EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr S Bucknor		Bidvest Noonan (UK) Ltd

Heard at: **London Central Employment Tribunal**

On: **10-12 October 2023**

Before: **EJ Webster**
Mr P Adkins
Ms D Warman

Appearances
For the Claimants: **In person**
For the Respondent: **Mr M Bignall (Counsel)**

JUDGMENT

1. The Claimant's claim for direct sex discrimination is not upheld.

2. The Claimant's claim for unfair dismissal is not upheld.

3. The Claimant's claim for holiday pay is upheld. The amount payable (as agreed between the parties) is £123.20.

4. The Claimant's claim for wrongful dismissal is upheld. The amount payable (as agreed between the parties) is £667.50.

Total Payable by the respondent to the claimant **£790.70**

WRITTEN REASONS

1. Oral judgment was delivered to the parties at the hearing. By emails dated 24, 25 and 26 October the Claimant asked for written reasons and a reconsideration of the Tribunal's decision. As the Claimant was using the wrong claim number, this was not forwarded to EJ Webster until 31 October. As the Claimant did not have the written reasons he has not set out the basis for his application for a reconsideration. Should the Claimant wish to apply for a reconsideration after receiving these written reasons, he should set out the basis for that application and send it to the Tribunal within the normal time limits.

The Hearing

2. The hearing was held in person over three days. We had a bundle numbering 219 pages. Two additional documents were supplied by the Respondent on the first day which it was agreed could be added to the bundle on the proviso that the Claimant did not accept that the contract was necessarily a copy of the contract he received and that he be entitled to provide additional evidence in chief regarding these documents if he wished to.

3. During cross examination the Claimant alluded to the following 'documents/evidence' that he possessed but had not disclosed. They were as follows:
   (i) His original contract of employment
   (ii) A recording of the termination meeting he had with Vincent Thompson
   (iii) Emails between him and an individual named Chris, an employee of the Respondent regarding shifts that had been agreed to take place after the Claimant's dismissal

4. I made orders for the Claimant to disclose these documents as by failing to disclose them he had failed to comply with his legal obligations of disclosure. I explained in full what the parties' obligations were for disclosure and that all documents relevant to the case were supposed to have been disclosed.

5. On day 2 the Claimant produced screenshots of two more documents in response to my Orders above – an email from Mr V Thompson and as well as a photo of a document which was already in the bundle. The Respondent agreed to these 3 documents being allowed into evidence.

6. Later that day, whilst the claimant was cross examining Mr Thompson, he alluded to another document which he said demonstrated that Mr Thompson was lying. When asked why he had not already disclosed them he had little explanation beyond that he was a litigant in person. The Respondent objected to the disclosure of those documents given the lateness of the disclosure, the fact that the Respondent would not be able to deal with the evidence properly and the fact that the Claimant had been given clear information about disclosure by EJ Webster the day before. In order to determine relevance, EJ Webster looked at the 3 emails. One of them was potentially relevant but the Tribunal refused the Claimant's application to have them included in the bundle of evidence because he was so late in disclosing them and had no good reason for his failure to comply. Full reasons were given at the hearing.

7. We had witness statements for:

   (i) The Claimant
   (ii) Vincent Thompson (made the decision to dismiss)
   (iii) Michael Thompson (heard the Claimant's appeal)

8. All of the witnesses were available to give evidence and be cross examined. It was clarified in evidence that the two Mr Thompsons were not related.

9. At the outset of the hearing Mr Bignall accepted that the Respondent was liable for notice pay and holiday pay but indicated that there remained a dispute as to the amount of pay owed. EJ Webster asked the parties to attempt to agree the amount but they could not.

10. On day 2, the Respondent resiled from their position that they conceded that notice pay ought to be paid though they continued to concede holiday pay. That issue is discussed further during our conclusions.

The Issues

Direct Sex Discrimination

11. Did the Respondent treat the Claimant less favourably, by dismissing him, than it would have treated a hypothetical female comparator who was also a lone parent with a child?
12. If so, can the Respondent show that the less favourable treatment was in no sense because of sex?

Unfair dismissal (s.98 ERA)

13. Has the Respondent shown the principal reason for dismissal and that it was a potentially fair reason in accordance with sections 98 ERA? In particular, was the reason for dismissal some other substantial reason?

The Respondent relies on the Claimant only having worked 6 shifts in the previous 12 months, having refused shifts and having not provided his availability and therefore that his employment was not sustainable.

14. If so, was the dismissal substantively and procedurally fair in accordance with section 98(4) ERA?

The Tribunal may consider whether dismissal was a reasonable sanction, including whether the Claimant had been given any formal warnings before his dismissal.

15. If the Claimant was unfairly dismissed, would the Claimant have been fairly dismissed in any event and//or to what extent and when? (see further under remedy below)

Notice pay (s13 ERA)

16. Is the Claimant entitled to six weeks' notice pay?

17. Did the Respondent have any obligation to make such payment?

18. If so, did the Respondent make such a payment? It is the Respondent's position that this has been paid.

19. If not, what is the value of notice pay?

Holiday pay (s13 ERA)

20. The Respondent conceded that the Claimant was entitled to holiday pay.

Remedy

21. If the Claimant succeeds, in whole or in part, what remedy is the Claimant entitled to?
22. Is the Claimant entitled to an injury to feelings award in respect of his sex discrimination complaint?
23. Should the Tribunal order that the Claimant be re-engaged or re-instated? The Respondent's position is that it would not be reasonably practicable to do either.
24. If the Claimant is entitled to a financial award of compensation:

(a) What actual financial losses has the Claimant suffered? In particular, if the Claimant had not been dismissed, how long would he have remained in employment with the Respondent?

(b) Is the Claimant entitled to a basic award?

(c) Should any future losses be awarded?

(d) Has the Claimant mitigated his losses?

(e) Should any uplifts or reductions be applied to any compensation?

(f) Should any deductions or reductions be applied to any compensation? In particular:

(i) Should the compensatory award be reduced in accordance with Polkey v AE Dayton Serviced Ltd [1998] ICR 42 i.e. to reflect the possibility that the Claimant would still have been fairly dismissed either at the time of dismissal or later? The Respondent contends that if the procedure was unfair, it was 100% likely that the Respondent would have dismissed the Claimant following a fair procedure.

(ii) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA; and if so, to what extent?

(iii) Did the Claimant, either by blameworthy or culpable actions, cause or contribute to their dismissal to any extend; and if so, by what proportion, if at all, would it be just

and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) ERA?

The Respondent relies on the Claimant's alleged failure to cooperate with the Respondent by providing details of his availability and making himself available for work.

The Law

25. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

26. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

27. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

28. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

29. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct Discrimination

30. 13 EqA "(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."

31. S13(2) EqA states

32. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

33. The claimant has relied upon a hypothetical comparator. We have born in mind the guidance set out by HHJ Mummery in In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: '*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable*

treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground.' Thus, it seems that, although considering the treatment of a comparator will often be the most straightforward way of determining whether direct disability discrimination has occurred, the issue may sometimes take a back seat to a common-sense appreciation of the facts.

34. We have therefore considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it in '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances*.'

35. We have reminded ourselves that it does not matter if the motive is benign or malign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim under S.13(1) to show that it had a 'good reason' for discriminating.

36. We have also reminded ourselves that the protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*).

Unfair Dismissal

37. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
        (c) …..

    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and
(b) Shall be determined in accordance with equity and the substantial merits of the case.

38. The respondent's case was that this was dismissal for Some Other Substantial Reason. That is a potentially fair reason under s 98(1)(b) Employment Rights Act 1996 ('ERA').

39. We need to determine whether the reason given by the Respondent is the genuine reason. The Tribunal needs to determine whether the reason is substantial and therefore whether it could justify dismissal. If the Respondent manages to establish that it was the real reason for dismissal then the Tribunal must consider whether the dismissal was, in all the circumstances of the case, reasonable in accordance with s98(4).

40. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). This may involve consideration of matters such as whether the employee was consulted, warned and given a hearing.

Facts

41. The Claimant was employed as a security guard on an hourly basis from 2016. The generic contract we were supplied with suggested that the employees needed to show a large amount of flexibility. Clause 7 was a flexibility clause that said

7 Working Hours

7.1 Your hours of work will vary according to the work requirements of the business. It is a condition of your employer that you will work flexibly in accordance with the working arrangements we operate.

7.2 We will endeavour to allocate suitable work to you when it is available and will in any event observe the minimum hour's obligation set out below.

7.3 subject to clause 7.7 below the company promises to make available to you a minimum of 336 hours of work brackets the minimum hours) in any year. For the avoidance of doubt all hours made available to you by the company shall count towards the discharge of the minimum hours whether or not those hours are worked by you and in the event that offered hours are not worked by you, whether or not failure to work such hours is due to any default on your part.

7.4 there is no obligation on the company to make available all or part of the minimum hours in any particular months or weeks or to spread them evenly over the year or to provide them at ape at particular intervals. You acknowledge that there may be periods when no work is allocated to you.

7.9.4 [sic] you agree that you are available to work when requested unless otherwise agreed in advance with us. You will notify us as early as possible and normally not less than 24 hours in advance of any occasions when you will be unavailable to work.

7.9.5 [sic] attend work having given less than four hours prior notice that you would be unavailable for a scheduled shift, the company may take disciplinary action against you.

42. Clause 8 was a mobility clause:

8 Place of Work

8.1 you have no permanent place of work but will be required to work at a series of customers sites in accordance with the demands of the business. In accordance with the procedures of the company you can expect to be sent to different customer sites on a regular basis.

8.2 Because of the nature of the business environment and the short-term nature of the company's agreements with customers, it is expected that you will be at each site for no more than six months. Your assignment to a particular customer will be automatically reviewed every six months, if you remain the same place of work or at the end of the contract with the customer, whichever is earlier.

8.3 , You agree, having regard to the nature of the company's business, the company may at any time change your place of work to suit the needs of the business and its clients.

8.4 Consequently, you agree that the company can at any time give you reasonable notice to carry out your duties at such place in the United Kingdom as the company sat shall specify.

43. Clause 15 provides for the termination of the contract as follows:

15 Termination of employment

15.1 Subject to clause 14 above, your employment may be terminated by the company giving you written and all verbal notice as follows common from the end of your probationary period one week's notice for every year of continuous employment, up to a maximum of 12 weeks.

15.2 Your employment may be terminated by you giving the company one week's notice in writing.

15.3 the company may terminate your employment without notice, if you are guilty of any gross default or gross misconduct, in connection with your work or in connection with or affecting the business of the Cordant security or its clients.

44. Although the claimant's signed contract could be found by neither party, (despite the Claimant alluding to it being somewhere in his home), on balance, we find that the above contract is likely to be similar if not identical to the one the Claimant was issued with when he started work as it is the generic contract for his role and at the bottom of the page it is recorded that it is a document from 2016 which was the year he was employed.

45. The claimant has a young daughter, born in 2020. It is relevant to these proceedings that he was embroiled in a difficult custody battle for her over much of the relevant period. He now has full custody of his daughter.

46. The claimant was originally employed by Cordant but his employment was transferred to the Respondent under TUPE on 1 December 2021. We were not here to consider that process but we can conclude that we think it is more likely than not that the Claimant was informed of the transfer. However we accept that he his domestic life was very complicated at that time and that he did not register the relevance of any correspondence related to TUPE that may have been sent to him at the time.

Claimant's work and availability

47. During the course of the Claimant's cross examination we were taken to numerous examples, across a 2 year period, of the Claimant not working. He explained to the respondent that he would have difficulties working because of his caring responsibilities. A summary of the work performed is as follows:

    (i) November 2020-December 2021 – No shifts were completed
    (ii) December 2021 – June 2021 – No shifts were completed
    (iii) July 2021 – two shifts were completed
    (iv) August 2021 – the Claimant was offered a shift but did not attend
    (v) The Claimant worked two shifts in September 2021 but had to leave one early.
    (vi) In October 2021 the Claimant missed one shift and was late to the other one.
    (vii) November 2021 – the Claimant did not work
    (viii) Dec 2021 – Feb 2022 - he only gave availability when chased (pgs 103-104) and when he did it was generally at very short notice (p103 and 100).

48. This evidence contradicts the Claimant's oral evidence that he provided the Respondent with his availability a week in advance. Throughout March and into April he accepted that he was repeatedly chased to provide availability and that he then rejected shifts having confirmed availability.

49. We were taken to evidence (p96-97) that he did not always check his emails. When this was put to him, he said that he was not obliged to check his emails.

50. In May 2022 the Claimant continued to turn down shifts (p86-88). In June he gave availability on Mondays and Thursdays but turned down every shift offered on those days until July.

51. Mr V Thompson took steps to try and allocate the Claimant work on those days. He informed those who were giving work that they should consider the Claimant on those days and we find that by August 2022, Mr V Thompson had gone to significant lengths to try to accommodate the Claimant's working requests. He continued to do so for the whole summer period. This was in direct contrast to the assertions that the Claimant was making that Mr V Thompson and the respondent were trying to avoid giving him work or to make it as difficult as possible for him to accept work.

52. On 15 August the Claimant missed a shift. He stated that he had not confirmed his willingness to take the offered shift (p113) and was therefore not obliged to perform it. When he was challenged on this he said that the Control department were lying.

53. Subsequently, the Claimant worked two shifts in September. He left one early so that he could collect his child.

54. In October 2022 the Claimant missed a shift in Bromley and was late to another shift.

55. The Claimant continued to miss shifts in November and by early November, 11 months after he had been told that his job was at risk unless he had only completed 6 shifts.

56. There were disputes between the parties as to the reasons and reasonableness for the Claimant's work being as set out above.

57. The issues we were taken to were, broadly speaking, the following allegations or inferences put forward by the Respondent
    (i) The Claimant not providing shift availability unless chased
    (ii) The Claimant not wanting to work anywhere apart from Woolwich
    (iii) The Claimant only being available to work 2 days per week
    (iv) The Claimant not turning up to shifts he had agreed to
    (v) The Claimant arriving late

58. Our approach to the issues was that where there was a dispute between the parties we assessed each issue separately based on the evidence we had. Where there was no documentary evidence to assist us, we generally, preferred the Respondent's witness evidence. Whilst we understand that the Claimant had huge difficulties in his personal life during this period which will have affected his ability to prepare for the hearing and affected his ability to work at the relevant time, he has made assertions during the course of these proceedings which have affected his credibility before us. He has made sweeping allegations against the Respondent witnesses and counsel without any evidence to support them, he has repeatedly failed to comply with the orders for disclosure and he has refused to accept matters put to him by

Counsel during cross examination which were clearly evidenced by the documents in front of him.

59. The Claimant's responses to the allegations above were as follows.

60. With regard to not providing shift availability other than when chased, he said that he had in fact called Control on numerous occasions and given shift availability but had not been allocated shifts. We did not have any evidence of that. During the internal appeal investigation Mr M Thompson had asked him to provide his phone records to substantiate this assertion but the Claimant had said that this was too difficult to do and he was not 'tech' savvy'. We do not accept that the Claimant was not able to produce his phone records even if it had only been for a month or two. This is not a difficult exercise and his job depended on it as did his case before us. We accept the evidence from both Mr Thompsons that Control does not record calls as has been suggested by the Claimant. Further we accept that in considering the Claimant's appeal Mr M Thompson called Control spoke to Colin Ray who said that they did not keep such records.

61. We were taken to the spreadsheets at pages 65- 73 of the bundle which demonstrate that the Claimant's availability was minimal during the period from November 2020 to December 2021. He did give some availability but it was not many days and it was not in dispute between the parties that he did not work at all during this period. The Claimant says that he called Control and gave availability but that Control told him that they had been told by managers not to offer him shifts. We do not accept that. We consider that the evidence we have demonstrates that the Claimant did not provide availability to any great extent. We find it implausible that had the Claimant offered availability to the extent that he now says he did via phonecalls to Control, that he would not have been allocated any shifts. It is clear from later emails that Mr V Thompson did chase the Claimant for his availability and there was no evidence to suggest that the Respondent did not want the Claimant to be offered or to accept shifts. Had that been the case, given his work history, we believe that he would have been dismissed at a far earlier point. We also consider that the absence of any availability of shifts being recorded in the spreadsheets also supports the contention that the Claimant did not make the calls to Control in the volume he suggests.

62. In contrast we were taken to emails that demonstrate that Mr V Thompson made numerous attempts to allocate shifts to the Claimant to correlate with his availability. For example, once the Claimant clarified that he could only work on Mondays and Thursdays, the claimant himself disclosed (late), a screenshot of an email from Mr V Thompson telling Control to offer shifts to the Claimant on Mondays and Thursdays. Were the Respondent to be looking to deny work to the Claimant we do not believe he would have taken those steps.

63. With regard to limiting his availability to Woolwich. The Claimant said that his suggestions that he work in Woolwich were just suggestions they were not demands. We accept that. at no point does he say that he will only work in Woolwich nor is the language regarding this matter 'demanding'. We also

accept that on occasion he worked elsewhere even during this period and therefore whilst the Respondent could be in no doubt that this was his preferred location, it is not correct to say that the Claimant demanded to work only in Woolwich. Nevertheless, we can see that on the occasions that the Claimant cancelled a shift at short notice, he would ask to work in Woolwich instead and that was something which was a repeated occurrence. We consider that this demonstrated a reluctance on the Claimant's part from the Respondent's point of view and informed the Claimant's decisions as to whether to accept shifts thus leading to him carrying out fewer shifts.

64. With regard to only being available 2 days per week. The Claimant's availability to work was quite limited. He told Mr V Thompson in an email that he, at that point in time, could only commit to 2 days per week because of his childcare obligations. In the period before his dismissal he was never criticised for only offering two days per week. In evidence Mr V Thompson told us that had the claimant worked Mondays and Thursdays from Summer 2022 onwards, he would still be in work. We accepted his evidence that where possible they accommodated the individual needs of the officers though they had to balance that against the needs of the customers. Mr V Thompson accepted that on occasion they fixed store locations for officers where the client was in agreement. They also fixed shifts where they could, again taking into account the individual officer's requirements. The email evidence we had supports that this was correct.

65. The problem with the Claimant's availability was not that it was only for two days per week, or that he needed consistency as to which two days, but because, to a great extent, he did not work those two days per week and continually refused shifts or did not work shifts he had previously said he was available for.

66. We understand the predicament he found himself in with regard to childcare. He told us that the family court proceedings made it difficult for him to leave his daughter with family members or friends and that any nursery had to provide a certain type of childcare. We understand the costs of childcare and the difficulties of having a sick child when a lone parent. However the period over which the Claimant expected complete flexibility from the Respondent but provided absolutely none of his own was extensive. Even though he offered Mondays and Thursdays on a number of occasions, he never actually worked both days in any one week. We can see from the documents that Mr V Thompson supported attempts to find and offer the Claimant work on only those 2 days per week and had emailed Control accordingly. Had those days actually been worked we find that the Claimant would not have been dismissed unless there was some other intervening event.

67. Contrary to the Respondent's contract of employment, there was no disciplinary action against the Claimant when the Claimant did not attend the 15 August 2022 shift. He said that this was because he had not confirmed that date. Having seen the emails we consider that he ought to have known that there was an expectation for him to attend and/or confirm that he was not attending. The Claimant said he was not 'tech savvy' and did not check emails nor that it

was his responsibility to check emails. It is not clear why he considered that it was not his responsibility given that he was emailing them about work on a frequent basis and had in the past accepted shifts this way. Had the tables been turned and he had turned up to one of these shifts and been turned away – that would seem unfair.

68. The Claimant was late to one shift and as a result Mr V Thompson organized a replacement to attend. It is not clear how late he was (10-20 mins). We accept that the Claimant had spoken to the store manager on his way and explained that he was lost. Nevertheless, it was not in dispute that the claimant was, to some degree, late. VT had to act swiftly to minimize the impact on the client. Regardless of the Claimant's presence or otherwise on this shift – it was not held against the claimant other than that he was not able to work that day. Again no disciplinary action was taken though we accept that it must have influenced the Respondent's view of the Claimant's reliability to some extent.

Other issues regarding work availability

69. The Claimant stated that during the work review meeting, Mr V Thompson had said that unless the Claimant could work 5 days per week then he would be dismissed. Mr V Thompson denied this. It is correct that Mr V Thompson said during the meeting (p 173) that 5 days was the average expected of a security officer. Nevertheless, we do not accept that this was laid down as a mandatory requirement – it was the number normally expected. Prior to the meeting, Mr V Thompson had demonstrated repeatedly that he was happy to accommodate the claimant working 2 days per week and prior to that had allowed a considerable period of no days at all. That is not the behaviour of someone who is unsympathetic or intransigent as now suggested by the Claimant.

70. The Claimant stated that his dismissal made no sense when he was booked to carry out 6 -9 shifts after the date of his dismissal. He said that in those circumstances, where he had been accused of not accepting shifts, it made no sense to dismiss him then.

71. We had no evidence that the Claimant was booked onto those shifts. On reviewing the written evidence the Tribunal could find no reference to those shifts in the meeting with Mr V Thompson. It is referenced in the Claimant's appeal letter where he says that he was allocated 6 - 9 shifts and, in the meeting with Mr M Thompson.

72. There was no evidence of these shifts having been agreed by anyone at the Respondent. The claimant said that they had been arranged via emails with Chris that he had copies of. When ordered to provide them he then told the Tribunal that they had in fact been made via text message and the claimant no longer had that phone. We had no confirmation or reference previously to such bookings being made by way of text message.

73. We find it implausible that there would be no evidence of this had they been booked. We accept it is possible that the Claimant had understood that the 2 days per week at Bromley that Mr Vincent Thompson had asked Control to make available to the Claimant had been booked in until Christmas – however

we note that save for 2 shifts, at no point did the Claimant fulfil his obligations to work on Mondays and Thursdays for the respondent and therefore this was unlikely to be something they could rely upon going forward and it was unlikely that he had been booked in accordingly. The Claimant does make reference to these shifts in his appeal letter and during his appeal meeting with Mr M Thompson. The number of shifts he says were booked in varies between 6 and 9. At the point at which the Claimant was appealing we doubt that he had lost his phone and there could easily have evidenced proof of these shifts to Mr M Thompson. The core of the Claimant's appeal and his case before us was that he wanted to work and that Mr V Thomspson was acting badly and seeking to prevent him from being offered shifts or working. Confirmation that he had been booked onto shifts at the time that he was dismissed for not being available for shifts would have been crucial evidence yet the Claimant has at no point provided that evidence when we think it more likely than not that at the time of his appeal he had easy access to that evidence.

74. In the absence of any evidence on this point despite repeated assurances from the Claimant and given his behaviour regarding shifts prior to this, we find it implausible that the claimant was booked onto any shifts at the time of his dismissal.

Other matters

75. It was put to Mr V Thompson that he had behaved in a way which suggested that for some time he had been looking to get rid of the Claimant. The evidence supporting that assertion from the Claimant was that Mr V Thompson had not provided him with uniform, correct ID or supported his DSA license application and that he had received a letter of dismissal in May 2022 that was subsequently revoked.

76. The Claimant's uniform was provided but the claimant did not go to collect it as instructed. He was provided with an ID once appropriate photographic evidence was sent.

77. With regard to the DSA license we accept that the reason for not progressing his application was that he had not worked for 2 years and could undertake a lesser qualification to enable him to continue working. We do not consider that there was any evidence of Mr V Thompson attempting to sabotage the Claimant's return to work given the evidence we have seen of him attempting to assist the claimant where he could.

78. We accept that the dismissal of the Claimant in May 2022 was an administrative error. On realizing the error Mr V Thompson reinstated the Claimant and immediately offered him shifts. Had he wanted to dismiss the Claimant or been building up to that we suggest that he would have stood by that error and not invited the Claimant back to work.

Process

79. The Claimant was written to on 26 November 2021 to tell him that his levels of attendance were a concern to the respondent. (p106)**.** That email clearly stated that if his attendance did not improve, the respondent may have to consider terminating the contract. However they invited his response and on receiving

his response they clearly decided not to terminate at that point. That said, his response indicated that he would not be able to work until the following summer (2022) due to his caring responsibilities.

80. During the period between November 2021 and February 2022 the claimant worked no shifts at all. He explained to the Respondent that he could not commit to more than that because of the difficulties of his ongoing custody battle for his daughter. He said that the court had told him that he could not leave his daughter with most people and this made it difficult. He said that the nursery funding he had provided fewer hours. He said that from the summer of 2022 he would have more time.

81. In summer 2022 the following occurred

    - C missed a shift on 15 August – 113 he said that he hadn't confirmed the shift but when confronted that he had missed on purpose he said that control were lying.
    - Worked 2 shifts in Sept and left one early
    - In October he missed one in Bromley and was late to another.
    - He continued to miss shifts in November and by early Nov, 11 months on – he had managed to complete 6 shifts

82. On 1 November 2022 R wrote to the Claimant (p169) inviting him to a meeting to discuss the situation. The letter informed him of his right to be accompanied at the meeting and that the outcome of the meeting could be dismissal.

83. The Claimant attended without a colleague. In his witness statement he says that he did not understand the purpose of the meeting and that he did not believe it was going to result in his dismissal. We find that the letter was clear in its content.

84. Subsequently, during the discussion, the Claimant said that his availability would improve when his daughter was 3 because the government would increase the funding for nursery attendance. Whilst we accept this this is how nursery funding works, at this point Mr V Thompson had waited a considerable period of time (until summer 2022) for the claimant's availability to increase and it had not done so as the Claimant had previously promised.

85. Therefore, this coupled with the upcoming reduction in the Respondent's available hours that they could offer the Claimant, led to Mr V Thompson's decision to dismiss the Claimant has he had up to that point, only worked 6 shifts over at least a 2 year period.

86. At the meeting with Mr V Thompson on 8 November, we accept that the Claimant was given the opportunity to discuss the situation with Mr V Thompson and to provide any information he may have had regarding his availability to work. This was all recorded in the notes. During the meeting the claimant did not dispute the amount that he had worked to date, he indicated that he was not going to have a large amount of availability until his daughter was 3 and explained why and explained why he preferred local work. We accept that during that meeting Mr V Thompson alluded to wanting the claimant to work 5

days per week but we do not accept that it was referenced as a demand – we believe that it was illustrative of the normal expectations of the role and an indication of how much had been adjusted to date.

87. Mr V Thompson decided to dismiss the claimant. The Claimant was informed of their decision during the meeting on 8 November The reason for the dismissal was confirmed in the letter dated 10 November 2022 (p177). That letter stated that the reason for the dismissal was:

"During the meeting we advised that we have an employee for the WHS Woolwich site meaning that cover at this site would reduce signifiyingly [sic] in the near future and reiterated that we require our guards to be flexible in terms of location and hours worked as Security work isn't a 9-5 role and some unsociable hours are required to meet the needs of our customers.

Based on the fact that you have only completed 6 shifts this year, and prior to that you have not worked in over 2 years with a total of approx. 42 hours worked this year and your refusal to work more hours to make your employment sustainable, highlights that we are required to utilise mobile support officers who pick up more shifts when required given the purpose of the role I have decided to dismiss you from your role on the basis that you are failing to pick up a reasonable amount of shifts. This decision is made on the grounds of Some Other Substantial Reason (SOSR)."

88. The Claimant appealed against that decision on 14 November 2022. The appeal hearing was held by Mr M Thompson (no relation) on 21 November 2022 and the appeal outcome was delivered on 5 December 2022.

89. Having read the notes of the appeal hearing and the appeal outcome letter we consider that this was a reasonable appeal meeting and process. Mr Thompson considered all the points raised by the Claimant and looked at the evidence relied upon and the issues raised by the Claimant and his concerns. The Claimant did not provide the evidence he was invited to but nevertheless Mr M Thompson did consider the points raised. In cross examination the Claimant accepted that Mr M Thompson had understood, investigated and considered the crux of his points of appeal.

90. Other than not obtaining the call records to Control, the Claimant did not raise any issues with regards to the appeal's fairness. We accept that M M Thompson attempted to obtain those call records as set out above.

Conclusions

Sex discrimination

91. We accept that, as a man, the claimant is unfortunately, in the minority, as acting as a single parent. The majority of single parents with sole caring responsibilities for young children remain women.

92. However, pointing out this fact does not mean that the Claimant has shifted the burden of proof to establish that his treatment was because of his sex. The

Claimant's sole evidence in respect of this was that he had the feeling that a woman in the same circumstances would have been treated more leniently and with more care and sympathy.

93. In discrimination cases a Claimant must do more than point to a difference in treatment There must be something more. Here the Claimant could not even point to a genuine difference in treatment or less favourable treatment at all bar his ultimate dismissal. We accept that comparators can be difficult to 'prove' but here the Claimant has taken no steps at all to provide the Tribunal with information from which it could establish that a woman in the same circumstances (i.e. a woman who was a sole parent, who had the same childcare commitments, who had only worked 6 shifts in two years and who could not provide reliable availability for some time into the future) would have been treated differently.

94. In contrast, the Respondent provided evidence that the Claimant had not provided them with any level of commitment for over 2 years. Though the Claimant may have been able to explain some of the reasons for that reduced commitment, we do not accept that it explains it all nor that the Respondent was not entitled to expect more. The Claimant had a contractual obligation to provide availability to the Respondent. He repeatedly states that he provided availability by calls to Control and was not offered shifts. We do not accept that. The Claimant had to be chased for availability, his availability on limited days was accepted by the Respondent but the Claimant did not accept those shifts repeatedly and over a protracted period of time. Whatever the reason behind that the Respondent had a reasonable expectation that more could be provided and they explained that requirement to the Claimant.

95. We find that the Claimant has not shifted the burden of proof but even if he had, the Respondent has proved to us the non-discriminatory reason for dismissal which was that the Claimant had not provided sufficient, reliable availability in accordance with his contract over a protracted period of time despite significant adjustments by the Respondent in terms of their requirements regarding the amount of work required. This coupled with the needs of the Respondent's clients was the reason for the Claimant's dismissal.

<u>Unfair Dismissal</u>

96. There is often a cross over between conduct dismissals and Some Other Substantial Reason ('SOSR'). We have to consider whether SOSR was the genuine reason for the dismissal. In evidence Mr V Thompson stated that this was not a misconduct dismissal by the back door. We accept that. Whilst the incidents on 15 August and October 2022 of lateness and failing to attend may have been the catalyst to the Respondent reviewing the Claimant's position we do not consider that they were the reason for his dismissal. The reason for his dismissal was his consistent lack of availability coupled with his lack of flexibility and the impact this had on when he could work. We accept that the claimant did not make working at Woolwich a demand. Nevertheless his repeated cancellations, coupled with simultaneous requests to work in Woolwich, reasonably suggested that until that arrangement was agreed to, the Claimant was likely to continue to be less available than the respondent needed. This

along with the fact that they were reducing the amount of work that they were being given at the Woolwich site due to client demand dropping supported their view that the Claimant's employment was not sustainable.

97. We next considered the procedure followed. We accept that the Claimant knew that he the respondent required him to provide more availability to work given the letter sent in November 2021. Prior to the meeting in November 2022 the claimant was told what the meeting was about, given the opportunity to be accompanied and told that the outcome of the meeting could be dismissal. During the dismissal hearing on 8 November we conclude that the claimant was given a full opportunity to say what he thought about the situation . It was this discussion that led to Mr Vincent Thompson becoming aware that the claimant was not in fact going to be available to any significant degree until the following summer when his daughter was 3.

98. He was then given the right of appeal which he exercised and the appeal was considered by a suitable, independent individual and a thorough review of the decision was made. In conclusion, a reasonable procedure was followed in all the circumstances.

99. We then have to decide <u>not</u> what we would have done in the same circumstances nor whether we agree with their decision. We must consider whether the respondent's decision to dismiss the Claimant was within the range of reasonable responses for an employer in all the circumstances based on a reasonable investigation. We conclude that it was. The Claimant had failed and continued to fail to demonstrate any commitment or willingness to provide availability to work for the Respondent and when he did provide availability his reliability was patchy at best. He had only worked 6 shifts across a period of more than 2 years. The Respondent took into account the reasons for his absence and tried to accommodate his other commitments. Contrary to the Claimant's assertions we consider that there was clear evidence that Mr V Thompson tried, on multiple occasions to accommodate the Claimant. This was not an attempt by Mr V Thompson to get rid of the claimant after some sort of campaign against him with regard to the uniform, ID or license. Had that been Mr V Thompson's aim we are sure that the Claimant's dismissal would have taken place far sooner.

100. The Claimant's claim for unfair dismissal is not we founded and is not upheld.

<u>Notice pay</u>

101. At the outset of the hearing the Respondent conceded notice pay was owed to the Claimant. Mr Bignall then resiled from that position and relied upon the case of Delaney v Staples to assert that as the List of Issues recorded the Claimant's claim as an unauthorised deduction from wages claim, the claim could not succeed as PILON does not amount to wages for the purposes of the Employment Rights Act 1996.

102. The legal submissions on this point are correct. Delaney v Staples defeats a claim for pay in lieu of notice. Nevertheless, the Claimant is a litigant in person and had a proper discussion of this issue been had at the outset of the hearing, we have no doubt that the pay in lieu of notice claim could and would have been correctly represented as a wrongful dismissal claim in the alternative. Whilst EJ Brown may have characterized this solely as an unauthorised deductions claim, we do not accept that it was her intention to restrict the claimant to this in circumstances where the claimant is a litigant in person and had ticked the box on the ET1 saying that he was owed notice pay – he had not limited his claim to an unauthorised deduction from wages claim and did not understand the difference between this and a wrongful dismissal/breach of contract claim. Had that discussion be held at the outset of this Tribunal hearing then this tribunal would have been able to ascertain that with the parties and would have decided it accordingly. We therefore do not consider that the Claimant is barred from now pursuing his claim when he had correctly set out the facts upon which he was pursuing a claim in his ET1.

103. The respondent accepts that they did not pay the Claimant any notice pay despite stating in the dismissal letter that they would pay him 6 weeks' notice pay. No explanation has been provided for that failure.

104. The Claimant is entitled to 6 weeks' statutory pay and the claimant's contract confirms that the contractual position was the same as the statutory period provided for. In submissions the respondent stated that the calculation for one week's pay did not apply. It is not clear on what basis that is asserted.

105. s 89ERA 1996 indicates that there is a right to guaranteed remuneration during a statutory period of notice. Where there are no normal working hours but the employee is ready and willing to work or incapable of work through sickness or injury, or absent on holiday, the employer must, for each week of the notice period, pay the employee a statutory week's pay. A statutory week's pay is calculated in accordance with s224 ERA where someone does not have normal hours. S224 states that you take the average over 12 weeks and where there is any one week that someone does not work, you have to go back to weeks when they did work. If I am correct then we do not have the evidence to determine what a week's pay is because we do not have payslips going back more than 3 months and there were many weeks during which he did not work.

106. In discussion with the parties we have come to an agreement of £667.50 as representing an accurate figure for 6 weeks' notice pay taking into account the Tribunal's findings above.

<u>Holiday pay</u>

107. The Respondent conceded that the Claimant was owed holiday pay in the sum of £123.20 and this was agreed by the Claimant.

Employment Judge Webster

Oral reasons given: 12 October 2023

Written reasons finalised 15.December 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

15/12/2023

FOR THE TRIBUNAL OFFICE