EMPLOYMENT TRIBUNALS

Claimant: **Ms Marie Johnson**

Respondent: **Bronzeshield Lifting Ltd**

Heard at: **London South Employment Tribunal**

On: **29 – 31 January 2024**

Before: **Employment Judge Dyal, Mrs Foster-Norman and Miss Murphy**

Representation:

Claimant: **in person (supported by Mr Foster)**

Respondent: **Mr McNerney, Counsel**

Upon the Respondent requesting written reasons they are provided as follows:

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. At the outset of the hearing there was a discussion of the issues and save for the concessions noted below it was agreed that they remained as identified at the Preliminary Hearing of 30 March 2023.

3. To summarise, there are two complaints of direct sex and disability discrimination. The complaints are that:

3.1. The Respondent failed to take into account the fact that the claimant was going through the menopause in determining her flexible working request dated 4 July 2022;
3.2. The Respondent refused the claimant's flexible working request dated 4 July 2022.

4. There is also a complaint of unfair (constructive) dismissal. The key issue is whether there was as dismissal and the Claimant relies upon those same two complaints as the allegations of breach of the implied term of trust and confidence.

5. There is a complaint of failure to provide written particulars of employment.

The hearing

6. *Documents before the tribunal*

6.1. Bundle running to 178 pages;
6.2. Respondent's chronology, cast list and list of key documents;
6.3. Witness statement for witnesses identified below.

7. *Witnesses the tribunal heard from*:

7.1. The Claimant;
7.2. Mr Martin Jones, Executive Director
7.3. Ms Rebecca French, external HR Consultant

8. The Claimant represented herself and did so with some skill. She cross-examined the Respondent's witnesses in detail. The Respondent was represented by counsel who presented the case robustly but with due sensitivity where that was needed.

Concessions

9. Shortly before the hearing the Respondent conceded in correspondence that the Clamant had been a disabled person within the meaning of the Equality Act 2010 at the relevant times by reason of menopause.

10. At the outset of the hearing, counsel conceded that the Respondent had been in breach of the duty to provide all of the written particulars of employment required under the Employment Rights Act 1996. Some of the relevant particulars were contained in a handbook which it admitted that the Claimant had not been provided with.

Findings of fact

11. The tribunal made the following findings of fact on the balance of probabilities.

12. The Respondent is in the business of crane hire. It is a small employer with a predominantly male workforce. The business owner is Mr Bill Frost but in the

relevant period he was unwell and was not involved in managing the index events. During the relevant period Mr Jones, Finance Director, dealt with personnel issues.

13. The Claimant was employed by the Respondent from December 1995 onwards as an administrator. She was therefore a very long serving employee.

14. The Claimant became menopausal in around January 2018 and remained menopausal at the time of the material events in this claim. She experienced a wide range of symptoms. These included physical symptoms of many kinds and also mental health symptoms such as:

    14.1. Low mood and volatile emotions.
    14.2. Anxiety and low self esteem. Things that she had previously found easy she found hard and anxiety/panic inducing.
    14.3. Sleep problems with tiredness and fatigue in the day time as a result.
    14.4. Brain fog: it felt to her like she had a goldfish bowl on her head. She knew what was going on but felt distant and found it hard to concentrate. She had feelings of disorientation. This could have happen for hours or days at a time.

15. The symptoms the Claimant experienced fluctuated and she had good days and bad days. Generally, menopause affected her resilience and ability to cope with the stresses and strains of daily life and work. This was unfortunate as the index events in the case coincided with some challenging things in the Claimant's personal life. Her mother and father were elderly and needed assistance with appointments and her uncle was unwell.

16. By 2021, the Claimant's working hours were, 32.5 per week, Monday to Friday 9am – 4pm, with a half an hour unpaid lunch break. In practice the Claimant did not take a proper lunch break. She ate at her desk and we accept her evidence that she would often be disturbed and asked to do work tasks. She did leave her desk a few times in the course of the day to make tea for herself and her colleagues.

17. On 20 August 2021, the Claimant asked to amend her working hours and reduce to a four day week in order for her to attend a course on Wednesdays:

    With both my children now grown up, I am no longer restricted to times, but at the same time with the above in mind, I am at a point in my life (coping with the "Old Lady Disease" [this was, and was understood to be, a reference to menopause]) that I need to reconsider my future…

    I would now like to work my hours over four days, this would be 9am to 5pm, Monday, Tuesday, Thursday and Friday. (Whilst on Wednesday I would not be in the office, I would be happy to check my emails on my table (at intervals during the day) and respond to them if required.)

18. On 24 August 2021, Mr Jones wrote to the Claimant agreeing this request for the period 13 September 2021 to 1 July 2022. The hours would thus be 30 hours per

week: Mon – Tue, Thur – Friday, 9 – 5 with 30 mins for lunch. The letter proposed a review on 1 July 2022 to review the arrangement and decide whether they should be made permanent "*otherwise you will revert to your current working arrangement on that date*".

19. No such review meeting was arranged and on his own candid account that was because Mr Jones had forgotten about the matter. However, at around the time the arrangement was coming to an end, the Claimant spoke to Mr Jones in the office and asked if she could reduce her hours further and change her day off to Fridays. Mr Jones told her to put the request in writing.

20. On 4 July 2022, the Claimant applied by email to work Monday to Wednesday 9 – 5pm, taking her lunch-break at 4.30 – 5pm (so leaving the office at 4.30pm), Thursday 9 – 1pm, with Friday off. In this short email she said this: "*due to changes in my circumstances, i.e., my elderly parents and my menopause issues, I do not feel that I can return to work for the five days as a I used to."* She suggested that Emma, a colleague, in accounts could cover the hours she had previously worked on Thursdays and Fridays. Emma worked 2.5 days per week, being a half day on Wednesdays and then Thursdays and Fridays.

21. It is relevant to note that the Respondent's office was in Crayford very near the Dartford tunnel and a number of major roads including the M25. It was thus a traffic blackspot and the traffic was especially bad on Fridays. The Claimant lived in Greenhithe and in low traffic the drive to the office was about 10 mins. In bad traffic it could take an hour or more.

22. On 7 July 2022, there was a meeting between the Claimant, Mr Jones and Ms French, external HR consultant:

    22.1. The Claimant said Emma could cover the hours she used to work on Thursdays/Fridays.
    22.2. Mr Jones disagreed – Emma worked in accounts and it was too much pressure/work to cover someone else's work all the time.
    22.3. The Claimant said that her role was not as busy as it used to be and that her "*mental health is not the same as it was as a result of the menopause*".
    22.4. Mr Jones said that taking the lunch break at the end of the day was not possible. There needed to be a break of 20 mins or more where employees worked a 6 hour shift or longer. The Claimant said that she took lunch at her desk and would be asked to do things. The Claimant said she needed to leave work before 5pm as she was concerned about traffic and getting home late.
    22.5. Ms French said a lot of people were having trouble with traffic and that the Claimant's full time hours finished at 4pm so she could travel home before the traffic was heavy.
    22.6. Mr Jones said that Friday could be the business' busiest day.

22.7. The Claimant said that traffic was really busy on a Friday and she would prefer to have Friday off.
22.8. The Claimant was asked by Ms French if there were any other reasons for wanting Friday off rather than Wednesday and she said she was a carer for her parents, her son and partner could help on Wednesday, but that they were not around on Fridays.
22.9. Mr Jones said the Claimant could take carer's leave as needed.
22.10. The Claimant said she felt she could not come back 5 days a week and needed Fridays off.

23. It was both Mr Jones' and Ms French's evidence that they approached the meeting hoping to reach a compromise with the Claimant in respect of some kind of 4 day per week working pattern that did not involve taking Fridays off, whether the one arising from the first flexible working application or otherwise. However, we find as a fact that at the meeting no indication was given to the Claimant that she could continue to work the 4 day a week pattern she had been working since September 2021 nor some other 4 day a week arrangement. If such an indication had been given it would have been plain in the notes of the meeting and it is not. On the contrary the sense of the meeting was that the Claimant would have to return to work 5 days a week if her specific application was refused. We also find as a fact that at the meeting the Claimant gave the clear impression that the non-working day had to be Friday. She had particular reasons for wanting the non-working day to be Friday rather than any other day and we think that is likely to have come across.

24. By letter of 8 July 2022, the application was refused. The letter is from Mr Jones and we find that he was the decision maker notwithstanding that in his oral evidence he suggested at times it was HR's decision (we do not accept it was, HR simply gave him advice to enable him to make his own decision):

24.1. The letter said that Fridays could be the busiest day due to customer demands and having to finalize quotes in preparation for the weekend. The request could not be accommodated for a number of reasons. In summary that the proposed working pattern did not work for the business because Friday was the busiest day, it was not fair on the existing staff to cover the Claimant's work on a permanent basis on Thursday afternoon and Friday, and that it was not feasible to recruit to cover the claimant. Further, breaks needed to be taken of 20 minutes for every six hours worked. If the Claimant finished at 4pm, that would allow her to miss the rush hour. The Claimant could take carers leave for her parents if required.

24.2. There as no indication the Claimant could work four days a week, with a day other than Friday off. On the contrary, the implication of the letter was that the Claimant would have to work 5 days per week.

24.3. The letter also said in a freestanding paragraph, "*You also explained that your mental health has changed due to you experiencing symptoms of menopause and you find yourself needing more time away from work."* Later it said if the Claimant wanted support with menopause symptoms to let the Respondent know, and she was referred to a website with information about menopause. It said that the Claimant had a right to appeal the decision and could do so in writing within 10 working day.

25. We pause the chronology of events to make some important findings.

Business implications of the requested work pattern

26. A significant issue of dispute between the parties was whether having Fridays off in particular was problematic for the business. Mr Jones' evidence was that it was because Fridays was the busiest day for the business. That was because the office was not open on the weekend but the business was operating – it had cranes out for hire at the weekend. That meant in effect it was necessary to deal with three days on Friday, not only Friday itself but also the weekend.

27. On balance, we accept that Friday was generally the busiest day for the business. It was the busiest day for the hire department, to which the Claimant was attached, and it was the busiest day for the accounts department in which Emma worked.

28. We also accept Mr Jones' evidence that if the Claimant finished work on Thursday at 1pm the business would be without an administrator for 3.5 days and that this was a long time in the context of this business.

29. We also accept that as matters appeared at the time of dealing with the application it was both reasonable and rational for Mr Jones to conclude that:

    29.1. the Claimant's job would need to be covered while she was out of the office;
    29.2. it would be too much to ask existing staff to cover the Claimant's work in her absence for 1.5 days per week on a permanent basis;
    29.3. it was unlikely that it would be possible to recruit someone new for one day per week.

30. However, it is another matter whether Friday was the busiest day for the Claimant. The Claimant's evidence was that it was not the busiest day for her, because the (travelling) sales reps she supported tended to avoid the office on Fridays, so her workload was thereby reduced. Fridays had also become less busy because the applications for road closures and parking suspensions that she dealt with were now done well in advance so could be planned for. It was plain that Mr Jones had little direct knowledge of the Claimant's day to day workload. He did speak to the sales director, Mr Stevens, about the Claimant's workload, but we accept the Claimant's evidence that Mr Stevens, also did not

have clear oversight of the detail of her workload and how it spread over the week. In our view the best evidence about whether Friday was or was not the Claimant's busiest day is the Claimant's and we accept her evidence that it was not.

31. Nonetheless, for the reasons noted above, it would have been problematic for the business for the Claimant to have Fridays off especially if combined with Thursday afternoon off.

Link between request for flexible working and menopause

32. One of the features of the Claimant's application of 4 July 2022 is that it made reference to the Claimant having "menopause issues", made clear this was a basis for the request, but did not make very clear what the link was between menopause and the requested work pattern i.e., what it was about being menopausal that meant the claimant wanted a different work pattern. The same thing is true of the meeting of 7 July 2022. The Claimant made reference to menopause but it was not very clear what that had to do with the requested work pattern.

33. In her oral evidence (which we accept) the Claimant was asked whether there was a link between the hours she was asking to change to and menopause and if so what. In essence her evidence was that she was struggling with work because of the mental health symptoms arising from menopause and did not feel able to work full time. Her general resilience and ability to cope with life and work had reduced. The reason she wanted Friday off in particular was twofold. Firstly, the traffic was awful on Fridays. Even if she were not menopausal the traffic would have been an objective reason for having Fridays off in particular. However, there was also a link with menopause in that with her reduced mental well-being meant she found the traffic harder to cope with. She experienced a greater level of anxiety about getting to work on time and home on time. We accept this evidence which is essentially consistent with having a reduced ability to cope with the stresses and strains of normal day to day life. Secondly, on Fridays there was no-one else to support her parents whereas on other days there was. Again, caring for elderly parents is one of the challenges of life that can affect people with or without menopause, but, the Claimant's ability to cope with the challenges of life (including this one) was reduced by menopause.

34. Mr Jones' oral evidence included the following:

    34.1. He did not know much about menopause;
    34.2. He did not ask the Claimant what her menopause symptoms were when dealing with the application (and he did not otherwise know). Asked why not, at one stage he said he did not know why not and at another that he would "not understand" it;
    34.3. Asked if he had given any thought to the Claimant being menopausal when dealing with her application he said he could not recall if he had or not. Set

in the context of the wider evidence we find that this reflects the reality that he did not give any thought to the Claimant being menopausal when dealing with her application.

34.4. He was asked what he would have done if the Claimant had made the same request but reported another condition, say cancer or any other significant condition, instead of menopause. His immediate answer was that it would depend because it might mean she needed to have treatment, like chemotherapy. He was asked whether he would have made inquiries of the Claimant whether she needed treatment and he said he would have consulted HR.

35. Ms French's oral evidence included the following:

35.1. She was asked if, when dealing with the Claimant's application, she knew what the link was, or whether there was a link, between menopause, and the work pattern requested. She said: "*I can't recall that*."

35.2. She was asked whether she had asked the Claimant a question to the effect of '*what does being menopausal have to do with the flexible working request?'* she could not recall doing so but said that she had discussed the request;

35.3. She was asked whether she had taken menopause into account when advising the respondent and if so in what way. Her answer was that it would have been taken into account to give support if needed, but the main factor was, that menopause wasn't the reason for the Claimant not to work Fridays. It would be a detriment to the business for the Claimant to not work Fridays and the Claimant was offered support menopause in the outcome letter.

Resignation and subsequent events

36. On 10 July 2022, the Claimant resigned on 4 week's notice. She wrote:

> *It is disappointing to note that as my circumstances are changing with my menopause and elderly parent situation, that none of the above has been taken in to consideration, nor a compromise suggested by yourselves even though for the last eleven months there has been not detrimental impact on the business whilst I have only worked my hours over four days, unfortunately if my needs cannot be met then it is with great regret that I feel my only option is to terminate my employment with Bronzeshield.*

37. On 11 July 2022, the Respondent wrote to the Claimant on 11 July 2022 offering her a 7 day cooling off period and reminding her that she could appeal the flexible work decision:

> *As stated in the previous flexible working meeting outcome letter, we cannot agree to a flexible working request that is in breach of the Working Time Regulations 1998, though we did offer you the opportunity to appeal the*

outcome if you think we have made an error in our judgement or if you do not feel we have suitably considered your circumstances.

Therefore, you are reminded that you have a statutory right to appeal our decision if you would like to reconsider your resignation from Bronzeshield and we would welcome discussing the matter further, particularly if you have any alternative ideas or solutions that you feel would work for both you personally and Bronzeshield Lifting Ltd.

38. The Claimant, responded on 22 July 2022. She challenged the flexible working decision directly in a reasoned 5 page, typed letter. The letter was not headed 'appeal' but in its substance that is essentially what it was.

39. Mr Jones was asked why the Respondent did not simply treat the Claimant's correspondence as a letter of appeal. It indicated that she disagreed with the decision to reject her application and set out in detail the basis of the disagreement. Mr Jones' evidence was essentially because it was not labelled as an appeal. Ms French could not shed any further light on the matter as she passed the case to a colleague at some point after the Claimant's resignation.

40. On 25 July 2022, the Respondent responded to the Claimant's letter. It asserted the Respondent's position in some detail. It extended the time for the Claimant to appeal and extended the cooling off period by a further 10 working days.

41. Neither party suggested an alternative work pattern in this correspondence though the Claimant expressed disappointment that the Respondent had not done so and the Respondent invited the Claimant, essentially, to do so in a letter of appeal.

42. After the Claimant's employment ended she was not replaced. The Respondent tried but failed to recruit a replacement. However, an ex-employee returned to its employment in August 2022 in the role of desk manager, and he was able pick up the Claimant's administrative duties. Mr Stevens took on the quotations the Claimant used to carry out and her work on road closures and suspensions zones were outsourced.

Law

Direct discrimination

43. Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

44. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…

45. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

46. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

47. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

48. The EHRC Employment Code says this on comparators in direct disability discrimination cases:

> *3.29*
> *The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).*
>
> *3.30*
>
> *It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.*
>
> *Example:*
> *A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.*

49. In ***Aylott v Stockton on Tees*** [2010] IRLR 994, Mummery LJ said this:

> *39. The employment tribunal selected a hypothetical comparator. As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must, as directed in section 3A(5) , be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same "or not materially different". The claimant's abilities, as directed in section 3A(5) , must be attributed to the comparator. Although the comparator is not required to be a clone of the claimant, failure by the employment tribunal to attribute other relevant circumstances to the comparator may be an error of law on the part of the tribunal: see, for example, the judgment (Judge McMullen QC) in High Quality Lifestyles Ltd v Watts [2006] IRLR 850 . However, as explained below, there is no obligation on the employment tribunal to construct a hypothetical comparator in every case and failure to do so does not necessarily lead to an error of law in the employment tribunal's findings.*

The burden of proof and inferences

50. The burden of proof provisions are contained in s.136(1)-(3) EqA:

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

51. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

52. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

53. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

54. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

Constructive dismissal

55. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in

response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

56. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

57. A breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

58. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25].

59. A completed repudiatory breach (unlike and anticipatory one) cannot be cured unilaterally by the guilty party: ***Buckland v Bournemouth University*** *[2010] IRLR 445.*

60. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see Chief Constable of Avon & Somerset Constabulary v Dolan (UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and Shaw v CCL Ltd [2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

61. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465*.*

62. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not

necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

Unfair dismissal

63. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed.

64. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996).

65. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA. The burden of proof is neutral. Section 98 (4) says:

> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

66. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

Submissions

67. The Respondent's submissions were primarily focussed on the 'reason why' the application for flexible work was refused. In short, the submission was that the balance of evidence showed that it was for the business reasons given in the Mr Jones outcome letter.

68. Judge Dyal flagged that the first discrimination complaint/allegation of breach of the implied term raised a distinct issue about failing to take into account the fact the claimant was going through the menopause in determining her flexible working request.

69. At this point, notwithstanding that the issues had been agreed at a preliminary hearing, that the orders following the hearing gave 14 days for comment (and no comment had been made) and that the issues had been agreed to be correctly identified by both parties at the outset of the hearing, Counsel, submitted that 'failing to take into account' was too vague.

70. Judge Dyal asked counsel whether he accepted that in principle direct disability discrimination could occur if a person with one disability were treated less

favourably than a person with a different disability who was otherwise in like circumstances, where the reason for the difference of treatment was the fact the person had disability they had rather than the disability the comparator has. He agreed, rightly, in principle that it could, but submitted that in this case that is not what had happened. What the claimant wanted was to work the pattern she had requested and that would have been refused no matter what the disability in question had been.

71. The Claimant made a brief closing statement in which she complained of the way that she had been treated.

Discussion and conclusions

Direct discrimination: disability/sex

Complaint 1: Fail to take into account the fact that the claimant was going through the menopause in determining her flexible working request dated 4 July 2022?

72. We reject the submission that this complaint is too vague. The allegation simply means what it says. It is clear and intelligible.

73. The facts of this complaint are well founded. The Respondent did not to take into account the fact that the claimant was going through the menopause in determining her flexible working request of 4 July 2022 and in the circumstances of this case that can properly be described as something it 'failed' to do.

74. The starting point is that the Claimant linked her flexible working request to "menopause issues" in the request itself. In the very short email making the request one of the few things she said was "*Due to changes in my circumstances, i.e my elderly parents and my menopause issues, I do not feel that I can return to work for the five days as I used to."* So this was not a case in which reference to menopause was tucked away and easily missed; it was front and centre in the request for flexible working.

75. The request itself made clear that the Claimant was saying there was link between the menopause and the working hours she wanted to work but it did not explain what the link actually was. The same was true at the meeting of 7 July 2022. The Claimant was clearly saying that there was a link between menopause and the request she was making but did not make clear what the link was.

76. At the meeting itself there was very little discussion of menopause and the Claimant was not, for instance, simply asked what her symptoms were and how menopause was related to her request.

77. We find that the Respondent did not in any sense take into account the fact the Claimant was menopausal when dealing with her request. This is plain from the above and from both Mr Jones' and Ms French's evidence the key parts of which we will repeat:

77.1. Mr Jones' evidence was that he not know much about menopause. His evidence was also that he did not ask the Claimant about it when dealing with her request. He said he did not do so because he would not understand. While we accept that was his approach, he is an intelligent man and he was of course in fact able to understand menopause symptoms if he asked someone about them and they explained them to him in an ordinary way. There is nothing inordinately difficult to understand. What was needed was not some scientific understanding, but simply how menopause affected the Claimant day to day in life and at work. That was easily within Mr Jones' comprehension.

77.2. Mr Jones' evidence was that he could not recall whether he had given any thought to the Claimant being menopausal when deciding her application and we think this is a very powerful indicator that he did not and we so find.

77.3. Mr Jones was taking advice from Ms French. When she was asked, 'did you know what the link was, or whether there was a link, between menopause and the work pattern requested?" she said "*I can't recall that*." Ms French could not recall asking the Claimant whether there was a link between menopause and the request.

78. Although Mr Jones was aware that the Claimant was menopausal and that she linked her request to, among other things, menopause issues, we find that we did not take this into account when determining her application.

79. We acknowledge that there are references in the outcome letter to menopause:

> *"You also explained that your mental health has changed due to you experiencing symptoms of menopause and you find yourself needing more time away from work.*
>
> *[…]*
>
> *If you would like us to arrange further support for you for the symptoms you are experiencing due to the menopause, please do let us know and we would be happy to arrange this for you. Alternatively, you can visit https://www.wellbeingofwomen.org.uk/about-us/ for more information and support*."

80. These references need to be read in the context of the oral evidence that we have heard and we remain of the view that Mr Jones did not take into account the fact the Claimant was going through the menopause when determining her flexible working request. In context, what they show is that the Respondent was aware that the Claimant was menopausal but did not treat it as something to bring into account when determining her request. It thought it was something she might need other support with outside the context of the flexible working request. In fact, granting the flexible working request *was* the support the Claimant was looking for.

81. A further issue is whether this was less favourable treatment than a relevant comparator would have received. For the purposes of the disability discrimination complaint a relevant hypothetical comparator would be a hypothetical employee who was employed in the same job as the Claimant with the same working pattern who made a request in like terms as the Claimant did on 4 July 2022 but with a different serious medical condition. Cancer is the one referred to in the evidence but it could be any other significant condition that is capable of affecting a person in a profound way, but where the actual effect on the person cannot be ascertained simply from the name of the condition (because it affects different people different and various a lot from case to case).

82. We think it is plain from Mr Jones' evidence that he would have treated such an employee differently. His first thought was about whether this person needed time off for treatment. The significance of this is in our view reflects the reality of the situation that Mr Jones would have been interested to find out, and would have asked basic questions to ascertain, what this hypothetical employee's needs were and what the link was between having the condition and the request to work flexibly actually was. More generally he would have taken the condition into account when determining the application. We consider it wholly implausible that this would have been left unexplored and simply dealt with by offering the employee unspecified general support with a link to a website. Realistically, the employee would have been asked to explain what the link was between the condition and needing to work the requested work pattern.

83. It is plain also that the reason for the difference of treatment is disability, i.e., the particular disability of menopause. Relying on and building on the above fact finding and reasoning, *because* the Claimant's particular disability was menopause Mr Jones treated it as something he did not need to take into account. He did not ask about it and assumed (baselessly) that he would not understand it. This in our view reflected an attitude that because the medical condition in issue was menopause in particular rather than another condition it was not something that he had to go into or think about when dealing with the application.

84. The first complaint of direct disability discrimination (3.2.1 on the list of issues) succeeds.

85. Turning to the matter of direct sex discrimination we do not think that there is any cogent evidence, and none sufficient to shift the burden of proof, to suggest that the reason or part of the reason for the treatment was sex as distinct from menopause.

86. It is of course true that menopause affects almost all women but nonetheless menopause and sex are different and distinct grounds. We do not think there is any credible evidence to suggest that the reason there was a failure to take into

account the fact the Claimant was going through the menopause in determining her application was because she was a woman.

87. A further matter is that the Claimant did not advance the claim in this way. She put it on the basis that she was menopausal rather than on the basis that she was a woman.

Complaint 2: Refuse the claimant's flexible working request dated 4 July 2022?

88. There is no dispute that the Respondent did refuse the Claimant's flexible working request.

89. As our reasoning above shows the refusal of that request had nothing whatsoever to do with the Claimant's menopause it was not a factor that was taken into account.

90. We also do not think that a comparator with a different disability but whose circumstances were otherwise the same as the Claimant's would have been treated differently as regards the outcome of the application. This would be somebody who, because of their (different) disability, had a moderately reduced ability to cope with the strains of life and work, so wanted to change working hours to the pattern the Claimant requested. Their particular reasons for wanting to avoid Fridays would be the same: because of bad traffic which they found particularly stressful because of their disability and because of caring responsibilities. The comparator's request would also have been refused.

91. We accept that the reasons for refusing the request were those given by the Respondent. Namely that:

    91.1. It would be unlawful for the claimant to work 9 – 4.30pm without a break on Monday to Wednesday so the requested work pattern had to be refused;

    91.2. It was not convenient or practicable for the business for the Claimant to take Fridays off.

92. So this complaint must fail as an allegation of direct disability discrimination.

93. It must also fail as a complaint of sex discrimination. We repeat the above analysis and add that there is no basis to infer that sex was any part of the reason for the refusal.

94. The Claimant did note that the sales reps she worked for did not regularly come to the office on Fridays and could come and go as they pleased. However, they were in a completely different position to her doing a completely different kind of job that - simply - was not office based. They were principally on the road trying to make sales and in a materially different position to the office staff. It was

inevitable that they would have much more freedom to come and go from the office as they pleased. The comparison with the sales reps is not a relevant one.

Constructive unfair dismissal

Was the Claimant dismissed?

95. The Claimant says she was constructively dismissed by one or both of two alleged breaches of the implied term of trust and confidence.

Fail to take into account the fact that the claimant was going through the menopause in determining her flexible working request dated 4 July 2022?

96. For the reasons given above, we find that the Respondent did fail to take into account the fact that the claimant was going through the menopause in determining her flexible working request of 4 July 2022.

97. It is plain that the Respondent did not have reasonable and proper cause for failing to take it into account. It would have been very simple to do so. All that was really required was to ask the Claimant a few questions, listen to her answers and factor it all into the reasoning when coming to a decision upon the application.

98. The question then is whether it was conduct that was, objectively, calculated or likely to undermine trust and confidence. In our view it was:

    98.1. Flexible working applications based upon health factors are generally matters of significant objective importance. That is because it often really matters to people what hours they work. The hours an employee works have a major impact on the employees life. That was also the case here.
    98.2. All the more so where the employee has physical and/or mental health problems and where they have a lot of commitments.
    98.3. It matters how a flexible working application is dealt with – the outcome is not the only thing of importance.
    98.4. The Claimant went to the Respondent asking for assistance. She put the request in significant part on the basis that she was menopausal – that factor was front and centre even if the detail of it was not clearly explained.
    98.5. Menopause was one of the main things going on in the Claimant's life and was affecting her in a profound way.
    98.6. Prior to rejecting the request to work flexibly, there was an absence of effort to try and understand how menopause was affecting her and to ascertain its relevance to the application.
    98.7. That important factor was left out of account without any good reason.

Refuse the claimant's flexible working request dated 4 July 2022

99. The Request was indeed refused.

100. In our view there was reasonable and proper cause for the refusal:

100.1. Firstly, and this a sufficient basis to give reasonable and proper cause, the hours the Claimant proposed working would have involved working from 9 – 4.30pm without a rest break on Monday – Wednesday and this would have been a breach of the Working Time Regulations 1998 and otherwise would have been bad practice. Even though it true that the Claimant was not in the habit of having proper rest break, that does not mean it would be acceptable to formalise that into her contractual working pattern.

100.2. Secondly, there were sound business reasons for refusing the request to take half of Thursday and then Friday as a non-working day. It would have left the business, which operated 7 days per week, without an administrator for some 3.5 days. That is a very long time. There was a proper basis to concluded that it would be unfair to ask existing staff to cover the Claimant's work in her absence and that it was unlikely that it would be possible to recruit someone for one day per week.

101. The Respondent was in repudiatory breach. The Claimant did resign in response to the breach and did so swiftly, without delay or waiver. She was constructively dismissed.

102. The Respondent has not submitted that if the Claimant was dismissed the dismissal was fair, and that is a realistic position. Nor does it aver that the dismissal was fair in its grounds of resistance.

103. The dismissal was unfair. There is no pleaded fair reason and it was unfair in any event in all the circumstances.

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Employment Judge Dyal

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Date **29.02.2024**

SENT TO THE PARTIES ON
15.03.2024

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FOR EMPLOYMENT TRIBUNALS