EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Lafford**

Respondent: **Forward Care Ltd**

Heard at: **Exeter** **On: 11, 12 and 13 April 2023**

Before: **Employment Judge A Matthews**

Members: **Ms C Lloyd-Jennings**
Ms P Skillin

Representation:
Claimant: **In Person**

Respondent: **Miss K Anderson of Counsel**

UNANIMOUS RESERVED JUDGMENT

1. Mrs Lafford was discriminated against because the Respondent Company applied a provision, criterion or practice which was discriminatory in relation to the protected characteristic of her sex by reference to section 19 of the Equality Act 2010 (indirect discrimination).

2. Mrs Lafford was unfairly constructively dismissed by the Respondent Company.

3. Mrs Lafford's complaint that, Mrs Lafford having made an application under section 80F of the Employment Rights Act 1996 (a flexible working request), the Respondent Company failed to comply with section 80H(1) of that Act, was not presented to an employment tribunal before the end of the period specified in section 80H(5) of that Act. The employment tribunals, therefore, have no jurisdiction to hear that complaint, which is dismissed.

4. Mrs Lafford's claim for wages by reference to section 23 of the Employment Rights Act 1996 is dismissed.

5. Mrs Lafford's claim for breach of contract (notice pay) by reference to article 6 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is dismissed.

6. The Respondent Company is ordered to pay to Mrs Lafford £9,326.05 comprising:

1. Compensation for injury to feelings in respect of the discrimination of £8,128.10 including interest of £1,281.10.

2. A basic award in respect of the unfair dismissal of £697.95.

3. A compensatory award in respect of the unfair dismissal of £500.

7. The Recoupment Regulations do not apply.

REASONS

INTRODUCTION

1. Mrs Claire Lafford's claims and the issues involved were discussed at a preliminary hearing before Employment Judge M Salter on 31 March 2022. That resulted in Case Management Orders sent to the parties on 7 April 2022 (the "CMOs"), which can be seen at pages 218-245 of the bundle (all references are to pages in the bundle unless otherwise specified). Employment Judge Salter set the case down for a preliminary hearing which came before Employment Judge Christensen on 6 December 2022. In a Judgment sent to the parties on 12 December 2022, Employment Judge Christensen dismissed Mrs Lafford's claims of disability discrimination.

2. The result of the CMOs and Employment Judge Christensen's Judgment was that the claims and issues for us to decide were, broadly speaking, as set out in paragraphs 27, 28 and 35-45 of the CMOs modified to take account of the dismissal of the disability discrimination claims. We will use our own order in the following summary of the claims and issues.

3. Indirect discrimination

4. Mrs Lafford claims that she has been indirectly discriminated against by reference to section 19 of the Equality Act 2010 (the "EA"). The relevant protected characteristic is sex. The Respondent Company raises a time point in relation to this claim. As far as the merits of the claim are concerned, the Company accepts that it applied a provision,

criterion or practice (the "PCP"), being the requirement that employees work certain set hours. The Company conceded that it applied that PCP to Mrs Lafford. The Company also accepted that the application of the PCP would put women with childcare responsibilities at a particular disadvantage when compared with persons who did not share the protected characteristic (for example, men) and that the application of the PCP put Mrs Lafford at that disadvantage. In short, Mrs Lafford could not attend work for the set hours because of her childcare responsibilities. Therefore, the Company accepted that there was potential indirect discrimination but argued that it was not discrimination because the Company could show it to be a proportionate means of achieving a legitimate aim.

5. Flexible working request

6. The parties agree that Mrs Lafford made a request (the "flexible working request") to vary her contract of employment that satisfied the requirements of sub sections 80F(1), 80F(2), 80F(4) and 80F(5) of the Employment Rights Act 1996 (the "ERA"). Mrs Lafford says that the Company did not thereafter deal with the application in a reasonable manner as is required by sub section 80G(1)(a) of the ERA and that the Company based its decision to reject the application on incorrect facts contrary to sub section 80H(1)(b) of the ERA. The Company raises a time point on the claims and, in any event, defends them on the merits.

7. Constructive unfair dismissal

8. Mrs Lafford claims that she was unfairly constructively dismissed. Mrs Lafford says that some of the Company's conduct amounted to a fundamental breach of the implied term of trust and confidence in her employment contract entitling her to resign and treat herself as constructively unfairly dismissed. The alleged breaches were clarified during the hearing and are:

   (1) The content of a letter from Mr Brann dated 11 August 2020 (154).

   (2) Mr Brann's rejection of Mrs Lafford's flexible working request in a letter dated 20 August 2020 (160), without a meeting.

   (3) Placing Mrs Lafford on "precautionary suspension" on 7 September 2020 and not paying her thereafter.

   (4) An invitation to Mrs Lafford from Ms Louise Warr to express interest in a vacancy for a Decontamination Nurse's role in an email dated 15 October 2020 (186). This is relied on as a "last straw".

9. The Company says that Mrs Lafford simply resigned. There was no fundamental breach of contract and, if there was, it was not why Mrs Lafford resigned. The Company says that Mrs Lafford resigned because she wanted to keep a clean employment record. Further, even if Mrs Lafford resigned because of a fundamental breach, she delayed too long before resigning and thereby affirmed the contract. The Company says that, even if there was a dismissal, it was fair. Mrs Lafford could not attend work to perform her contracted hours and the Company could not reasonably accommodate a change in hours.

10. Claims for wages and notice pay

11. Mrs Lafford claims wages for the period from 7 September 2020 until 2 December 2020 and notice pay for the period from 2 December 2020 until 30 December 2020. The Company, in short, says that Mrs Lafford did not make herself available for work in accordance with her contract of employment, did no work and is not due any wages or notice pay.

12. Mrs Lafford gave evidence supported by a written statement. On the Company's side we heard from Mr Christopher Brann (the owner of the Company and Practice Principal) who also produced a written statement. The Company produced a statement from Ms Emma Glover (running payroll and associate pay at the relevant times). Ms Glover did not appear. We read Ms Glover's statement but have given it no evidential weight.

13. There was a 315 page bundle of documentation, supplemented by a further 7 pages during the course of the hearing.

14. Miss Anderson produced comprehensive and helpful written argument.

15. The Hearing was listed for four days but was completed in two and a half. This was on the basis that the Tribunal reserved judgment.

16. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate, the provisions of section 136 EA (Burden of Proof) have been taken into account.

17. A feature of this case is that the pleadings, being the claim form and amended response, are very clear. The witness statements, however, are not. Mrs Lafford had the assistance of a knowledgeable friend at the pleadings stage. It was apparent that this was not the case when it came to preparing Mrs Lafford's statement. This resulted in a lack of focus. On the Company's side, Mr Brann's statement was very short.

18. Neither Mrs Lafford nor Mr Brann should take this as a personal criticism. We record these points only to explain two consequences. First, we felt it necessary to adjourn the hearing for most of the first day to read the bundle. This enabled us to understand both sides cases. Second, with skill but sailing somewhat close to the wind, Miss Anderson introduced some of what became the Company's case on the issue of why Mrs Lafford's flexible working request had been turned down, by questioning Mrs Lafford on the subject. In this Miss Anderson was offering answers to questions that should have been dealt with in the Company's witness statements. In any event, the Tribunal is satisfied that the upshot was a fair hearing of the issues.

FACTS

19. The relevant facts are mostly confined to a short period in 2020. They are tolerably clear from the paperwork and such dispute as there is, is over what lay behind them.

20. The Company is a dental practice in Stoke sub Hamdon in Somerset, some 5 miles West of Yeovil. At the time of its response in these proceedings the Company reported 18 employees.

21. Mrs Lafford started work for the Company on 8 May 2017. The effective date of the termination of Mrs Lafford's employment was 30 December 2020.

22. When Mrs Lafford joined the Company, she was employed as a part time Decontamination Assistant working 16.5 hours a week spread over Mondays to Wednesdays (see 81). The Tribunal understands that, broadly speaking, the job involved the rigorous cleaning of dental equipment for re-use. However, from 5 June 2017 Mrs Lafford became a trainee Dental Nurse/Decontamination Assistant and her shifts changed, although her hours remained the same. Mrs Lafford's shifts were now 1400-1930 on Mondays to Wednesdays. We understand that Mrs Lafford's ability to work in the early evenings was important to the Company because it enabled evening surgeries. As a trainee Dental Nurse, Mrs Lafford was training for a National Examining Board for Dental Nurses' Diploma in Dental Nursing. Mrs Lafford was awarded that diploma in July 2019. No doubt the Company helped Mrs Lafford to gain that diploma and the benefit of securing it was mutually advantageous.

23. Once a Dental Nurse, Mrs Lafford was qualified to support dental practitioners in the range of jobs familiar to those who are patients of dental practices. Of course, Dental Nurses also provide additional support unseen by patients.

24. As a mother of two young daughters (aged 7 and 10 in January 2019) Mrs Lafford had work/life balances to consider. These periodically impacted on the hours Mrs Lafford was able to work. The extent of this, exacerbated by Covid 19, will become clearer below.

25. At some stage, Mrs Lafford started to work Saturdays, although not contractually obliged to do so. These hours were offered to others in August 2018, when Mrs Lafford's childcare responsibilities prevented her from continuing to work on Saturdays (99 and 101).

26. In January 2019 Mrs Lafford asked to meet Ms Glover to discuss, in essence, Mrs Lafford's work/life balance. Ms Glover's note of the meeting is at 110. Things had been exacerbated by a recent marital split between Mrs Lafford and her husband. The upshot of the meeting was that Ms Glover spoke to Mr Brann, who agreed to reduce Mrs Lafford's hours on Wednesday evenings (111). Mrs Lafford was allowed to finish at 1700 on Wednesdays. Somewhere along the line the finish time appears to have moved without formality to 1715.

27. It seems that, on 23 March 2019, Mrs Lafford sent Ms Glover an email asking for a change in hours. We do not see that email in the bundle, nor do we know what change was requested. However, Ms Glover's letter of reply dated 28 March 2019 is at 113. On this occasion Mr Brann could not agree the change. Ms Glover went on to say that the change to Mrs Lafford's finish time agreed in January had left the rest of the team under great pressure. Ms Glover ended by offering Mrs Lafford a switch to work in reception. This was something that Mrs Lafford had rejected before and was not happy to do.

28. Shortly afterwards, towards the end of April 2019, Mrs Lafford was obviously looking for ways to increase her hours following the shortening of her Wednesday shift. On 12 April 2019 Ms Glover wrote to Mrs Lafford to say that Mr Brann, Ms Warr and Ms Glover did not consider Mrs Lafford working lunch breaks was the best way to do this (115). In any event, Mrs Lafford should look to increase her surgery hours and this might best be done on Saturdays. Subsequently, Mrs Lafford offered and worked some Saturday shifts through until she was furloughed with effect from 1 March 2020.

29. Thereafter there is evidence of give and take on both sides as far as Mrs Lafford's hours were concerned. The Company allowed time off for parents' evenings (see 123-124) and Mrs Lafford helped with reception work, which she did not like (127).

30. On or around 17 February 2020 Mrs Lafford asked Ms Glover that she be allowed to reduce her hours on a Monday evening, so she

could finish at 1730 (see Mrs Lafford's email at 137). Significant, perhaps, for what was to follow was Mrs Lafford's direction of travel towards discontinuing evening shifts:

> *"I am available to do morning shifts, afternoons, or do regular lunch time hours if CB"* [Mr Brann] *"were to continue lunch appointments on a regular basis to fulfil my hours…and more if needed."*

31. Ms Glover's emailed response on the same day, 17 February 2020, was that Mrs Lafford should make her request under the Company's flexible working policy. No such request was made at the time.

32. As of March 2020, therefore, Mrs Lafford's contractual working hours with the Company were Mondays and Tuesdays, 1400-1930 and Wednesdays 1400-1715 (contractually, probably 1700, but 1715 in practice) with Saturdays worked by arrangement. Apart from the change on Wednesdays and, in effect, working some Saturdays to make up for that loss of hours, these were the same hours that Mrs Lafford had started on as a trainee Dental Nurse/Decontamination Assistant on 5 June 2017.

33. Covid 19 now intervened. On 1 April 2020 Mr Brann wrote to the Company's employees offering them choices, one of which was to go on furlough and receive furlough pay with effect from 1 March 2020 (140-142). Evidently, Mrs Lafford opted for furlough.

34. On 22 April 2020 Mr Brann wrote to the Company's employees giving them an update including starting to think about a restart (143-144). Mr Brann took the opportunity to report on the Company's progress and plans to expand and thanked the employees for their part in the Company's success to date.

35. There were some unexceptional exchanges between Mr Brann and Mrs Lafford during the furlough period. The next significant development was on 29 July 2020 when Mr Brann sent an email to Mrs Lafford (149). It included:

> *"The Furlough scheme is changing increasing the costs to the practice, and the practice itself is now extremely busy, we need you back. I understand there are various issues at play but please contact me to discuss your return to work in the next few days."*

36. Mrs Lafford's response was to send an e-mail on 7 August 2020 (149-150). It included:

> *"My options….*

- After looking into holiday clubs, calling local childminders, etc, due to covid regulations this has been futile, not to mention the cost for two children, and the covid risk.

- My regular childcare has previously been via two people, the children's big brother and father. These options are now not available to me.

- My father has never supported me re childcare except on an odd occasion if desperate.

- My mother has not once looked after Martha or Molly.

- Friends of mine are struggling to work from home with their own children, and are not able to take on caring for mine as well.

This exhausts my options, and at the end of the day, as a single parent, caring for my girls is my responsibility.

I am very much looking forward to working again when they return to school in September, but again, due to covid and childcare, my hours of availability will be different. I shall email separately to confirm that situation."

37. On 11 August 2020, forwarding his email exchange with Mrs Lafford, Mr Brann emailed Ms Glover and Ms Warr (152):

> *"Hi both, any thoughts on this…. Shes now saying she cant do the evenings on return……"*

Mrs Lafford had not said that she would not work evenings, but Mr Brann seems to have expected that to be the case. He was probably right in that it was a continuation of the discussion Mrs Lafford had started before the Covid 19 shut down. In context, we see this as Mr Brann showing frustration. We accept that not too much should be read into this single comment by Mr Brann, but it is the start of a pattern.

38. We do not know what, if any, input Mr Brann received from Ms Glover and/or Ms Warr. However, on the same day, 11 August, Mr Brann wrote a letter to Mrs Lafford which should be read for its full content (154-155). It is largely reproduced here:

> *"As a parent myself, I completely understand how difficult it can be arranging childcare around working hours and the decisions and sacrifices that must be made.*

I should like to confirm that your job is available at the normal (pre-covid) working hours and days, ie 14 hours per week Monday - Wednesday.

At present I am having to arrange locum cover to cover your absence, which as you know comes at an increased cost to the business. You are currently still on furlough, the government job retention scheme, which has been successful at keeping your job available. This scheme has changed in July and I now incur costs to keep staff on this scheme." ….

"In the past you have requested to change/reduce your hours and the practice arranged for you to reduce your hours on a Wednesday evening. This caused much difficulty for the remaining staff and in the end, I was forced to reduce opening hours. This is not good for the business and I have a duty to keep the business viable.

In February you spoke to Emma at your appraisal and expressed a desire to change/reduce you hours. Emma pointed you in the direction of our flexible working policy and asked you to submit a formal request. We did not receive one from you.

Our options:

Perhaps you may like to submit a formal request under the flexible working policy now?" …. "To give you time to do this and us to consider a request, I am prepared to leave you on furlough until the end of this month, Monday 31st August.

However, on Tuesday 1st September, if you are unavailable to work, I can arrange for you to go on annual leave. Once your annual leave is exhausted, I will put you on unpaid leave until you have decided how you wish to proceed. I will give a time frame of 3 months, at which time your contract with Forward Dental Care will be terminated.

I am unable to make you redundant as your job is still available."

39. At one level, as with Mr Brann's comment to Ms Glover and Ms Warr in the email on the same day, the letter can be read as reporting the fact. We think, however, that it reveals more than that. Mr Brann was, at the least, frustrated with Mrs Lafford's position. Mrs Lafford's absence was costing money. The reduction in Wednesday night hours the Company had allowed Mrs Lafford in the past had forced

Mr Brann to reduce opening hours. We do not think that Mr Brann was in a constructive frame of mind to deal with the flexible working request which followed.

40. The Company has a Flexible working policy (65-66). This can be referred to for its full content, but we record the following extracts:

> *"**Considering your request**" ….*
>
> *"Chris Brann or Emma Glover will:*
>
> - *Offer to meet with you to discuss your request" ….*
>
> *"If we are not readily able to agree to your request, we will explain our reasons and offer to meet with you again to discuss any possible alternatives or compromises."*

41. On 17 August 2020 Mrs Lafford submitted her flexible working request (156). Again, this should be referred to for its full content. It included:

> *"As requested by yourselves, here is my first formal, statutory request for Flexible working hours. I would like to request a change in hours due to changes in my domestic circumstances, and due to Covid 19 restrictions. My son no longer resides with us on a regular basis, and the father is not an active member of the children's lives.*
>
> *As of Monday 7th September, my available days to continue working for the practice will be Mondays to Fridays, three days out of five per week. I would be more than happy to swap days with others if holiday cover etc is needed.*
>
> *My hours of availability will be 9am – 2.30pm. This is assuming there are no school clubs due to covid & mixing year groups… I have yet to confirm if there will be out of hours clubs, and hope that this will be an option, allowing me to work a longer day, 8.30am until 3.30pm. I shall know more once schools open." ….*
>
> *"If it is that I work a shorter day, I am happy to work through the lunch hour of 1pm-2pm on decon or nursing as I recall sometimes surgery runs through lunch? Also deep clean surgeries to ensure continued high standard during these times.*

> *I appreciate these are not ideal hours for the practice, as you often do a 12 hour opening. I am happy to relieve nurses to free them for other duties.*
>
> *Could the excess hours that I would normally fulfill be offered to other members of staff who may like more hours, or would consider a change of hours? Or to even arrange my hours to accomodate a new nurse for uncovered hours as the business seems to be growing. If there is cover for the evening hours, this would not affect the normal running of surgery.*
>
> *Maybe we could use a three month trial basis to see if it works with the company. I do hope we can come to an acceptable agreement, and that it will not be disruptive to the company."*

42. Looking at the request in the round, three things are immediately apparent. First, Mrs Lafford was offering, in essence, to work the morning shift rather than the afternoon shift. This was something very different to her contracted pattern of working and, we think significantly, included no early evening working. Second, although offering something very different from her contracted pattern of working, Mrs Lafford was offering several areas of flexibility for discussion. Third, this was not a cynical exercise. Mrs Lafford obviously wanted to come to an agreement and go back to work.

43. We know from notes in the bundle (157 and 159) that Mrs Lafford's request was on the agenda for meetings on 17 and 19 August 2020 of Mr Brann, Ms Glover and Ms Warr. Apart from a brief note that, at the time, the Company did not have a requirement for a full time decontamination assistant, there is no record of any discussion of Mrs Lafford's request and Mr Brann has no recollection of what happened.

44. The next development that we see, therefore, is that Mr Brann wrote to Mrs Lafford on 21 August 2020 (160). The letter included:

> *"We understand your available hours to be anywhere between a Monday - Friday 09.30 hrs - 1430 hrs. As you are unaware of any out of school clubs enabling you to work an early morning, we have used these hours while considering your request.*
>
> *As you know the surgeries run on a sessional basis, morning shifts, starting between 07.15 and 0900 and afternoon/evening shifts, starting at 14.00 through to 17.30 or 19.30 to accommodate the popular demand for out of*

> *hours appointments. Unfortunately, the hours you are available cannot be accommodated by the surgery session without having a detrimental effect on meeting our patients' expectations and practice income.*
>
> *The surgeries do not normally run through lunch time so there would not be enough work for you during this time. I have investigated whether the practice could afford to "create" a decon role for you in the hours you are available, but sadly the practice is too small and with the current loss in income due to Covid 19 the burden of this additional cost is unaffordable.*
>
> *It is with regret that I must turn down your request to change your hours."*

45. Although at first glance straightforward, there are several difficulties with this letter.

    (1) On the face of the letter, Mr Brann considered Mrs Lafford's request on the basis that she was requesting an 0930 start. In fact, she was offering an 0900 start. Mr Brann says this was a typographical error in his letter. That seems improbable given the importance the start time assumed at the hearing before us. More likely, it either reflects scant regard for the details of the request or, worse, a lack of genuine consideration given to what Mrs Lafford was requesting. From the evidence we heard, the importance of the difference between start times of 0900 and 0930 appears to be this. Mrs Lafford was requesting a start time of 0900, which coincided with the 0900 start for morning appointments. On that basis she was, in effect, offering to do morning shifts. Having spotted the difficulty this posed for the Company's case and it not being covered in Mr Brann's witness statement, the Company introduced evidence (through questioning Mrs Lafford) that it was necessary to attend work at 0830 to prepare for an 0900 appointment. In the round, Mrs Lafford's response to that was that she could have attended by 0845, which would have allowed sufficient time to prepare. We do not have to decide which of the times, 0830 or 0845 is right. Whatever, the right answer is, the obvious point is that this is the sort of conversation that should and probably would have happened had Mr Brann discussed Mrs Lafford's request with her at the time, as was required by the Company's own policy. We appreciate that Covid 19 placed restrictions on meetings but, as Mr Brann anticipated and allowed when asked about this, videoconferencing was possible. The telephone was another obvious option. Further, in the event of a refusal of a flexible working request, the Company's policy stipulated: "*we will explain*

our reasons and offer to meet with you again to discuss any possible alternatives or compromises".

(2) The statement in Mr Brann's letter that *"the hours you are available cannot be accommodated by the surgery session without a detrimental effect on meeting our patients' expectations and practice income"* begs the obvious question "Why not?" The only direct references to the reasoning behind this in Mr Brann's statement are in paragraphs 10 and 11:

> *"10." …. "The request was rejected on the basis that the working hours suggested by the Claimant were not viable for the practice. The practice runs on a sessional basis with morning shifts and evening shifts. The proposed hours would not have fallen into either shift pattern and would leave the Claimant with no work to complete during the lunchtimes of the other staff.*
>
> *11. I also had to take into consideration the fact that the practice has an NHS contract which requires 9-5 opening hours. As such the proposed hours from the Claimant were not compatible with the practices' contractual obligations."*

This adds little to the letter and leaves wide open the same question about whether Mrs Lafford was offering to do the morning shift. Although Mrs Lafford was offering to work over the lunch hour which might not have suited the Company, had there been a conversation, that could also have been addressed. When asked about what lay behind the reasoning for the decision in the letter refusing the flexible working request, Mr Brann basically made two points. First was the issue of the start time mentioned above. Second, Mr Brann did not think splitting a role between Mrs Lafford and another Dental Nurse and/or Decontamination Assistant was a way forward. This was because it was more difficult to recruit for a split role generally and, in any event, the afternoon shift was more difficult to fill. If Mr Brann thought that at the time, it is not recorded anywhere.

46. When the tone of previous communications (see paragraphs 37 and 38 above) is added to the error over start times, the sparsity of reasoning for turning down the request and a complete failure to observe the Company's own policy to engage in discussion on the subject, it is our view that Mr Brann had, at best, a closed mind to Mrs Lafford's request.

47. Mrs Lafford's evidence is that the refusal of her flexible working request and the manner of that refusal affected her confidence and

mental health. However, Mrs Lafford did not tell the Company this at the time, nor did she appeal against Mr Brann's decision, as she was entitled to under the Company's policy. Rather, Mrs Lafford seems to have chosen to run down her employment with the Company in a low-key manner. We were surprised by this and it took us a while to understand what happened in this respect. Mrs Lafford's reasoning was she wanted to leave the Company's employment in "good standing" (our phrase), so as not to prejudice her chances of employment in the future. In particular, Mrs Lafford wanted to be seen to have resigned rather than having been dismissed. What followed the refusal of the flexible working request must be seen in that light.

48. On 28 August 2020 Mrs Lafford sent an e-mail to Mr Brann (163). Mrs Lafford was sorry the hours she had offered were not suitable for Mr Brann. Pending clarification of out of school hours care, Mrs Lafford accepted the suggestion that she use her remaining annual leave.

49. The position, therefore, was that Mrs Lafford's furlough ended on 7 September 2020, Mrs Lafford took paid leave until 23 September 2020 and the three month period Mr Brann had mentioned in his letter of 8 August (see paragraph 38 above), at the end of which Mrs Lafford's employment would be terminated, ended on 23 December 2020. In the event, this was pre-empted by Mrs Lafford's resignation.

50. On 15 October 2020 Ms Warr sent an email to Mrs Lafford asking if Mrs Lafford was interested in a vacancy for a Decontamination Nurse (186). The hours offered were 0800-1730. On 19 October Mrs Lafford replied to say that she could not commit to the hours offered (186).

51. On 19 October 2020 Ms Warr emailed Mrs Lafford to ask if Mrs Lafford had an idea of when she would be able to return to work on her contracted hours (187). Mrs Lafford replied on 21 October to say that her availability had not changed (187).

52. In a letter to Mr Brann dated 2 December 2020, Mrs Lafford took matters into her own hands, resigning with effect from 30 December 2020 (191 - the letter appears to have been emailed on 3 December - see 193). Thanking Mr Brann for the opportunity to train to become a Dental Nurse, Mrs Lafford gave the reason for her resignation as:

> *"Due to the fact that we have been unable to come to an agreement on hours regarding my return to work…."*

53. On 9 February 2021 Mrs Lafford, with the help of a friend who worked in HR, sent Mr Brann a detailed grievance (194-197). Although this and the subsequent outcome, appeal and outcome of the appeal provide much post event context, no purpose is served in a detailed

record here. The Company employed an outside consultant to investigate the grievance and the outcome is at 198-202. Mrs Lafford appealed. We do not see the appeal in the bundle. The Company employed a second consultant to handle that and the outcome is at 203-207.

54. During her employment there do not seem to have been any particular issues between Mrs Lafford and the Company. In December 2018 Mrs Lafford had a falling out with one of the dental practitioners, which Mr Brann sensibly seems to have addressed by thereafter keeping them apart in the workplace.

55. On 9 February 2021 Mrs Lafford contacted ACAS to commence early conciliation. The Early Conciliation Certificate was issued on 23 March 2021 (1). Mrs Lafford's claim form was lodged with the employment tribunals on 13 April 2021.

56. We asked Mrs Lafford why she had not lodged her claims with the employment tribunals before 13 April 2021. Mrs Lafford's reply was to the effect that she had been hoping that something would change and she would be able to continue her employment with the Company. Mrs Lafford had approached a CAB in November/December 2020. Mrs Lafford also sought legal advice after she first contacted ACAS on 9 February 2021. It seems, however, that Mrs Lafford's main source of advice was her friend in HR, whom she had known throughout but only approached specifically around October 2020.

57. Since leaving her employment with the Company Mrs Lafford has done very little to secure other employment. Mrs Lafford had a part time job in a café from 20 May 2022, but that has since ended. We accept that Mrs Lafford may have had personal reasons for not seeking alternative employment, including her feelings about how she had been treated by the Company and her childcare responsibilities. However, Mrs Lafford has failed to take any significant steps to mitigate her loss. That is Mrs Lafford's choice, but the consequential loss of income cannot be laid at the Company's door.

APPLICABLE LAW

58. Constructive unfair dismissal

59. Section 94 of the ERA provides an employee with a right not to be unfairly dismissed by his or her employer. For this right to arise there must be a dismissal.

60. Section 95(1) of the ERA, so far as it is relevant, provides:

"95 Circumstances in which an employee is dismissed

> *(1) For the purposes of this Part an employee is dismissed by his employer if*"….
>
> *"(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

61. The general principles relating to constructive unfair dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer's actions (and not for some other reason, although the employer's actions need not be the sole cause) or he or she risks waiving the breach and affirming the contract.

62. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

63. The burden of proving a breach of contract sufficient to support a finding of constructive unfair dismissal is on the claimant.

64. <u>Indirect discrimination</u>

65. Section 4 of the EA, so far as it is relevant, provides:

> *"4* ***The protected characteristics***
>
> *The following characteristics are protected characteristics-" ….*
>
> *"sex;"*

66. Section 19 of the EA, so far as it is relevant, provides:

> *"****19 Indirect discrimination***

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-*

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) *The relevant protected characteristics are-" ….*

"sex;"

67. Section 23 of the EA, so far as it is relevant, provides as follows:

*"**23 Comparison by reference to circumstances***

(1) On a comparison of cases for the purposes of sections 13,14, or 19 there must be no material differences between the circumstances relating to each case."

68. Section 123 of the EA, so far as it is relevant, provides:

*"**123 Time limits***

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks is just and equitable." ….

"(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of that period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

Section 140B of the EA is the provision that extends time limits to facilitate conciliation through ACAS. The scheme of it is twofold. First, the period of conciliation is discounted when calculating time limits. Second, if a time limit would have expired in a period of conciliation, the time limit is extended for a month beyond the end of conciliation.

69. A recent Court of Appeal decision (*Adedeji v University Hospital Birmingham NHS Trust* [2021] EWCA Civ 23) cautions against using the traditional approach of going through the factors in section 33 of the Limitation Act 1980 when applying the "just and equitable" test. In his leading Judgment, Lord Justice Underhill made it clear that the focus in applying the test, should be on the factors behind the delay. Further, Lord Justice Underhill pointed out that the employment tribunals have a wide discretion in this area.

70. Section 136 of the EA, so far as it is relevant, provides:

> *"**136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

71. Chapter 4 of the Equality and Human Rights Commission Code of Practice on Employment (2011) deals with indirect discrimination. Paragraphs 4.25-4.32 cover the subject of what a legitimate aim may be and what proportionate means of achieving it are.

72. Section 15 of the Equality Act 2006, so far as it is relevant, provides:

> "***15 Codes of practice: supplemental**" ....*
>
> *"(4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code-*
>
> *(a) shall be admissible in evidence in criminal or civil proceedings, and*
>
> *(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."*

73. Flexible working

74. Part VIIIA of the ERA sets out provisions in relation to requests for "Flexible Working". The following provisions are relevant:

> *"**80G Employer's duties in relation to application under section 80F***
>
> *(1) An employer to whom an application under section 80F is made-*
>
> *(a) Shall deal with the application in a reasonable manner,"*
>
> *"**80H Complaints to employment tribunals***
>
> *(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal-*
>
> *(a) that his employer has failed in relation to the application to comply with section 80G(1),*
>
> *(b) that a decision by his employer to reject the application was based on incorrect facts," ….*
>
> *"(5) An employment tribunal shall not consider a complaint under this section unless it is presented-*
>
> *(a) Before the end of the period of three months beginning with the relevant date, or*
>
> *(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.*
>
> *Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a)."*

75. There is an ACAS Code of Practice 5, Handling in a reasonable manner requests to work flexibly (2014). This short advisory code includes this:

> *"**4.** Once you have received a written request, you must consider it. You should arrange to talk with your employee as soon as possible after receiving their written request." ….*
>
> *"**6.** You should discuss the request with your employee. It will help you get a better idea of what changes they are looking for and how they might benefit your business and the employee."*

76. Remedy

77. Section 119 of the EA, so far as it is relevant, provides:

> *"**119 Remedies"** ….*

"(2) The county court has power to grant any remedy which could be granted by the High Court-

(a) in proceedings in tort;" ….

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)"

78. Section 124 of the EA, so far as it is relevant, provides:

*"**124 Remedies: general***

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may-

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate-

(4) Subsection (5) applies if the tribunal –

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection 2(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

79. Section 126 of the ERA provides:

*"**126 Acts which are both unfair dismissal and discrimination***

(1) This section applies where compensation falls to be awarded in respect of any act both under-

(a) the provisions of this Act relating to unfair dismissal, and

(b) the Equality Act 2010.

> *(2) An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal (or another employment tribunal) in awarding compensation on the same or another complaint in respect of that act."*

80. The Tribunal was referred to *Avon County Council v Haywood-Hicks* [1978] IRLR 118, *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, *Porter v Bainbridge Ltd* [1978] IRLR 271, *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1984] IRLR 317, *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, *Rainey v Greater Gasgow Health Board* [1987] IRLR 26, *Cast v Croydon College* [1998] IRLR 318, *Rai v Somerfield Stores* EAT/0557/02, *Hardy & Hansons plc v Lax* [2005] IRLR 726, *Starmer v British Airways* [2005] IRLR 862, *MacCulloch v ICI* [2008] IRLR 846, *Shaw v CCL Ltd* [2008] IRLR 284, *Lockwood v DWP* [2014] ICR 1257, *O'Brien v Bolton St Catherine's Academy* [2017] IRLR 547, *City of York Council v Grosset* [2018] IRLR 746, *Scott v Kenton Schools Academy Trust* UKEAT/0031/19, *Iceland Foods Ltd v Stevenson* UKEAT/0309/19, *Department of Work and Pensions v Boyers* UKEAT0282/19, *Birtenshaw v Oldfield* [2019] IRLR 946 and *Knightley v Chelsea & Westminster Hospital Foundation Trust* [2022] EAT 63.

CONCLUSIONS

81. **The indirect discrimination claim**

82. The time point

83. As recorded above, Mrs Lafford contacted ACAS to commence early conciliation on 9 February 2021. The Early Conciliation Certificate was issued on 23 March 2021 and Mrs Lafford's claim form was lodged with the employment tribunals on 13 April 2021. As identified by Employment Judge Salter, any complaint about something that happened before 10 November 2020 is potentially out of time.

84. The alleged act of discrimination is the requirement for Mrs Lafford to work certain set hours. Miss Anderson dealt with the time point very fairly in her submissions on the subject. We repeat Miss Anderson's summary here (paragraphs 13 and 14):

> "13. In this case R has admitted a PCP of requiring C to work certain set hours. If this is C's case, her claim is of an extended act applicable to her up to the end of her employment in December 2020, and the claim is in time: see *Cast v Croydon College* at [56].

> 14. However, if C's case turns on R's decision on 21/8/21 as the trigger for her dismissal, her contention would enable her to rely, contrary to the authorities, on an argument that the consequence of an out of time "one-off" act is "the act complained of" which, on the authority of *Cast v Croydon College,* she cannot do".

85. To decide this issue, we are first required to determine what the specific act complained of is. On 21 August 2020 Mr Brann turned down Mrs Lafford's flexible working request. This was a specific application of the PCP. Had Mrs Lafford thereafter been able to return to work, notwithstanding the refusal of her flexible working request, we would have seen the refusal as the act complained of. That is not, however, what happened. The refusal created a state of affairs in which Mrs Lafford was unable to return to work because of the application of the PCP up until and including the date of her leaving the Company's employment. That was conduct extending over a period to be treated as done at the end of the period, on 30 December 2020. Thus, the claim was in time.

86. We should add that, if we were to be wrong about that, we would have extended time to allow the claim in on the just and equitable ground. Mrs Lafford applied for an extension of time, if necessary. It is clear from the facts that Mrs Lafford delayed primarily because, at least until her resignation on 2 December 2020, she hoped she might be able to save the employment relationship if her availability changed. In those circumstances, Mrs Lafford thought it best not to complain so as not to prejudice her chance of returning to work. We see no particular prejudice to either party and in all the circumstances would have considered it just and equitable to extend time.

87. <u>The merits of the indirect discrimination claim</u>

88. The Company accepts that it applied a provision, criterion or practice (the "PCP"), being the requirement that employees work certain set hours. The Company conceded that it applied that PCP to Mrs Lafford. The Company also accepted that the application of the PCP would put women with childcare responsibilities at a particular disadvantage when compared with persons who did not share the protected characteristic (for example, men) and that the application of the PCP put Mrs Lafford at that disadvantage. In short, Mrs Lafford could not attend work for the set hours because of her childcare responsibilities. Therefore, the Company accepted that there was potential indirect discrimination but argued that it was not discrimination because the Company could show it to be a proportionate means of achieving a legitimate aim.

89. The test is a two step test. Does the PCP have a legitimate aim? If so, was the PCP a proportionate means of achieving it? It is for the Company to show evidentially both the legitimate aim and the proportionate means.

90. The legitimate aims relied upon by the Company are set out in paragraph 78 of its Amended Response in these proceedings (48):

> *"78 However, the Respondent submits that having set working hours was a proportionate means of achieving the following legitimate aims:*
>
> *78.1 The Respondent is contracted by the NHS to be open 9:00-17:00;*
>
> *78.2 The Respondent has an NHS contract to see children which must be done outside of school hours;*
>
> *78.3 Providing a wide range of appointments to accommodate patient's needs;*
>
> *78.4 To accord with the General Dental Council Standard 6.2 which confirms that Dentists must have a Dental Nurse with them when treating patients;*
>
> *78.5 Continuity of dental nurse cover throughout the while session;*
>
> *78.6 Business efficacy – it would not be financially viable or realistic to have a Dental Nurse cover the first part of a session that the Claimant was unable to attend."*

91. It is permissible for a respondent to rely on legitimate aims articulated after the event. However, at the time, Mr Brann's reason for refusing Mrs Lafford's flexible working request was:

> *"Unfortunately, the hours you are available cannot be accommodated by the surgery session without having a detrimental effect on meeting our patients' expectations and practice income."*

92. Mr Brann gave a further explanation of this in his witness statement (see paragraph 45(2) above).

93. In our view, there are several problems with the pleaded legitimate aims, especially when read in the context of the mix up over the 0900/0930 start time. However, we will not detail these here. It suffices to record that Mr Brann's articulation of the legitimate aim in

his letter to Mrs Lafford dated 21 August 2020 is concise, precise and more persuasive. It is a legitimate aim.

94. We turn to the second part of the test. Was the application of the PCP a proportionate means of achieving the legitimate aim identified?

95. The test is objective and it is for the Tribunal to apply. We must engage in critical scrutiny by weighing the Company's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end.

96. The issue here is this. Could the Company have fulfilled its legitimate aim by less discriminatory means? The Company has two particular difficulties in this respect. First, when Mr Brann referred to *"the hours you are available"* he was referring to a start time of 0930, not 0900. The Company, therefore, made its decision on a false premise. As explained in our findings of fact, this may well have been critical (see paragraph 45 above). That leads into the second difficulty which is that the Company does not, therefore, know (and cannot show) whether it could have fulfilled its legitimate aim by less discriminatory means because it never engaged with Mrs Lafford on the subject. Mrs Lafford was offering flexibility that was never explored.

97. The Company cannot show that applying the PCP was a proportionate means of achieving its legitimate aim and Mrs Lafford's claim of indirect discrimination therefore succeeds.

98. **The flexible working request**

99. The time point

100. As recorded above, Mrs Lafford contacted ACAS to commence early conciliation on 9 February 2021. The Early Conciliation Certificate was issued on 23 March 2021 and Mrs Lafford's claim form was lodged with the employment tribunals on 13 April 2021. As identified by Employment Judge Salter, any complaint about something that happened before 10 November 2020 is potentially out of time.

101. Mr Brann refused Mrs Lafford's flexible working request on 21 August 2020. Mrs Lafford's complaint to the employment tribunals was not presented to the employment tribunals before the end of the period of three months beginning with that date as extended to allow for early conciliation. It was, therefore, out of time, unless we are satisfied that it was presented within such further period as we consider reasonable if we are satisfied that it was not reasonably

practicable for the complaint to be presented before the end of the three month period.

102. The test here is the "reasonably practicable" test. This is more restrictive than the "just and equitable test" applicable to the indirect discrimination claim. The reason for the delay appears to be that Mrs Lafford chose to delay, either in the hope that things might work out or that she could leave in good standing. That is a matter of choice rather than it not being reasonably practicable to present the claim in time. If knowledge played a part, it is not a question of what Mrs Lafford knew of her right to complain and the time limits applicable to it but, rather, what she ought to have known. As far as that is concerned, Mrs Lafford knew enough to contact the CAB and a lawyer. Mrs Lafford also had her friend, knowledgeable in HR, available. Mrs Lafford had the opportunity to enquire about and pursue her rights but chose not to do so.

103. It cannot, therefore, be said that it was not reasonably practicable for Mrs Lafford to present this claim within the applicable time limit. Mrs Lafford did not do so. Therefore, the employment tribunals have no jurisdiction to hear this claim which must be dismissed.

104. <u>The merits of the flexible working claim</u>

105. Notwithstanding, if we were to be wrong about that, we have heard the evidence and it is proportionate to consider whether this claim would have succeeded if it had not been out of time. Our conclusions on the claim set out below, are to be read on the basis that this is the decision we would have made, had the claim been in time.

106. As set out above, the parties agree that Mrs Lafford made a flexible working request to vary her contract of employment that satisfied the requirements of sub sections 80F(1), 80F(2), 80F(4) and 80F(5) of the ERA. Mrs Lafford says that the Company did not thereafter deal with the application in a reasonable manner as is required by sub section 80G(1)(a) of the ERA and that the Company based its decision to reject the application on incorrect facts contrary to sub section 80H(1)(b) of the ERA.

107. Mrs Lafford is right on both counts.

108. The Company did not deal with the application in a reasonable manner. The ACAS guidance that there should be a discussion is not determinative but should be noted. In this case, however, the Company had a written policy requiring an offer of an initial meeting and a further discussion if a request was refused (see paragraph 40 above). It is not clear whether this was contractual or not, but that is

of no consequence. There was no offer of a meeting or discussion. Further, it is fair to observe that, because of the 0900/0930 mix up, such a meeting might have produced a different result. Mr Brann's evidence is that it would not have done, but in that we see further support for our view that Mr Brann gave the request scant consideration. Mrs Lafford's claim under section 80H(1)(a) of the ERA that the application was not dealt with in a reasonable manner would have succeeded.

109. Further, Mrs Lafford's claim under section 80H(1)(b) of the ERA would also have succeeded. Mr Brann's decision was based on the incorrect factual assumption that Mrs Lafford was offering to start at 0930, rather than 0900.

110. If those claims had not been dismissed for want of jurisdiction, we would have awarded Mrs Lafford compensation equal to five weeks' pay by reference to section 80I ERA.

111. **The constructive unfair dismissal claim**

112. Did the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Company going to the root of the contract of employment? In other words, was there a fundamental breach of contract entitling Mrs Lafford to resign and treat herself as constructively dismissed?

113. The alleged breaches are:

(1) The content of the letter from Mr Brann dated 11 August 2020 (154).

(2) Mr Brann's rejection of Mrs Lafford's flexible working request in a letter dated 20 August 2020 (160), without a meeting.

(3) Placing Mrs Lafford on "precautionary suspension" on 7 September 2020 and not paying her thereafter.

(4) An invitation to Mrs Lafford from Ms Louise Warr to express interest in a vacancy for a Decontamination Nurse's role in an email dated 15 October 2020 (186). This is relied on as a "last straw".

114. Mrs Lafford took objection to various of the contents of Mr Brann's letter of 11 August 2020. For example, Mrs Lafford objected to Mr Brann comparing their respective circumstances. Whilst we have commented that the letter, seen in the light of another internal communication, betrayed frustration on Mr Brann's part (see

paragraph 39 above), an objective observer would not have seen the content of the letter itself as objectionable in context.

115. On 20 August 2020 Mr Brann rejected Mrs Lafford's flexible working request. There was no meeting and no discussion. For the reasons we have explored above, we have found this, in terms, to be an act of indirect discrimination. A discriminatory act cannot be "read across" as a fundamental breach of the implied term of trust and confidence in a claim of constructive unfair dismissal. In this case, however, it was such a fundamental breach. The Company did not treat Mrs Lafford objectively and fairly in this respect. Mr Brann had, at best, a closed mind to Mrs Lafford's request (see paragraph 46 above). We find that that lack of objective and fair treatment amounted to a fundamental breach of the implied term of trust and confidence in the contract of employment between Mrs Lafford and the Company. It entitled Mrs Lafford to resign and treat herself as constructively dismissed.

116. Mrs Lafford was not placed on "precautionary suspension" on 7 September 2020. Mrs Lafford's contracted hours were available to her. Mrs Lafford could not perform her contracted hours and, therefore, stayed away from work. There was no suspension and Mrs Lafford did no work for which she should have been paid.

117. Mrs Lafford also took objection to the offer from Ms Warr on 15 October 2020 of a job as a Decontamination Nurse. Again, an objective observer would not have seen the offer as objectionable in context.

118. <u>Why did Mrs Lafford resign?</u>

119. The Respondent makes various arguments on this subject. On the facts, however, it is clear why Mrs Lafford resigned. Mrs Lafford resigned because the Company refused her flexible working request, therefore making it impossible for her to return to work because of her circumstances. The other factors mostly go to the timing of the resignation.

120. <u>Did Mrs Lafford affirm the contract following the breach? In essence, did Mrs Lafford delay too long before she resigned?</u>

121. Over four months passed between Mr Brann's letter of 20 August 2020 and Mrs Lafford's resignation on 2 December 2020.

122. The general rule is that an employee who wishes to resign and claim that he or she has been unfairly constructively dismissed must make up their mind soon after the conduct complained of and resign. If they continue without leaving for any length of time, they will lose

the right to complain of the conduct in question. They will have affirmed the contract.

123. As a general proposition, in the absence of other factors, over four months is probably too long to wait. However, in this case, there were other factors.

124. Mrs Lafford hoped, throughout, that the position might resolve itself and the circumstances might arise in which she could return to work. This is so even though Mrs Lafford also gave evidence that she was very unhappy about the way she had been treated and was going to resign at some stage in the future when she found an alternative job. This leads to the second factor. Mrs Lafford wanted to leave in good standing and did not want to make a fuss that would prejudice that outcome.

125. In no sense of the lay use of the word did Mrs Lafford affirm the contract. Taking all the circumstances into account, on balance our view is that Mrs Lafford did not affirm the contact of employment in the context of the legal test.

126. Has the Company shown a reason for the dismissal? If so was it potentially fair and was the dismissal itself fair?

127. The Company put forward "some other substantial reason" for any dismissal. Mrs Lafford had indicated that she could not attend work to perform her contracted hours and the Company could not reasonably accommodate a change in hours. This is a potentially fair reason. However, it cannot succeed in this case. The Company has not shown that it could not accommodate a change in hours. Further, there was no consultation whatsoever on the subject.

128. It follows that Mrs Lafford's claim of constructive unfair dismissal succeeds.

129. Claims for wages and notice pay

130. Mrs Lafford claims wages for the period from 7 September 2020 until 2 December 2020 and notice pay for the period from 2 December 2020 until 30 December 2020. Mrs Lafford did not make herself available for work in accordance with her contract of employment, did no work and is not due any wages or notice pay.

131. **Remedy**

132. Discrimination

133. We are satisfied that the PCP was not applied with the intention of discriminating against Mrs Lafford. Accordingly, section 124(5) of the EA applies.

134. *Declaration*

135. A declaration is made.

136. *Recommendation*

137. There is no appropriate recommendation to be made.

138. *Injury to feelings*

139. An award made in this respect is to compensate for anger, distress and upset caused to the claimant by the unlawful discrimination they have been subjected to. It is not a punitive award. The focus is on the injury caused to the claimant. It is awarded in bands. The upper band for the most serious cases is £33,700 - £56,200, the middle band for cases that do not merit an award in the upper band is £11,200 - £33,700 and the lower band for less serious cases is £1,100 - £11,200.

140. Mrs Lafford was careful to keep her communications with the Company business like, between Mr Brann's turning down her flexible working request on 21 August 2020 and her leaving her employment on 30 December 2020. They do not reflect anger, distress or upset. We accept, however, that the discrimination we have found did cause a level of anger, distress and upset, albeit complicated by other personal issues in Mrs Lafford's life.

141. In our view, an award in the lower band is appropriate and we put this at <u>£7,000</u>. Interest is payable on this award calculated as follows:

> Days between 30 December 2020 (that being taken as the day of the discriminatory act) and 13 April 2023 (the day of calculation): 835
>
> Interest rate: 8%
>
> 835 (days) x 0.08 x 1/365 x £8,000 = <u>£1,281.10</u>

142. *Financial losses*

143. Here we are concerned with putting Mrs Lafford in the same financial position, as far as it is reasonable, as she would have been in, had she not been discriminated against. We must try to assess what would have happened had the discrimination not taken place.

144. It seems to us almost impossible to assess what might have happened had proper consideration been given to Mrs Lafford's flexible working request. We decline to do so. What, however, we can say is that Mrs Lafford, in essence through choice, failed to mitigate her loss by diligently searching for alternative employment. The consequent loss in Mrs Lafford's income cannot, therefore, be attributed to the Company. We make no award for loss of earnings.

145. Unfair dismissal

146. Mrs Lafford does not seek reinstatement or reengagement.

147. *Basic award*

148. The basic award is agreed by the parties at £697.95.

149. *Financial losses*

150. The factors in respect of compensation for loss of earnings are the same as the factors for compensation for financial losses in respect of the discrimination. No award is made.

151. *Loss of statutory rights*

152. Compensation for loss of statutory rights is awarded in the agreed sum of £500.

Employment Judge A Matthews
Date: 30 April 2023

Judgment & reasons sent to the parties on 11 May 2023

For the Tribunal Office