EMPLOYMENT TRIBUNALS

Claimant: Mrs S Markwick

Respondent: The Bevendean Community Pub Ltd

Heard at: London South Employment Tribunal – hybrid hearing

On: 20 – 22 February 2024

Before: Employment Judge Macey
Ms J Forecast
Mr A Peart

Representation
Claimant: Mr Grover, non-practising solicitor on 20 February 2024 and then in person

Respondent: Mrs Singh, solicitor

JUDGMENT having been given orally on 22 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

CLAIMS AND ISSUES

1. The claimant brought claims for unfair dismissal and direct age discrimination.

2. The respondent after the case management hearing on 31 March 2023 did not in its amended ET3 include a "proportionate means of achieving a legitimate aim" as a defence to the claim for direct age discrimination. The issues relating to a "proportionate means of achieving a legitimate aim" were removed from the agreed list of issues.

3. The outstanding issues that were agreed at the case management hearing on 31 March 2023 were as follows:

1. **Time limits**

    1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 18 May 2022 may not have been brought within time.

    1.2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

        1.2.1. Was the claim made to the tribunal within 3 months (plus early conciliation extension) of the act to which the complaint relates?

        1.2.2. If not, was there conduct extending over a period?

        1.2.3. If so, was the claim made to the tribunal within three months (plus early conciliation) of the end of that period?

        1.2.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

            1.2.4.1. Why were the complaints not made to the tribunal in time?

            1.2.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

    2.1. What was the reason or principal reason for the dismissal? The respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

    2.2. If the reason was misconduct did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:

        2.2.1. there were reasonable grounds for that belief;

        2.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation.

        2.2.3. the respondent otherwise acted in a procedurally fair manner;

        2.2.4. the dismissal was within the range of reasonable responses.

3. **Remedy for unfair dismissal**

    3.1. If there is a compensatory award, how much should it be? The tribunal will decide:

        3.1.1. What financial losses has the dismissal caused the claimant?

        3.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

        3.1.3. If not, for what period of loss should the claimant be compensated?

        3.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

        3.1.5. If so, should the claimant's compensation be reduced? By how much?

3.1.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.1.7. Did the respondent or the claimant unreasonably fail to comply with it?

3.1.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.1.9. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.1.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.1.11. Does the statutory cap of fifty-two weeks' pay apply?

3.2. What basic award is payable to the claimant, if any?

3.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Direct age discrimination (Equality Act 2010 section 13)**

4.1. At the date of the claimant's dismissal she was 58 years old. She compares herself with people in the age group 20-40.

4.2. Did the respondent do the following things:

4.2.1. On or around 13 January 2022, Sarah Hamilton allocated the claimant only two days (12 hours) in the weekly rota, when the claimant's contract was for 23.5 hours. Comparators: Kelsey (in her 20s); Ray (in his 20s or 30s).

4.2.2. On 13 January 2022 Sarah Hamilton did not respond to the claimant's query about her hours. Comparator Paige (in her 20s).

4.2.3. On 21 January 2022 Sarah Hamilton made the claimant wait to have a chat about her hours while she had a drink at the bar.

4.2.4. On or around 5 February 2022 Sarah Hamilton allocated the claimant only 16 hours in the weekly rota. Comparator: Paige.

4.2.5. Sarah Hamilton did not allocate the claimant a shift on Saturday 5 February 2022 and gave work instead to a new member of staff. Comparator: Nate (in his 20s).

4.2.6. On 17 February 2022 when the claimant mentioned how unhappy she was feeling Sarah Hamilton said, "Why are you still here?".

4.2.7. On 24 February 2022 Sarah Hamilton accused the claimant of falsifying her contract and suspended her.

4.2.8. On 19 May 2022 Sarah Hamilton removed the claimant from the staff group chat on WhatsApp.

4.2.9. On 23 May 2022 Sarah Hamilton and Chris Llewellyn decided to dismiss the claimant.

4.3. Was that less favourable treatment?

The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the tribunal will decide whether she was treated worse than someone else was treated.

Where the claimant relies on an actual comparator that is set out above.

4.4. If so, was it because of age?

5. **Remedy for discrimination**

5.1. Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2. What financial losses has the discrimination caused the claimant?

5.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4. If not, for what period of loss should the claimant be compensated?

5.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8. Should interest be awarded? How much?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

4. For the claimant the tribunal heard evidence from the claimant. The claimant did not have a written witness statement and it was agreed that the content of her ET1 could be used as her evidence to the tribunal. The claimant provided a letter from Mr Charlie Pyment, her former manager at the respondent. The respondent agreed that this could be read to the tribunal but that the contents of the letter were not agreed by the respondent.

5. For the respondent, the tribunal heard evidence from Mr Chris Llewellyn (who had been secretary of the committee at the respondent until 14 July 2023). The tribunal decided to hear Mr Llewellyn's evidence first because the claimant only had representation for the first day of the hearing.

6. There was an agreed bundle of 173 pages. Page 64 of the bundle had parts of the document cut-off. The panel requested a full copy, which was provided by the claimant. In addition, the minutes of the appeal hearing at page 101 appeared to stop abruptly and the panel queried whether it was the entire document. An additional page of the minutes of the appeal hearing was provided by the parties.

7. The format of the hearing was a hybrid hearing with the respondent's witness attending remotely by video (CVP).

8. The remedy part of the hearing was postponed due to unforeseen circumstances. This meant that the fourth day of the hearing was vacated.

FACTS

9. The relevant facts are as follows. Where I have had to resolve any conflicts of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

10. The claimant was employed by the respondent, originally as bar staff from 17 July 2018 and then from October 2020 as designated premises supervisor. The claimant's employment terminated with effect from 31 May 2022 (as confirmed by the respondent's ET3 and response). At the date of the dismissal the claimant's age was 58.

11. The respondent runs a community pub called The Bevy that was established by the residents of a deprived housing estate. It is run by a committee and all the committee members are volunteers.

12. The claimant says that she was given a contract of employment by Charlie Pyment (the manager at the respondent at that time) at the start of her employment. She and Mr Pyment signed this contract which is headed "Statement of Main Terms of Employment" [58-59] on 17 July 2018. This is supported by Mr Pyment in his letter. This contract [58-59] is two pages and has space for the name of the employee, start date, job title, hours of work and pay rate to be added in by hand.

13. The claimant says this was the only contract of employment she was given and that the minimum hours in that contract were 23.5 hours and the rate of pay was £9.00 ph. The claimant further says that she wrote in the hours (23.5) and rate of pay (£9.00ph) in front of Mr Pyment. Mr Pyment in his letter states that he cannot remember the number of hours that were in the contract.

14. Mr Pyment in his letter does remember that both he and the claimant signed the contract and then he placed it into the filing cabinet in the office at the respondent.

15. The respondent has not provided an alternative contract for 17 July 2018 to the one at 58-59 and has provided no explanation as to why it had not been provided.

16. There is a further unsigned contract of employment dated 15 April 2021 [60-63] which states that the claimant's job title is "The Designated Premises Supervisor". This has not been signed by either the claimant or the respondent. This unsigned contract states that the minimum hours are 20. This unsigned contract also states the hourly rate as being £9.85. It also contains a shortage of work clause. It is also in a completely different format to the contract in 2018 [58-59].

17. The claimant says she never saw this contract [60-63] while she was employed at the respondent and the first time she saw this contract [60-63] was on 18 December 2023. The respondent has not provided any evidence that this unsigned contract was given to the claimant. Nor is there any evidence that the format of the unsigned contract with the shortage of work clause was brought to the attention of any of the staff at the respondent or issued to them or discussed with them at any point prior to the claimant's dismissal. There are no committee minutes about any consultation process on the shortage of work clause or a contract change to include that clause. We find that the claimant was not ever issued with the contract at 62-63.

18. The claimant says that the only document she received when she was promoted to designated premises supervisor was the job description for the role [65].

19. We accept the claimant's evidence that the statement of mains terms of employment [58-59] was her contract of employment.

20. The bundle did not contain the respondent's disciplinary procedure and it was not provided to the tribunal upon the panel requesting it. In the respondent's submissions it was confirmed that the respondent does not appear to have a grievance and disciplinary procedure.

21. The claimant says that she was the only staff member working in the bar who was over 40. Mr Llewellyn on being questioned by the tribunal said that an employee named Vanessa was over 40. He confirmed that there was a good chance that everyone else listed on the rota at 114 was under 40. The respondent has not contested that Nate (who is not listed on 114) was over 40.

22. On 9 November 2021 Sarah Hamilton's appointment as the respondent's manager was communicated in a formal meeting to all staff. The claimant was present at that meeting.

23. The claimant was off work from 3 December 2021 to 16 December 2021 (the fit note [66] states the reason for absence was depression).

24. On or around 13 January 2022 Ms Hamilton allocated the claimant only two days (12 hours) in the weekly rota. In cross-examination Mr Llewellyn said he had been told that the claimant did not want to close the bar on her own due to a previous incident.

25. On being questioned by the tribunal about whether the claimant had given anyone any indication that she did not want to work certain shifts the claimant confirmed she had not and that she had worked evening shifts. Further the claimant stated she had been working on weekends and the reason she stopped working on weekends was because Ms Hamilton was not allocating her the weekends. We accept the claimant's evidence.

26. The rota for the week ending 23 January 2022 [119] shows the total number of hours from 17 January 2022 to 23 January 2022 as being:

    26.1. The claimant - 12;

26.2. Paige -12;
26.3. Sarah (Ms Hamilton) - 28.5;
26.4. Kelsey - 25.5;
26.5. Connor – 12;
26.6. Mercy – 17;
26.7. Brandon – 7;
26.8. Vanessa – 0;
26.9. Ray – 24; and
26.10. Marco – 0.

27. We find that the claimant was only allocated 12 hours for the week ending 23 January 2022 and there was no reason for this given the hours that were allocated to the other staff.

28. The claimant says that she asked Ms Hamilton on 13 January 2022 why she only had two days' work and Ms Hamilton did not answer. In cross-examination the claimant confirmed this was made on a WhatsApp chat and that she has asked Ms Hamilton again and that Ms Hamilton just ignored her. The only WhatsApp in the bundle that refers to asking for more hours states, "*Can I please have more hours?"* [73] and the index to the bundle states this was made on 5 February 2022. In cross-examination the claimant said this was not the WhatsApp message she was referring to on 13 January 2022. We accept the claimant's evidence that she did ask Ms Hamilton on 13 January 2022 about why she only had two days' work and Ms Hamilton did not answer.

29. The claimant, however, has not presented any evidence to the tribunal that other members of staff had queried their hours with Ms Hamilton and that Ms Hamilton had responded to them.

30. On 21 January 2022 Ms Hamilton made the claimant wait to have a chat about the claimant's hours while she (Ms Hamilton) was having a drink (a shot) at the bar. In cross-examination the claimant was clear that she arrived at the respondent to chat with Ms Hamilton about her hours and they went to the office. Ms Hamilton then left the claimant and said, "*I won't be a minute*". Ms Hamilton left the claimant to wait. The claimant then left the office and saw Ms Hamilton having a shot at the bar with a customer. It is not clear from the evidence or her answer in cross-examination how long the claimant had been left to wait by Ms Hamilton.

31. On or around 5 February 2022 the respondent allocated the claimant 16 hours in the weekly rota. The rota for the week ending 6 February 2022 [121] shows the total number of hours from 31 Jan 2022 to 6 February 2022 as being:

31.1. The claimant – 16;
31.2. Paige - 28.5;
31.3. Sarah -12;
31.4. Kelsey – 16;
31.5. Vanessa - 11.5;
31.6. Mercy – 19;
31.7. Connor – 9;
31.8. Brandon – 0;

31.9. Ray – 16;
31.10. Callum – 5; and
31.11. Nate – 4.

32. Ms Hamilton did not allocate the claimant a shift on Saturday 5 February 2022 and gave the shift to a new member of staff (Nate). That is demonstrated by the rota [121]. The respondent has not explained why a new younger member of staff joined at this time when there was difficulty providing sufficient work to meet everyone's minimum hours.

33. On 5 February 2022 in the respondent's staff WhatsApp group chat the claimant requested more hours [73]. Ms Hamilton replied "*leave it with me*". Further in an undated WhatsApp group chat [78] it states, "*No, I need to do this meeting with you Sue before I can give you any hours.*"

34. In the ET1 the claimant stated that her averaged weekly hours were 25 hours per week. This was not contested by the respondent in its ET3.

35. The rotas show the following total hourly allocations for the claimant, Paige, Kelsey and Ray:

35.1. [114] (week ending 14 November 2021) the claimant 25, Paige 32, Kelsey 30 and Ray 12;
35.2. [115] (week ending 21 November 2021) the claimant 24, Paige 28, Kelsey 24 and Ray 17.
35.3. There is no rota for 22-28 November 2021.
35.4. [116] (week ending 5 December 2021) the claimant was originally rostered 29, Paige 29, Kelsey 32 and Ray's name is cut-off on this rota, but there is half an "a" and a "y". We find this refers to Ray and his hours were 28 that week;
35.5. [117] (week ending 26 December 2021) the Sunday (26 December 2021) on this rota is cut-off but for the other days (20-25 December 2021) the total hours are: the claimant 23.5, Paige, 25.5, Kelsey 27.5 and Ray 4.5;
35.6. [118] (week ending 2 January 2022) the Sunday is cut-off for Ray, the claimant 8, Paige 13.5, Kelsey 19 and Ray 11 (without knowing his hours on Sunday that week);
35.7. There is no rota for 3-9 January 2022;
35.8. [118a] (week ending 16 January 2022) the claimant 22, Paige 21.5, Kelsey 25 and Ray (the Sunday for Ray is cut-off again) without including Sunday, 6 hours;
35.9. [119] (week ending 23 January 2022) the claimant 12, Paige 12, Kelsey 25.5 and Ray 24;
35.10. [120] (week ending 30 January 2022) the claimant 8, Paige 19, Kelsey 23.5 and Ray 27;
35.11. [121] (week ending 6 Feb) the claimant 16, Paige 28.5, Kelsey 16 and Ray 16;
35.12. [122] (week ending 13 February 2022) Monday 7 February 2022 is missing from this rota, without the Monday hours: the claimant 12, Paige 21.5, Kelsey 28.5 and Ray 21;
35.13. [123] (week ending 20 February 2022) Monday is missing from this rota, without the Monday hours: the claimant 1, Paige 33, Kelsey 22 and Ray 12;

35.14. [124] a 10 am meeting is rostered for the claimant on 24 February 2022.

36. From 17 January 2022 onwards the claimant was generally receiving less hours than she had been rostered to work previously and compared to Kelsey, Paige, Ray. Kelsey, Paige and Ray were generally being given the same or more hours. Further the respondent has not provided any evidence about why the comparators were given more hours than the claimant. Nor has the respondent provided evidence about how the comparators hours compared to their contracted minimum hours.

37. The claimant in her evidence referred to herself as "full-time" and to Ray and Kelsey as "part-timers" and that Helen Jones (an intervening manager between Mr Pyment and Ms Hamilton) had informed her that Ray and Kelsey were on part-time hours. The claimant also confirmed in evidence that Paige was on a contractual minimum hours of 20 hour per week. We accept the claimant's evidence on these points.

38. The rotas also demonstrate that the claimant was working in the evenings and at weekends.

39. The claimant was only paid for the hours that she actually worked for the respondent and not for her contractual minimum hours.

40. On 17 February 2022 Ms Hamilton and the claimant had a meeting. In the meeting the claimant mentioned how unhappy she was feeling and Ms Hamilton replied, "*Why are you still here?*" In cross-examination the claimant further explained this was a conversation in which Ms Hamilton had told the claimant about the claimant only having a 20-hour contract and had then further accused the claimant of falsifying her contract sometime between 19 January 2022 and 2 February 2022 and that Ms Hamilton was not going to give the claimant any more hours until they had had a meeting about that.

41. The respondent says that in approximately mid-February 2022, Ms Hamilton came to see Mr Llewellyn and advised Mr Llewellyn that Ms Hamilton thought that the claimant had unilaterally amended her contract of employment. That it had been amended to 23.5 hours and to £9 per hour. Mr Llewellyn says that it was Ms Hamilton's understanding that the claimant's agreed hours of work were 20 hours and that the pay rate was £8.75 per hour. The respondent has not provided evidence to the tribunal about the basis for Ms Hamilton's understanding. Ms Hamilton was a fairly new employee of the respondent. Ms Hamilton had joined the respondent in early November 2021, previously she had only been a customer.

42. On 24 February 2022 an investigation meeting with the claimant took place about the allegation of the claimant falsifying her contract of employment. Ms Hamilton and Mr Llewellyn were present on behalf of the respondent.

43. The claimant's evidence was that she had a meeting with Ms Hamilton and Mr Llewellyn, and that she "*was told that I was suspended and to hand in my keys, and that the case will be reviewed by the complex case team at Peninsula and that they would be in touch with to inform me of the next part of process."*

44. There is an email (dated 25 February 2022) detailing the minutes of the notes made by Ms Hamilton of that investigation meeting on 24 February 2022 [64].

45. The minutes state:

"*Myself and another member of staff – Candy Goswell were reviewing the staff's contracts of employment so as to ensure that we had a "shortage of work clause" in each member of staff's contract. Whilst reviewing the contract we noted that Sue was contracted to 20 hours per week.*

Three days later I met with Sue to discuss the lack of hours being offered to her, upon retrieving her contract I noted the hours were now 23.5 hours per week with an hourly rate of £9. I conferred with Candy who also confirmed that that the original contract had only stated 20 hours. We then went back though historical payslips for Sue and noted that the pay rate on the system for the date stated on the contract, was in fact £8.75 and that the rate of £9 was not introduced until a year later.

Furthermore, in December, Sue was unfortunately signed off sick. As per our contracts of employment we pay a week's worth of contracted hours for one week's sickness in any 12 month period. This was paid out at 20 hours as opposed to 23.5.

Sue responded that she has no idea how these discrepancies have occurred, and that she has only ever had or signed one contract whilst working at the Bevy and that was for a minimum of 23.5 hours.

She has reviewed her payslips and has realised that on the date the contract was signed and for a year after she was in fact being paid £8.75 per hour. Sue also stated that she had never questioned her hourly rate despite allegedly signing a contract for £9 per hour and only being paid £8.75."
...

"When asked why she never queried not receiving 23.5 hours a week numerous times over the four year period she stated that as she was always receiving enough hours (to live on) she never thought to question it"
…

"… I then informed Sue that she was suspended whilst this investigation takes place and that she needs to return her keys to the business…"

46. At the end of the meeting on 24 February 2022 Ms Hamilton suspended the claimant. The email [64] supports the claimant's evidence about the investigation meeting.

47. On 3 March 2022 Ms Hamilton sent a letter to the claimant [79]. It states:

"*I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of falsifying documents in particular SMT, contracted hours and hourly rate*".

48. On 1 April 2022 the claimant was removed as being an administrator of the Facebook page of the respondent [84].

49. The claimant was invited on 16 May 2022 to attend a disciplinary hearing on 19 May 2022 [82-83]. This letter states:

    "…*Further particulars being that between 19th January and 2nd February you handwrote a new contract of employment for yourself which increased your hours from 20 hours per week to 23.5 hours per week. This contract falsely represented that you had a larger amount of contract hours that you were entitled to. It is alleged that in fact your contract of employment has always been for 20 hours per week and your attempt to deceive the company was to receive financial gain for a larger number of contracted hours"*

50. The letter stated that it enclosed the following documents:
    1. A copy of the alleged falsified contract;
    2. A statement from Candy Goswell;
    3. Pay slip from sick period in December;
    4. Payslips showing the discrepancy around rate of pay between the dates stated on the alleged fraudulent contract; and
    5. The disciplinary procedure.

51. The letter also said the hearing would be conducted by Ms Hamilton, General Manager, and that Chris Llewellyn Committee Secretary would also be in attendance as note-taker.

52. The claimant was informed of her right to be accompanied to the disciplinary hearing in the letter dated 16 May 2022 [82-83]. Though it only mentioned being accompanied by a fellow employee, it failed to mention that a trade union official could alternatively accompany the claimant.

53. The claimant was also warned in this letter [82-83] that if the allegations were substantiated the respondent will regard it as gross misconduct. Further, if the claimant was unable to provide a satisfactory explanation then her employment may be terminated without notice.

54. In this letter [82-83] the respondent did not include the contract that Ms Hamilton and Ms Goswell had originally had sight of stating the hours of work as 20 hours and nor was any explanation provided in that letter nor at the hearing as to why it was not provided. On being questioned by the tribunal Mr Llewellyn did not believe that the unsigned contract [60-63] was the other version of the claimant's contract that Mr Llewellyn had seen with the 20 hours. He informed the tribunal that he would not have been happy with an unsigned contract.

55. On 19 May 2022 Ms Hamilton removed the claimant from the respondent's staff WhatsApp group [85].

56. In a text message [86] the claimant requested that the disciplinary hearing be postponed due to short notice. This states:

    "*Due to the short notice to attend the meeting on the 19/4/22, i feel I have been unable to prepare, and unable to organise a chaperone, to accompany*

me as the law requires, so this meeting will have to be rescheduled. I also feel that legal advice will be necessary to assist in this matter. Therefore I have declined attendance today. Regards sue"

57. There is a response from an unknown individual [86], it states:

    "*Oh right? I see? I thought you were handing in your notice in but back behind the bar or something?*
    Or have I missed something?
    And fyi legally I only have to give you 24 hours notice for a disciplinary hearing and if you decline to attend today it will be treated as a separate misconduct and the investigation meeting will continue without you and a conclusion will be made in your absence."

58. Ms Hamilton sent the claimant a letter on 20 May 2022 rescheduling the meeting for 21 May 2022 [87]. In this letter the meeting was referred to as being an investigation meeting and further stated there is no statutory right for an employee to be accompanied to an investigation meeting. There was no reference in this letter to the claimant being at risk of being dismissed, either with or without notice. Further it said a possible outcome from the meeting may be that the respondent would decide to pursue a formal disciplinary procedure or that they made decide that there are no grounds for this.

59. Mr Llewellyn conceded that the two letters (16 May 2022 [82 – 83] and 20 May [87]) had the potential to be confusing.

60. The disciplinary hearing was in fact rescheduled to 23 May 2022 and took place on this date. Sarah Hamilton was present at the meeting and Mr Llewellyn attended remotely via Zoom. Ms Hamilton took notes [88].

61. The notes state that Ms Hamilton explained to the claimant that they would be going through four pieces of evidence: the handwritten contract itself; the statement from Ms Goswell; a pay slip from 2018 highlighting the discrepancy between the pay rate stated on the alleged falsified contract and a pay slip from December 2023 in which Sue was paid 20 hours sick pay (as opposed to 23.5).

62. The claimant was handed Ms Goswell's statement during the meeting [102]. Ms Goswell's statement states:

    "*On December Sue was off sick for a week and I paid her 20 hours as this was her contracted amount.*

    On Jan 19th Sarah and I checked the contracts as we needed to reduce our opening times and wanted to make sure the contract covered us for reducing hours. The contracts were for 20 hours"

63. It was signed by Ms Goswell.

64. The notes of the meeting on 23 February 2022 state:

"*When I asked why Sue's contract is handwritten and in her own handwriting she replied that another member of staff's contract is also written in their handwriting. I do not believe this to be the case.*
Sue also stated that she has never seen or signed a contract for 20 hours since her employment began."
…
"I then asked Sue why if she believed she was being paid £9.00 per hour upon signing her contract did she not realise that for a full financial year she was only being paid £8.75 per hour, to which she replied that as she was making a decent wage she didn't feel the need to question it. She also stated that Warren Carter (Chair of Committee) told her she would be paid £9 per hour at the beginning of her employment but again didn't notice the discrepancy between the rate of pay (£8.75) or the hours she was being given (around 20).

I proceeded to ask Sue why she did not question the fact that she was only paid for 20 hours of sick pay in December to which she replied that in December she thought she had a 20 hour contract, when I asked why she thought that she said because I had told her so. This was not the case as the conversations around Sue's contract and hours did not begin until mid-January. I also asked why if as she had earlier stated she had never even seen a contract for 20 hours' she would believe she had a contract other than for 23.5 hours to which she replied because I kept telling her so. Again, this it not possible as the disagreement around contracted hours did not happen until nearly 6 weeks later.
When asked if she would like to add anything else she replied that she hasn't done anything wrong and that she doesn't want to fucking say another word."

65. These notes [88] are a summary of the meeting in the past tense as written in the first person from Ms Hamilton despite Mr Llewellyn attending to take notes. The minutes also do not appear to show Ms Hamilton explaining to the claimant that this was in fact a disciplinary meeting. Although later in her appeal letter [95] the claimant does state that she was dumbfounded when it was made clear at the outset of the meeting that it was a disciplinary hearing.

66. The impression of the meeting from the notes is the claimant being cross-examined about why she did not spot any underpayment earlier in her employment and further why she did not question only receiving 20 hours sick pay during her sick leave in December 2021.

67. It does not appear from the minutes that the claimant had the opportunity to present her case during this meeting, or to question Ms Goswell or Ms Hamilton.

68. At no point during this meeting was the claimant presented with a different version of her contract.

69. The respondent says the claimant became upset by the end of the meeting. The minutes also demonstrate that the claimant said that Ms Goswell's statement is "bullshit" and that when Ms Hamilton asked her if she would like to add anything the claimant replied that she has not done anything wrong and that she doesn't want to fucking say another word.

70. The claimant says she did not receive Ms Goswell's statement or the disciplinary procedure in the 16 May 2022 letter [82-83]. We accept the claimant's evidence on this point. The minutes of the meeting on 23 May 2022 demonstrate that she asked to see Ms Goswell's statement and no disciplinary procedure has been produced to the tribunal.

71. Mr Llewellyn confirmed that he did assist Ms Hamilton with the decision to dismiss the claimant. Mr Llewellyn says that he did not know for sure whether the claimant did alter her contract but that he thought that she did because of the way she reacted during the disciplinary hearing on 23 May 2022.

72. We find that it is clear from the notes of the disciplinary hearing on 23 May 2022 and from the fact that Ms Hamilton wrote the letter dismissing the claimant [89-90] that Ms Hamilton was the main decision-maker.

73. It was put to Mr Llewellyn during cross-examination that the respondent's position was that the claimant took an original document and falsified it. Mr Llewellyn agreed that was the outcome of the process and that was the assumption made.

74. Further it was put to Mr Llewellyn why would the claimant sneak into the filing cabinet to change her contract for an extra 25 pence per hour that she is not going to be paid and Mr Llewellyn said that "*I understand what you mean, it was surprising at that stage.*"

75. Following the meeting the claimant was dismissed with immediate effect by the respondent. The letter dismissing the claimant [89-90] is from Ms Hamilton. This letter is undated and mistakenly refers to the disciplinary meeting as having taken place on 25 May 2022. This letter repeated the allegation against the claimant.

76. The letter stated:

"*At the hearing your explanation was that you hadn't re-written your contract, and that the allegations against you were false. You also noted that the statement provided by Candy Goswell, which stated that she had never provided you with a contract for 23.5 hours, was bullsh*t.*

I considered your explanation to be unsatisfactory because:

- *Your statements throughout the disciplinary hearing from 25.05.2022 were inconsistent. In the first instance, you noted that you believed you had been contracted to work 23.5 hours since the commencement of your employment. At another point in the meeting you that you believed you were on a contract for 20 hours per week in December 2021.*
- *The evidence demonstrates that you had been paid at a rate of 20 hours per week throughout your employment. One example of this include your sick pay from December 2021, at which you were paid at this rate. I find it difficult to believe that throughout your employment, when you state you believed you were contracted to 23.5 hours per week that you did not query that you were only being given and paid for 20 hours per week.*
- *Additionally, the alleged fraudulent contract notes that it was drawn up in 2018, and states that you would be paid £9 per hour. However, for at*

least a full financial year, you were paid at a rate of £8.75 per hour, which I believe to be your actual contracted hours upon employment in 2018. I find it hard to believe that you did not question that you were being underpaid at a rate of 25p per hour if this were the case.

- *Throughout the disciplinary hearing, I found that you were not willing to engage with the process on a multiple of occasions. For example. At one point you said "just f*cking fire me", and called a witness statement "bullsh*t".*

Having carefully reviewed the circumstances and considered your responses I have decided that I have reasonable belief to regard the allegation against you as true. Your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. I have referred to our standard disciplinary procedure when making this decision. It states that an act of misconduct of this nature warrants summary dismissal, however, I have considered whether, in the circumstances, a lesser sanction may be appropriate. However, I am unable to apply a lesser sanction in the case because of the reasons given above.

You are therefore dismissed with immediate effect. You are not entitled to notice or to pay in lieu of notice."

77. The letter further informed the claimant that she could appeal to Ms Hamilton within seven days.

78. The claimant appealed on 9 June 2022 [92-99].

79. Jenny Hawke, Bevy Vice Chair replied on 24 June 2022 [100] and informed the claimant the appeal would take place on 29 June 2022, that Ms Hawke would be the Chair and Neil Hilton would take the minutes.

80. In the letter [100] Ms Hawke narrowed the claimant's grounds of appeal to the following:

    80.1. Procedural flaws - that the claimant had been incorrectly informed that the disciplinary hearing was an investigation hearing and she had not been afforded the right to be accompanied.

    80.2. That the claimant felt further investigations should have been conducted.

81. The letter [100] further informed the claimant that Ms Hawke would be re-examining the allegations against the claimant. The letter also mentioned that Ms Hawke would obtain a statement from Warren Carter and would email Charlie Pyment.

82. Comparing the claimant's appeal letter [92-99] to Ms Hawke's letter [100] we find that the claimant raised other procedural flaws with the disciplinary process.

83. An appeal meeting was held on 29 July 2022 chaired by Ms Hawke and Neil Hilton (committee member for the respondent) [101 and additional page]. At

the top of the minutes this states that it is a re-hearing of the disciplinary hearing.

84. In the appeal hearing the claimant was shown an email from Charlie Pyment [105].

85. Nothing in the minutes [101 and additional page] demonstrate that the claimant was shown an email or statement from Warren Carter.

86. The minutes [101 and additional page] do not demonstrate any engagement with the claimant's grounds of appeal [92-99].

87. Following the appeal hearing the decision was not to alter original decision to dismiss the claimant.

88. The appeal outcome is in a letter dated 31 July 2022 [109-110]. Ms Hawke and Mr Hilton held another meeting with the claimant on 1 August 2022. There are minutes for this meeting [111]. The claimant was handed the appeal outcome letter [109-110] in this meeting.

89. The appeal outcome letter [109-110] confirms the following further investigations:

    89.1. They had spoken to Charlie Pyment;
    89.2. They had spoken to Paige Banks;
    89.3. They had ensured there was an open case with Peninsula; and
    89.4. They had confirmed pay slips and pay rates with Candy Goswell.

90. No witness evidence has been presented from the respondent about the appeal hearing or the appeal process. We find that the appeal hearing was not a re-hearing of original disciplinary hearing.

LAW

Unfair dismissal

91. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the ERA).

92. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

93. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having

regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

94. The Court of Session in **CJD -v- Royal Bank of Scotland [2013] CSIH 86** stated:

"*In our opinion the use of the word "reprehensible" by the tribunal was unfortunate. We agree with what was said in Thomson v Alloa Motor Company Ltd [1983] IRLR 403 that conduct within the meaning of section 98(2) means "actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship*".

95. The Employment Appeal Tribunal also confirmed in **JP Morgan Securities Plc -v- Ktorza UKEAT/0311/16 237** that the conduct does not need to be culpable.

96. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in **Burchell [1978] IRLR 379 and Post Office v Foley [2000] IRLR 827**. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

97. Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of **Burchell** are neutral as to burden of proof and the onus is not on the respondent (**Boys and Girls Welfare Society -v- McDonald [1996] IRLR 129, [1997] ICR 693**).

98. In **Trust Houses Forte Leisure Ltd -v- Aquilar [1976] IRLR** 251 the EAT held that the test was not whether the tribunal was satisfied that A was guilty of the misconduct alleged. There was adequate material and evidence upon which the management could reasonably dismiss A. Nor was the test whether the tribunal would have dismissed A. A dismissal is not necessarily unfair if the tribunal would have acted otherwise.

99. In **Farrant -v- Woodroffe School [1998] ICR 184** the EAT confirmed that a genuine, even if mistaken, belief on the part of the employer as to the conduct of the employee relied upon will be sufficient to discharge the burden of establishing this potentially fair reason for dismissal.

100. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Foley -v- Post Office; Midland Bank plc -v- Madden [2000] IRLR 827,**

Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563).

101. In **JJ Food Service Ltd -v- Kefil UKEAT/0320/12** President Langstaff said at paragraph 17:

"*A substitution mindset is all too easy to allege. There is a great danger which is readily apparent to those of us who sit day by day in this Tribunal that employers who do not like the result which a Tribunal has reached, but cannot go so far as to say it is necessarily perverse, seek to argue that the very fact of the result in the circumstances must indicate a substitution. That is not, in our view, a proper approach*."

102. In reaching their decision a tribunal must also take account of the ACAS Code on Disciplinary and Grievance Procedures ("ACAS Code"). By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the ACAS code is admissible in evidence and if any provision of the ACAS Code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question. A failure by any person to follow a provision of the ACAS Code does not, however, in itself render him liable to proceedings.

103. The ACAS Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the ACAS Code applies and there is unreasonable failure by either the employer or employee to comply with the ACAS Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

Discrimination

104. The prohibition on discrimination against employees is found in s39(2) of the Equality Act 2010. Employers must not discriminate:

1.1. in the terms of employment;

1.2. in the provision of opportunities for promotion, training, or other benefits;

1.3. by dismissing the employee;

1.4. by subjecting the employee to any other detriment.

105. Under s13(1) of the Equality Act 2010 read with s5, direct discrimination takes place where a person treats the claimant less favourably because of their age than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

106. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of age. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered

without first considering the 'reason why' the claimant was treated as she was. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285**).

107. In the **Shamoon** case, the House of Lords held that the two male chief officers with whose treatment S sought to compare her own were directly comparable with her position in several respects: they were of the same rank; they served in the same branch; and they had similar responsibilities, including the responsibility for staff appraisals. However, the male officers were not appropriate comparators as there were two material differences that precluded such a direct comparison: there had been no complaints made against them, and they were under the managerial control of a different superintendent. The correct task for the tribunal was to consider how the claimant's superintendent would have treated a male officer against whom similar complaints had been made.

108. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**).

109. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

110. S136 of the Equality Act 2010 sets out the burden of proof. 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 another. (**Hewage v Grampian Health Board [2012] IRLR 870, SC**).

111. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

112. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the respondent to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.

113. The Court of Appeal in **Madarassy**, a case brought under the then Sex Discrimination Act 1975, states: '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.

Time limits

114. Time-limits are set out in s123 of the Equality Act. The ACAS early conciliation procedure covers discrimination claims. The primary time-limit is within 3 months of the discriminatory action. The 3 months is counted as it is for unfair dismissal claims, i.e., 3 calendar months less 1 day from the discriminatory action.

115. If the claim is late, the tribunal has a 'just and equitable' discretion under s123(1)(b) to extend the time limit. The reason why the claim was late is just one factor. The discretion to extend the time limit because it's just and equitable is an exception, not the rule and the claimant needs to convince the tribunal that it is just and equitable to extend. The emphasis must be on whether the delay has affected the ability of the tribunal to conduct a fair hearing.

116. If more than one discriminatory action is claimed, the 3-month time-limit attaches to each action. However, under s132(3), conduct extending over a period is treated as if done at the end of the period, so the 3 months only needs to be counted from that point. This is often colloquially referred to as 'continuing discrimination'. Only discrimination which occurs up to the date the claim is presented can be conduct extending over a period. Discrimination which occurs after the claim has been presented cannot be relied upon to demonstrate conduct extending over a period.

117. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, the Court of Appeal held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts.

118. There needs to be some kind of link or connection between the actions, especially if different people are involved. This often means that a series of discriminatory actions can be in time provided the claim was presented within 3 months of the most recent action (i.e., the most recent action which is ultimately found to be discrimination).

CONCLUSIONS

Unfair dismissal

Issue 2.1 Unfair dismissal

119. The respondent did not present any evidence or submissions, nor did it cross-examine the claimant on an alternative some other substantial reason for the dismissal.

120. The reason for the claimant's dismissal was conduct, i.e., that the respondent believed that that the claimant had unilaterally amended her written statement of terms in relation to the number of hours and rate of pay.

121. This is a substantial reason of a kind which would potentially justify a dismissal. Whether it did so on the facts is set out below.

Issue 2.2 Unfair dismissal

122. We applied the three-stage test in **Burchell**.

Stage one: did the respondent genuinely believe the claimant had committed misconduct?

123. We conclude that the respondent has not on the balance of probabilities proven this.

124. It is clear from Mr Llewellyn's evidence that he was relying on Ms Hamilton's understanding (paragraphs 5 – 7 of his witness statement). We conclude that he was assisting Ms Hamilton and that Ms Hamilton was the main decision-maker.

125. Mr Llewellyn was not able to confirm whether the unsigned contract [60-63] was the other version of the claimant's contract that had been relied upon by the respondent to demonstrate the claimant's minimum hours of work was 20 hours per week.

126. Ms Hamilton did not attend the tribunal to give evidence. We have been unable to question her about her belief in the claimant's misconduct. We have insufficient information before us about what was in her mind.

127. We have also not been provided with the contract that Ms Goswell and Ms Hamilton refer to in the investigation minutes [64]. Ms Goswell also has not attended tribunal to give evidence about the contract referred to in the investigation minutes [64].

128. Mr Llewellyn's evidence about his belief in paragraphs 29-30 of his witness statement is unclear, because he says in paragraph 29 that he did not know for sure if the claimant did alter her contract but then in paragraph 30 he says but I think she did because of the way she reacted.

129. Further Mr Llewellyn, the only witness for the respondent, agreed that their belief (Ms Hamilton's and Mr Llewellyn's) was that the claimant had taken the original contract and falsified it. We conclude that although this may explain why there is not another version of the claimant's contract the respondent has not clearly set out its case, nor provided any evidence to substantiate that belief.

130. We conclude that this takes the decision to dismiss the claimant outside the range of reasonable responses. We have still considered stage two and stage three of **Burchell** below.

Stage 2 – was that belief on reasonable grounds?

131. We conclude that Ms Hamilton's belief was not based on reasonable grounds.

132. Ms Hamilton was a fairly new employee and was not an employee of the respondent at the time the claimant commenced employment in July 2018, nor when the claimant became designated premises supervisor in October 2020.

133. Ms Hamilton, therefore, would not have been involved in any changes to the contracts to include a shortage of work clause that the unsigned contract [60-63] contains in addition to it stating 20 hours of work.

134. Ms Goswell's statement to the disciplinary hearing on 23 May 2022 was unclear as to whether Ms Hamilton and Ms Goswell checked the claimant's contract of employment as part of checking contracts on 19 January 2022. Ms Goswell's statement says they checked "contracts", and the "contracts" were for 20 hours.

135. We do not accept Mr Llewellyn's assertion that he considered it was accepted at that time that there were different signed contracts. Mr Llewellyn bases that on what Ms Hamilton told him and he was unable to definitively confirm whether the unsigned contract [60-63] was the other version of the claimant's contract. No contract showing 20 minimum hours that Ms Hamilton and Ms Goswell refer to in the investigation minutes [64] has been produced to the tribunal.

136. From the content of the dismissal letter [89-90] it appears that Ms Hamilton's belief was further based on the claimant being unable to explain why she did not spot the discrepancies in her pay from July 2018 to April 2019, the discrepancy in the hours for her sick pay in December 2021 and the claimant's reaction in the disciplinary meeting on 23 May 2022 to the accusation that she had falsified her contract.

137. Ms Hamilton did not attend tribunal to give evidence about why she relied on these to found a belief that the claimant had falsified her contract. We conclude that the fact that the claimant did not spot these discrepancies or did not raise them with anyone are not reasonable grounds for believing that the claimant had falsified her contract.

138. We have taken account of the fact that the respondent has not disputed the average of 25 hours in the claimant's ET1. Which meant that the minimum hours were generally immaterial.

139. Further we conclude it is more likely that the claimant's reaction in the disciplinary hearing on 23 May 2022 is more indicative of someone who is angry that they have been falsely accused of something that they did not do and/ or being confronted with a discrepancy in the hourly rate of £9 in their signed contract and the pay rate of £8.75 that was in the pay slips from July 2018 to April 2019.

140. We conclude that these were not reasonable grounds for a belief by either Ms Hamilton or Mr Llewellyn that the claimant had falsified her contract. This takes the decision to dismiss the claimant outside the range of reasonable responses.

141. We further conclude that it was not reasonable to believe that the claimant, in 2022, would change her rate of pay for 2018 and early 2019 by 25 pence per hour when she was in 2022 on a much higher rate of pay than the disputed figure.

142. We conclude that this undermines the allegation that she had falsified the contract for financial gain. In reaching this conclusion we have taken note of Mr Llewellyn's concession on cross-examination that doing so seemed surprising at this stage. This also demonstrates that the respondent did not have reasonable grounds on which to base its belief that the claimant had falsified her contract. This takes the decision to dismiss the claimant outside the range of reasonable responses.

Stage 3 – was there a reasonable investigation?

143. We conclude that a reasonable investigation was not conducted.

144. Firstly, it is not in dispute that there was no disciplinary procedure at the material time and the reference to one being attached in the letter dated 16 May 2022 [82-83] is incorrect.

145. When the respondent agreed to postpone the disciplinary hearing the re-issued invitation letter [87] referred to the rescheduled meeting as an investigation, it said that there was no right to be accompanied to that meeting and that the possible outcomes included either pursuing a formal disciplinary procedure or that there would be no grounds for this.

146. We conclude that this caused the claimant to be confused about the purpose of the disciplinary hearing on 23 May 2022 and that was accepted by Mr Llewellyn on behalf of the respondent.

147. We conclude that there was a breach of paragraph 10 of the ACAS code because the respondent did not explain the claimant's right to be accompanied to the meeting on 23 May 2022.

148. Ms Hamilton and Mr Llewellyn conducted both the investigation meeting on 24 February 2022 and the disciplinary hearing on 23 May 2022.

149. It is clear from the email containing the minutes of the investigation meeting on 24 February 2022 [64] that Ms Hamilton is the main investigator of the allegation against the the claimant and then in the disciplinary hearing on 23 May 2022 she is the manager questioning the claimant about the alleged misconduct and she also took the notes of the hearing.

150. We conclude it is not a reasonable investigation for the investigators/ witnesses against the claimant to then also conduct the disciplinary hearing and to take the notes of the disciplinary hearing.

151. The very brief minutes of the disciplinary hearing on 23 May 2022 [88] and the appeal hearing on 29 June 2022 [101 and additional page] do not demonstrate a reasonable exploration of the case for and against the claimant committing the misconduct.

152. We conclude that the claimant did not have a reasonable opportunity to present her case or to bring witnesses to the hearings.

153. We further conclude that when the claimant did present points in her favour these were not followed up by the respondent. For example, in the

disciplinary hearing on 23 May 2022 when the claimant explained that another member of staff had a handwritten contract this was not investigated by the respondent prior to the claimant's dismissal.

154. Although the appeal hearing was conducted by individuals independent of the original decision-makers we conclude that the appeal hearing was not a full re-hearing. This is demonstrated by the minutes of the appeal hearing [101 and additional page]. In addition, no statement from the original decision-maker/ s was presented at the appeal hearing or to the claimant at the appeal stage.

155. Further the respondent has not presented any witness evidence from the decision-makers at the appeal stage.

156. We conclude, therefore, that the defects in the disciplinary process were not remedied by the appeal hearing.

157. The failure by the respondent to conduct a reasonable investigation takes the decision to dismiss the claimant outside the range of reasonable responses.

158. For all these reasons, the dismissal was substantively unfair. We conclude that the respondent unfairly dismissed the claimant.

Direct Age Discrimination

<u>Issue 4.1 and 4.2.9 direct age discrimination by dismissing the claimant</u>

159. We applied the statutory burden of proof.

160. The first question we considered was whether the claimant had proved facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent dismissed the claimant because of her age.

161. In our view, the answer was yes.

162. Firstly, out of the 13 staff listed on the rota [114] only the claimant and one other staff member, Vanessa, were over 40 at the relevant time. The majority of the bar staff at the respondent were under 40 at the relevant time.

163. Secondly, none of the main decision-makers at the disciplinary stage and appeal stage attended the tribunal to give evidence. Although Mr Llewellyn did give evidence we have found above that he was not the main decision-maker, and it was Ms Hamilton who led the disciplinary hearing and who wrote the dismissal letter [89-90].

164. Taking these two together, we conclude that this is sufficient to shift the burden of proof to the respondent.

165. It is then for the respondent to prove that the claimant's dismissal was in no sense whatsoever because of the claimant's age.

166. While we accept that the respondent was in a difficult position without Ms Hamilton being present as a witness there was not cogent evidence put forward by the respondent on this issue as already explained above under our conclusions on the unfair dismissal complaint.

167. In fact, the respondent sought only to suggest that the claimant was not consistently given less hours than Kelsey, Paige and Ray by cherry-picking some of the rotas and putting those rotas to the claimant in cross-examination.

168. The respondent has failed to prove the dismissal was in no sense whatsoever because of the claimant's age.

169. We conclude that the claimant's dismissal amounts to a detriment because she has lost her employment.

170. We conclude that the respondent in dismissing the claimant did subject to claimant to direct discrimination because of her age.

<u>Issue 4.1 and 4.2.1 direct age discrimination – on or around 13 January 2022 allocating the claimant only two days (12 hours) in the weekly rota when the claimant's contract was for 23.5 hours</u>

171. The claimant's named comparators for this issue are Kelsey and Ray.

172. The rota for the week ending 23 January 2022 [119] demonstrates that this did happen. The claimant was allocated 12 hours, Kelsey was allocated 25.5 hours and Ray was allocated 24 hours.

173. The respondent submitted that the claimant had refused to work evenings and weekends. We have found above that the claimant did not indicate to anyone at the respondent that she did not want to work evenings or weekends. We also found above that she did in fact work evenings and weekends until Ms Hamilton reduced the claimant's allocation of hours.

174. We conclude that the claimant was treated differently to Kelsey and Ray.

175. Taking these facts together with the fact that the majority of the bar staff were under 40 we conclude that the burden of proof has shifted to the respondent to prove that this was in no way whatsoever because of the claimant's age.

176. We did not accept Mr Llewellyn's evidence that the claimant had refused to work evenings and weekends and no other reason was put forward by the respondent as to why the claimant was allocated fewer hours than Kelsey and Ray on this occasion.

177. We conclude that this amounted to a detriment because we found above that the claimant was only paid for those hours that she actually worked. By being allocated fewer hours she received less pay.

178. We conclude that the respondent subjected the claimant to direct age discrimination.

Issue 4.1 and 4.2.2 direct age discrimination – on 13 January 2022 Ms Hamilton did not respond to the claimant's query about her hours

179. The claimant's named comparator for this issue is Paige.

180. We have found above that Ms Hamilton did not respond to the claimant's query about her hours.

181. The claimant, however, has not presented enough evidence to the tribunal to shift the burden of proof onto the respondent. In particular, the claimant has not presented evidence in relation to whether Paige had been treated differently to the claimant.

182. We conclude that this was not direct age discrimination.

Issue 4.1 and 4.2.3 direct age discrimination – on 21 January 2022 Ms Hamilton made the claimant wait to have a chat about her hours while she had a drink at the bar

183. We have found above that Ms Hamilton did leave the claimant waiting in the office while she had a shot at the bar with a customer.

184. We conclude that the claimant has not presented enough evidence to the tribunal to shift the burden of proof onto the respondent.

185. We conclude that this was not direct age discrimination.

Issue 4.1 and 4.2.4 direct age discrimination – on or around 5 February 2022 Ms Hamilton allocated the claimant only 16 hours in the weekly rota

186. The claimant's named comparator for this issue is Paige.

187. The rota for the week ending 6 February 2022 [121] shows a large difference in the hours allocated in favour of Paige who was on a minimum 20-hour contract. The claimant was allocated 16 hours and Paige was allocated 28.5 hours that week.

188. In submissions, Mrs Singh referred to Ray and Kelsey's allocated hours and not to Paige's allocated hours. Paige is the named comparator for this issue.

189. We conclude that the claimant was treated differently to Paige.

190. We also conclude, taking into account the fact it is such a large difference in the number of allocated hours and that the majority of the bar staff at the respondent were under 40 that the burden of proof has shifted to the respondent.

191. The respondent has not provided an explanation as to why the claimant was allocated fewer hours than Paige on this occasion.

192. We conclude that this amounted to a detriment because we found above that the claimant was only paid for those hours that she actually worked. By being allocated fewer hours she received less pay.

193. We conclude that the respondent did subject the claimant to direct age discrimination.

Issue 4.1 and 4.2.5 direct age discrimination – Ms Hamilton did not allocate the claimant a shift on Saturday 5 February 2022 and gave the work instead to a new member of staff

194. The claimant's named comparator for this issue is Nate.

195. The rota for the week ending 6 February 2022 [121] does demonstrate that Nate was allocated to work on Saturday, 5 February 2022 and the claimant was not.

196. We conclude that for the same reasons mentioned in respect of issue 4.2.1 above that the burden of proof has shifted to the respondent.

197. No explanation has been provided by the respondent as to why Nate was engaged in the first place when the existing bar staff were not being allocated their minimum contractual hours.

198. The respondent has not presented any evidence about Ms Hamilton's decision to allocate this Saturday shift to Nate. The respondent's submissions also confirm that the respondent can offer no evidence on this allegation.

199. We conclude that the respondent has not proved that this decision was in no sense whatsoever because of the claimant's age.

200. We conclude that this amounted to a detriment because we found above that the claimant was only paid for those hours that she actually worked. By being allocated fewer hours she received less pay.

201. We conclude that the respondent subjected the claimant to direct age discrimination.

Issue 4.1 and 4.2.6 direct age discrimination – On 17 February 2022 when the claimant mentioned how unhappy she was feeling Ms Hamilton said, "Why are you still here?"

202. We have found above that Ms Hamilton did say to the claimant on 17 February 2022 "Why are you still here?" and this was during a conversation in which Ms Hamilton said she was not going to give the claimant any more hours until they had a meeting about the allegation that the claimant had falsified her contract.

203. We conclude that the burden of proof has shifted to the respondent because the majority of the bar staff were under 40 and there has been a difference in allocation of hours to the detriment of the claimant.

204. The respondent has submitted that it can offer no evidence on this allegation.

205. We conclude that the respondent has not presented evidence to prove that that this comment was in no sense whatsoever because of the claimant's age.

206. We conclude that this amounted to a detriment because it caused the claimant to be upset.

207. We conclude that the respondent subjected the claimant to direct age discrimination.

<u>Issue 4.1 and 4.2.7 direct age discrimination – on 24 February 2022 Ms Hamilton accused the claimant of falsifying her contract and suspended her</u>

208. We found above that Ms Hamilton on 24 February 2022 informed the claimant of the difference in the contracts and the discrepancies. We conclude that Ms Hamilton was not accusing the claimant at that point of falsifying her contract. It is also clear from the claimant's own narrative in her ET1 of that meeting that she was not being accused at that point.

209. We conclude that the claimant was not accused of falsifying her contract on 24 February 2022.

210. We found above that Ms Hamilton did suspend the claimant on 24 February 2022. We conclude that this was a neutral act and not unsurprising given what was to be investigated.

211. The respondent did not subject the claimant to direct age discrimination in respect of this issue.

<u>Issue 4.1 and 4.2.8 direct age discrimination – on 19 May 2022 Ms Hamilton removed the claimant from the staff group chat on WhatsApp</u>

212. We have found above that the claimant was removed from the staff group WhatsApp chat on 19 May 2022.

213. Given that the claimant was suspended on 24 February 2022 and then was not removed from the WhatsApp group at that stage and instead was removed on 19 May 2022 the burden of proof has shifted to the respondent to prove that this act was in no sense whatsoever because of the claimant's age.

214. We conclude that the respondent has failed to present evidence that this was in no sense whatsoever because of the claimant's age.

215. We conclude that this removal from the staff group chat was not because of the claimant's suspension pending the disciplinary given that the claimant was suspended nearly 2 months prior to 19 May 2022. No other explanation has been put forward by the respondent about why it was necessary just before the disciplinary hearing to remove the claimant from the staff group WhatsApp chat compared with waiting until after a decision had been made.

216. We conclude that this amounted to a detriment to the claimant because it is treating the claimant as if she is already not an employee of the respondent. In addition, the other employees would have seen that the claimant had been removed from the group, which would have caused them to speculate about the claimant and what was going to happen in respect of her employment.

217. We conclude that the respondent subjected the claimant to direct age discrimination.

Issue 1 – Time limits

218. We conclude that the claimant's removal from the WhatsApp staff group chat on 19 May 2022 and the claimant's dismissal on 31 May 2022 were both presented within the statutory time limits.

219. In respect of unlawful acts predating 18 May 2022, we have concluded that there was a conduct extending over a period from on or around 13 January 2022 up to and including the claimant's dismissal on 31 May 2022.

220. We particularly took account of the fact that Ms Hamilton led on all of these decisions and acts and there is a connecting theme to these decisions around the claimant's allocated hours and the minimum hours in her contract of employment.

221. We conclude that the unlawful acts prior to 18 May 2022 have also been presented within the statutory time limits.

Employment Judge Macey
Date: 14 March 2024