EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Enwelim	**v**	West London YMCA

Heard at: Cambridge (parties via CVP) **On**: 1/2/3 & 25 August 2023

Before: Employment Judge Conley
Ms S Morgan
Mr M Kidd

Appearances
For the Claimant: Litigant in Person
For the Respondent: Mr A Pickett, counsel

RESERVED JUDGMENT

1. The claim of direct discrimination on the grounds of race is not well founded and is dismissed.

2. The claim that the claimant was subjected to an unlawful detriment contrary to section 45A(1)(f) (on the grounds that she had alleged that her rights under the Working Time Regulations had been infringed) is not well founded and is dismissed.

3. The claimant's claim that the respondent refused to permit her to take rest breaks contrary to the Working Time Regulations 1998 is dismissed.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 10 September 2021, following a period of ACAS early conciliation between 19 July 2021 and 11 August 2021, the Claimant pursued a complaint against the Respondent that they discriminated against her on the grounds of race in that they subjected her to a detriment: namely, that she was issued with a final written warning.

2. Further, she claimed that the respondent was in breach of the Working Time Regulations 1998 in that the claimant was prevented from being able to take regular rest breaks.

3. The claim was resisted by the Respondent and they presented a Response and on 1 March 2022 provided comprehensive Grounds of Resistance to the Claim.

4. She had originally sought to make a claim of victimisation under the section 27 Equality Act in that she asserted that she had suffered a detriment as a result of giving evidence on behalf of her colleague Mr Ikie - she relied upon this as being a 'protected act'. However, because the proceedings in which she gave evidence did not relate to any claim under the Equality Act, there was no basis upon which she had any standing to make such a claim.

5. However, she later applied to amend her claim to one pursuant to Section 45A(1)(f) of the Employment Rights Act 1996, asserting that she suffered victimisation for alleging that the respondent had infringed her rights under the Working Time Directions - the detriment being that, as a result of giving evidence for Mr Ikie - during which she had told the Tribunal that she had not be permitted to take her rest breaks - she had been issued with a Final Written Warning and refused additional shifts.

6. The Tribunal considers that her application was made in accordance with the Case Management Orders made by Employment Judge Lewis on 22 February 2023, in an email that she sent to the Tribunal on 8 March 2023, and that the amendment had effectively been granted by the same Judge on 3 June 2023.

7. For the avoidance of all doubt, the Tribunal expressly granted the amendment to the claimant's claim and has considered the matter in coming to this decision.

THE EVIDENCE

8. We have considered evidence from the following sources in reaching our findings of fact in this case:
   i. The statement and oral evidence of the claimant;
   ii. The statements and oral evidence of Kalid Ahmed, Sunday Ikie and Abimbola Idowu, who each gave evidence on behalf of the claimant;
   iii. The statements and oral evidence of Harry McKeown, John David, Praxides Chisakuta, and Heather Barrow who all gave evidence on behalf of the respondent
   iv. An agreed Bundle of Documents consisting of 418 pages.

THE ISSUES

9. The issues to be determined by the Tribunal may be summarised as follows:

Direct discrimination on the grounds of race

10. Direct discrimination:

(a) Did the respondent do any of the following:

(b) Was that less favourable treatment?

For these purposes, the Tribunal is required to consider Karen Thomas, a white employee, as a comparator, whom the claimant, who is black, says was treated more favourably than her.

(c) If so, was it because of race?

(d) Did the respondent's treatment amount to a detriment?

11. Working Time Regulations:

(a) Has the respondent at any time prevented the claimant from taking the rest break to which she is entitled under Regulation 12 of the WTR?

(b) If so, how much should the claimant be awarded?

12. 'Victimisation' as defined by s45A(1)(f) Employment Rights Act 1996:

(a) Was the claimant subjected a detriment, namely, that she was refused overtime shifts?

(b) Was that done on the ground that she alleged that her right under the Working Time Regulations to take rest breaks had been infringed?

FINDINGS OF FACT

13. The respondent is an organisation offering housing and support for vulnerable young people in the Greenford area of West London, and is part of a nationwide organisation offering similar services across the country.

14. The claimant was originally employed by the respondent on a temporary basis as a Bank Night Support Officer on 18 January 2018. This date marked the commencement of her period of continuous employment with the respondent. She then commenced a permanent position as a Weekend Duty Support Officer on 2 May 2020 and in that capacity was contracted to work 14 hours per week on Saturdays and Sundays.

15. She was first issued with a contract (a 7 page document) by Efrat Burl on 29 April 2020. However, following a routine audit exercise by the respondent's HR services, it came to light that she had not returned a signed contract to the respondent and she was asked to provide the same by 21 October 2020.

16. The contract terms issued to the claimant included, inter alia, a clause which indicated that she would be entitled to breaks of '20 minutes every 6 hours that [she] work[s] for lunch ensuring adequate cover'.

17. In a series of emails exchanged between the claimant and the respondent's HR team following the request to sign and return the contract, the claimant stated, 'I have reviewed the contract and I do have a few queries before signing please'. She raised concerns about the fine detail of a number of the clauses of the contract, in particular clauses 7.5 relating to the requirement to undergo a medical examination, and clause 17 which related to the right for the respondent to temporarily lay off staff.

18. It is clear that the claimant had studied the contract with care and that she was well able to challenge any aspect of the contract which caused her any concern. It is inconceivable in the view of the Tribunal that she could not have been aware of provisions relating to the taking of breaks or that she had any reason to be concerned as to whether it would be practicable for her to take her breaks. Had she had such concerns she doubtless would have raised them at this stage.

19. On 26 August 2020 the claimant was contacted by Darrion Davis, a Senior Supported Housing Officer, to inform her that she had not followed the respondent's policy in relation to working an additional shift without first seeking authorisation from a manager, and that she had previously been advised of the need to do so. As a result, she would not be paid for this shift but would instead be offered time off in lieu. The additional shift in question had been allocated to her colleague, Mr Sunday Ikie. She provided a robust and assertive reply in which she denied any wrongdoing.

20. In the early part of 2019 the claimant took an extended period of sickness absence having contracted Covid, returning to work on 6 February 2021. The previous day she asked Ms Chisakuta if she could do a 14 hour shift on 13 Feb 2021. Ms Chisakuta was concerned that the claimant should not be taking on 14 hour double shift unless she was fully recovered, but having been assured by claimant that she was fully fit, Ms Chisakuta authorised the shifts. Thereafter, Ms Chisakuta allocated double shifts to the claimant for the whole of the month of March 2021 as Mr Ikie was absent from work.

21. On 5 March 2021, the claimant provided a witness statement on behalf of Mr Ikie, who at the time was pursuing a claim in the Employment Tribunal against the respondent for breach of the Working Time Regulations in which she described her working patterns and in particular set out what her contract stated about taking breaks. Her witness statement includes the following: 'It is not possible for me to ensure cover whilst I am on a break as it is a lone worker shift pattern. I do not take breaks whilst on shift.'

22. She gave evidence before the Tribunal before Employment Judge Cotton on the 26 March 2021 in which she adopted the content of this witness statement and was cross-examined on behalf of the respondent.

23. The Judgment in that case sets out, in summary form, the evidence that the claimant gave before the Tribunal on behalf of Mr Ikie at paragraph 45 as follows:

'Ms Enwelim also works at the Greenford site as a lone worker, generally on the morning shift which ends at 3pm. Her contract says she is entitled to a 20 minute break for every 6 hours worked but it also says she must ensure adequate cover while on her breaks, which is not possible given that she is a lone worker and at week ends it is unusual to have a manager or supervisor on site. She conceded that the Greenford site is not a very hectic 'oil rig style' environment and can be quiet, but was clear that in practice she does not take an uninterrupted break during her shifts. She feels she needs to be on alert at all times. Sometimes the bell does not work; sometimes residents try to sneak in animals or undesirable associates; some residents have mental health problems. Ms Enwelim was clear that 'my focus is only on my work. I am very committed to the work. I believe in doing what is necessary.' Ms Enwelim said that she was aware that other staff have a practice of putting up a sign saying they were away on their break but she had never used such a sign or discussed a sign system with a manager. She said that when she goes on 'patrol,' which is one of her duties, she will close up the office.'

24. On the afternoon of 20 March 2021, an incident occurred, whilst the claimant was on duty, in relation to a vulnerable female resident. The incident was reported to Ms Chisakuta on 22 March 2021 by the resident who then recorded the matters reported to her in a witness statement. In summary, the resident informed her aunt at approximately 2:00pm on the 20 March 2021 that she was having difficulty walking due to pain in her leg, and that she was going to have a rest. She woke around 5:08pm, called her aunt again informing her that she was still in pain and her leg appeared to be swollen. The aunt encouraged her to go to the office and inform a member of staff so that they could call the emergency services.

25. The resident went to the reception office at 5:10pm and found the lights switched off and the member of staff later discovered to be the claimant, fast asleep. The aunt sent a text message to the office mobile phone at 5:25pm to notify the staff on duty to check the resident's flat urgently as she was in so much pain, but there was no response to the text message. The resident returned to the office at 5:58pm and found the claimant still asleep and had to knock very hard on the reception counter for her to wake up.

26. Acting upon the instructions of her aunt, the resident took a photo on her phone of the claimant sitting in the reception area asleep before being woken up.

27. Having been woken up, the claimant did then offer support to the resident and ensured that she received appropriate medical attention by contacting NHS 111 and securing the attendance of paramedics who transported her to hospital for treatment.

28. Karen Thomas, who is the white colleague whom is said to be the comparator for the purposes of the race discrimination claim, began her shift at 10:00pm although she was present in the reception area from approximately 9.55pm.

29. Contrary to the assertions made by the claimant we do not find any evidence to support the suggestion that Karen Thomas missed a number of calls on the office phone that were placed by the resident's aunt. The items that are logged on the schedule at page 77 of the bundle appear to us to relate to text messages and not phone calls. This is consistent with the statement from the resident and also with the exchange of text messages between the claimant and the aunt which are depicted in the photograph of the phone handset at page 74. It appears that this is a fundamental error on the part of the claimant in terms of her interpretation of the schedule.

30. However even if it were the case that Karen Thomas had been unavailable on the phone this is in our judgment entirely different from the matters which led to disciplinary action being taken against the claimant in which she fell asleep whilst on duty and whilst one of the vulnerable residents was experiencing a medical crisis. By the time Ms Thomas was on duty, the crisis had receded and the resident was receiving medical treatment. Moreover, there was no complaint made against Ms Thomas for any failure or dereliction of her duty and so we do not consider Ms Thomas to be comparable in any way with the circumstances of the claimant.

31. Nothing in the notes taken by the claimant on the 20 March 2021 indicate that she was engaged with Mr Kalid Ahmed during the period in which she was said to have been asleep. The Tribunal does not accept the evidence of Mr Ahmed that he could have a sufficiently clear recollection of the precise times of his movements and interactions with the claimant after a period of over two years during which time he had had no reason to recall what would have been, at the time, insignificant details. He was an honest witness who was doing his best, but in the absence of any supporting evidence or contemporaneous account, we find that the claimant was asleep for the period as described in the statement of the female resident.

32. As a result of the incident on the 20 March 2021, the claimant was suspended from work pending an investigation on 3 April 2021, and on 7 April 2021 she was invited to an investigation meeting which took place on 17 April 2021. The investigation meeting was carried out by John David, Housing Manager. During the course of the meeting the claimant did not accept any wrongdoing, and indeed did not accept that the photograph taken by the resident was of her at all. As a result of the investigation, Mr David recommended disciplinary action be taken against the claimant, and

in due course a disciplinary meeting was fixed for the 8 May 2021, to be chaired by Heather Barrow, Regional Housing and Support Manager.

33. The claimant attended the meeting accompanied by Mr Sunday Ikie as her supporter. During the course of this meeting, the claimant was prepared to accept that the photograph did show her, but she denied that she had been asleep but instead stated that she was in a trance, something which had happened frequently since the death of her father.

34. The claimant also indicated that she was taking her break at the time that the photograph was taken. This represents a material inconsistency with her evidence that she was unaware of, or unable to exercise, her right to take rest breaks.

35. The disciplinary meeting resulted in the claimant being issued with a final written warning. In the circumstances, the Tribunal accepts the evidence of all of the respondent's witnesses that this disposal represented a lenient course of action given the potential seriousness of falling asleep on duty in circumstances where a vulnerable resident underwent a medical emergency.

36. The claimant exercised her right to appeal against the final written warning and appeal hearings were held on the 7 and 11 June 2021, chaired by Mr Harry McKeown, who was then Head of Housing, Care and Support. When he gave evidence, he was no longer employed by the respondent. Once again, Mr Ikie accompanied the claimant. We accept Mr McKeown's evidence that Mr Ikie was disruptive during the course of the meetings. We found it probable that Mr Ikie, in his support of the claimant in her disciplinary proceedings and in his evidence before us, was at least partially motivated by his own previous unresolved disputes with the respondent and that he may have been using the proceedings involving the claimant to ventilate his own grievances.

37. The Appeal upheld the decision to impose the final written warning and reiterated the view that it was a lenient course of action in the circumstances. We do not find that there was any causal connection whatsoever between the decision to give the warning and the claimant's evidence on behalf of Mr Ikie. Had there been any seriously ill will towards the claimant, then it is likely that they would not have chosen to be so lenient.

38. As far as the evidence concerning the taking of breaks is concerned, the Tribunal accepts the evidence that there was the facility to take breaks, even as a lone worker on reception.

39. We did find the evidence of Ms Idowu compelling; and we recognise that the role carried out by Ms Idowu and the claimant carries with it many pressures

and responsibilities which may make it difficult to switch off entirely and some staff may find that it is, at times, very difficult to leave their post in order to take breaks, out of a sense of duty to the residents that they support.

40. However, we also accept the evidence that there were quiet times on reception and that there were opportunities to take breaks, albeit that they must be contactable during their breaks in case of emergency which, from time to time, will result in their breaks being interrupted.

41. Following the imposition of the FWW, on 29 May 2021 the claimant was then signed off from work with 'perceived work-related stress' for a prolonged period of time. A Stage 1 absence meeting took place on 29 July 2021, and she was subsequently referred to Occupational Health for an assessment. A 'Return to Work' meeting was scheduled to take place firstly on 8 September 2021 and then rescheduled for the 11 September 2021, whereupon the claimant sought to take further annual leave due to family issues.

42. The Return to Work meeting did not take place until 2 October 2021, when the claimant immediately requested to work double shifts. In an email dated 8 October 2021, Ms Chisakuta told the claimant, 'Since you have just returned from long term sickness, I am afraid I can't honour this request because I have to look out for your health as a manager'.

43. The claimant seeks to assert that the denial of overtime to her upon her return to work is a detriment which is attributable to victimisation of her by reason of her giving evidence in the earlier Employment Tribunal. The Tribunal rejects this assertion in its entirety. The email referred to in the paragraph above makes it abundantly clear why overtime was refused and we accept this as being the primary reason.

44. Notwithstanding the claimant's recent return to work after a protracted period of sickness absence, there are a multitude of other reasons why the Tribunal considers that it would have be inappropriate to give the claimant the opportunity to work double shifts. Firstly, the fact that it was whilst working a double shift that she fell asleep on duty; secondly, she was subject to a final written warning; thirdly, the fact that she had a number of performance issues including poor punctuality, and had previously violated the respondent's procedures in relation to taking additional shifts on behalf of colleagues (specifically, Mr Ikie).

LAW AND CONCLUSIONS

Direct discrimination on grounds of race

45. Section 13(1) Equality Act 2010 defines direct discrimination as follows:

(1) 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."

46. 'Race' is a protected characteristic listed in Section 4 of the EA 2010

47. Section 23 provides that on a comparison of cases for the purpose of Section 13 "there be no material difference between the circumstances relating to each case".

48. Section 136 deals with the burden of proof as follows:-

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

49. As set out in the List of Issues, the claimant maintains that the appropriate comparator against whom to compare her treatment is her white colleague, Karen Thomas. The claimant avers that, like her, Ms Thomas missed calls made to the reception desk by a resident, and as a result, she was not available to assist the resident. According to the claimant, this failure on the part of Ms Thomas was comparable to her own conduct, but while she the claimant was subjected to a disciplinary procedure, Ms Thomas was not. The only sensible inference, according to the claimant, is that the difference in their treatment is attributable to the claimant's race.

50. The Tribunal does not find Ms Thomas to be an apt comparator in the way that the claimant asserts her to be. Even if it were true, the mere fact that Ms Thomas may not have answered the phone on 4 occasions within a very short space of time does not bear any resemblance to the matters for which that claimant was disciplined, namely falling asleep whilst at the reception desk in circumstances where a vulnerable young person in urgent need of medical assistance was unable to rouse her.

51. Furthermore, upon closer inspection of the supposed 'missed calls', the Tribunal is satisfied that the claimant has misunderstood the evidence and as a result has placed too great an emphasis upon it.

52. Throughout her evidence, and indeed in the majority of the contemporaneous documents, the claimant indicated that her belief is that the detriments that she says she suffered were attributable to the fact that she was a witness against the respondent in the case of Mr Ikie, and not due to any perceived discrimination on the grounds of race.

53. The Tribunal is of the view that the claimant has made a claim of race discrimination as an afterthought in order to broaden the scope of her claim; but we feel that even the claimant does not genuinely believe that race was a factor in the way that she was treated by the respondent.

54. In all the circumstances, we find that this aspect of the claim is completely without merit.

Rest breaks

55. Regulation 12 of the WTR 1988 states as follows:

> 12(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.
>
> (3) The details of the rest break to which an adult worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.
>
> (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

56. A number of exceptions to the right conferred by Regulation 12 can be found in Regulation 21 - the relevant one so far as this case is concerned being in

> *21. Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker—*
>
> *(a)…*
>
> *(b)…*
>
> *(c) where the worker's activities involve the need for continuity of service or production, as may be the case in relation to—*
>
> *(i) services relating to the reception, treatment or care provided by hospitals or similar establishments, residential institutions and prisons;*

57. In the case of *Grange v Abellio London Ltd [2017] IRLR 108, [2017] ICR 287* it was stated that, in order to be compliant with Regulation 12, the employer had an obligation to afford the worker the entitlement to take a rest break. That entitlement would be "refused" by an employer if it put into place working arrangements that failed to allow the taking of a rest break. If, however, the employer had taken active steps to ensure working arrangements that enabled the worker to take the requisite break, it would have met the obligation.

58. Although not expressly argued as such, the Tribunal understands that the claimant's case is essentially that, although she was not specifically refused permission to take her rest breaks, there were a number of working arrangements that militated against her ability to take them.

59. First and foremost, she relies upon the contractual requirement for her to ensure 'adequate cover' when taking breaks, something that she was unable to do when acting as a lone worker.

60. We have some sympathy for the claimant's position on this and we do find that the contract is poorly drafted in this regard; most likely as a result of a template contract having been used for all employees which did not take account of employees in the claimant's position. The respondent needs to remedy this forthwith as it is bound to cause further problems of this nature. We do accept that it would be impossible to comply with the contract on a strict interpretation, absent the custom and practice of the respondent, to which we will refer below.

61. That said, we also note our earlier observations that the claimant had gone through her contract with a fine-tooth comb and clearly had every opportunity and ability to challenge any aspect of the contract that she felt caused her any difficulty.

62. Secondly, she asserts that the work that she did entailed constant vigilance: baby monitors needed to be listened to constantly without interruption; the reception area needed to be policed constantly to prevent non-residents gaining access; and so forth.

63. The Tribunal does not accept this. By the claimant's own admission there were times when the reception area had to be left unattended in order to perform their other duties and so by extension there is no reason why it could not be left unattended for the duration of rest breaks.

64. The Tribunal accepts the evidence from Ms Chisakuta and Ms Barrow that there was a custom at the respondent's place of work whereby a note (which at some point became a laminated placard) that can be placed on the reception desk to indicate that the person on duty is taking a break. We are of the view that this would not only have been the common sense solution but would have been something that the claimant would have been aware of in the course of her employment. In the highly unlikely situation that she was NOT so aware, it is something that could have been established very easily by means of an enquiry with a colleague or manager.

65. We cannot ignore the summary of the evidence that the claimant gave as recorded in the judgment of the case of *Ikie v West London YMCA 3307450/2020V*, which we have considered in light of the fact that a substantial part of the claimant's case rests upon the assertion that she suffered a detriment as a result of the evidence that she gave in those proceedings. Whilst we must acknowledge that the Employment Tribunal is not a Court of Record, we nevertheless note that the summary tends to support our view that the claimant was aware at the material time of the practice of putting up a sign when on a break.

66. We also accept the evidence that there was a back room available where the claimant could have gone to take her break uninterrupted.

67. Overall, we accept that the system that the respondent operated for the taking of breaks was far from perfect and we believe that they need to address this.

68. However, we are also satisfied that the respondent's working arrangements were not such that they prevented the taking of breaks, and that there were customs that were known and understood by staff, including the claimant, such as to allow for the taking of breaks.

69. Even were this not the case, we are satisfied that, due to the nature of the organisation and the work expected of the claimant under her contract, the exception to Regulation 12 under Regulation 21(c)(i) would apply, and that the claimant was afforded adequate compensatory rest as a result of any interruptions to her rest breaks that may from time to time have arisen.

Unlawful Detriment contrary to Section 45A(1)(f) of the Employment Rights Act 1996

70. Section 45A of the ERA 1996 states as follows:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—

(a)…

(b)…

(c)…

(d)…

(f) alleged that the employer had infringed such a right [namely, one conferred upon her by the Working Time Regulations 1998].

(2) It is immaterial for the purposes of subsection (1)(e) or (f)—

(a) whether or not the worker has the right, or

(b) whether or not the right has been infringed,but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.

71. Section 48(2) states that on complaint to the Tribunal in respect of an unlawful detriment under this provision, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

72. The underlying complaint made by the claimant under this section is that, in the course of her evidence before the Employment Tribunal on 26 March 2021 when she gave evidence on behalf of Mr Ikie, and subsequently during the course of the disciplinary proceedings arising from the incident on the 21 March, she alleged that she had been unable to take regular rest breaks - these being a right conferred upon her by Regulation 21 of the Working Time Regulations

73. The Tribunal is prepared to accept that these matters do amount to allegations that her rights under the WTR were infringed for the purposes of section 45A(1)(f). However, we must then go on to consider whether any detriment was suffered as a result.

74. She alleges that the detriments that she suffered as a result of her complaint are twofold: primarily, it is her complaint that the decision to issue her with a final written warning was, either wholly or in part, as a result of her decision to support her colleague by giving evidence on his behalf before the Employment Tribunal on the 26 March 2021. In the view of the Tribunal, it is not necessary to make any further comment in relation to this aspect of her complaint. As set out above, we are satisfied that the sole reason for this decision was that the respondent was satisfied, having conducted an investigation and a disciplinary hearing, that the claimant had fallen asleep whilst on duty and that this meant that a vulnerable service user had not been able to get assistance when she needed it. We repeat that this was conduct that could have justified dismissal without notice and that the decision to draw back from this and imposed a final written warning is not, in our view, consistent with the allegation that the respondent was seeking to take revenge upon the claimant.

75. The second alleged detriment relates to the fact that, having previously been consistently offered additional overtime shifts by her manager, Ms Chisakuta, the claimant found that, after she had raised her complaint concerning her inability to take rest breaks, she found that Ms Chisakuta was no longer prepared to offer her the overtime shift that she wanted.

76. We do not accept that there is any merit in this allegation. We are satisfied that, in accordance with section 48(2), there were numerous other credible reasons why the claimant was no longer offered overtime shifts as she had been previously.

77. Firstly there is the fact that it was on one such double-shift that the claimant had fallen asleep whilst on duty. Ms Chisakuta in her text messages to the claimant in February 2021 had already expressed her concern for the claimant that taking on 14 hour shifts so soon after a prolonged period of sickness absence may have been too much for the claimant. It was only after the claimant assured Ms Chisakuta that she was able to take on the extra shifts without her health suffering that she was allowed the overtime. It would seem that in light of what subsequently happened that Ms Chisakuta's concerns were not misplaced.

78. Similarly, after the claimant's period of suspension concluded there then followed as prolonged period of absence due to, among other things, stress at work. This led to a referral to Occupational Health as a result of which recommendations were made to alleviate the stress and allow the claimant to return to work. In the circumstances it is entirely understandable that the claimant would not be burdened with 14 hour shifts upon her return to work which would likely jeopardise her health.

79. Secondly, when the claimant returned to work following her period of suspension, she was subject to a final written warning as a result of her misconduct whilst at work. In our judgment it seems entirely reasonable that a manager such as Ms Chisakuta might be somewhat disinclined to offer multiple overtime shifts to an employee who had recently been disciplined in these

circumstances. As Ms Chisakuta herself said in evidence, she (Ms Chisakuta) was the manager and as such it was entirely a matter for her own discretion whether to offer a member of staff overtime. We do not find that she exercised that discretion in an unreasonable or unfair way.

80. Finally, the Tribunal has received evidence that the claimant did not comply with the appropriate procedures in relation to taking additional shifts, which invariably involved the claimant standing in for Mr Ikie at short notice without necessarily seeking permission in advance from the manager on duty. Ms Chisakuta detected a sense of entitlement on the part of the claimant in relation to overtime, which the Tribunal finds is reflected in the tone of her evidence generally and in particular in some of the email exchanges which are contained within the bundle.

81. For all these reasons, we are satisfied that there was no connection between any refusal of overtime to the claimant and the allegations that she had made that she had been denied her rest breaks. Accordingly this part of her claim also fails.

_____
Employment Judge Conley

Date: …9 October 2023…….

Sent to the parties on: 12 October 2023.

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For the Tribunal Office