EMPLOYMENT TRIBUNALS

Claimant: Miss M Hunter
Respondent: Lidl Great Britain Limited

Heard at: Reading
On: 13-16 March 2023, 4 April 2023, 14 April 2023 and 18 April 2023 (in chambers).

Before: Employment Judge S. Matthews
Members: Mr. C. Juden
Mr. F. Wright

Representation
Claimant: Mr. Hirst (father of the Claimant)
Respondent: Mr. Zaman (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Tribunal does not have jurisdiction to decide the complaint of direct sex discrimination contrary to section 13 Equality Act 2010, the claim having been brought out of time.

2. The claimant was subjected to harassment related to sex contrary to section 26 (3) Equality Act 2010.

3. The complaint relating to equal pay pursuant to section 65 Equality Act 2010 succeeds. The claimant is entitled to be paid the difference between her pay and that of her comparator for the period 1 April 2021 to 7 July 2021.

4. The claimant was unfairly dismissed.

5. The claimant is entitled to be paid for outstanding hours in respect of work performed after clocking out on 16 June 2021.The remaining complaints of unauthorised deduction of wages are out of time and are dismissed.

6. The hearing to determine remedy for harassment, equal pay, unfair dismissal and unauthorised deduction of wages will take place on 2 August 2023 at Reading Employment Tribunal.

REASONS

Introduction

1. The claimant was employed by the respondent, a discount supermarket, as a Customer Assistant from 5 February 2019. She was promoted to shift manager on 1 August 2020. Her employment terminated on 7 July 2021.

2. She has brought claims for direct sex discrimination, harassment, equal pay, constructive unfair dismissal and unlawful deduction of wages. Early conciliation started on 12 July 2021 and ended on 23 August 2021. The claim form was presented on 13 September 2021.

3. The respondent denies liability for each of the claims. In respect of the claim for unfair dismissal, if it is successful, the respondent contends that the claimant unreasonably failed to follow the ACAS code of practice on disciplinary and grievance procedures (29) and contributed to her own dismissal.

4. It was agreed that the Tribunal would not hear evidence on remedy at this hearing but would hear evidence relating to whether compensation should be reduced following Polkey v AE Dayton Services Limited or owing to the claimant's conduct and contributory fault.

5. The hearing was originally listed for four days. This was insufficient and the matter was part heard at the end of day four. A further three days were listed: two for evidence and one in chambers. Judgment was reserved. The case has been listed for a further one day hearing to determine Remedy on 2 August 2023.

6. Adjustments were discussed and made for hearing the claimant's oral evidence and the oral evidence of the respondent's witness Michael Harding, taking into account the 'Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings'.

7. At the beginning of the hearing the Tribunal discussed arrangements with the representatives. The claimant's father indicated that she did not want to be in the same room as the respondent's five male witnesses. We decided that this could affect her ability to give her best evidence. We agreed that the respondent's witnesses would be excluded from the hearing room while the claimant gave evidence, and we made arrangements for them to watch the proceedings by CVP from another room in the Tribunal building. The claimant was provided with a CVP link so that she could watch the proceedings from outside the room while the respondent's witnesses gave evidence.

8. Mr. Harding indicates in his statement that he is an autistic person and that he has ADHD. It was agreed that Mr. Harding would give evidence at the beginning of day five so that he would not have to wait while other witnesses gave evidence or finish a day part way through evidence which could cause unnecessary anxiety. He was also to be allowed to take breaks whenever he required and ask for clarification of the questions. The Judge summarised the

relevant guidance in the 'Advocates Gateway toolkit' to the claimant's representative and took over the questioning where necessary to ensure that the witness could give his best evidence.

Issues

9. The List of Issues had been discussed at two case management hearings. At the first hearing before EJ Welch on 17 August 2022 the discussion was aborted because EJ Welch did not have the file (39-42). At a subsequent hearing on 19 October 2022 (43-47) EJ S. Moore directed that on or before 2 November 2022 the parties were to file a final agreed List of Issues with the Tribunal. The Tribunal have no record of the final agreed List being filed.

10. On the second day of the hearing, the claimant indicated that she intended to rely on factual allegations included in her statement, which were not set out in the List of Issues document in the bundle (48-61).

11. The factual allegations gave examples of behaviour that the claimant alleges took place throughout 2020 and 2021. They are as follows:

    Michael Harding regularly initiated conversations attempting to discuss in detail the Claimant's love life/sex life; for example:

    (i) "I'd love to see what they could do", "who would I rather sleep with x y or z", "bet they're good at giving head"

    (ii) He once said directly to the Claimant how much he'd like to sleep with both her and her boyfriend

    (iii) When the Claimant arrived for work with wet hair, he made multiple comments asking "how was your shower", "do you shower alone", and "what did you do in the shower". The Claimant was made to feel acutely uncomfortable to receive such obviously unwanted sexually orientated questions

    (iv) When the Claimant was training a new colleague including merchandising underwear he said "Ooo I'd love to see you two in those". The Claimant challenged this immediately saying "You can't be saying stuff like that", Michael Harding responded "better get used to it". This behaviour became a pattern during changeovers of swimming costumes/underwear/other clothing items.

    Michael Harding would regularly, often daily:

    (i) Touch the Claimant on the bum, thighs, waist, and go further, putting his arm around her and often attempting to hug her. The Claimant made it clear on every occasion that this was unwanted and unsolicited contact and asked him to stop.

    (ii) He continued this behaviour, for example, on one occasion attempted to slap the Claimant on the behind whilst on the shop

floor during trading hours and only stopped because another colleague witnesses this and told him to stop him to stop.

12. The claimant's representative drew the Tribunal's attention to eight drafts of the List of Issues that had passed between himself and the respondent's Solicitors. One of the drafts, referred to as version 2, was attached to an email to the respondent's solicitor and to the Tribunal, dated 16 May 2022. In that draft the factual allegations set out at paragraph 11 above were included. The claimant's representative said that he was persuaded to delete these factual allegations from the List of Issues by the respondent's Solicitor as the claimant was unable to give specific dates for the incidents.

13. Counsel for the respondent objected to the factual allegations being included in the List of Issues. He argued that the claimant's representative had previously confirmed that he agreed the List of Issues in the original bundle. As this hearing was now part way through oral evidence he submitted that the fairness of the proceedings would be affected and the Tribunal was descending into the factual and evidential arena. The Tribunal was in effect formulating a list of issues for the party. He referred to the Court of Appeal case of Mervyn v BW Controls Limited [2020] ICR 1364.

14. The Tribunal decided to allow the factual allegations to be included in the List of Issues. The Tribunal's core duty is to hear the case in accordance with the law and evidence and departure from an agreed List of Issues is sometimes necessary to enable the Tribunal to comply with that duty. The Tribunal took into account that a draft List of Issues produced before the first case management hearing included the factual allegations. The respondent was on notice from at least that point that these were factual allegations on which the claimant wished to rely. The respondent was not prejudiced as the witness who could give evidence on the factual allegations was at the Tribunal. This could be dealt with by a short adjournment and by amendment to the respondent's witness statements or by the respondent being given leave to give evidence in chief on the factual allegations. The claimant could be cross examined on the allegations. The Tribunal was not stepping into the arena as these were factual allegations about which the respondent had been given prior notice by the claimant.

15. The final Amended List of Issues required the Tribunal to make findings in respect of the following facts:

> A. Direct sex discrimination (s11 + 13 EA 2010)
>
> 1. Whether the Claimant was subjected to less favourable treatment because of her sex. In October and December 2020, the Claimant requested a transfer to a store with female store manager which was refused by Dan Bridges because of the Claimant's sex.
>
> 2. The Claimant relies on a hypothetical comparator, namely a male shift manager. The Claimant contends that a male shift manager could be moved to a store with a male or female store manager but because she is female the Claimant was not permitted to move to a store with a female manager because how that would appear.

B. Harassment (s26 EA 2010)

1. The Claimant claims that the Respondent engaged in unwanted conduct of a sexual nature or related to her sex.

2. She lists events that she says occurred; the first being 15 March 2019 and the last being 19 May 2021 together with the factual allegations listed at paragraph 11 above which she asserts occurred 'throughout 2020/2021'.

C. Equal pay- Sections 65 (2), (4) and (6) EqA 2010 Like Work Section 65(2)

1. Was the Claimant engaged in "like work" to, Lewis Thomas, in respect of her role from 1st August 2020

2. If so, were the terms of the claimant's contract, namely her hourly rate, less favourable than that of a male colleague in her position? The Claimant contends Lewis Thomas was paid £11.70 vs her rate of £10.30-£10.90 and the difference is due to sex.

Constructive Unfair Dismissal – s.96 ERA 1996

1. Whether the Respondent's treatment of the Claimant amounted to a breach of an express or implied term of the Claimant's contract of employment.

2. The Claimant relies on the conduct referred to at paragraphs A (direct discrimination) and B (sexual harassment).

3. The Claimant relies on breach of mutual trust and confidence.

4. The Claimant contends the acts or omissions referred to below amount to a breach of her contract of employment:

   Being required to work excessive hours (as detailed in list of events from 4 December 2019 to 20 October 2020).

   Being required to continue working after clocking out, undertake management duties whilst being paid as a customer assistant, being required to work during annual leave or otherwise being treated unreasonably [as detailed in a list of events from 10 November 2019 to 16 June 2021].

   Failing to deal with grievances/ concerns raised by the Claimant and/or failure to support and/or to pay her a higher bonus [as set out in a list of events dated from 6 October 2019 to 15 June 2021].

Time limits

Are the Claimant's claims in time? If not was there "conduct extending over a period"? If not, would it be just and equitable to extend time?

Underpayments

10/11/2019 paid for 4.54 hours (1-6:58) when she worked a 17-hour shift working until 6:58 am.

6/6/2020 Forced to work on my day off –It is unclear due to all the underpayments as outlined herein

31/8/2020 Worked unpaid for a few hours

13/9/2020 13:02- 8:36 almost 20 hours at work but not paid for 20 hours.

16/6/2021 Stayed a few hours unpaid because the alarm wouldn't set – this happened countless times and the time waiting/ on the phone to alarm companies/ re checking all the locks were never paid.

Evidence

16. The Tribunal heard oral evidence from the claimant and two witnesses on behalf of the claimant:

    - K. Lennartsson, a friend of the claimant.
    - L. Thomas, former customer assistant and shift manager at the same store as the claimant. Mr. Thomas gave evidence by CVP.

17. The Respondent relied on 7 witnesses, whose names and roles at the respondent's Wallingford store at the material time were as follows:

    - M. Harding: Deputy Store Manager (DSM) February 2020 to July/September 2021.
    - P. Skwanek: DSM from December 2020 to April 2021.
    - J. Dos Santos: DSM from December 2020 to June 2021.
    - D. Bridges: Area Manager (AM) responsible for the Wallingford store from March 2020 to April 2022.
    - J. Tuckwell: Store Manager (SM) from July 2020 to February 2021.
    - N. Warring**:** SM from January 2021 to the end of 2021.
    - L. Palmer: Personal Welfare Consultant (PWC) and Employee Relations Consultant (ERC) for the Avonmouth Regional Distribution Centre (RDC).

18. The witnesses from whom we heard oral evidence each confirmed the truth of a written statement before being questioned. The claimant also confirmed the truth of a document entitled 'Impact statement' (62-69) which is in the bundle. Although this is headed 'Impact statement' we decided to allow it in evidence at this hearing as some of the content relates to liability.

19. Mr. N Warring did not give oral evidence. Although he was present for the hearing on days one to five in anticipation of giving evidence, he contracted Covid shortly before day six and was not able to give evidence. Counsel for the respondent confirmed that the respondent intended to finish the respondent's evidence that day and did not make an application for an adjournment. We did take account of Mr. Warring's evidence, but we treated it with caution as his statement was not signed and he was not available to be cross examined.

20. At the outset of the hearing the respondent sought leave to call an additional witness, Ms. L. Palmer (Employee Relations Consultant). Her statement referred to the HR support she provided to the respondent's Wallingford store at the relevant time. We decided that the claimant was not prejudiced by the late admission of the statement, as the claimant could give be permitted to give evidence in chief relating to Ms. Palmer's evidence and we granted leave.

21. The following documents were disclosed and admitted during the course of the evidence, and numbered as follows:

    21.1 307-309. Notes referred to in evidence by the claimant (disclosed by claimant)

    21.2 310-312. Email Correspondence between Claimant and Payroll (Payroll Query) 15.06.2021- 24.06.2021

    21.3 313-324. Summary Sheet of Hours Worked (Michael Harding and Claimant) (01.01.2020 – 07.07.2021)

    21.4 325-330. Colleague Handbook – Chapter 2 (The Way we do the Basics)

    21.5 331-333. Working Time Planning and Recording

    21.6 334-335. Lidl Accident Report Form (LAR) – Store

    21.7 336-339. Transcript of WhatsApp Correspondence between Michael Harding and Claimant (21.03.2020 – 05.07.2021)

    21.8 340-342. Claimant's Compilation of Text Message, Snapchat, and WhatsApp Screenshots ,15.03.2023 (disclosed by claimant)

    21.9 343.Milk ACD Setup Sheet Undated

    21.10 344-345. 'Spaceman Plan' Sheets for Store Merchandising – Herbs S & C Undated

    21.11 346-347 Images of ACD Device Undated

    21.12 348 Image of Man on Chair Undated

    21.13 349 Electronic documents: Claimant's Video of Clocking-In Hub 13.08.2019, Claimant's Video of Clocking-In Hub 18.02.2020, Claimant's Video of Clocking-In Hub 24.05.2020, Claimant's Video (Re: Alarm) Undated, Claimant's Video of Plastic Screens on Tills Undated (disclosed by claimant)

    21.14 350-352 Selection of electronic messages from claimant's phone, undated (disclosed by claimant)

    21.15 353-379 Training records

22. With the exception of the documents identified as 'disclosed by claimant' the majority of the documents referred to above were disclosed during the course of the hearing by the respondent. The Tribunal expressed their disappointment that they were in breach of the Order of EJ S. Moore to disclose documents by 2 November 2022. It causes delay and potential prejudice when documents are disclosed during the course of the evidence.

23. In reaching its decision the Tribunal has taken into account only the documents to which it was taken in evidence.

24. During the course of the hearing there was a discussion about electronic communications such as What's App and text messages. The claimant stated in evidence that she was able to be precise about dates referred to in parts of the List of Issues because she had been back through electronic messages and social media to date them. She subsequently disclosed a compilation of messages (340-342) and videos (349). The respondent also disclosed What's App messages between the claimant and Michael Harding (336-339).

25. The claimant indicated that she had some further electronic messages that would corroborate some of her allegations. She said the electronic messages contained her comments to friends and colleagues about the conduct at the time. She was reluctant to disclose these as they would identify other members of staff to whom she had promised confidentiality. She maintained that the respondent would also have messages on multiple platforms besides What's App during her employment which had not been disclosed.

26. The Tribunal decided that it was not necessary or proportionate to require disclosure of all electronic messages. They would be of limited relevance as they were not in themselves part of the conduct.

27. References to pages in the Bundle are in brackets (X) and references to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB/YZ) or in the case of the claimant (cl/YZ). Some parts of the witness statements do not have numbered paragraphs and are referred to by their page in the witness statement bundle.

Findings of Fact

28. This section of our Reasons sets out the broad chronology of events. There were points where we had to resolve disputed issues of primary fact in order to decide the case and we give our reasons for the findings we made.

<u>Claimant recruitment and terms and conditions.</u>

29. The claimant was employed at the respondent's Wallingford store. This store is managed by the respondent's Avonmouth Regional Distribution Centre (RDC). The Store Manager (SM) for Wallingford reports to the Area Manager (AM) who reports to Head of Sales at the RDC. The store had at least 2 Deputy Store Managers (DSM) at the material time.

30. The claimant was initially recruited as a Customer Assistant (CA) on 5 February 2019, shortly after her 18th birthday (66). She was interviewed at 17 and started work at 18.

31. At the beginning of her employment, she was studying for her A levels and available to work evening shifts. Her contracted hours were 20 a week (86).

32. She was promoted to shift manager on 1 August 2020 (27). The claimant signed a contract relating to the shift manager role on 13 September 2020 (100-112). Her contracted hours were 40 a week (100).

33. Both contracts had the same terms for all material purposes save for the hours. Clause 3.1 (101) provided that her manager may change her job title and duties. Clause 5.1 (102) stated that there were no normal hours of work and hours will be in accordance with the rota displayed at your Place of Work.

34. The rota was usually prepared by the SM and usually required her to work 48 hours a week. A company handbook entitled 'The way we do the basics' (322-330) states that staff are given a time recording fob (327) to swipe in or out at the beginning and end of the shift and record breaks into a terminal.

35. Following her promotion, the claimant was paid £10.30 an hour (100). This hourly rate increased to £10.90 from 1 April 2021. The claimant subsequently discovered that two males, Lewis Thomas (who gave evidence) and CJ who became shift managers from 1 April 2021 were paid a higher hourly rate.

36. LT was paid £11.70 an hour from May 2021 (DB/26). The respondent now accepts that the claimant was underpaid from 1 August 2020. She was placed on the wrong banding in error. The respondent maintains that she should have been paid £10.70 from August 2020 (DB/23) and £11.30 from April/May 2021 (DB/27). This is less than the £11.70 that LT and CJ were paid for the same role (DB/26).

Claimant's line managers

37. Throughout her employment the claimant worked under four SMs and various DSMs. When she joined she recalls that her first store manager was named Chris and there were two DSMs, named Tom and Liam.

38. From February 2020 Stefan Burrell (SB) was the SM. He no longer works for the respondent and did not give evidence. Jamie Tuckwell (JT) was trained to take over management of the store from SB from around August 2020. SB and JT worked together in the store during the handover period and SB left the store in September 2020. In January/ February 2021 Nicholas Warring (NW) took over as SM. There was a handover period and JT left the store in April 2021.

39. Michael Harding (MH) was the DSM from February 2020 (having joined the store in November/December 2019). MH was still DSM at the store at the date of termination of the claimant's employment. Jose dos Santos (JS) was a DSM from December 2020 to June 2021, together with Piotr Skwarek (PS) from December 2020 to April 2021.

Working conditions

40. The claimant worked long hours, usually over 40 hours a week and her shifts frequently exceeded 12 hours (62). She got tired regularly working the late shift (1pm to 11pm). It had suited her when she first started working there during A levels (62) but she would have liked to work more day shifts. She

felt that the late shift did not receive as much supervision, training or attention as the day shift. The SMs and DSMs tended to work the day shift.

41. She raised her concerns about being so regularly put on the late shift with the SMs. JT said he changed the rotas to accommodate morning shifts but says that the claimant turned up late for the morning shifts multiple times and he was unwilling to continue rota-ing early shifts (JT/page 52). The claimant also spoke to NW on 6 April 2021 about the unfairness of the rotas in April 2021 but nothing was done (cl/page 6).

42. We accept the claimant's evidence that she was regularly put on the rota for the late shift, against her wishes. We do not accept the respondent's explanation that she was not put on morning shifts because she was regularly late. We take into account in making this finding that there are only two instances of the claimant being late documented during her employment with the respondent (paragraph 50 below). These were 17 months apart in time.

43. The claimant was keen to progress to manager level. She was given management tasks to perform while still a CA (63). The respondent maintained this was training and preparation for the role but the claimant in time started to feel resentful as she was not being paid as a manager. When she was interviewed for the Shift Manager role in August 2020, she felt that the interviewers, SB and the Area Manager (AM) Dan Bridges (DB) did not take her seriously. DB left halfway through the interview (cl/page 6). Once appointed she did not have any formal training. The claimant described it as 'self-teaching on the job' (cl/page 7).

44. The claimant maintained that she was expected to work some hours without pay. This started during the time that SB was manager and was encouraged so the store's productivity appeared higher than it was for the number of hours work. We accept the evidence of the claimant and Lewis Thomas (LT) that staff were encouraged to clock out and continue working. LT said that the practice was referred to as 'fudging numbers' (LT/ page 10) and there was 'a stress over saving productivity which let (sic) to us working for free' (LT/page 11). He refers to 'guilt tripping' (LT/page 11). In evidence the claimant confirmed that she did not expect to be paid when she was clocked out.

45. JT admits that he heard a rumour about the practice of working when clocked out when he started as a manager. He says he dealt with it at a meeting with the store's managers by saying that it was not acceptable. He did not follow this up. The claimant and LT say that the practice continued to occur under JT and NW. The claimant described the time under SB as 'traumatic' and it 'had an everlasting effect and affected how we viewed repercussions from the company'. We accept the evidence of the claimant and LT on this. The culture had become embedded.

46. The claimant frequently did not take the breaks to which she was entitled in the course of her working day (62). Breaks were unpaid and pay was deducted even when she did not take the break. In those circumstances she was expected to complete a Working time correction (WTC) form (MH/page

11) to claim the pay deducted. She did not do so as she knew the store was monitored on the amount of WTC forms and it would be frowned upon.

47. The claimant was asked to work when she had Covid and was put on a 20 hour shift by SB in September 2020. She sustained accidents at work. On 6 October 2019 her wrist was put in a splint following a visit to hospital, owing to a repetitive strain. On 27.5.21 she cut her hand on broken glass in the warehouse. The respondent produced blank accident report forms during the hearing but no evidence that the accidents the claimant sustained were recorded. We accept the claimant's evidence that the accidents occurred.

Claimant's performance

48. At the beginning of her employment the claimant was recognised as an employee with promise (DB/7). She was nominated for Customer Assistant of the year and won a British Citizenship award (68).

49. The claimant was not subject to any disciplinary hearings throughout her employment with the respondent. There are no records of appraisals and no performance plans.

50. There are two records relating to lateness. The first is a 'Note of Informal Performance discussion' dated 2 January 2020 (98), which records that it is a 'last warning', but there are no recorded discussions prior to it. There is a second one dated 2 June 2021 (118). It records that the claimant gives the reason for arriving late as getting out late from her shift the night before as there were not enough managers on shift. Under 'Details of any support measures which will be put in place' it states '1x extra manager for evenings to help with manager tasks'.

51. The claimant conceded that she was sometimes five minutes late but maintains that was because of the long hours she was working. She says she was not challenged or disciplined because the managers recognised that she was often 'working for free.' We accept the claimant's evidence that time recording procedures were not followed properly and the hours that are recorded as clocked in are not the only hours that she was working. The claimant was not challenged for lateness because of the long hours she was working.

52. MH said he had 'difficult conversations' about her performance such as non-food set up and back stock (MH/6). JT said that her work was very good and of a high standard when he first joined the store but 'gradually this wore off' and by Christmas 2020 standards fell 'below expectation' (JT/11).

53. We consider that if there had been genuine concerns about the claimant's performance and lateness at the time it would have been recorded in notes of meetings. The fact that there is no documentary support other than the two notes referred to at paragraph 50 indicates that the respondent was satisfied with her performance.

Request for transfer

54. In October and December 2020, the claimant asked to be transferred to a store with a female manager. She had a store in mind but did not want to name the manager at the time. She made the request verbally to DB and to Mark Wright. Mark Wright did not give evidence. DB denied that any such request was made (DB/17). In evidence he said he would have accommodated a request if possible as he was always happy for staff to move to other stores if they wished. There was not a female manager in his area at the time but he would have made enquiries of other AMs if the claimant wished to be moved to a store in another area.

55. We accept that the claimant made a verbal request. It was not in writing and did not specify the store she wished to move to. We find it likely that DB does not remember it because of the way that it was made. We find that his reason for not dealing with it was that he did not think it was important. The request should have alerted him to the harassment the claimant was experiencing but he failed to consider this. This reflects the lack of training and lack of awareness of the risk of harassment.

Sexual harassment

56. The claimant claims that she was subject to unwanted conduct of a sexual nature or related to her sex. The factual allegations are set out in the Amended List of Issues. Each factual allegation was considered by the Tribunal. We made factual findings where relevant to our conclusions.

57. The first incident was shortly after she started working for the respondent on 15 March 2019. Another customer assistant, Sam, moved his till next to her, asked her for her number and made comments and sexual advances through the day (cl/page 3). She asked Chris, the SM at the time, if she could move tills and he said that it was not possible and she should take it as a compliment. We found the claimant's account of the event credible and we found it significant that her complaint to the SM was not addressed.

58. In October 2020 the claimant complained to SB, the SM at the time, about inappropriate comments and touching. He laughed and said he was not surprised. The reaction to her complaints explains why the claimant wanted to move to a store with a female manager. We note that it was around this time that she asked to move to another store.

59. We find that the comments and touching continued after SB left the store. Although most of the complaints relate to MH, the DSM from February 2020, we find that his conduct reflected the store's culture. This allowed the conduct to continue unchecked.

60. Some of the factual allegations relate to MH taking his breaks with the claimant against her wishes and insistence on sharing his food with her. The dates range from 22 February 2020 to 24 November 2020.The Tribunal decided that it did not need to make individual findings on these allegations as this behaviour in itself would not constitute sexual harassment. The claimant states she was reluctant to spend breaks with MH because of

'unsolicited inappropriate behaviour' (cl/page 4) and our findings focus on whether this type of behaviour took place.

61. As the evidence of the claimant and MH was, in many respects, directly opposed we are required to decide whose evidence we prefer. It is for the claimant to prove that the alleged conduct occurred. The standard of proof which we are required to apply is the balance of probabilities. We considered the evidence in respect of each allegation referred to below separately.

62. In deciding how much weight to apply to the witness evidence we took into account the following factors;

    65.1 Mr. Warring did not attend and his evidence was not tested by cross examination. His statement was not signed or sworn.

    65.2 The claimant, who was not legally represented, had prepared statements with her witnesses by setting out her contentions and asking the witnesses to comment on them. The Tribunal has made its findings on the basis of hearing their oral account of events.

63. When making our findings of fact we took into account the submissions by respondent's counsel that elements of the claimant's evidence were not corroborated by the documents in the bundle. Overall, we did not consider this affected the claimant's credibility in respect of the issues we had to decide and we explain the reasons for this where relevant. We found the claimant's evidence credible. She described what occurred in oral evidence and we found no evidence that she was fabricating.

64. MH's responses to the questions about his conduct were a mixture of denial and not recollecting. He denied the conduct on the grounds that it was 'out of my character' and 'very unlikely'. When weighed against the claimant's evidence we considered that the claimant was more likely to remember the comments and actions as they would have been disturbing and significant to her at the time.

65. We also found that MH's recollection was weak in some important respects. For instance, he acknowledged that there had been a complaint against him at some stage during his time working at the store but he could not remember which manager spoke to him about it or what the complaint was about (MH/15). We find it surprising that he was unable to remember such a potentially significant event.

66. Furthermore, we heard evidence that indicated that MH did not appreciate the effect his comments could have. His reaction when told 'you cannot say that' in respect of the underwear incident referred at paragraph 73 was; 'I was confused. At the time I thought we had a good enough friendship and it would be acceptable'. He did not understand why he was challenged about the comment. The Tribunal formed the view that he is not likely to remember making comments if he does not realise that they are offensive until pointed out to him.

67. The claimant is unable to identify specific dates when some of the incidents occurred. The lack of specificity in itself does not affect our assessment of the claimant's credibility. It is not surprising that she does not remember particular occasions as she was in contact with MH on numerous occasions and she could not be expected to remember specific dates unless she kept a contemporaneous record. She has specified dates for some of the incidents. She explained that she has obtained these dates by going back through messages and social media. The documents were not disclosed (see paragraph 25) and the Tribunal has based its finding on her oral account.

Our factual findings on comments by MH

68. On 22 August 2020 MH said that the claimant was distracting in her uniform. MH denies this on the grounds that as a gay man he is not interested in women (MH/12). We do not accept that is a reason why he did not make the comment and on a balance of probabilities we find that the comment was made.

69. In September 2020 the claimant says that there was a conversation where MH said, 'that jumper really brings out your figure'. SB, the store manager at the time, said 'You can't take that jumper off that shirt is too revealing' and DB said, 'I don't think those jeans are appropriate'. The claimant said that DB then looked closely at her bottom half. DB denies this. We accept that the claimant could have been mistaken as to where DB was looking. We find that on a balance of probabilities a conversation did take place about what the claimant was wearing and that it had sexual overtones.

70. MH regularly talked about sex. We accept the claimant's evidence that he talked about who he would rather sleep with, 'what they could do' and comments such as 'bet they're good at giving head'. We take into account in making this finding the culture in the store at the time which we refer to at paragraph 75 below.

71. There is a dispute about exactly what MH said about the claimant's boyfriend. MH admits that he said that he found him attractive (MH/5). The claimant said he told her he wanted to sleep with her and her boyfriend. NW said that the claimant told him that MH said he would like to sleep with her boyfriend (NW/6). We concluded that whichever version was true, in the context of the atmosphere within the store, even MH's version of events could be found to constitute harassment.

72. The claimant said that when she arrived at the store with wet hair MH asked 'how was your shower?', 'do you shower alone?', and 'what did you do in the shower? The claimant said in evidence that she had a specific recollection of this event as she remembered that SB was the manager at the time. We found her description of the event credible.

73. The claimant alleges that MH made inappropriate comments when she was doing changeovers of swimming costumes and underwear on the middle aisle. MH conceded in evidence that he can remember an occasion when he made a comment. He said he was passing through the warehouse, and he picked up some 'knickers' and asked the claimant and the person who she

was with 'do you think I look good in these?'. The claimant did not respond and he then said 'I bet you would look good in this' to which she did not respond. Someone said 'You can't say that'. The claimant says that it was her, MH says it was the other colleague. The claimant says that MH then said 'you better get used to it'. The Tribunal's finding of liability would remain the same whichever version is accurate.

74. We accept that MH did not intend to cause offence by his comments. He did not realise that they were offensive. This reflects the culture in the store which was allowed to go unchecked.

75. The Tribunal has found that there was an acceptance of comments with sexual overtones. The claimant's witness and former boyfriend, LT, talked about a ranking system in which females were ranked according to their perceived attractiveness (LT/page 13). We accept their evidence on this: LT admitted he participated in it and we consider he is unlikely to fabricate such a detail. He said that it was only men who participated and when the females found out about it they were annoyed and it created a bad atmosphere.

76. MH has been identified as the main perpetrator but that does not excuse the failure to act by more senior management. We find that MH was reflecting the culture within the store. He said in evidence he wanted to lighten the atmosphere and that workplace banter was not uncommon; they were like a big family.

<u>Our factual findings on actions by MH</u>

77. We then went on to consider the actions alleged by the claimant. She said that MH would 'regularly, often daily' 'touch me on the bum, thigh, waist, and go further, putting his arm around me and often attempting to hug me'. (cl, page 3 and 4). MH denies this. MH admits that he hugged the claimant when they met outside work and once when at work.

78. We accept the claimant's version of events. The constant touching of the claimant is corroborated by the claimant's witness, KL. The Tribunal accept that KL saw MH touch the claimant on at least one occasion and confronted him about it. KL said in evidence ' I did mention it to him. I would bring it up to him, at least on one occasion'. 'I can't remember when, it was in Lidl, he and Maddie were at work. He just shrugged it off, he was shy and hesitant round me. I said 'I have heard comments you have made to Maddie and seen you touch her, why is this?' He shrugged his shoulders and did not say anything'.

79. The Tribunal also accept that MH attempted to slap the claimant on the bottom. The claimant's evidence is that another colleague asked him to stop, (cl/page 4). This was corroborated by LT (LT/ page 13). MH said he could not remember the incident but did not deny it.

80. On 29 September 2020, MH admits he hugged the claimant when he met her outside work. He denies that he told her he loved her. The claimant said she 'physically tensed up'. We accept that MH did not pick up the signals that she did not want to be hugged. In evidence she referred to him as 'overtly friendly'

and clarified that meant 'unwanted physical contact'. She said there was 'no reason to hug me and it made me uncomfortable'.

81. On 19 May 2021 the claimant alleges MH put his hand on her thigh. MH denies it. We prefer the claimant's version of this event as she is more likely to remember the event as she was disturbed by it. She also appeared to have a clearer recollection of the meeting. She said she was on her own with MH at the time. MH was adamant that NW was at the meeting. The claimant was adamant that he was not. NW, who did not give evidence, said in his unsigned statement that he was not there. It is possible that they are recalling different occasions.

82. We find that MH did not intend to cause offence or cause an intimidating and humiliating environment, but that was the effect. His comments and actions reflect a lack of boundaries and went beyond what was acceptable. The situation which was allowed to develop was caused by a lack of training and awareness about harassment at the store.

Complaints about harassment

83. The respondent says that the claimant did not raise a grievance or complain about harassment and invites the Tribunal to draw the inference that the events did not occur. The claimant's case is that the experience was made worse because her complaints were ignored.

84. The claimant says that she complained to her line management about the conduct (cl/page 2). These complaints were verbal except one handwritten complaint in early 2020 which she gave to SB and to which she received no response. This is corroborated by her witness, KL, who can remember her writing it (KL/page 22). The respondent has no record of this complaint and SB did not give evidence. The Tribunal accept the claimant's evidence.

85. We find that the reason she only made one written complaint was because this was her first job and she was in a junior role. There was a lack of training for staff at all levels on what was acceptable and she thought that there was not much that would be done about it. Her previous verbal complaints had been met with the response that she should take it as a compliment (paragraphs 57-58 above). She was in a predominantly male team, and was a young female, new to the workplace. She said in evidence that she thought she had to put up with it.

86. In evidence JT, who was her line manager from July 2020 to February 2021, denied any knowledge of sexual harassment in the store. He knew that the claimant personally disliked MH (JT/15). He said in evidence that MH could be a bit blunt. He did not accept that she told him that her feelings were due to sexual harassment. He said he tried to accommodate her feelings by putting her on different shift (JT/16). We find it surprising that he did not investigate further why she did not want to be on the same shift as MH. MH was a DSM and higher in the management structure. The claimant was a young female and he should have been alert to the possibility of harassment, even if the claimant had not told him.

87. We did not hear evidence from SB or NW, who were her managers before and after JT. In his unsigned statement NW denies that there was a culture of harassment in the store. He admits that the claimant told him that MH wanted to sleep with her boyfriend just before she gave her notice in. There is no evidence or suggestion that this was investigated. JS and PS, the DSMs, also denied awareness.

88. DB stated that he heard no complaints about harassment when meeting up with the SMs. He had regular meetings with them about financial key performance indicators (KPIs). He said that it was up to the line managers to raise anything staff related as staff management normally came within their remit. When visiting the store, his 'prime focus' is 'legal compliance, cleanliness, availability, stock availability and support the SM to ensure that they are trained and able to deliver the store's KPIs which include write-offs, inventory and personnel related matters such as working time compliance' (DB/3).

89. On a balance of probabilities and having heard oral evidence we accept the claimant's evidence that she told her managers Chris, SB, JT and NW about the comments and actions of MH which she is now claiming amount to sexual harassment. We take into account the managers lack of awareness and training on harassment which we refer to at paragraph 94 below and the extent to which DB concentrated on operational matters. We accept the claimant's explanation that 'It was a man's world in that company'(cl/page 5). We find that the line managers did not consider that it was their role to police harassment. They paid no attention to her complaints and closed their eyes and ears to the culture of harassment that existed.

Company policy and training on harassment

90. The respondent's Anti- Harassment policy (74- 79) sets out employees' and managers' responsibilities which include creating a climate in which harassment is not tolerated, supporting and assisting employees who bring a claim of harassment and dealing with complaints efficiently, sympathetically and confidentially (78). The list of examples of behaviour which could be regarded as harassment include 'lewd remarks' and 'unwanted physical contact' (76-77). There is an informal and formal procedure for an employee to follow if they feel that they are the victim of harassment (79).

91. The Grievance policy (81-85) provides that the appropriate policy if the complaint relates to bullying or harassment is the Anti-Harassment policy (82).

92. The claimant denied having seen either policy prior to these proceedings. Her contract states that it is contained in an induction pack (92). The Tribunal heard evidence that when the claimant started work she was asked to sign the contract and the documents and policies were not explained to her.

93. The Tribunal heard no evidence that the claimant was advised to use or directed to either policy in respect of her complaints relating to harassment or in respect of her pay.

94. The Tribunal found that the line managers and the AM had limited or no working knowledge of the respondent's Anti-Harassment policy. They all gave evidence that they had not dealt with a complaint of harassment prior to the claimant's leaving date. The documents on training which were produced during the hearing and added to the bundle do not evidence any training relating to harassment. DB said that he recalls training when he first joined the respondent in 2016. JT described attending diversity training in 2022. In evidence neither were able to outline any content of the training that dealt specifically with harassment.

95. In evidence DB said that if an employee wanted to bring a formal complaint about harassment, he would now ask them whether they wanted to deal with it informally or formally. If formally he would advise them to write a grievance and he would enlist the help of HR. He did not refer to the Anti- Harassment policy.

96. Liz Palmer (ERC) stated in evidence that she was not aware of the content of SMs training on harassment, but she would 'like to think it is there'. She stated that in all workplaces there is 'banter'. No evidence was produced of risk assessments. She said a poster with helpline number, an employee assistance number and her photograph were displayed in the store and the claimant could have raised her complaint via that route. She was disappointed that she had not done so.

97. DB stated that managers would have been able to look at the HR portal if they 'needed to refresh their memory' on how to deal with harassment complaints. When asked how he would ensure SMs were familiar with the policy he said that it was up to them to look it up whenever they deem necessary.

98. The Tribunal found that the respondent expected victims of harassment to raise a complaint. The managers did not accept their responsibility to create an environment in which harassment is not tolerated, as required by the respondent's policy. They did not deal with the claimant's complaints sympathetically. There was a failure to train staff and managers which resulted in a situation where male staff felt able to behave with remarks, language and behaviour with sexual overtones.

<u>Timing and frequency of harassment</u>

99. The Tribunal made findings of fact on when the alleged harassment occurred. Although the claimant could not recall specific dates in respect of the majority of the incidents she said in her statement that the comments and actions by MJ occurred 'often daily'.

100. Counsel for the respondent argued in submissions that in the last few months the claimant and MH were rarely on the rota to work together and took the Tribunal to the timesheets (313-324). However, the Tribunal carefully examined the timesheets and found that on many dates there was an overlap. The last day the claimant and respondent worked together was her final day in the store, 7 July 2021. Their shifts overlapped on 6 days in the last 7 days

she worked (ie. 21 June 2021, 25 June 2021, 2 July 2021, 3 July 2021, 5 July 2021 and 7 July 2021). We also take into account the practice of working when clocked out which means that there may have been additional days when MH and the claimant worked together which were not recorded.

101. The claimant said in evidence that the unwanted conduct by MH continued during her notice period. On a balance of probabilities, the Tribunal were satisfied that the unwanted comments continued to occur in those last few weeks. MH put his hand on her thigh on 19 May 2021 and she last worked with him 7.7.21. It is reasonable to conclude that the conduct continued during the final weeks of her employment.

102. The Tribunal asked the claimant why she had not brought proceedings when the events first started occurring. The claimant said she felt 'isolated' and 'excluded'. Her complaints were ignored. She had mental health issues but was unable to attend therapy regularly owing to the hours she was working for the respondent. She said she knew what was happening was 'not ok' but did not have the 'headspace' to bring proceedings for harassment.

103. The Tribunal accept the claimant's evidence that the delay was due to her mental health, the fact that complaints were ignored and her age and lack of experience in the workplace.

Pay

104. The claimant's complaints about her pay fall into four categories: equal pay (which we have dealt with under Terms and Conditions), pay when clocked out (dealt with under Working Conditions), pay discrepancies and 'underpayments'. We deal with the latter two here.

105. In an email to payroll dated 15 June 2021 (310-312) the claimant stated that there have been significant discrepancies in her pay over the last 6 months amounting to nearly £3000. She asked if she can 'sit down and discuss these in detail with somebody.' The email in reply, which she denies receiving, gives various reasons including undertime and unpaid leave.

106. The claimant's concerns about discrepancies were not addressed by her line managers, JT or NW. DB said SMs were not responsible for pay and JT said that he could not speak direct to payroll for 'data protection' reasons. She was told by NW to email payroll and she did this. She did not receive the reply (310-312) but even if she had her request for a meeting to discuss the alleged discrepancies was ignored.

107. The Tribunal have referred to the matters listed on the List of Issues under 'Underpayments'. This part of the claim falls to be dealt with under the unlawful deduction of wages provisions in the ERA 1996. It is for the claimant to establish her case and bring it within the time limit. The dates range from 10 November 2019 to 16 June 2021.

108. The Tribunal only has jurisdiction to consider the latter claim as the earlier claims are out of time unless the claimant can establish a series of

deductions. The evidence provided is not sufficiently specific to enable the Tribunal to find that there was a series of deductions.

109. In respect of the alleged underpayment on 16 June 2021 the claimant described how the alarm would not set. She had already clocked out but had to wait a 'few' hours for the problem to be resolved. The respondent concedes that this sometimes this happened. MH says that it was sometimes necessary to wait 30 minutes to an hour (MH/11) and JT says he sometimes had to stay 3-4 hours longer (JT/page 53). We find on the balance of probabilities that she waited three hours that evening.

Termination of employment

110. The claimant gave notice to terminate her employment on 24 June 2021, with the termination taking effect on 7 July 2021. Her resignation letter addressed to NW (119) stated:

> 'Please accept this letter as formal notice of my resignation from my position as Shift Manager at Lidl, Wallingford. My last day will be the 7th of July 2021.
> I would like to thank you for the opportunities and the experience I gained while working at this company but have ultimately decided it is time for me to move on. Please let me know if there is anything I can do to aid the transition process'.

111. The claimant gave oral evidence about what occurred the day before her letter. On 23 June 2021 NW told her that he would need to have a performance discussion about her lateness. She responded by saying that she did not think that would be fair. She talked about the extent of the issues she faced in the store, the level of expectation placed on her and the harassment. She says NW sympathised. He said he was well aware of the issues; he was just following procedure. The claimant then walked out of the shop in tears, within an hour of arriving. Her time sheet for that day shows 'Absence Unpaid' (324).

112. The claimant says she went home, cried a lot, and spoke to her family. She says she finally accepted that the issues she was facing together with her belief that she was not getting paid the right amount were 'not ok'. She wrote her resignation letter. She went into work early on 24 June 2021 to speak to NW and handed him her resignation letter.

113. The contents of the letter did not reflect her discussion with NW the day before. Her explanation in evidence was that she did not want to 'burn her boats' and we find this explanation credible. She also felt that it was not fair to put all the blame for the issues on NW as she realised he had inherited a difficult situation: the store was already demoralised and it was hard for him to pick up pieces.

114. The Tribunal found that the issues which led to her resignation include the harassment referred to above, her belief that she was not being paid the correct amount, being required to work excessive hours, being required to work while clocked out and the failure to deal with her complaints about the issues she raised. The final straw was being told she would be 'written up' for being late which needs to be viewed in the context of such treatment.

Law

115. The claimant brings complaints of sex discrimination, harassment, equal pay, constructive unfair dismissal and unlawful deduction of wages. The first three complaints fall to be considered under the Equality Act 2010, the remaining two under the Employment Rights Act 1996. This section of our Reasons first sets out the relevant law under the Equality Act 2010 and then the relevant law under the Employment Rights Act 1996 together with respective provisions on the burden of proof and time limits where relevant.

Equality Act 2010 complaints

116. The complaints of sex discrimination and harassment are brought under the Equality Act 2010. Section 39(2) (c) and (d) prohibit discrimination against an employee by dismissing her or subjecting her to a detriment. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

Burden of Proof: Equality Act (EA) 2010

117. The Equality Act 2010 provides for a shifting burden of proof. Section 136 provides as follows:

> "(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."

118. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

119. In Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others?

Direct Sex Discrimination

120. Direct discrimination is defined in section 13(1) as follows:

> "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."

The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> "On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

121. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical comparator. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, in most cases the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Harassment

122. The Equality and Human Rights Commission code gives helpful guidance on combatting harassment in the workplace. It sets out seven steps which are; to have an appropriate policy, engage your staff, assess and mitigate risks in the workplace, think about reporting systems, deliver training and know what to do when a complaint is made.

123. The definition of harassment appears in section 26 as follows:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
> (b) the conduct has the purpose or effect referred to in subsection (1)(b)….
>
> …..
>
> (4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect."

Vicarious Liability

124. Section 109 provides that an employer is liable for the conduct of its employees as follows:

"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or
(b) from doing anything of that description."

Equal Pay

125. Section 65 of the Equality Act 2010 ("EA 2010") provides,

"(1) ... A's work is equal to that of B if it is – (a) like B's work,

(b) rated as equivalent to B's work, or
(c) of equal value to B's work.

(2) A's work is like B's work if –

(a) A's work and B's work are the same or broadly similar, and
(b) such differences as there are between their work are not of practical importance in relation to the terms of their work."

126. Section 66 EA 2010 provides,

"(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
(2) A sex equality clause is a provision that has the following effect –

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as to be not less favourable;
(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."

127. Section 69 EA 2010 provides,

"(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

...

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's case."

Time limits: Equality Act 2010 complaints

128. The time limit for Equality Act claims, subject to the ACAS conciliation provisions, appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –
(a) the period of three months starting with the date of the act to which the complaint relates, or
(b) such other period as the Employment Tribunal thinks just and equitable ...

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks 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 the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it".

Employment Rights Act (ERA) 1996 complaints

Constructive Unfair Dismissal

129. In a case of constructive dismissal it is for the claimant to prove that they resigned in response to a fundamental breach of contract.

130. Section 95 of the Employment Rights Act 1996 provides:

"(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 (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

131. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA, Lord Denning MR put it as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

132. Malik and Mahmud v BCCI [1997] ICR 606 referred to the term of trust and confidence as being an obligation that the employer shall not:

> "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

133. The claimant therefore needs to establish a repudiatory or fundamental breach of the contract of employment by the employer and a termination of the contract by the employee because of that breach. The employee must not have lost the right to resign by affirming the contract after the breach, typically by delay.

134. In a constructive dismissal case a claimant can rely on a "last straw" which does not itself have to be a repudiation of the contract. The key cases are the decisions of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, more recently reaffirmed in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

135. The fundamental breach of contract by the employer need only be a reason for the resignation of the claimant. It does not matter if there are other reasons: Wright v North Ayrshire Council [2014] IRLR 4.

136. Applying Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604 the Tribunal can reduce an award of damages on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time.

137. Section 122(2) of the ERA 1996 Act requires the Tribunal to consider whether it would be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, and if so to what extent.

138. Section 123(6) of the ERA 1996 requires the Tribunal to consider whether the claimant, by her blameworthy or culpable conduct, cause or contribute to her dismissal to any extent, and if so, by what proportion and if it would it be just and equitable to reduce the amount of any compensatory award.

Unlawful deduction of wages

139. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

140. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

141. The question of what is properly payable requires interpretation of the relevant terms of the contract and a factual analysis of the claim.

Time limit: Employment Rights Act 1996 complaints

142. Section 111 of the ERA 1996 provides that a claim must be brought before the end of the period of three months beginning with the effective date of termination, or 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. This is subject to the extension of time allowed by the ACAS conciliation provisions.

Submissions

143. The Tribunal heard submissions from Counsel for the respondent and the claimant's Representative.

144. Counsel for the respondent invited the Tribunal to find that the claimant's account of the incidents and her allegations were not reliable or credible. He invited the Tribunal to compare her oral evidence to the documents in the bundle. The points he highlighted (which we have addressed in our Reasons where relevant) were as follows:

    144.1 The claimant was 18 not 17 when she signed the contract but said in evidence that she was 17;
    144.2 The claimant said that she did not know how to contact payroll/HR in evidence but the payslips had the number on them;
    144.3 Timesheets indicated that she did not work with MH every day;
    144.4 There is no documentary evidence of a complaint or grievance or that she raised or escalated her concerns at the time.

145. He further submitted that her claims were out of time and she had not provided an explanation.

146. The claimant's representative stated that the respondent had repeatedly failed to follow its own procedures, there was an abdication of responsibility at management level for training and they did not investigate harassment in accordance with their own policy.

147. He submitted that there was evidence that the claimant did make a complaint in writing. In response to the submission that she did not take matters further he stated that she was intimidated, working as a young female in a largely male team. In response to the submission that she said she worked with MH 'daily' he submitted that the claimant's case as set out in witness statement was not every day but 'regularly, often daily' which is not the same as saying 'daily'.

148. He reminded the Tribunal that the claimant's case was that she did not see the email (310-312) replying to her concerns about pay and which indeed the respondent itself only produced on first day of hearing.

149. In respect of the time limit the claimant's representative submitted that there was a clear course of conduct and in any event it would not be just and equitable to deprive the claimant of the opportunity to bring a claim.

Conclusions

150. In respect of each complaint in the List of Issues we concluded as follows:

Direct Sex discrimination

151. The Tribunal found that the claimant made a request to transfer to another store in October and December 2020. The request was not in writing and DB does not remember the request. The Tribunal find that it was probable it was not actioned because DB did not think it was important at the time.

152. The claimant's case is that the refusal amounted to sex discrimination. If she had been a male shift manager, she would have been able to be moved to a store with a male or female manager.

153. This claim is brought after expiration of limitation period, the events having occurred in October and December 2020. The Tribunal does not have jurisdiction to hear it. There was not a continuing course of conduct which would bring it within the time limit. It was a one-off request.

154. Even if that was not the case the Tribunal found the claim was not made out. The fact that a man can transfer to a store managed by a man or woman does not equate to a woman being treated differently, as the woman can also move to a store managed by a man or woman. The correct comparison would be a man wanting to move to a store with a manager of the same sex.

155. The Claimant has not proved facts from which the tribunal could conclude in the absence of an adequate explanation that the Respondent has discriminated against the Claimant. The Tribunal finds it is not just and equitable to extend time.

Harassment

156. The Tribunal has found that conduct took place which constituted harassment within the definition of section 26 (2) of the EA 2010. Specifically on 15 March 2019 Sam moved his till closer and made sexual advances, on 22 August 2020 MH said that the claimant was distracting in her uniform, in 2020 he asked questions with sexual overtones when she arrived at work with wet hair, in September 2020 comments were made about her jumper and on 19 May 2021 MH put his hand on her thigh. Throughout 2020/2021 MH made comments about sex; this reflected the culture of the store where such behaviour was allowed to go unchecked.

157. MH admitted some conduct in evidence. He admits he said he found the claimant's boyfriend attractive, he admits that he made comments about the claimant and her colleague looking good in underwear and he admits that he hugged the claimant outside work on 29 September 2020.

158. The Tribunal find that the conduct amounts to sexual harassment. In making this finding it acknowledges that sexual harassment does not have to be sexually motivated, and that MH did not intend or necessarily appreciate that his behaviour was causing offence. He was reflecting the culture of the store where such behaviour was allowed to go unchecked.

159. We find that the conduct was unwanted. There has been no suggestion that the claimant participated in the conduct. We have found that she raised complaints. She wanted to move to another store and did not want to take breaks with MH. JT was aware that she was uncomfortable and admits that he tried not to list them on shift together.

160. The respondent is subject to the principle of vicarious liability, even if it did not know about the behaviour. Respondent's counsel did not make any submissions on whether the respondent took reasonable steps to prevent harassment but, in any event, the Tribunal found that it did not. There was no evidence of relevant training of staff or managers and no risk assessments. The respondent did not comply with the ECHR code or its own Anti-harassment policy and the managers who gave evidence showed a lack of familiarity with it.

161. The Tribunal has considered whether the claimant's claim for harassment has been brought within the time limit as required by section 123 EA 2010. The Tribunal find that on a balance of probabilities the last act of harassment by MH occurred during the claimant's notice period. Even if that were not the case the Tribunal found that he put his hand on her thigh at the meeting on 19 May 2021. This event is within the time limit. The Tribunal found that the conduct occurred very regularly, often daily, from the time of the incident with Sam to the last weeks of her employment. This was a continuing course of conduct. We take into account that the main perpetrator, MH, was there from February 2020 and was still there when she left. There was an overlap of managers throughout her time and we found that the culture was embedded and did not significantly improve over time.

162. The Tribunal does not need to consider whether it is just and equitable to extend time, having found a continuing course of conduct. However, for completeness we record that we would find it is just and equitable for the claimant to pursue her complaints out of time. We take into account the extent of the delay. The prejudice to the claimant if she were not able to bring her claim when weighed against the prejudice to the respondent is greater as the claimant would be deprived of bringing a claim. The respondent was able to call several witnesses including the main perpetrator and was not prejudiced. We heard evidence that the claimant's mental health and the way her verbal complaints were ignored, making her feel isolated and excluded affected her ability to bring a claim.

<u>Equal Pay</u>

163. The respondent admits that LT, a male comparator, was paid less for the same work from the date he was promoted to shift manager.

164. The respondent concedes that it was an administrative error. This does not constitute a 'material factor' defence to disapply the sex equality clause.

165. Under s. 66 EA 2010 the claimant should have been paid the same hourly rate as her comparator from the date of his promotion in April 2021.

Constructive Unfair Dismissal

166. The Tribunal found that the reason the claimant resigned was the harassment, her perception that she was not being paid properly and the failure of the respondent to resolve her pay queries and her complaints. She was regularly working long unsociable hours and the final straw was NW saying that he would 'write her up' for being late, with no account taken of the problems which he acknowledged she was facing.

167. We find that the conduct of the respondent was in breach of the term of mutual trust and confidence and the claimant was entitled to treat the contract at an end and resign.

168. The respondent did not make any submissions regarding Polkey, conduct, or contribution, other than referring to the claimant failing to raise a grievance. For completeness we record that we found no evidence of misconduct by the claimant that would have led to her dismissal.

Unlawful deduction of wages

169. The burden of proof is on the claimant to establish that there has been an unlawful deduction of wages. Although her letter dated 15 June 2021 (310-312) refers to a discrepancy of £3000 over the last 6 months she has not produced any relevant evidence in support and the claim therefore fails.

170. The Tribunal accepted her evidence she was not paid when clocked out but specific evidence of the occasions when that occurred were not provided. The claimant gave evidence that she was not expecting to be paid when clocked out and accordingly the Tribunal find that the wages were not 'properly payable' as required by section 13(3) ERA 1996.

171. In respect of the other payments listed under 'Underpayments' in the List of Issues the Tribunal have found that they were all out of time, with the exception of the last one dated 16 June 2021 which related to the alarm and for which she should have been paid for three hours at her correct hourly rate.

Summary

172. The claimant accordingly succeeds in her claims of harassment, unfair dismissal, equal pay and in respect of part of her claim for unauthorised deductions from wages. The matter has been listed for a Remedy hearing in Reading Tribunal on 2 August 2023. Directions will be sent to the parties' representatives.

Employment Judge **S. Matthews**

Date **13 June 2023**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS