EMPLOYMENT TRIBUNALS

Claimant: Mrs C Mason

Respondent: Wilko Limited

AT A FINAL HEARING

Heard at: Nottingham, in public **On:** 3, 4 & 5 October 2022
And in chambers on 17 November 2022

Before: Employment Judge Clark (sitting alone)

Appearances
For the claimant: Mr Jones of Counsel
For the respondent: Ms Bayliss of Counsel

JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed.**
2. The claim of breach of contract **fails and is dismissed**.
3. The claim of unauthorised deductions from wages **fails and is dismissed.**

REASONS

1. Introduction

1.1. These claims relate to the employer's working hours and rostering practices, in particular, the practical implications of the claimant exercising her statutory right to opt out from Sunday working.

2. Preliminary issues

2.1. At the start of the hearing, Mr Jones made an application to exclude the Respondent's additional disclosure and a supplementary statement served only last Friday. That application, however, had to be put on a pragmatic basis as the reason for the respondent's

additional evidence flowed directly from the claimant's own late service of evidence and a further 80-page supplementary bundle. I pointed out that there was no explicit application by the claimant to rely on her own late service. In the circumstances, I deemed both parties to be making applications to rely on further additional documentation and evidence and permitted both to be relied on. I record also that this late service had had other implications to the respondent in that it was only then that certain events took on a significance in the claimant's case which had not previously been understood to be in issue. Mr Elleston emerged as a significant player. He no longer works for the respondent and it had not previously been understood to be necessary to try to call him. In the circumstances and timing of this coming to light, the respondent elected to defend the claim on the contemporaneous documentation.

2.2. I should also record the relevance of a first instance judgment of another Employment Tribunal contained in the bundle. It is a case involving this respondent, but not this claimant, in a collective claim touching the same Sunday working guidelines as this claim. The Judge in that case made findings and conclusions that the respondent seeks to rely on in this case. As it is a decision at the same level and does not involve the same parties as are now before me, neither Counsel could explain the basis on which that decision was binding on me and it was put no higher than being persuasive. I can see no basis on which it would be manifestly unfair to the respondent that the same issues should be relitigated or that doing so would bring the administration of justice into disrepute. Consequently, I do not regard it to bind me. I cannot assess the extent to which the evidence in that case differs from or repeats the evidence before me and have chosen not to take it into account in reaching my own conclusions.

3. Evidence

3.1. I have received a bundle running to 708 pages (plus the further 80-page bundle served by the claimant).

3.2. For the claimant, I have heard from Mrs Mason herself.

3.3. For the respondent, I have heard from: -

a. Julie Rayner, the claimant's previous store manager, who also produced a supplementary statement arising from matters contained in the claimant's late disclosure.

b. Julie Machin, the new store manager replacing Ms Rayner.

c. Matthew Broughton, the regional manager who heard the claimant's grievance in 2020.

d. Sally Whyman, the assistant Manager at the store at which the claimant was employed.

e. Suzanne Marshall, the regional manager from a different region who heard the claimant's grievance appeal in 2020.

3.4. All witnesses adopted written witness statements on oath or affirmation and were questioned. Both Counsel made oral closing submissions speaking to written submissions.

4. Issues

4.1. The issues were discussed at the outset. The respondent had prepared a draft list of issues which captured the main issues but required some further clarification. The issues for determination are as follows: -

Unfair Dismissal

4.2. Did the respondent conduct itself in a way that, without reasonable and proper cause, was calculated or likely to destroy or seriously damage trust and confidence. The conduct relied on is:

a. The Respondent's decision to roster the Claimant to work Sundays [in or around October 2018] despite the Claimant having opted out of Sunday working, resulting in the Claimant being paid five hours less a week.

b. The Respondent not upholding the claimant's grievances lodged in 2018 and again in 2021.

c. The Respondent not consulting with the Claimant before rostering her to work on Sundays.

d. The final straw relied on is the rejection of the claimant's grievance appeal and not 'rectifying' the Claimant's pay.

4.3. If they give rise to a repudiatory breach, did the Claimant affirm the contract/waive the breach?

4.4. Did the Claimant resign in response to the breach?

4.5. Was any dismissal automatically unfair under s.104 Employment Rights Act 1996? In other words: -

a. Did the claimant allege an infringement of a relevant statutory right?

b. Was any of the subsequent conduct relied on by the claimant as breaching the implied term of trust and confidence done on the ground that the claimant alleged the infringement?

4.6. If not automatically unfair, was it in any event fair?

a. The respondent says there was some other substantial reason for each of the alleged acts of conduct.

b. It says it acted reasonably in all the circumstances and that, as such, even if the claimant was dismissed in law, that dismissal was fair.

Unauthorised Deduction from Wages

4.7. In respect of the claim of unauthorised deduction from wages, the general allegation is that 199 hours were not paid when the claimant was rostered to work on a Sunday and did not work because she had opted out and was not therefore paid. More specifically the issues are: -

a. Has the claimant suffered a deduction within 3 months of the date the claim was presented?

b. Has there been a series of similar deductions? (It being acknowledged that this claim is subject to a 2-year backstop and that there is no gap in the series of greater than 3 months).

c. On each such pay date in that series, was the amount paid in wages less than that which was properly due to the claimant?

Wrongful dismissal

4.8. In respect of the claim of wrongful dismissal, I was concerned to properly understand what was being alleged. The label applied to this claim is conventionally understood to arise where an employer dismisses an employee without giving the required period of contractual notice. Indeed, the particulars of claim reinforce that understanding. I explored how that could arise in a claim of constructive unfair dismissal where the employment ended by the employee's resignation. Perhaps because of that same concern, the respondent's proposed list of issues had unilaterally recast this claim as a breach of the implied term, effectively restating the constructive dismissal claim. Whilst that may be a proper basis to allege a breach of contract claim, it was not the claim that was presented and its outcome would largely duplicate that of the constructive dismissal claim.

5. Facts

5.1. It is not the tribunal's function to resolve every last dispute of fact between the parties but to focus on those facts necessary to deal with the issues and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2. Since the implementation of the Sunday Trading Act 1994, qualifying shop workers have been able to opt out of working on Sundays. Without, at this stage, expressing a view on the correctness of its interpretation, I find this employer has interpreted the rights given by that Act to mean that any term of the contract requiring the employee to work on a Sunday or the employer to provide Sunday work simply becomes unenforceable. It operates on the basis that the opt out itself does not vary the underlying contract of employment and, more specifically, it does not vary the contract so that the hours that would have been worked on the Sunday have to be redistributed across the remaining 6 days of the week. It has sought to apply that interpretation within a broad framework of terms, policies, guidelines and principles to which I will return. The practical application has varied to some degree over time

and from store to store as business needs have dictated. Despite those variations, I find this employer has maintained a desire, where possible, for its business needs of keeping stores open on Sundays to be achieved with as little disruption to the individual interests of its affected employees. I find this has been a statement of a desired aim only but one which has been shared by the recognised trade union and regularly restated over the years in the formal collective bargaining and consultation processes. The most obvious way of helping staff to minimise the disruption has been to try to maintain their level of hours and pay by redistributing their hours across the other 6 days of the week. Whilst that has remained an aim for both employer and staff side, I find it was never more than that and, save for some rare exceptions where individual contracts may have been expressly varied to reflect the redistribution of hours, it never found its way into any enforceable right through the collective process.

5.3. The ability to give practical effect to that aim has not remained constant. This case has traversed a lengthy chronology of over 10 years and involves the application of contracts and non-contractual principles nationwide. The economic landscape has changed since the introduction of Sunday working rights putting pressures on stores. I find stores have faced different pressures from their local market or their own staffing situation. The business as a whole has faced new economic pressures affecting how it operates. One basic factor in achieving the shared aim has been the ratio of the opted-out workforce in a store to those who have not exercised that right (or have opted back into Sunday working). Where the proportion of opted out staff is small, it has always been more likely that the business needs could be met while at the same time redistributing the weekly contracted hours of opted out workers across the remaining 6 days. Where the proportion is high, the business's need to staff the store on Sundays has meant this aim is less likely to be achievable. In those circumstances, the underlying contractual position is this. The shop worker continues to be rostered to work a Sunday according to the prevailing rota but is not required to work it. Consequently, for that week they will lose a proportion of their income. Taken to its extreme, if all available staff at a store opted out of Sunday working there would be no staff left to work on Sunday. The business would either have to accept not opening the store on Sundays or come up with some other way of staffing it. One option might be to offer Sunday only jobs. Whilst that is a possibility that has been used by this respondent, it is unlikely to be an attractive way of running the business from either side's perspective. Moreover, such an approach would have to be funded. If the staff opting out were able to have all their contracted hours rostered over the 6 remaining days in the week, the business would have a wage bill higher than it needed and would be overstaffed during the rest of the week. I find this employer has wrestled with all of those issues and more but, even in the recent more challenging times, it has consistently sought to keep sight of the effect on individual workers opting out.

5.4. Mrs Mason has worked for the respondent since October 2003 and continued in her role for 18 years until she terminated that employment by her resignation on 15 September 2021. Although silent on the point, it is common ground that resignation was treated by both as being given with notice.

5.5. This was the second spell of employment. There is nothing I need to consider in respect of that earlier spell of employment that is relevant to the issued before me.

5.6. Mrs Mason was employed as a customer services assistance, at least at the times material to this claim. That employment was as a "shop worker" required to perform tasks and duties which include "shop work" thus satisfying the meaning given to those phrases in part IV of the Employment Rights Act 1996. There is no dispute that that means she was entitled to "opt out" of working on a Sunday.

5.7. There is equally no dispute that the contract of employment under which Mrs Mason was employed initially was the standard terms of employment used for shop workers by this employer. Clause 6 states: -

> ***6.HOURS OF WORK***
>
> ***You contacted for [ ] hours per week flexibly scheduled over 5 out of 7 days (Sunday to Saturday)** You may be required to work statutory and bank holidays. You will be required to be flexible to work additional hours or extra hours when requested. Where at all possible, a minimum of 24 hours' notice will be given to you.***
>
> ***** Retail store staff may opt out of working Sundays by giving three months' notice in writing to their manager of their intention not to work Sundays, as defined under the Sunday Trading Act 1994 and as further detailed in the attached Sunday working statement. You should be aware that, if you 'opt out' of Sunday working:***
>
> - ***the company is not obliged to reschedule those hours which you would have worked on a Sunday to another day in the week; And***
> - ***your contracted weekly working hours and pay may be reduced accordingly (from the effective date of your opt out), to reflect the weekly Sunday hours which will no longer be worked by you.***

5.8. Save for some individual anomalies arising from specific circumstances not engaged here, this contract applied to all shop workers. These terms were also subject to variation as a result of collective bargaining. The results of which become incorporated into individual terms and conditions as a result of clause 12 of the contract of employment which states: -

> ***12.COLLECTIVE AGREEMENTS & CHANGES TO TERMS OR EMPLOYMENT***
>
> ***The HR policy and procedures manual has been collectively agreed in negotiation with the GMB union and is applicable to your employment. There are no other collective agreements in place affecting your employment unless otherwise notified. The company reserves the right to make reasonable changes to any of the terms and conditions of employment, details in this statement or in the company policy or collective bargaining agreements following negotiation with the GMB union. You will be notified of minor changes of detail by way of a general notice to all team members. You will be given not less than one month's written notice of any significant changes, which may be given by way of an individual notice or a general notice.***

5.9. For reasons explained below, I find as a fact that Mrs Mason's employment remained governed by these contractual terms throughout her employment.

5.10. In the presentation of the respective cases before me, there was at times a less than precise use of the terms "policies" and "guidance". Sometimes "policy" has been used as an abstract or catch all phrase, sometimes referring to the "guidelines" that senior managers issued to local store managers from time to time, sometimes to describe the aim jointly held

by management and trade unions I have described above. Sometimes it was used to refer to the contractual terms themselves and sometimes it actually was a "policy" proper.

5.11. The relevant part of the 2007 remuneration policy states: -

> ***You should be aware that by opting out we are not obliged to reschedule those hours you would have worked to another day in the week.***

5.12. I find the phrase ***"not obliged"*** is apt to reflect the joint aim already referred to. It reflects the limitation that it could only be achieved where the business needs permitted it, otherwise the respondent would stand on its contractual rights. It is further support for the finding that none of these policies, guidelines practices or aims were understood by the employer or staff side to have the effect in themselves of varying the contract of employment.

5.13. I find the respondent has published guidance on the management of Sunday working and the implications of opt outs. These are statements by HR or other senior management aimed at assisting the local store and regional managers discharge their functions. They have varied over time in response to commercial pressures on the business. I find these guidelines are themselves issued after consultation with the recognised trade unions, albeit they may not be agreed.

5.14. In or around 2010, Mrs Mason became a local trade union representative of the GMB union. This fact is relevant only insofar as it explains how and why, in or around 2012, she would come into possession of the 2012 guidance to managers on the management of Sunday working opt outs published by HR. It amounts to an email from an HR Officer attaching a document entitled "communications to Line Managers" which itself included 3 template letters available for use with staff and reflecting how their opt out could be managed. One was for staff continuing working Sundays as part of contracted hours, I find that to be the standard contract that the claimant was already working to and seems to be applicable to those not opting out. The second template letter was for those opting out of Sunday working where there was agreement to permanently vary their standard contract so that they would work only over Mondays to Saturdays but with a reduction in hours to reflect the days they otherwise would have worked Sundays. The third was a variation to contract to permit those opting out of Sunday working to permanently redistribute their hours over Monday to Saturday. In other words, to opt out without loss of hours or pay. The fact that in 2018 the respondent would have to undertake a more focused review of its Sunday working staffing leads me to find, on balance, that the guidance was not particularly enforced at this time and did not prompt local store managers into a great deal of action. I find that, in turn to be because many staff did not opt out and most were subject to the standard contract caught by the first of those standard letters. Moreover, the ability to give effect to the joint aim meant there was no immediate tension in the staffing arrangements prompting consideration of the third arrangement of an express contractual variation. In fact, I have no evidence before me of that third option being applied but the fact that it appears as an option must mean the employer at least contemplated that possibility arising in some circumstances.

5.15. The 2012 guidance is illustrative of a consistent factor in all the various versions of guidance before me. That is that each guidance seeks to respond to a particular business

pressure. In the case of this 2012 guidance, this related to certain stores not meeting certain performance targets which was related, in part, to their staffing arrangements which included the application of Sunday opt outs. I find, this meant there was some consideration whether the aim of minimising the impact of an opt out by individual employees could be maintained. That was set out in terms: -

> ***whether the individual store was or was not meeting is cost and SPH (Sales per hour) requirements – and if not so whether it tactically needs to enact a local operational review and incorporate Sundays as part of contract.***

5.16. I do not find this guidance was of general application to all employees in all stores. I find it was targeted and specific to deal with that issue at that time. As a result, I find the claimant's contract of employment was not varied as a result of the 2012 guidance to reflect any of the three template letters. She remained employed on the standard contract terms available to work 5 out of 7 days.

5.17. Over time, new business pressures arose causing the respondent to reflect again on its practices. This next arose in March 2016 when the respondent and the Union negotiated changes to terms of employment. This were primarily about implementing the living wage but they touched on other aspects of staffing. The only reference to Sunday working in the negotiated agreement was to restate the principle already referred to. There is a short note that: -

> ***"Where the business allows, redistribute contracted hours where team members opt out of Sunday working".***

I find despite the changes needed the aim continued.

5.18. The 2007 remuneration policy was updated in 2016. There was some dispute before me as to whether this change happened as part of the March 2016 negotiated changes relating to the living wage or not. The document the respondent relies on is dated November 2016. It seems to me the parties may have been at cross purposes for two reasons. First, there is no material change in the relevant extract of the remuneration policy in November 2016 compared to the previous remuneration policy dated 2007. Both make the same reference that when opting out of Sunday working, the Company was not obliged to reschedule Sunday hours to another day in the week and hours and pay may be reduced as a result of opting out. Secondly, I find there was a completely new version of the general "Sunday Working guidelines" dated March 2016 aimed at supporting managers to "manage retail team member opt-outs". Mrs Mason relied on this new set of guidelines to assert that the 2012 template letters effecting a contractual change remained in use during 2016. The argument was supported by reference to similar documents (at pages 153-157). There are two parts to that document. The first two pages are headed "Sunday Working" and set out a background to the impact the new living wage and the Sunday premium pay changes is likely to have on store operations. The second relates to "proposed guidelines and it is clear there was concern that implementing the living wage had implications for other aspects of the employment relationship, including Sunday working opt outs. There was little clarity from either side as to the nature, purpose and status of these documents. In its context, I find it to be some sort of position paper or proposals for change. It is not clear whether the documents

were exchanged between managers, shared with staff or with the staff side. I find that pages 3 onwards, headed “Proposed guidelines” contain just that, the proposed new guidelines. Somewhere, in whatever process was adopted, I find they became the new Sunday working guidelines published in March 2016 and to which I have already referred.

5.19. The claimant invites me to find the 2012 draft contracts continued to be used and relies on the fact that paragraph 3 of the ‘position paper’ explicitly refers to the Sunday working pack ‘sold in to stores from 2012’ and the various options for contractual variation. I accept it is referring to those 2012 templates but I do not accept the 2012 guidance or letters continued in force after this new guidance was issued although I would accept that somewhere across the business as a whole it must have remained possible for a situation to arise where an employee was explicitly contracted in a way that excluded Sunday but there is nothing before me showing any were used at Sutton at this time. So far as such templates might provide for a variation of contract to redistribute existing contracted hours over the remaining 6 days a week, as one of the 2012 letters had, I find that to be completely at odds with the thrust of the guidelines and the issues that the Sutton store were then facing. The guidance also refers to the variations in managing Sunday working across the business and the new business pressures the business was facing. It refers to certain stores “going into risk”, a term I find to refer to stores failing to meet targets and requiring some intervention.

5.20. I find Sunday working has not been the only pressure on these stores potentially at risk. I find store managers faced increasing challenges in night working and maintaining the numbers in post in various roles in each store. They carried the responsibility to achieve an efficient use of the staff in those different roles within the standard contracted hours for each type of role. I find this new guidance was needed to meet a clear business concern about long term viability of some stores.

5.21. The paper posed options for harvesting hours from the available budget to recruit Sunday workers to meet the 7 day per week demands the business now faced. After posing various options available to managers to manage their store’s staffing budget, the proposals revisit the joint aims of minimising the effect on individual workers opting out. It stated that: -

> ***If the store is unable to widen the pool of Sunday workers or harvest required hours on a voluntary basis we will use the fall-back position of having to remove hours from individuals if large numbers of team members opt out and this puts your operation at. In terms of removing hours it would be based on 1/5.***

5.22. I find the joint aim remained, but the pressure on stores was now such that the effect of the “where possible” caveat was now being stated far more explicitly. Similarly, the reference to the respondent’s “fall back” position reflects the understanding of the strict contractual position.

5.23. Whatever the intention had been behind the earlier 2012 guidance, I find this guidance overtook that. The pressure on stores was now clearly moving in one direction only, making it less likely that the company would be able to reallocate hours over the remaining days of the week, although that remained an aim where possible. This guidance refers to the “operational toolkit” which I find is not the same as the Sunday working pack that the 2012

guidance referred to. Indeed, the implementation of the toolkit was supported by a workshop and the slides for that were before me. It is clear those slides disclose a significant business pressure and are focused on ways that each store can remain "viable" and avoid "going into risk". Indeed, I find the focus by this time was very much about making use of the available budget that could arise from staff opting out of Sunday working so as to reduce the use of overtime for Sunday working and thus make the stores more viable.

5.24. Shortly before these new guidelines came into effect, on 16 January 2016 Mrs Mason exercised her statutory right to opt out of Sunday working. She gave three months' written notice. This notice did not refer to any expectation on the claimant's part of any change to her contractual position. In fact, it anticipated that a meeting with her manager may not be necessary.

5.25. This is critical part of the chronology. Mrs Mason's case is that a meeting did take place with her manager Gary Elleston. Her opt out taking effect coincides broadly with a return to work from a short break. Mrs Mason says that her opting out resulted in an express contractual change so that her contracted 30 hours per week were thereafter rostered over the remaining 6 days, and not the full 7 days which the contract otherwise provided for. There is no written contract before me supporting this.

5.26. The matters which Mrs Mason relies on to support her contention that her contract was varied are that one of the standard letters in the 2012 guidance clearly did include the option to vary a contract of employment in this way. She relies on actually working to such a rota and there is no dispute that, for about 18 months, the claimant was in fact rostered to work her 30 hours per week over only 6 days. Mrs Mason believed that the effect in law of her Sunday working opt out was that the employer had a choice about what to do with the hours and that, in her case, she says it had exercised the choice to redistribute the 30 hours over the remaining 6 days each week. Mrs Mason also says there was a notice of a contractual change on her payslip around the same time as she would have expected the change to 6 days to be noted.

5.27. There are equally matters which undermine Mrs Mason's contention. First, and obviously, the template letter she relies on is in a form to be sent <u>to the employee</u> concerned. It is common ground that no such letter was sent to the claimant and Mrs Mason does not say she ever received one. I do not accept the claimant's account that that Mr Elleston discussed the template letter and then scanned it over to HR. Her evidence was only that she "understood this happened". The fact of actually working 30 hours over 6 days does not help as it is entirely consistent with the common aim of minimising the effect on staff who opt out of Sunday working by rostering their hours over other days of the week where the business needs can accommodate it. I have seen other correspondence Mr Elleston wrote to the claimant after the alleged contractual change which makes clear that his view at the time was that there had not been a contractual change. Similarly, the form he completed in March 2016 was the perfect opportunity to refer to a fundamental contractual change in working pattern, yet he did not do so. Nothing anywhere refers to any template letters. The notice on the payslip of a contractual change does not refer to anything specifically at all still less a change from a 7 to a 6-day rota and occurs at a time when other contractual changes were

being introduced such as the national living wage. I have also been concerned that Mrs Mason raised a number of subsequent formal and informal complaints or grievances with her employer. The suggestion that there had been a binding contractual variation agreed with Mr Elleston explicitly based on one of those 2012 standard letters that were in the claimant's possession at all material times is an odd thing to be left out of those complaints. Indeed, the claimant's contentions have asserted the automatic effect of an opt out is to vary the underlying contract. Finally, Mrs Mason accepted in her oral evidence that she may have misunderstood the implications of what was happening after her opt out in 2016.

5.28. Weighing those competing factors, on the balance of probabilities I find that there was no contractual change following Mrs Masons opt out in January 2016, taking effect in April 2016. I find the Sutton store was not an at-risk store at the time. I find that the Sutton store was able to staff Sunday adequately in a way that did not require her hours to be used to fund other employees working Sundays. In other words, the business needs accommodated a redistribution as was always the aim of the employer and trade union. Consequently, I find Mr Elleston had been able to roster Mrs Mason in such a way that she was given all of her contracted working hours on days other than Sundays. That, however, was consistent with the existing standard contractual position and joint aims.

5.29. That arrangement continued for about 18 months. During that time, I find the pressure on individual stores continued to mount. By 2018, other changes in staffing, local competition and their effect on stores meeting targets meant the ability of store managers to accommodate that sort of informal rostering arrangements started to come to an end.

5.30. Around this time, I find the business undertook a review of its stores and their ability to meet the need to open 7 days a week. This was largely driven by changes to the delivery system which itself was forced to become a 7 day a week function and which created its own implications for staffing at each store. Once again, the management of those opting out of Sunday working came under review. The difference this time was it also directly affected the Sutton Store. The review categorised stores into category A or B. Category A stores were directly impacted as a result of the change to delivery timing. Category B were not directly impacted by the change but were by then facing other operational issues with staffing on Sundays which were amplified by the changes. I find there was detailed consultation with the GMB over the issues. One side issue that arose was the lack of records for those who had opted out of Sunday working 'historically' and the need to bring the records up to date. This resulted in a communication to staff on 29 October 2018 setting out the challenges and what would happen. It also resulted in the Sunday working guidance to managers being updated again on 8 November. Key to all of this was the need to keep stores viable and open. Despite what had become an increasingly challenging commercial position for an increasing number of stores, the underlying aim of facilitating hours over the remaining days was yet again maintained as an aim held by both sides of the collective process. This time, however, it seems the caveat was strengthened and was now framed as being based only on a legitimate business need and that the store manager must be able to evidence that it is not practical to reschedule the hours for another time of the week.

5.31. I find the Sutton store at which the claimant worked was placed into group B. It had already had Sunday deliveries but was now a store facing additional pressures of maintaining staffing on Sundays. I accept Ms Wyman's evidence that the implementation of the underlying principle of trying to reallocate hours over the remaining days of the week was no longer sustainable. Essentially, I find the proportion of staff who had not opted out was diminishing to the point where they were working not only their rostered Sunday but were the only pool from which labour could be drawn to undertake the overtime to cover the other staff who had opted out of Sunday working.

5.32. I find the staff were consulted about their circumstances in individual meetings. By the time this was implemented, I find Mr Elleston had been succeeded as the Sutton Store Manager by Ms Raynor. I will return to the significance of this change. The effect of the November 2018 guidelines might give the impression of requiring staff to elect whether to opt out again and certainly that was how Mrs Mason understood what was asked of her. On balance, I find this was more about demonstrating there was a record of each employee's position as opposed to treating those opted out staff as being available for work on Sundays unless they opted out again. In any event, on 17 October Mrs Mason did give such a written notice of her position. She expressed her position extremely thoughtfully, putting it in negative terms to convey the fact that she had already opted out and that this notice was not a new notice of opt out, stating: -

> ***"I do not at this time wish to rescind my statutory rights regarding Sunday working"***

5.33. I find that from November 2018 until her employment ended, Mrs Mason and all staff in her role in store were rostered to work across all 7 days. For some weeks, that meant Monday to Saturday but once every three weeks or so, the rota would include Sunday. The result of the opt out meant that Mrs Mason was not required to work the Sunday shift she was rostered for but she would not be paid for it either. In effect, the money saved by her and others not working their Sunday shift was diverted to fund the staff covering that Sunday shift.

5.34. The first such Sunday was in early November of 2018. In line with her opt out, the claimant did not work that shift. On the corresponding pay day of 16 November 2018, she was consequently paid for 24 hours instead of 30.

5.35. Before that roster took effect, on 30 October 2018 the claimant lodged a grievance about her Sunday working and the implications for her. It is clear that Mrs Mason's belief was that she was entitled to have her 30 contracted hours rostered in a way that avoided Sundays. It said: -

> ***Simply I do not agree to rescind my statutory rights and view these actions in breach of the law as stated in the employment [rights] act 1996 under section 43***
>
> (Which she then sets out)
>
> ***By scheduling hours on a Sunday for any individual after they have completed the opt out notices in breach of the legislation and a breach of the individual's current contract. Creating an unlawful deduction of wages and open to discrimination claims.***

5.36. I find Mrs Mason was not alone in expressing this concern about being rostered for Sunday's. I find many store and regional managers, and indeed many trade union representatives, were being contacted by a number of staff potentially affected and who were unhappy about the potential changes. Whilst I don't doubt they each saw the implications from their own individual perspective, I am equally satisfied that the essence of those implications was exactly what the trade union representatives and employer's side were grappling with in the collective consultation process. Nevertheless, I find Mrs Mason was expecting her grievance to be dealt with as an individual grievance process. It did not happen that way. Instead, Ms Thurlow of HR responded to the claimant in writing on 7th November 2018. She considered Mrs Mason's grievance to cover the very subject matter that was being discussed with the GMB in the collective process about Sunday working. Ms Thurlow explained in her response how that collective process had now ended and the points raised by the union had been considered and had led to some changes but the that the business had decided to proceed with the changes to the guidance on Sunday working. The response made clear that the staff side had been informed that the respondent had received an individual grievance but would not be dealing with it on an individual basis as it covered the same ground as the collective process. Ms Thurlow encouraged Mrs Mason to raise any outstanding points with her GMB representatives. I find Mrs Mason would, in due course, do that and that her focus of dissatisfaction shifted to her representation in that collective process. Had these issues been responded to within the framework of an individual grievance, I am sure that the outcome would have been no different.

5.37. I find the collective consultative process referred to had been taking place over a number of meetings between June and November. The meeting on 1 November 2018 specifically dealt with the issue of historical Sunday working opt outs which may not be evidenced in writing. The union expressed a position that they did not want people to be required to work on a Sunday if it was believed that they had opted out. That, of course, reflected the aim, it did not reflect any contractual position before or after the consultation.

5.38. We then arrive at the dispute over whether Mrs Mason submitted a further grievance around in 2018. Mrs Mason says she tried to raise another grievance on or around 19 November 2018 which she says was handed to Mr Elleston who simply handed it back to her. She was unable produce a copy of any grievance and the respondent says it has no knowledge of it. In support of her contention, Mrs Mason relies on an email dated 9 November 2018 from her to a Mr Redgate of GMB in which she sets out her dissatisfaction with the state of affairs. Curiously, the complaint in that letter is not aimed at the employer but at the stance taken by GMB. It contains the line "just to let you know a grievance relating to the Sunday opt out rescheduling of hours will be submitted tomorrow and will forward you copy when completed". It is not clear whether that was intended to be a grievance to the union, as the context would imply, or to the employer as Mr Mason contends. If such a grievance had been submitted nothing was done about it and I find in such circumstances, the claimant would have been chasing the matter. There is no evidence of that happening in the weeks that followed the alleged grievance. The nearest I can see to any evidence of any later chasing is many months later, in June 2019, in Mrs Mason's reference to the collective grievance that had been responded to by Ms Thurlow. However, even that was raised with

the Union, in the context of its role in the collective process, and not the employer in the context of a further individual grievance and does not suggest a further grievance to Mr Elleston.

5.39. In the context of this grievance, a peripheral factual dispute arose between the parties as with whom the claimant had been dealing with and to whom she says she handed her further internal grievance. Mrs Mason says it was Mr Elleston and for some time in her evidence was adamant not only of that, but that it was not any other manager she dealt with. I find she is mistaken. I find Mr Elleston was absent on sick leave from late 2017 and, in fact, his employment with the respondent terminated in early 2018 meaning he could not have received and handed back any grievance in November 2018. The significance of this matter only arose in the exchange of witness evidence. Despite not hearing from Mr Elleston, I prefer the respondent's evidence on this matter as Mrs Raynor is more likely than not to accurately recall her own start date as the new manager at the Sutton store replacing Mr Elleston. She was also able to give direct evidence of the meetings she held with the claimant which the claimant attributed to Mr Elleston in which I find no further written grievance was lodged. Additionally, Mrs Wyman, as the assistant manager at the time, was able to give clear and detailed evidence of the circumstances of Mr Elleston's absence and was able to account for the time she had to act up as manager before Mrs Raynor's appointment. Finally, Mrs Mason's own position softened and she accepted the possibility that her recollection might be confused.

5.40. The consequence of that finding goes further than resolving that peripheral factual matter. It means not only is the claimant's case on this issue not accepted, but it also casts some doubt over the claimant's oral evidence generally and, specifically, on the more substantive point of submitting this further grievance. On the evidence before me, whatever her intention was at the time, I find no such further grievance was submitted to the employer between then and the 2021 grievance, which is properly the 'second' grievance.

5.41. I find that when the new guidelines were implemented, individual consultation took place with all staff in the Sutton store, not just the claimant and this is supported not just by Ms Raynor's evidence but by documentation showing 100% of the staff in store signed up, or at least acknowledged, the introduction of the new working arrangements as part of the process. It is a further fact that suggests the prior working arrangements for Sunday working were based on mutual convenience, as opposed to being based on a contractual variation to work the same hours over 6 days.

5.42. I find that Ms Wyman approached all staff equally and there is nothing to show that staff who opted out of Sunday working were subject to any different treatment. In the claimant's case I do not accept she was viewed as being stubborn for insisting on her rights or greedy for wanting extra hours outside the Sunday roster. The highpoint of this suggestion was a discussion between the claimant and Julie Machin the new store manager who took over from Ms Raynor in early 2021, in the context of staff getting additional hours that might be available from time to time. I return to that specific issue later but, within the grievance investigation that followed, Ms Machin accepts she asked why the claimant did not work

Sundays to which she replied it was a matter of principle. Ms Machin questioned whether that was “cutting her nose off to spite her face”.

5.43. The claimant continued to work through 2019 and into 2020 on her contracted hours which now included being rostered for Sunday shifts as all other staff but for which she, and others having opted out of Sunday working, was not required to work. Of course, the consequence was that she lost the pay for that shift. I find there is no basis for concluding she did this under protest or in any way asserting she was reserving her rights.

5.44. From the claimant’s perspective, I find as a fact that the only material change from 2018 was that the joint aim of trying to accommodate full contracted hours for opted out shop workers on the remaining days of the week could no longer be sustained. Of course, the aim remained intact as it always had been, just as the caveat that it would apply where the business could accommodate it had always been present. All that had changed was that the balance between the employee’s needs and those of the business now tipped the other way and the respondent could no longer accommodate it.

5.45. A union meeting was called for 7 June 2019 to consider, in part at least, the effect of Sunday opt outs. The claimant was invited to the meeting but declined. In doing so, she asked for an update of the collective grievances regarding Sunday working and unlawful deduction of wages. She set out the effect Sunday working had on her. Specifically, she was losing money on the weeks she was rostered for Sunday working and had further complications because she was technically contracted for 30 hours per week but could not claim for tax credits. On 17 June 2019, the GMB organiser Mr Redgate contacted Mrs Mason, as a local representative asking her for evidence of any members suffering financial detriment due to opting out of Sunday working and asking for details including any grievances. Mrs Mason replied the same day stating that the respondent: -

> ***“will not run a grievance they have stated they are dealing with as a collective grievance directly with the GMB, hence my request to know at what stage are the proceeds at as it has been about 6 months.”***

5.46. Mr Redgate responded the same day. In summary, he was passing on a request for information from the Officer. That is the extent of this exchange. It is clearly correspondence within the union structure and not with the respondent. Whilst it supports a conclusion that the claimant remained dissatisfied, I do not accept it demonstrates Mrs Mason was pursing any grievance with the respondent at that time.

5.47. In early 2020 the Covid pandemic hit. I find this had a significant effect on the respondent’s business both in the medium term, dealing with stores opening during lockdowns, and the longer-term effect it had on viability for aspects of its business and stores.

5.48. On 16 March 2020 Mrs Mason was in correspondence with GMB in what appears to be a contemplation of a claim to an employment tribunal. She attached an earlier email from 30 October when the change to Sunday working was implemented which set out the effect of hours she lost as a result of the periodic rostering on Sunday’s. She clearly maintained her understanding that she was contractually entitled to work and be paid for the 30 hours stated in her contract as a result of her opt out.

5.49. For completeness, I note that on 28 March 2020 the claimant did lodge a further, separate grievance in respect of various health and safety matters relating to the store operation during Covid. The grievance was responded to in writing. It was made clear that part of the respondent's Covid response at that time was to postpone meetings that were not business critical. The letter did, however, go on to provide a substantive response to the issues. Nothing in that appears to engage with the issues in the case now before me.

5.50. The chronology then arrives at yet another point in time when stores across the business, some more than others, faced additional commercial pressures to remain viable. There is no dispute that as the last of the Covid related lockdowns ended in the new year of 2021, the respondent announced a reallocation and redundancy programme to take place in February 2021 under the name Project Horizon. There was no dispute before me about the underlying commercial issues affecting store viability arose largely as a result of covid. I accept the evidence of Mr Broughton that the region in which the Sutton store was based was particularly affected and action was necessary to try to preserve the business and avoid redundancies. Putting it bluntly, stores such as the Sutton store had to lose hours from their weekly budget.

5.51. I find all staff at the Sutton store were affected and therefore potentially at risk of redundancy. A new structure based on new basic hours for each type of role in store was implemented as a means of trying to keep the store open and competitive. All staff had to be allocated one of those new roles in the new structure to avoid redundancy. I find the structure for the Sutton store included 31 positions. The total hours budgeted to operate the store was 471 hours per week. This was referred to in shorthand as the "blueprint". I find the store manager tasked with implementing this change had a difficult task to execute with little individual discretion. Indeed, there was some criticism of the way the "blueprint" was constructed but I find the local store managers had no real options to unilaterally change the blueprint. Much of the reason for that was that it was simply dictated to them by a policy of store structures but even that was itself a reflection of the reality of what roles were needed to operate a store 7 days a week and the hours that each should be given was again a reflection of how a rota could be efficiently structured across the opening hours on each of those days. Store managers were not only constrained by what hours each role could have, but some roles such as till operators had their own additional constraints as to how they could be deployed.

5.52. I find Ms Raynor's main objective in her role implementing project horizon was to try to ensure all of the staff she employed had a job at the end of it.

5.53. For Mrs Mason, as a customer services assistant, the previous 30 hours per week contract was no longer available. Customer service assistant basic hours were now based on weekly contracts of 6 hours, 12 hours, 16 hours or 25 hours. That is not to say that there were no roles available at 30 hour per week. Indeed, when the consultation process started on the changes Mrs Mason was invited to consider one such 30-hour role for 'goods inwards'. Whilst that would have secured the same contractual hours, I find Mrs Mason had her own personal reasons for declining based on her own past experience of this role some years earlier. That was a perfectly understandable decision. It meant, however, that the most that

could be available to her now was a 25-hour contract, meaning a reduction of 5 basic hours per week each week. Of course, in addition on the weeks when she was rostered to work a Sunday, there would be a further reduction of 5 hours. A small positive consequence of project horizon was that the frequency of Sunday working reduced to something in the region of 1 in 6.

5.54. There is no complaint about the rationale for change or the process to implement it or Mrs Mason's decision to accept a 25-hour post. Mrs Mason accepted in the course of what would become the later grievance process that: -

> ***"That was my choice but I felt it was best for both the company and myself to be able to do a job until I can retire comfortably."***

5.55. And in respect of the availability of a 30-hour post, that her manager had: -

> ***"explained it fully that she looked to see whether or not she could at the time of the redundancy give me 30 hours. She could not because she had to under the law mitigate as many people as possible into the best hours possible. So I understood her decision not to be able to do it at the time is the decision since then I cannot understand"***

5.56. The reference to "the decision since" is in respect of how Mrs. Mason believed any available hours that became available were being redistributed. There were two aspects to this. One was that the manger did not consolidate hours that might become available in the existing structure. In other words, where there was a vacancy for, say, one of the 6-hour contracts, that vacancy was filled as a stand-alone post rather taking those 6 hours and combining them with, say, a 25-hours contract to give that person more basic hours. I accept the respondent's evidence that it was not a simple as that. At the time, there needed to be a number of employees in post in each role to service the rota and provide flexibility that was not achieved with a smaller total number of employees working longer hours. Whilst individuals might have different views on what the ideal structure ought to be, and indeed some changes were later made to some of the weekly contracts, I accept that the respondent's rationale was at the time both genuinely the reason for declining to combine roles and was a view that, at the time, it reasonably believed provided the most efficient structure.

5.57. In the course of the consultation for Project Horizon, Mrs Mason requested that a 30-hour role over 6 days each week was created. This was understandably refused as this was part of the old structure that had brought about the need for project horizon.

5.58. The second aspect of the dispute arises in the allocation of overtime. I find overtime was no longer available to stores under the constraints of Project Horizon as it previously might have been. In fact, I find the availability of additional hours was close to non-existent for a number of reasons. First, stores now had to operate within the base contract. In the case of the Sutton store, that was 471 hours. Secondly, during the first 13 weeks after the implementation of Project Horizon, some displaced staff were working out notice relating to their original higher weekly contracts so there were more hours of labour available to managers than were needed in the rota. This meant if there were any gaps in the rota, such as with sickness absence, these were covered without the need to arrange overtime. Thirdly,

even if any additional hours were to have become available as a result of covering the staff who had opted out of Sunday work, for obvious reasons that overtime would not be something that the claimant would have been interested in covering.

5.59. After the 13-week period, I find overtime only ever arose in respect of absences of other members of staff or for special projects. One such special project involved a week-long project to reorganise the layout of the store to restock for pet products. I find this was a one-off event generating additional hours, at least as far as the relevant chronology is concerned. The work required a number of particular skills and attributes which were likely to exclude the claimant either on the manager's selection or her own self-selection. One criterion was it needed people to do heavy physical work to manually handle the displays. Another was it required a first aider to be present. Another was a requirement for store "key holders". Moreover, the additional hours were performed over each night of that week. However, secondary opportunities arose as those doing that additional work were drawn from the normal day shifts so there were some hours available as a consequence.

5.60. The project was managed by Ms Whyman, the assistant store manager. I find her aims were focused on delivering the change for the store. The claimant was previously known as someone who did not undertake additional hours. However, despite that previous stance, I accept that the change in contracted weekly hours had meant that Mrs Mason was now prepared to undertake additional hours. Whilst ignorance of her change of position might have been a factor as to why Mrs Mason would not be someone that was actively approached and asked to take additional hours, the Project Horizon consultation records show that Mrs Mason and Ms Whyman had discussed the subject during which it was explicitly noted that she would "pick up additional hours to cover if available". Nevertheless, I find the only real opportunity for any additional hours had been the week implementing the pet products and Ms Whyman had been managing that with her operational needs uppermost in mind.

5.61. The claimant complained to Mrs Machin at the time and I find Mrs Machin promptly looked into the allocation of overtime. As a result, it is common ground that Mrs Mason was able to undertake some additional hours. Moreover, a new system for additional hours was implemented. The way Mrs Machin positively addressed this leads me to find on balance, that the words she would later accept saying in conversation to the claimant about Sunday working and additional hours "cutting her nose off to spite her face" were no more than part of the genuine conversation between an employee and a new manager who did not know each other particularly well exploring the issue of additional hours. I find it does not disclose Ms Machin held any adverse view towards those who had opted out of Sunday working. Similarly, I find there was no aspect of Mrs Whyman's decision making that was influenced by the fact Mrs Mason had opted out of Sunday working. In particular, the date for "pet week", setting up the store for the pet products, had not been set in stone and when it happened, had to be implemented at relatively short notice. Significantly, I find the claimant was on holiday during the week before pet week when the overtime arrangements were made. Having regard to how quickly the situation was resolved when Mrs Mason raised her concern

I find, on balance, that this was the determining factor in explaining why no overtime was allocated to her.

5.62. I find project horizon was an ongoing concept and not simply a one-off exercise. It was about realigning the staffing across the organisation so as to achieve control over store staffing budgets and building flexibility in how it operated over 7 days.

5.63. The new hours and roles commenced from 1 March 2021. The implementation of Project Horizon faced an additional layer of complexity as Ms Raynor left her post as the Sutton store manager around this time. The new manager was Julie Machin. She had little knowledge of the staff or previous issues.

5.64. One specific aspect of the implementation that I need to deal with is whether there were staff who were given favourable treatment by being given more contracted hours shortly after project horizon was implemented. The specific example put before me in evidence was in relation to Sue, a colleague of the claimant who had been allocated a 16-hour contract instead of her previous 25-hour contract. Mrs Mason later learned that she had had her hours "increased" back to 25 hours. I do not accept that is what happened although I understand why the claimant may have viewed the change simply as an increase and why Sue may even have referred to her hours being "increased". I find this was not, however, a situation of Sue simply being given an additional 9 hours on top of her existing contract as the claimant understood it. Still less does it support the argument that if there were additional hours available the claimant ought to have been considered to increase her weekly contract hours. I find that what had happened was directly related to the posts available in the blueprint. I find Sue was not allocated a 25-hour post in the initial implementation but was viewed as being in line for a 25-hours post should it become available on another colleague leaving for promotion to another store. That other colleague did leave, Sue was slotted into the vacant post her departure left behind and the 16-hour post Sue then left available was filled. Some might criticise that process but nothing in it related to the claimant opting out of Sunday working. Nothing in it involved the redistribution of hours across the blueprint. There is nothing in this that could have led to the claimant's 25 hours increasing to 30 or at all. The most that could be challenged is that the 25-hour role became vacant and others who might have been interest in "that role" might have been denied the opportunity in favour of Sue but that does not go to the issues in this case and it remains a perfectly understandable approach for the respondent to fill its vacancies and retain staff.

5.65. On 13 May 2021 the claimant raised a grievance. Summarising, it raised three broad issues all in relation to Sunday working. One was the allocation of any additional hours in overtime that became available. The second was the concern that others had had their contracted hours increased (i.e., Sue). Thirdly, all of this was set against an allegation that the Sunday working guidelines had been misapplied and Mrs Mason again set out her understanding that the effect of the opt out was to vary the contract of employment so as to provide the same contracted hours over the remaining 6 days each week and that this had been breached in October when she began being rostered for Sundays. Mrs Mason restates the original grievance of 2018.

5.66. I note within the grievance, Mrs Mason attributed the decisions largely to Ms Whyman and her new store manager as it distinguished the approach of her previous store manager, Julie Raynor, which she described as being “fair in all respects”.

5.67. Matthew Broughton was the regional manager and he was appointed to hear the grievance. He met the claimant on 9 June 2021. The meeting was recorded. I find Mr Broughton explored the allegations carefully with the claimant and her representative. Based on the grievance letter and what was said in that meeting, I find it was reasonable for him to understand the grievance to focus on the three matters I have summarised.

5.68. I find Mr Broughton made further enquiries on the issues raised. On the same day he met with Sally Whyman and Julie Machin to explore some of the allegations from their perspective. He also had discussions with HR and learned of the claimants 2018 grievance which he understood had been dealt with within the collective process. He understood the claimant’s concern to be that she had not received a satisfactory response to that. He understood that no further grievance had been raised between then and now during which time Mrs Mason had been rostered to work on Sundays and consequently lost a proportion of her earnings for those weeks.

5.69. Mr Broughton considered the issues raised in the grievance and set out his decision in writing in a letter dated 1 July 2021. He concluded: -

a. That the allocation of overtime had not previously followed any set structure or system but he did not accept that the claimant had been excluded from such overtime. Some overtime was outside trading hours and in circumstances that would exclude certain individuals including the claimant. Some was during her annual leave. Some however would be available. He therefore partly upheld this much of the grievance insofar as there was an absence of a system and made recommendations for a system which would include some degree of priority to opted out workers to work additional hours that became available during trading hours in a week where they were rostered for Sunday so as to try to make up what they would lose. (I find that the essence of this recommendation is itself a nod towards the long-standing aim to minimise the impact on staff opting out of Sunday working that I have referred to previously).

b. In respect of the Sunday working guidelines Mr Broughton had investigated what happened at the time. He did not have any an outcome of any group grievance as he understood the claimant to be suggesting was what she was told but he noted that the claimant had received an individual response from Ms Thurlow at the time. He had referred the claimant’s concerns about that to HR. He was unable to comment on the legality of the guidelines as he was not a lawyer but recorded how they had been developed after taking legal advice. He formed a view that he was entitled to form on the information known to him that Mrs Mason was wrong in her interpretation that opting out varied the contract. He was able to investigate the specific application of the Sunday working guidelines in the Sutton

store and concluded that they had been applied consistently to all. That part of the grievance was therefore rejected.

c. In respect of the allocation of hours to another colleague, that was rejected on the basis that this concerned the filling of vacancies in the structure, not an increase in hours. If a vacancy suitable to the claimant's preference were ever to arise in the structure, he reassured her that she would have opportunity to be considered for it.

5.70. On 9 July 2021 the claimant appealed against Mr Broughton's decision. Her grounds of appeal were set out in writing and whilst they followed a similar structure reflecting the three main points addressed by Mr Broughton, the focus of the complaints evolved slightly. There was now an explicit allegation that the application of the Sunday working guidelines resulted in a breach of contract which in turn resulted in a failure to pay the legally required minimum wage for her contracted hours of 30 hours per week. She challenged Mr Broughton's decision in respect of the allocation of additional hours of overtime, in the decision of the company not to hear an individual grievance in respect of the application of the Sunday working guidelines which again she set in the context of her understanding that there was a variation of contract by her opt out in 2016. In respect of the availability of additional contracted hours, she challenged the conclusion on the basis that even if there was a vacancy filled, ultimately there remained hours available further down the line for redistribution to her. In conclusion, she specifically sought an acknowledgement that the guidelines had been retrospectively applied to her and to return her to a 30 hour per week contract over 6 days.

5.71. Suzanne Marshall, a regional manager from a different region was appointed to hear the appeal. She met with the claimant on 13 August 2021 and was supported by an HR adviser. As a result of the further exploration of the issues raised, I find Ms Marshall understood the claimant to be raising four issues. They were: -

a. That the Sunday working guidelines had been retrospectively and unlawfully applied

b. That her 2018 grievance was not heard as an individual grievance.

c. That she believed she had not been paid the national minimum wage when the Sunday working guidelines were attributed to her.

d. The way in which decisions were made about recruiting and distributing hours either in respect of vacancies or overtime.

5.72. I find Ms Marshall took a fresh look at these issues and genuinely explored the contentions. In the course of that meeting they discussed the specifics of the claimant's concerns and Ms Marshall expressed some insight on the issues from a store manager's perspective. In particular, in discussing the ability to combine hours from on post into another, Ms Marshall explained the need for flexibility in store management and gave the example of changes to turn one post into two each with fewer hours to provide greater

flexibility for the staffing of the store which I find were the reasons behind the blueprint being structured as it was.

5.73. I find during the discussion Mrs Mason seemed to accept the benefit of Mr Broughton's recommendation on an overtime system particularly giving some priority to those losing a Sunday. She also seemed to accept that the overtime issue had been resolved and that staff could now volunteer for the available overtime, indeed she referred to the fact that she was: -

> ***"Volunteering myself for 9 hours today, it's wonderful".***

In fact, the effect had been that she had not lost hours for a number of months and clearly the store management were trying to accommodate her despite the implications of project horizon. Although she remained on a rota requiring Sundays to be worked on a frequency of 1 in 6, in fact she had either not been rostered for a Sunday or, where she had been rostered for a Sunday had been able to pick up additional hours in the week to maintain her pay at a consistent 25 hours.

5.74. Ms Marshall noted that Mrs Mason had wanted to raise her original issues with the application of Sunday working on an individual basis, that she had had a response at the time and, in any event, that she had now in fact been given the opportunity for her issues to be considered on an individual basis.

5.75. Ms Marshall did not accept Mrs Mason's understanding that the effect of opting out was, as she described it, to change the contract from 5 out of 7 to a 5 out of 6 contract. Mrs Mason accepted that when she raised the issue of overtime,

> ***"Julie put in a system and she put it right, I put my grievance in and it's been different ever since".***

These discussions were in the context of the individual and personal affect the loss of pay had had on Mrs Mason. I should make clear for Mrs Mason benefit that I don't doubt the reduction in hours as a result of project horizon did have financial consequences particularly in respect of her household commitments and that this caused added stress and pressure. The issue discussed with Mrs Marshall seemed to be more about a desire for a consistent and steady wage, rather than the fact that she was excluded from overtime. Overtime was not guaranteed and even if it was available could mean irregular work pattern.

5.76. I find Ms Marshall considered the appeal carefully and gave a detailed response to each of the four issues in a written decision dated 9 September 2021. All four points were rejected with reasons.

5.77. The allegation that the Sunday working was unlawful was rejected. It was explained it had been needed due to inefficient operation of Sunday opening in some stores and produced following joint national discussions with GMB and whilst the legal advice was not disclosed, the fact that it was based on legal advice was. As with Mr Broughton, Ms Marshall was not a lawyer and was reasonably working on a lay understanding of the information she had available to her, in particular that those guidelines applied to Mrs Mason in her role.

From the information she had including her own application in her own region, her belief was that the guidelines had been applied fairly and consistently.

5.78. In respect of the complaint that Mrs Mason had wished her 2018 grievance to have been conducted in an individual process. Ms Marshall understood that the issues had been addressed through the collective hearing process but that in any event, this grievance process had given the opportunity for the issues to be considered on an individual basis.

5.79. In respect of the alleged shortfall in respect of the National Minimum Wage for weeks in which a Sunday was rostered, this was rejected on the basis that Mrs Mason accepted that she had been paid correctly for the other hours that she had worked in the week. As the contract permitted the effect of rostering Mrs mason for a Sunday, and in particular the opt out meant she was not required to work it, there was no work done and nothing to pay.

5.80. In respect of the consultation process for project horizon and the specific issues raised about the way potentially available hours had been redistributed. Ms Marshall upheld Mr Broughton conclusions on colleagues being slotted into vacant posts.

5.81. I find the outcome rejecting the appeal was sent to Mrs Mason by email on the same date. About a week later, on 15 September 2021 Mrs Mason resigned. The resignation letter is silent on whether it was with immediate effect or with notice. It was common ground before me that the employment came to an end on 21 September 2021 and was thus treated as being with notice.

5.82. I do not need to set out the letter in full. There is no dispute that letter gave reasons for the resignation which explicitly referred to the issues raised in her grievance including the application of the Sunday working guidelines. She described the appeal outcome as the last straw suggesting this grievance had taken a number of years to complete.

6. Constructive unfair dismissal

Law

6.1. There is no dispute between the parties on the applicable law. It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 ("the Act") provides the statutory definition of dismissal:

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(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.***

6.2. Both parties have referred to the essential and leading authorities on "constructive" dismissal relevant to this case. That starts with **Western Excavating (ECC) Ltd v Sharp**

[1978] 1 QB 761 on the application of common law principles of repudiatory breach, acceptance and causation within the context of contracts of employment. The definition of the implied term of trust and confidence set out in **Mahmud v BCCI [1997] UKHL 23** that: -

> ***"An employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence'.***

6.3. That is an objective test I have to apply. The case is put on the basis of a last straw. I have had regard to **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a "last straw" event not needing to be a breach in itself but adding something to the character of the overall state of affairs said to breach the implied term. I have also considered **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** on the approach to take in normal last straw cases.

6.4. If there is a repudiatory breach, I must be satisfied that the breach has not been waived (or rather the continuation of the contract affirmed). This may arise explicitly. It may arise by implication, often by the effluxion of time. In that sense, the passage of time does not, in itself, provide the answer. What is important is what has happened during that time. Often, the time provides the opportunity for the performance of the new state of affairs for a sufficient time to be able to infer acceptance. What is required is an unequivocal acceptance of the new state of affairs. Working under protest is equivocal. Invoking the internal grievance procedures is not to be treated, in itself, as an unequivocal affirmation of the contract. (See **Kaur**, per Underhill LJ at para 63)

6.5. As to causation, the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (**Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666)**. It is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach "played a part in the dismissal" (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703; Wright v North Ayrshire Council [2013] UKEAT 0017/13) (Bunning v GT Bunning & Sons Ltd [2005] EWCA Civ 104)**

6.6. If a resignation amounts in law to a dismissal, the provisions of section 98 of the Act then engage. It is for the respondent to prove the reason, or if more than one the principal reason, for dismissal and that that reason is a potentially fair reason. The respondent relies on "some other substantial reason'.

6.7. For a reason to be "another substantial reason" so as to fall within the catch all of section 98(1)(b) of the ERA 1996 it has been held that it must be substantial, meaning it must not be frivolous or trivial, and must not be based on an inadmissible reason such as race or sex (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552**). It need only be genuinely held but cannot be substantial if it is whimsical or capricious (**Harper v National Coal Board 1980 IRLR 260, EAT**). It must be something that *could* justify dismissal, whether it does is the section 98(1) question (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**)

6.8. The reason is the set of facts known to, or beliefs held by, the employer which causes it to dismiss the employee. In a case of constructive dismissal under s.95(1)(c), where it is the employee that brings the contract to an end by acceptance of a repudiatory breach, the focus turns to the employer's reasons for the conduct which entitled the employee to resign and the burden of proving the reason remains with the employer (**Berriman v Delabole Slate Ltd 1985 ICR 546 CA)**

6.9. If the respondent does not establish a potentially fair reason, the dismissal is unfair without more. If it does, I must then consider the test of reasonableness within section 98(4). Whilst the legal analysis of reasonable and proper cause to establish breach of contract and reasonableness to establish fairness are conceptually different, it is difficult to conceive a factual situation where they would arrive at different outcomes.

6.10. This claim is also put on the basis that the dismissal is automatic on the ground that the claimant asserted a statutory right under section 104. The section itself provides: -

> ***(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—***
>
> ***(a) …., or***
>
> ***(b) alleged that the employer had infringed a right of his which is a relevant statutory right.***
>
> ***(2)It is immaterial for the purposes of subsection (1)—***
>
> ***(a)whether or not the employee has the right, or***
>
> ***(b)whether or not the right has been infringed;***
>
> ***but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.***

6.11. Again, in the context of a claim of constructive unfair dismissal, the focus is on the reason for the conduct relied on by the employee as repudiatory breach. It is that which has to have been, done for the reason, or principal reason, that the claimant had alleged the employer had breached a relevant statutory right.

6.12. There is no dispute that the right to opt out of Sunday working is a relevant statutory right.

6.13. For completeness, the claimant has chosen not to advance a claim based on either suffering detriment or that her dismissal was automatically unfair under sections 45 or 101 of the Employment Rights Act 1996 respectively, which deal specifically with the exercise of the right to opt out of Sunday working .

Discussion

6.14. Two matters arise by way of context for my decision. The first is that the claim is put on the basis of a breach of the implied term of trust and confidence yet, at its heart, there is an allegation that there was a variation of an express contract term which changed the

claimant's contractual roster from one of 5 over 7 days, to one of 5 over 6 days. Reliance on the implied term might be explained where it was accepted that there was an intervening waiver of a breach of the express term but the claimant denies waiver at any time. Consequently, elements of the alleged breach of the implied term continue to be based on an underlying suggestion that an express term has been breached, but without that term being relied on explicitly as the breach. So far as that can be reconciled, and of course a breach of a substantial express term is likely to damage trust and confidence, I have considered that as part of the alleged breach.

6.15. Secondly, much of the issues in this claim flow from the claimant's belief in the legal effect of her opting out of Sunday working. The Sunday Trading Act 1994 deregulated trading hours and brought in various rights and protections for shop workers. Those rights are now found in part IV of the Employment Rights Act 1996 with associated protections for detriments and dismissal in parts V and X respectively. The key right is the right to opt out of working on a Sunday after a period of notice. It is a limited statutory right which renders "unenforceable any term of a contract under which he was employed immediately before giving the notice to the extent that it requires the employee to work a Sunday or the employer to provide Sunday work. It is significant that the statutory language renders those provisions unenforceable, as opposed to varied. The underlying contractual terms therefore remain, they do not disappear or change by virtue of an opt out. Part of the reason for that may be that an opted-out worker can opt in at a later date. The fact that an opt out does not change the underlying contract of employment in itself means that I have to conclude Mrs Mason is wrong in her understanding of the effect of the opt out. More specifically, it does not vary the contract so that the hours that would have been worked on the Sunday under the contract have to be redistributed across the remaining 6 days of the week. As it happens, I consider the respondent's legal interpretation that it sought to implement to be correct but it is Mrs Mason's incorrect understanding of the legal effect of the opt out which underpins much of the dispute before me.

6.16. Against that background, an employee and employer may *separately* agree to vary the contract of employment but they need not. In this case I reached the following findings which are key to my conclusions on the issues in the claim:-

a. That at all times the claimant's contract of employment required her to work a rota of 5 over 7 days including Sunday.

b. That upon opting out there was no guarantee that she would not still be rostered for Sunday work and that, in such a situation, she would not be required to work it but would equally not be paid.

c. That the employer agreed a non-contractual aim with the staff side that where it could roster such a worker avoiding Sundays, it would if its business needs permitted it.

d. That the fact that the claimant was not rostered to work on a Sunday after she opted out in early 2016 was because Mr Elleston was applying that principle.

e. Mr Elleston did not agree to a separate express variation of the claimant's contract.

f. Nothing in the collective discussions with the GMB had the effect of varying the claimant's contract of employment.

g. That over the years, increasing commercial pressures have caused it to revisit its approach to Sunday working and the balance to be struck between individual contracted hours and the business needs of the particular store or region has changed to the point that increasing number of stores found its business needs outweighed the individuals wishes and they had to be rostered on Sunday to redistribute the funds for that work.

6.17. It follows that in the absence of any variation to the underlying contract of employment to exclude rostering on a Sunday, the claimant remained employed on terms which could mean she was rostered on a Sunday. The opt out would continue to mean she was not required to work that shift but with the financial consequences to her that would bring. The changing pressures on stores generally, and the Sutton store in particular, meant that event came to pass in late 2018.

6.18. Moreover, there is no basis to conclude that a variation could be said to have been varied by implication. It was never necessary to imply such a term and it would be in direct contradiction to the express terms relating to rostering and Sunday work after an opt out was exercised.

6.19. Adopting the approach in **Kaur**, I start with the events said to be the last straw. That is the outcome of the grievance appeal which is said to be conduct undermining trust and confidence because it did not uphold the appeal and, consequently, did not rectify the claimant's alleged loss of pay.

6.20. The claimant was notified of this decision on 9 September 2021 and resigned on 15 September 2021. There is nothing in that period which expressly affirmed the contract of employment and I am satisfied that the period of 6 days was not sufficient to infer affirmation. There is equally no dispute that Mrs Mason's resignation was in response to this, along with the history of the respondent's application of its Sunday working guidance to her.

6.21. I am satisfied that Ms Marshall's rejection of the grievance appeal (including rejecting the consequential remedy asked for) was done with reasonable and proper cause, even if the act of rejecting a grievance appeal in respect of some of the matters rejected is likely to seriously damage trust and confidence.

a. Ms Marshall considered the issues in the grievance appeal seriously and promptly. She undertook reasonable steps to establish the situation and to form a reasonable conclusion. I am satisfied the steps taken and the information she had available to her entitled her to come to the conclusions she did.

b. In particular, I am satisfied she was in a position to understand the application of the Sunday working guidelines which gave her reasonable and proper cause for reaching the conclusion that they had been applied fairly and consistently and to reject the contention that they had been misapplied.

c. She reasonably concluded that the nature of the issues raised in 2018 were those engaged with in the collective process with the trade union. When Ms Marshall reviewed it in this grievance appeal I am satisfied she had reasonable and proper cause to reach the conclusion she did. In addition, Ms Marshall recognised that the issue of complaint about the 2018 grievance was itself undermined by the fact that the 2021 grievance process raised the issues and was considered in the context of an individual grievance process. Again, I am satisfied there was reasonable and proper cause for her rejecting that part of the grievance.

d. The conclusion Ms Marshall reached that the claimant was not contractually entitled to be rostered over 6 days feeds into her conclusion on the National Minimum Wage claim and the claim for back pay. I am satisfied that she investigated the matter adequately and accurately concluded that the claimant had been paid appropriately for the hours she had worked. There was, again reasonable and proper cause for that decision.

e. Finally. Ms Marshall considered that Mr Broughton was correct in his understanding of the way additional hours were distributed as overtime and in respect of the complaint that others were given additional contracted hours. Her understanding of the issues came to that same conclusion that another had not been given extra hours, they had been slotted into a vacancy that had arisen. Similarly, the availability of overtime was a matter that Mr Broughton had partially upheld, insofar as he recommended a structed system was put in place that prioritised those workers who might have lost hours due to that week's roster. The investigation undertaken by Mr Broughton and Ms Marshall's understanding of it gave reasonable and proper cause to conclude that the claimant's opt out was not part of the reasoning for decisions made in respect of additional hours.

f. On the specific issue of overtime itself, I am not satisfied the old system amounted to conduct that was likely to seriously undermine trust and confidence. It was not a practice that had any link to Sunday working opt out. The claimant had not until the project horizon changes been someone that was prepared to undertake overtime. Moreover, factors such as the particular business needs and the speed with which the complaint was remedied, even before the grievance and without any real consequence to the claimant, is such that I am not satisfied that could be sufficient in itself to amount to conduct likely to undermine trust and confidence.

6.22. The failure to rectify the claimant's pay is relied on as a separate allegation of conduct but I am not satisfied that is the correct way to view it. It is more naturally in the nature of a remedy or outcome to the grievance appeal and necessarily follows only if the appeal succeeded. In other words, it does not stand up separately to the grievance appeal itself

failing. For completeness, it follows I am satisfied that Ms Marshall had reasonable and proper cause for not "rectifying" the claimant's pay because the substance of the appeal had failed, there had not been any underpayment as against the contract and there was nothing to rectify.

6.23. In short, the outcome of the appeal as the last straw event is not sufficient to amount to a breach of the implied term of trust and confidence in itself. That, however, is not the end of the matter. Applying the next stage of **Kaur**, I must then consider the history of the case and decide whether cumulatively, the appeal outcome nonetheless contributes something to the events so that taken together it can be said that the implied term of trust and confidence has been breached.

6.24. The next before event is the 2021 grievance investigation and decision of Mr Broughton. Mr Broughton acted promptly to deal with and responded to the grievance. He focused on the three elements of the claimant's complaint. There was reasonable and proper cause for doing that as it reflected the grievance letter and was an understanding formed after discussion with the claimant at the grievance hearing. He rejected the essence of all three only after exploring matters further. I am satisfied there was reasonable and proper cause for him reaching the conclusions that he did.

6.25. Firstly, Mr Broughton partially upheld the grievance to the extent that the was no structured system for the allocation of overtime in store. Whilst that was not the gravamen of Mrs Masons grievance, it is difficult to see how a positive outcome could contribute to conduct likely to undermine trust and confidence. As to the other matters, I am satisfied Mr Broughton took reasonable steps to accurately establish the facts relevant to each remaining complaint. I am satisfied he had accurately identified a very narrow opportunity for any overtime to be available after project horizon and factors about the timing and opportunity for this overtime which meant he was entitled to conclude Mrs Mason's status as an opted-out worker was not in any way related to the distribution of overtime. Secondly, in respect of the claimant's earlier grievance around two years earlier, he was entitled to respond on the basis that his investigation into the facts of that matter identified that Mrs Mason had received an individual response that at the time setting out the respondent's position that the essence of her grievance was the subject of the collective discussions and would not be dealt with as an individual grievance. Related to that, he was correct in his analysis of the effect of the Sunday working guidelines and the effect of a statutory opt out. Thirdly, he had taken reasonable steps to enquire into was way hours had been allocated in the implementation of project horizon and had an accurate understanding of the facts to conclude that ad hoc hours had not been added to other workers to make up their hours. All of his conclusions were reached with reasonable and proper cause.

6.26. The next before conduct relied on as contributing to a breach is put in Mr Jones' written submissions as a failure to increase Mrs Mason's contracted hours from 25 to 30 in the course of implementing Project Horizon and/or to offer her overtime. Strictly speaking, this was not identified in the list of issues but it is sufficiently part of the totality of the claimant's issues for me to address it.

6.27. It follows from my conclusion that Mr Broughton accurately concluded there had not been such failures that I am satisfied that there was reasonable and proper cause for the employer conducting itself as it had. In particular, the claimant was offered a 30-hour contract during the project horizon consultation which she rejected for her own good reasons. The 25-hour contract that she was offered and accepted was the largest basic hours contract available for her role. The structure had been designed to achieve an efficient roster across 7 days per week which included the number of posts at the different levels of basic hours. Combining ad hoc hours to create larger and differing posts outside of that structure was not consistent with that aim. There was, therefore, reasonable and proper cause for the employer not to take that approach. Moreover, I found that is not what happened with the colleague Sue, who may have appeared to have had her pre project horizon hours restored, but in fact was simply appointed to another post at 25 hours per week when it became available. It is difficult to see how the implementation of Project Horizon can be seen as likely to undermine trust and confidence when the claimant's own position was that the implementation was done by her manager as fairly as it could and she understood her rationale for acting as she did. Nevertheless, to the extent that any change as a result of Project Horizon is likely to seriously damage trust and confidence, I am satisfied these matters show there was reasonable and proper cause for the way the employer conducted itself.

6.28. The same can be said in respect of overtime. The complaint arises against a background of there being next to no overtime after project horizon and the claimant previously being someone who did not take on additional hours. It is true she had raised this with Ms Whyman in the project horizon consultation but the highest that can be said is that she was overlooked for overtime at a time when she was off work. It is perfectly reasonably that she should raise this but the response was equally reasonable and prompt and led to the claimant being allocated some of the very limited overtime that became available. Indeed, by the time of the grievance hearing, she had worked overtime in weeks that she would otherwise have lost out due to a shift falling on a Sunday so that her weekly hours had not fallen below the contracted 25 hours per week. In short, there was reasonable and proper cause for all aspects of the employers conduct both at the time and in the later reviews of those decisions.

6.29. The earliest matters alleged in the list of issues are said to be 'the Respondent's decision to roster the claimant to work Sundays in or around October 2018 despite the Claimant having opted out of Sunday working, resulting in the Claimant being paid five hours less a week'. A separate allegation of conduct was not consulting the claimant before rostering her to work on Sundays. These were put slightly differently in her closing submissions as 'unilaterally varying Mrs Mason's contract from 5 over 6 days to 5 over 7 days in November 2018 so that she was put on the rota to work Sundays despite having opted out in January 2016; the contract having been varied to the former by Gary Elleston, Store Manager, on or around 3 April 2016'. I don't regard the different formulation to be changing the essence of the allegation that from November 2018 she began being rostered on Sundays and losing pay accordingly and the additional reference to Gary Elleston simply reflects the claimant's case, before me at least, that there had been a variation to her

contract. Similarly, I interpret the allegation that the change was ‘unilateral” to relate to the issue that the change is alleged to have happened without consultation.

6.30. This aspect of the alleged conduct is answered largely by my findings of fact. I have found firstly that there was no express variation of contract and that at all times the claimant remained strictly subject to the contractual term entitling the employer to roster the claimant on any 5 over 7 days each week. The fact that she had not been so rostered reflected the ability of Mr Elleston to engage the non-contractual joint aim that has always accompanied the contractual position, albeit that from 2018 it became effectively impractical for the employer to do so for the claimant at the Sutton store as elsewhere. Further, I have found that the introduction and application of the new Sunday working guidelines in late 2018 were done through a process of consultation with the staff insofar as there was both collective consultation and individual discussions about the introduction of the new Sunday guidelines with each member of staff in affected stores. It follows that the alleged conduct is not made out, at least as formulated. Insofar as the employer did implement a change, in the sense that the balance between its needs and the ability to avoid rostering on Sundays changed, it was done on the back of a genuine business need, was done after consultation and was consistent with the express contractual terms of employment. To the extent that such act as did in fact happen can be said to seriously damage trust and confidence, they were with reasonable and proper cause.

6.31. Whether the earlier alleged conduct is viewed individually or cumulatively, I have concluded there is no breach of the implied term of trust and confidence. Returning to the final straw conduct, which I have concluded is not a breach in its own right, I still have to consider whether it adds something to the totality of the alleged conduct so that the entirety of the conduct can then be said to amount to a breach of the implied term. I am unable to do so. Some of the conduct is not in fact as the claimant alleges and even where there is conduct by the employer, there was reasonable and proper cause for it. The entire episode is premised on a misunderstanding of the legal effect of opting out of Sunday working. That means I can readily understand why the claimant is genuinely aggrieved about the events over the last three years of her employment with the respondent but that subjective belief does not create a breach of contract. Objectively, the employer has not breached the implied term of trust and confidence. It follows that if there is no dismissal there can be no unfair dismissal.

6.32. For completeness, I deal briefly with the question of fairness. That is artificial to analyse where the term said to have been breached is the implied term of trust and confidence as this has been found not to have been breached. Although the common law and statutory tests are different, it is hard to imagine a situation where there was reasonable and proper cause for an employer acting in a certain way but which was not also a substantial reason and a reasonable one. More scrutiny is required for the automatic unfairness as this also requires the provisions of s.104 of the Employment Rights Act 1996 to be made out.

6.33. That statutory right is often misunderstood and the requirement to “assert’ a relevant statutory right is sometimes conflated with the exercise of it. The section actually requires the employee to allege an infringement of a statutory right. Mrs Mason’s case was argued on the basis that she had made “references” to her right to opt out of working on a Sunday. In

itself that would not be enough. As it happens, I am satisfied that she has alleged the infringement of that right at least insofar as she has alleged that her reasonable belief in *the effect* of opting out has not been honoured by the employer. There may be arguments as to whether that is an allegation of an infringement of the statutory right or something separate and consequential to it but for present purposes it seems to me to be sufficiently part of her reasonable belief in that right to be included. Moreover, there is no basis for finding that was not done in good faith. I accept she made qualifying allegations of infringement in her grievances of 30 October 2018 and 13 May 2021. Whilst her email of 10 November 2018 to the GMB arguably also contains allegations, I am not satisfied that her employer was aware of that email at all so that its content could have been operative on any of its decision making. I accept that the allegations were restated orally in the grievance meeting with Mr Broughton on 9 June 2021, in her appeal letter of 1 July 2021 and again orally in the appeal meeting with Mrs Marshall on 13 August 2021. Whilst the resignation letter is also relied on, and I accept it contains allegations of infringement of the relevant statutory right, it cannot be relevant to the claim as it post-dates the conduct relied on. Indeed, one difficulty with the sequence of earlier occasions on which the right is asserted to have been infringed, is their temporal proximity to the conduct which the claimant then relies on as occurring in consequence. The first assertion, on 30 October 2028, is after the decision has been made that the claimant and other opted out staff will be rostered for Sundays under the new Sunday working guidelines and I am satisfied could have no bearing on it. The later conduct alleged focuses on the 2021 grievance outcomes by different individuals who would have both had to be adopting the same negative approach to someone suggesting there was a breach or being steered or directed by some third party or other common principle.

6.34. I am not satisfied that causation is made out. In short, I am entirely satisfied that none of the conduct or decisions alleged to breach the implied term of trust and confidence were in any way influenced by the fact she had alleged her right to opt out of Sunday working was being infringed. I would go further and say the mere exercise of that right was itself irrelevant to the decisions.

7. Unlawful deduction from wages

7.1. The essence of this claim is that there are some weeks since November 2018 when the claimant has been rostered on a Sunday, not worked it and her pay has been reduced by 6 or later 5 hours accordingly. Section 13(3) of the Employment Rights Act 1996 provides that a deduction occurs where: -

> ***Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him 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.***

7.2. Whether a payment is properly payable is to be resolved by considering the ordinary contractual principals. (**Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188 EAT**). To be properly payable, a payment must have some legal basis, usually contractual but not necessarily so. (**New Century Cleaning v Church 2000 IRLR 27 CA**).As

to what is “properly payable” that is to be answered by what the contract (or sometimes some other legal authority) provides to be paid.

7.3. In short, if there is a contractual basis for the pay being 6 (or later 5) hours short in the weeks in which the claimant was rostered on a Sunday, then the amount paid to her is the amount properly payable. If not, then there will have been a shortfall and a deduction from wages.

7.4. This claim has not been evidenced in a way that engaged with the actual pay dates and the actual sums paid on each of them. I explained at the outset of the case that without that, it was not possible for the claimant to show the claim was in time, on the basis that I must be satisfied that there was a deduction within 3 months of the date of presentation of the claim. Similarly, I could not determine whether there had been a gap of 3 months or more in the series of similar deductions.

7.5. However, during the course of the hearing Counsel agreed there was a deduction that would bring the claim in time and that if it was well founded, they were likely to be able to resolve the arithmetic between them. In essence, I was invited to decide the claim in the abstract as the only issue of principle is whether the Respondent was entitled to roster the claimant on a Sunday shift at any time from November 2018 until her resignation in September 2021 with the result that on those weeks, her pay was reduced accordingly for the hours not worked. Mrs Mason’s position is that the opt out meant that her 30 hours per week (or 25 hours from 2021) had to be rostered between Monday and Saturday so that the employer’s failure to do that amounted to a deduction from the normal weekly hours she was contracted for.

7.6. As I have stated elsewhere, an opt out from Sunday working does not in itself have the effect of varying the contract. The opt out explicitly renders the terms that require an employer to provide work on a Sunday, or an employee to work it, unenforceable. It does not have the effect of redistributing the hours to other days of the week that the employee may be contracted to work. The effect can be illustrated by an extreme example of a shop worker contracted to work only on a Sunday because the shop is only opens on Sundays. Such a shop worker would still have the statutory right to opt out of Sunday working, yet there would no alternative days on which those hours could be performed.

7.7. Whilst the parties might agree to a new contract which has that effect, I have found that not to be the case here. If an employer and employee did agree to vary the contract, their relations would then be governed by the terms of that varied contract, and not because of any automatic effect of a Sunday working opt out.

7.8. The starting point in this case is that the contract the claimant was employed under explicitly defined her work pattern as being subject to a roster on any 5 over 7 days each week. That term was not varied either expressly or by implication. The contract further expressly cautioned the effect of an opt out as being that hours may not be redistributed to other days of the week and if hours were rostered for a Sunday which was not worked due to the opt out, the pay would be reduced accordingly. It therefore follows that I am satisfied the

respondent was contractually entitled to roster the claimant on a Sunday, that the parties' respective rights under the contract were rendered merely unenforceable by the opt out, and that the amount that the claimant actually received in those weeks that she was rostered on a Sunday (being 6 or later 5 hours less than her contracted weekly hours) was the amount that was properly payable in that week. In other words, there was no deduction from wages in those weeks.

7.9. For completeness, it may be that I need to express my conclusion on an alternative legal basis. If, technically, there was a deduction from wages in those weeks that the claimant was rostered on a Sunday, the effect of the opt out operates as a bar to the claimant enforcing what would otherwise be her rights under sections 13 and 23 of the Employment Rights act 1996 as the only reason for that deduction was the operation of the statutory opt out.

8. Wrongful dismissal

8.1. This is a common law claim alleging breach of contract. The contractual term said to be breached is the notice the employer is required to give the employee when terminating the contract. In this case the respondent did not terminate the contract as a matter of fact and was not, therefore, obliged to give any notice. What is alleged, within the unfair dismissal claim, is that the respondent acted in a way that entitled the employee to accept the repudiatory breach of contract and accept it by resigning and treating herself as released from any ongoing contractual obligation she may herself have to the employer. In the context of constructive dismissal claims, that ongoing contractual obligation will typically be in respect of the notice period that the employee would herself otherwise be obliged to give to the employer to bring the contract to an end. The question of contractual notice from the employer to the employee does not therefore arise.

8.2. I note the submissions describe the claimant as having been "constructively wrongfully dismissed". The confusion in that term may stem from the operation of section 95(1)(c) of the Employment Rights Act 1996 which does two things. First it modifies the law of repudiatory breach in the context of employment cases by permitted an employee to resign with contractual notice without the performance of that contractual term amounting to an express affirmation of the contract (which it otherwise would). The second and more pertinent thing it does is to deem that resignation to be a dismissal in law for the purposes of a claim of unfair dismissal. Section 95 is explicitly stated to apply "for the purposes of this part", that is part X of the Act dealing with unfair dismissal. It does not modify the common law and it does not apply to part IX which otherwise deals with certain rights during notice.

8.3. For those reasons, there is no claim for breach of contract in respect of notice, irrespective of the outcome of the unfair dismissal claim. To the extent one is alleged, I dismiss it for those reasons.

8.4. That does not mean to say there could not be a breach of contract claim relating to the breach of the implied term but that is not the claim that has been brought. Such a claim might have the feel of a claim for notice pay as the measure of loss would be subject to the 'least

onerous principle (or the “minimal performance principle”) where the contract could have been lawfully terminated by giving the contractual notice period. Were such a claim before me, it would necessarily stand or fall with the constructive unfair dismissal claim. The only practical differences between it and a claim of constructive unfair dismissal that I can see would be in respect of any statutory adjustments to unfair dismissal compensation and the application of the recoupment provisions, neither of which would apply to damages for breach of contract.

8.5. However, even if that is the contract claim that was intended, as the constructive unfair dismissal claim has failed, so too would this claim have failed.

EMPLOYMENT JUDGE R Clark
DATE: 13 January 2023