EMPLOYMENT TRIBUNALS

Claimant:	**Mrs L Oscroft**
Respondent:	**Apollo Home Healthcare Ltd**
Heard at Leeds	**5, 6 and 7 February 2024**
Hybrid hearing	**8 and 9 February 2024**
Heart at Sheffield	**7 and 8 March 2024**
Heard by CVP	**27 March 2024**

Before:	**Employment Judge Brain**
Members:	**Mrs J Hiser**
	Mr J Howarth

Representation

Claimant:	**In person**
Respondent:	**Miss J Laxton, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's application for permission to amend her claim to include a claim under Part VIIIA of the Employment Rights Act 1996 upon the basis of the flexible working appeal dated 1 November 2022 (which is in the hearing bundle at pages 186 and 187) is refused.
2. Upon the claimant's complaints of direct associative disability discrimination brought pursuant to sections 13 and 39(2)(d) of the Equality Act 2010:

   (1) By consent, the claimant's son (*'X')* was at all material times a disabled person for the purposes of section 6 of the 2010 Act.

   (2) At all material times, the respondent had knowledge of X's disability.

   (3) The complaints fail and stand dismissed.

   (4) The complaint at paragraph 139.5.2.6 (below) was presented outside the limitation period in section 123 of the 2010 Act. It is not just and equitable to extend time. The Tribunal has no jurisdiction to consider it.

(5) The complaints at paragraphs 139.5.2.2 and 139.5.2.3 were presented outside the limitation period in section 123 of the 2010 Act. It is just and equitable to extend time. The Tribunal has jurisdiction to consider them.

(6) The complaints at paragraphs 139.5.2.1, 139.5.2.4, and 139.5.2.5 form a continuing course of conduct such that the complaints were presented within the limitation period in section 123 Act.

3. Upon the claimant's complaint of constructive unfair dismissal brought pursuant to the 1996 Act:

(1) The claimant was constructively dismissed.

(2) The dismissal of the claimant was unfair. Accordingly, the complaint of constructive unfair dismissal succeeds.

(3) It is not just and equitable for there to be any reduction to the basic and compensatory awards because of the claimant's conduct.

(4) It is not just and equitable for there to be any reduction to the compensatory award to reflect the chance that the claimant may have been fairly dismissed by reason of the matters referred to in the letter dated 29 November 2022 at pages 167 and 168 of the bundle.

4. The claimant's complaints that the respondent failed to comply with the flexible working provisions in Part VIIIA of the 1996 Act fail and stand dismissed.

REASONS

Introduction and preliminaries

1. The evidence in this case was heard over seven days (between 5 and 9 February inclusive and 7 and 8 March 2024). The hearing on 8 March 2024 concluded at 4.15pm. There was insufficient time to hear the parties' submissions. Accordingly, directions were given for those to be made on 27 March 2024.

2. After receiving the parties' helpful submissions (and after having had the opportunity of reading Miss Laxton's very useful written submissions) the hearing concluded on 27 March 2024 at 10.45. Judgment was reserved. The Tribunal deliberated for the rest of the day in chambers. We now give reasons for the judgment that has been reached.

3. Regrettably, some difficulties beset the hearing during week commencing 5 February 2024. The third day of the hearing (on 7 February 2024) had to be abandoned. This is because, unfortunately, the claimant was involved in a road traffic accident on her way to the Tribunal. Thankfully, she was uninjured. Nevertheless, the respondent very fairly recognised that in the circumstances it would be unfair on her to continue that day.

4. The matter was therefore adjourned to recommence on 8 February 2024. The Tribunal directed that the hearing on 8 and 9 February 2024 should proceed by way of a hybrid hearing. This was due to a poor weather forecast. In the event, the hearing proceeded as a hybrid. The Tribunal's decision was vindicated as there was poor weather in South Yorkshire on 8 and 9 February which would have made transport difficult. The claimant had given evidence on 5 and 6 February 2024 when the matter proceeded in the Leeds Employment Tribunal

as an in-person hearing. She was part heard when the hearing concluded on the afternoon of 6 February 2024. After the unfortunate events of 7 February 2024, the claimant continued to give evidence from her home on 8 February. The Tribunal then heard evidence from two of the respondent's witnesses on 9 February 2024. One of those was with Miss Laxton and her instructing solicitor who appeared on video from the hearing room in Leeds. The other witness attended by video.

5. At the conclusion of the hearing on 9 February 2024, case management directions were issued. The Tribunal listed the matter to recommence on 7 and 8 March 2024 in Sheffield Employment Tribunal. The reason for this is that given the location of the claimant's workplace when she was with the respondent the matter ought properly to have been listed in the Sheffield Employment Tribunal and not in Leeds. Submissions were heard by CVP on 27 March 2024.

6. To set the scene, the respondent is a complex care provider for the community. They provide care for around 210 service users around the country. The claimant worked for the respondent from their premises in Doncaster. She commenced her employment with them on 11 December 2017. It is agreed that her contract of employment ended on 8 February 2023.

7. The claimant was initially engaged as a care consultant. She was promoted to the post of senior manager in November 2019. She then achieved a further promotion to the post of deputy manager in November 2021.

8. The claimant presented her claim form to the Employment Tribunal on 5 January 2023. (The date of presentation was in fact during her notice period).

9. Following the respondent's presentation of their grounds of resistance on 22 February 2023, the matter benefited from a preliminary hearing which was held for the purposes of case management. This came before Employment Judge Jones on 5 April 2023. His case management summary is at pages 37 to 40 of the bundle.

10. He gave case management directions. He then listed the case for a further preliminary hearing to be held on 16 June 2023.

11. The second preliminary hearing came before Employment Judge Armstrong that day. She listed the case for a final hearing on liability to take place over week commencing 5 February 2024 with a trial window of five days. She identified the issues in the case. These are in the case management summary which is in the bundle commencing at page 58. The list of issues is at pages 65 to 70. The Tribunal will return to these in due course.

12. At the outset of the hearing on 5 February 2024, the parties confirmed the matters to be decided by the Tribunal were set out in Employment Judge Armstrong's list of issues. Given that there was material within the bundle and within the witness statements to deal with them, the Tribunal ordered a variation of Employment Judge Armstrong's case management directions on remedy. It was directed that any remedy issues arising out of the claimant's conduct and the question of whether the claimant would have been (or there was a chance that she would have been) dismissed for disciplinary issues which arose in November 2022 should be dealt with at this hearing. It was directed that any other remedy issues will be dealt with at a subsequent remedy hearing (if required).

13. On 5 February 2024, the Tribunal heard evidence from the claimant's witness, Jodie Lloyd. She is a former employee of the respondent. The Tribunal also received in evidence a short witness statement from Sophie Rook who is another former employee of the respondent. The Tribunal did not have the benefit of hearing from Miss Rook. Her evidence is rather generalised. It has not been tested in cross-examination and accordingly the Tribunal shall give little weight to it.

14. The Tribunal heard evidence from the claimant on 5, 6 and 8 February 2024. She was recalled to give evidence arising out of some late disclosure from her to do with her new employment and WhatsApp messages between her and her line manager, Amanda Stanley. The claimant was recalled for this purpose on the afternoon of 8 March 2024.

15. The Tribunal heard evidence from the following witnesses who were called to give evidence on behalf of the respondent:

    15.1. Brody Flynn-Williamson. The Tribunal received evidence from him by video on 9 February 2024. He is employed by the respondent as head of commercial.

    15.2. Amanda Swift. She gave evidence from the Leeds Employment Tribunal room on the afternoon of 9 February 2024. She is employed by the respondent as HR manager.

    15.3. Simranjit Kaur Dulku. She gave evidence by video on the afternoon of 9 February 2024. She is employed by the respondent as HR officer.

    15.4. Amanda Stanley. She gave evidence on 7 March 2024. She is employed by the respondent as operations manager. She was, at all material times, the claimant's line manager.

    15.5. Michelle Flynn. She gave evidence from the Sheffield Employment Tribunal on the morning of 8 March 2024. She is employed by the respondent as operations director.

16. Although we shall look at the issues in the case in more detail, the heads of claim brought by the claimant against the respondent are:

    16.1. Associative direct disability discrimination.

    16.2. Constructive unfair dismissal.

    16.3. Alleged breaches by the respondent of the flexible work provisions which are to be found in Part VIIIA of the 1996 Act.

17. The claimant's complaint of associative disability discrimination is of course one brought pursuant to the 2010 Act. The complaint is of direct discrimination of the claimant by reason of association with her son. At the case management hearing of 16 June 2023 Employment Judge Armstrong directed that the claimant's son be anonymised. He shall be referred to as *"the claimant's son*" or *"X"* interchangeably in these reasons.

18. On 5 February 2024, Miss Laxton on behalf of the respondent conceded X to be a disabled person for the purposes of section 6 of the 2010 Act. The question of X's disability status was one of the issues identified by Employment Judge Armstrong to be decided by the Tribunal at this hearing. However, the issue of the respondent's knowledge of X's disability was not conceded.

19. At the conclusion of the first leg of the hearing on the afternoon of 9 February 2024, the Tribunal raised as an issue whether on a fair reading of the claim form the claimant had put in issue the status of her flexible working appeal of 1 November 2022 (at pages 185 to 188 of the bundle) as a flexible working request. It was acknowledged by the claimant, when the matter resumed on 7 March 2024, that on a fair reading there was no extant claim before the Tribunal that the letter of 1 November 2022 was a flexible working request within the meaning of the 1996 Act. However, the claimant applied to amend her claim to include it.

20. This application was opposed by the respondent. The Tribunal heard the application on 7 March 2024 and refused it.

21. In considering the amendment application, the Tribunal considered the judgment of Mummery J (as he then was) in *Selkent Bus Co Limited v Moore* [1996] IRLR 661. This requires the Tribunal to consider, when considering an amendment application, all the circumstances of the case and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J in *Selkent* identified several relevant circumstances on a non-exhaustive basis as follows:

    21.1. The nature of the amendment.

    21.2. The applicability of time limits should the subject matter of the amendment application be contained within a new claim presented to the Tribunal.

    21.3. The timing and manner of the application.

22. By application of these factors, the Tribunal determined:

    22.1. The nature of the amendment was the addition of a new claim that the letter of 1 November 2022 was a flexible working request.

    22.2. If presented as a fresh claim on the date of the claimant's application to amend (on 4 March 2024) then it will have been presented outside the limitation period for such actions in section 80H (5) of the 1996 Act. Time may only be extended in such a case where the Tribunal is satisfied that it was not reasonably practicable to have presented the claim in time and that the claim was presented within a reasonable time. There was nothing to suggest that the claimant could not have included a claim about the status of the letter of 1 November 2022 when she presented the claim on 5 January 2023. Although time limits are not decisive upon an amendment application, they are an important factor.

    22.3. The application was made by the claimant between the fifth and sixth days of the hearing. On any view, this was a late application and therefore the timing and manner of the application is a factor against her.

23. The Tribunal was persuaded by Miss Laxton's submissions that if allowed to proceed, the amendment application would give rise to a fresh issue. It would require the recall of the claimant to give evidence about the status of the flexible working application and the recall of some (if not all) of the respondent's witnesses from whom the Tribunal had already heard. It may also require supplementary evidence to be given by the two respondent's witnesses from whom the Tribunal had yet to hear (those being Mrs Stanley and Mrs Flynn).

24. The Tribunal may also consider the merits of the proposed new claim. This is because there is no prejudice to a party in not allowing them to proceed with a

weak claim or defence (as the case may be). As was said several times during the hearing, the law around flexible working requests is prescriptive. Section 80F(2) of the 1996 Act says that an application must state that it is a flexible work application, specify the change applied for and the date on which it is proposed the change should become effective and explain what effect if any the employee thinks making the change applied for would have on their employer and how in their opinion any such effect may be dealt with. By section 80F (5) the Secretary of State may by regulations make provision about the form of application under section 80F and when such an application is to be taken as made. The relevant regulations applicable at the time were the Flexible Working Regulations 2014. This prescribes further requirements upon the making of an application.

25. The letter of 1 November 2022 does not say in terms it is a flexible working request as required by section 80F(2)(a) nor (as required by Regulation 4 of the 2014 Regulations) does the claimant say whether she has made a previous flexible working application.

26. There is no equity in the flexible working regime. A failure to comply with the statutory requirements is fatal to an application. Upon this basis, the effect of refusing the amendment application was simply to shut out the claimant from pursuing what was in any case a weak claim. Therefore, taking into account the nature of the amendment, the timing and manner of it, the application of relevant time limits, and the merits of the claim the Tribunal concludes that the balance of prejudice favours the respondent, and the amendment application was not allowed. The Tribunal now turns to make our findings of fact.

Factual findings

27. It is, we think, helpful to set out a chronology of the events. This chronology is undisputed. The heart of the case (and the issue which turned the constructive dismissal complaint in the claimant's favour) is around a request made by the claimant on 17 October 2022 to alter her working hours. This was treated by the respondent as a flexible working request. This led to the pursuit by the claimant of an appeal against the refusal of the request made on 17 October 2022. There was also a parallel grievance process pursued by the claimant. As there are overlapping events, it seems sensible to set out the undisputed chronology to give structure. This is now set out:

    27.1. March 2020 – the claimant made a flexible working request.

    27.2. August 2020 – the claimant made a further flexible working request.

    27.3. 8 March 2022 – the claimant made another flexible working request to change her hours: (page 105 of the bundle).

    27.4. 25 April 2022 – the claimant made an application to extend the varied hours which had been agreed in March 2022: (page 113 of the bundle).

    27.5. 26 July 2022 – the claimant was signed off work due to stress and anxiety.

    27.6. 12 September 2022 – the claimant returned to work on a two weeks' shift pattern (at page 152 of the bundle).

    27.7. 17 October 2022 – the claimant made a flexible working request to change the two weeks' shift pattern to the hours shown at pages 133 and 134.

27.8. 20 October 2022 – the respondent replied to the flexible working application of 17 October 2022. They offered her a weekly shift pattern based upon the hours shown in page 148.

27.9. 1 November 2022 – the claimant appealed the flexible working request outcome of 20 October 2022 (pages 186 and 187).

27.10. 9 November 2022 – the claimant resigned from her employment. She tendered three months' notice to expire on 8 February 2023. Her resignation letter is at pages 197 to 201.

27.11. 11 November 2022 – the hearing took place of the claimant's flexible working appeal. The minutes are at pages 190 to 191.

27.12. 15 November 2022 – the respondent wrote to the claimant with the flexible working appeal outcome (pages 194 and 195).

27.13. 16 November 2022 – the claimant raised a grievance (pages 169 and 170).

27.14. 24 November 2022 – the claimant's grievance hearing took place: (pages 172 to 176).

27.15. 29 November 2022 – the respondent invited the claimant to attend a disciplinary hearing which was scheduled for 1 December 2022. The letter is at pages 167 and 168 of the bundle.

27.16. 2 December 2022 – the claimant was placed on garden leave (pages 205 and 206). She was notified that the disciplinary issue was not to be pursued.

27.17. 5 December 2022 – the respondent wrote to the claimant to confirm that she was placed on garden leave for the balance of the notice period. The termination date of her contract of employment remained 8 February 2023 (page 207).

28. We interpose here to say that where we use the term *"flexible working request"* we do so in a non-technical sense. The Tribunal has determined that the claimant's claims brought pursuant to Part VIIIA of the 1996 Act have not succeeded. This is because, as will be seen, none of the three flexible working requests about which the claimant brings her claim (dated 8 March 2022, 25 April 2022 and 17 October 2022) complied with the technical requirements of the 1996 Act and the 2014 Regulations. Our use of the term *"flexible working request"* therefore must be understood in this context.

29. Having now given the general context of the claimant's employment, a chronology of the key events, and a brief description of the principal people involved in the case, we now turn to a more detailed consideration of the facts in issue. We shall start at the beginning when the claimant commenced her employment with the respondent.

30. Her offer letter (for the position of consultant) is at page 71 of the bundle. It is dated 14 November 2017 and is signed by Phil Burrows who is the respondent's chief executive.

31. Her contract of employment is in the bundle commencing at page 72 which is also dated 14 November 2017. The copy in the bundle appears to be unsigned. However, there was no dispute that this was the contract between the parties.

32. The claimant was contracted to work 37.5 hours per week between the hours of 08:00 and 18:00 Monday to Friday. 9 am to 5 pm were regarded as *"core hours."* The Tribunal was not taken to any contractual provision requiring the claimant to work core hours. The clause in the contract to which we have just referred imposed no such obligation upon her. That said, there is no dispute as that 09:00 to 17:00 are the core hours.

33. It was also not in dispute that during her employment with the respondent, the claimant's working hours varied. Most helpfully, the parties responded to the Tribunal's request for assistance by producing an agreed excel spreadsheet of the hours worked by the claimant at different times. This helpful document was handed to the Tribunal on the morning of 7 March 2024. What this document shows is that at times the claimant did work core hours and at other times she was working a different pattern.

34. The significance of core hours from the respondent's perspective (and which is a feature of some significance as we shall see) is the requirement for there to be a management presence in each of their offices during those core hours.

35. The claimant achieved managerial status in November 2021 when she was appointed to the post of deputy manager. Before achieving that promotion (which Mrs Flynn commented was richly deserved) she had worked for two years as senior consultant having achieved a promotion from the post of consultant in November 2019. When she achieved promotion to the post of deputy manager, her line manager became Mrs Stanley.

36. To fulfil the need for *"management"* during core hours, the respondent includes not just the managers but also includes the deputy managers. Consultants and senior consultants are not deemed to be management for this purpose. With reference to a management presence on business days, the need is particularly acute Thursdays and Fridays. The claimant said so in evidence before the Tribunal and her account is corroborated by what was said by Michelle Flynn in the grievance investigation interview of 28 November 2022 conducted by Mrs Dulku. We refer to what Michelle Flynn said at page 161 of the investigation meeting notes (at pages 160 to 162). Indeed, there was little dispute that there was not always a management presence until 5 pm at all times on Mondays and Tuesdays. (This was the case from the date of the claimant's return to work in September 2022. We can see from the rota at page 127 that very other Monday and Tuesday neither the claimant or Mrs Stanley were in the office past 4:30).

37. From this general overview of matters, we now turn to make findings of fact about specific matters which form the basis of the claimant's constructive dismissal and disability discrimination claims. By reference to the list of issues (at page 68) we can see that three events from 2020 form the basis of the direct disability discrimination claim. There are then an additional three events said to have occurred in 2022. Those six matters also form the basis at the constructive dismissal claim in addition to which is added the respondent's response to the claimant's flexible working requests made on 8 March 2022, 25 April 2022, and 17 October 2022.

38. In making our findings of fact about the 2020 events, matters have not been helped by the respondent's witnesses not leading any evidence in chief about them.

39. The first matter that we shall look at is the claimant's complaint that in March 2020, during the Covid lockdown, the respondent refused a flexible working request to enable her to work from home. The claimant's account of this is in paragraphs 7 and 8 of her witness statement. (We should observe that the claimant did not number her witness statement. The Tribunal numbered it by manuscript amendments for ease of reference).

40. In March 2020, the claimant held the post of senior consultant. She did not hold a managerial role. The claimant explains that she and her work colleagues were classed as keyworkers required to go to the office during normal working hours. X was able to attend his then-mainstream school but there was no after-school provision due to Covid restrictions. The claimant complains that when leaving work early (as she had to as there was no after-school provision) she was compelled to take annual leave and then unpaid leave. The claimant's account of these arrangements was corroborated by Miss Lloyd.

41. The claimant complained that Miss Lloyd had been allowed to work from home in or around March 2020 at the onset of the pandemic. This was to enable her to care for her daughter who had Covid.

42. In evidence given during cross-examination, Mrs Stanley confirmed what the claimant and Miss Lloyd had said about arrangements to the effect that where childcare provision could not be obtained, and an employee left work early, the expectation was to use annual leave and once that had run out to take unpaid leave.

43. When she gave evidence under cross-examination, Mrs Flynn said that the respondent was an operational and a reactive business. She said that there was a risk to service users if a call was placed with a manager or senior consultant working at home and they are distracted by childcare needs. Mrs Flynn also raised Data Protection Act 2018 issues in answer to the claimant's suggestion of patching calls from the office to her mobile.

44. The claimant said that she had been labelled as challenging when, on behalf of herself and Jodie Lloyd, she raised the issue of the need to take unpaid leave for childcare reasons.

45. In connection with this, on 8 February 2024, the respondent produced a screenshot recording a discussion between Mrs Flynn and the claimant. This is dated 29 June 2021. The discussion followed comments made by the claimant in a mental health survey. The discussion appears to have been around comments made by the claimant in the survey about the support (or lack of it from the claimant's perspective) at the outset of the pandemic. Mrs Flynn recorded explaining to the claimant that she had no issues with her voicing how she felt, but there may be other ways to raise concerns than the one which the claimant had chosen.

46. From the evidence at paragraphs 39 to 45, we find that the claimant was expected to take annual leave and unpaid leave where she needed to leave early because of the lack of after-school provision. The claimant continued to feel aggrieved about this prompting her to use the survey carried out 18 months afterwards as a platform for her complaint. The Tribunal accepts that the respondent's need was for their employees handling reactive calls to be focussed and not be distracted by childcare demands.

47. The respondent was unable to produce a copy of the flexible working request made by the claimant in March 2020. However, they were able to produce a copy of the flexible working request made by the claimant in August 2020 and the flexible working request meeting which followed it.

48. The flexible leave application form and the minute of the meeting which followed it held on 11 August 2020 were produced by the respondent during the hearing. The claimant requested a change in her working pattern. The reason for the request was given as the shortage of childcare which had a real impact upon the claimant, and which had caused her to reduce her working hours due to the pandemic.

49. Mrs Stanley and Mrs Swift met with the claimant to discuss her flexible working request on 11 August 2020. The claimant explained that the childminder who would normally pick X up from school (except on days when he went to his father's) was no longer able to provide her services. The claimant had been unable to locate an alternative childminder.

50. The claimant was requesting the changed work pattern to commence on 4 September 2020. At this point she held the role of senior consultant. Mrs Stanley said at the meeting that if the respondent was able to accommodate this request, then the claimant would be expected to revert to working the core hours of 9 to 5 with effect from January 2021. The claimant said (as recorded on the second page of the meeting notes), *"So what happens if I can't return in January to normal, what happens to the senior role?"* Mrs Stanley replied, *"I presume that we would have a further meeting would we Amanda [Swift]?"* Mrs Swift agreed that that would be the way forward. The claimant's request was agreed.

51. In anticipation of the meeting of 11 August 2020, Mrs Stanley had emailed Mrs Swift and Mrs Flynn on 7 August 2020 to confirm that when meeting with the claimant she would be informed of the expectation for her to return to full time hours with effect from January 2021.

52. In fact, a couple of days earlier, on 5 August 2020, Mrs Stanley had emailed Mrs Flynn to say that she had had *"a catch up with Laura and she has told me about the childminding issue, after school club is also not opening now until January 2021. Laura has tried every local and available childminder in the area and no one has any availability, Laura has said that she needs to apply for flexible working as she feels she has no other option. In all day if you want to catch up."* In reply, Mrs Flynn asked Mrs Stanley, *"Has she tried Doncaster Council, Family Services and asked if they can advise, is there no after school club as alternative for childminder?"* (Pages 103 and 104).

53. The claimant raised two allegations (in her discrimination and constructive unfair dismissal claims) about the respondent's handling of the flexible working request in August 2020. The first allegation was that Mrs Flynn and Mrs Stanley questioned the claimant as to why she was unable to put X in childcare.

54. It is clear, from the notes of the flexible work meeting of 11 August 2020, that the claimant was asked to explain her difficulties with childcare. However, this was only to be expected given that childcare difficulties formed the basis of the flexible working request made by the claimant. She had volunteered difficulties with the shortage of childcare to lay the basis for the request.

55. In evidence given under cross-examination, the claimant accepted that she had not discussed childcare issues directly with Mrs Flynn in August 2020. (The

claimant appeared confused matters, as Mrs Flynn had discussed childcare issues with her in connection with a flexible working request made by her in March 2022).

56. The second allegation raised by the claimant around the August 2022 request was that the claimant was threatened on two occasions, and she was told or instructed to *"stick X in a childminder or after- school club."* The claimant in fact gave no evidence in her witness statement that Mrs Stanley or Mrs Flynn had directed her to simply "*stick"* X anywhere. In her grounds of claim which accompanied her ET1, she said (at page 18 of the bundle) that she *"can't just stick [X] with anyone".* In the further information of her claims which she was directed to produce by Employment Judge Jones, she raised no issue that she had been directed by Mrs Stanley and Mrs Flynn simply to *"stick"* X with a childminder.

57. In her grievance investigation interview (to which mention has already been made in paragraph 27 above) Mrs Flynn said (at page 161) that she is a single person herself. She said that she had offered support for the claimant during Covid.

58. On balance, the Tribunal prefers the respondent's account of matters from August 2020. While we accept that Mrs Stanley questioned the claimant about her childcare needs in August 2020, this is only to be expected as it formed the basis of the flexible working request. There was nothing improper about Mrs Stanley questioning the claimant about the childcare issue that had arisen.

59. We find that the claimant's position was not threatened by Mrs Stanley. The claimant was simply informed at the flexible working meeting held on 11 August 2020 that there would have to be a review of her position if she was unable to source childcare and return to her normal working hours by January 2021. What was contemplated was consideration of moving the claimant to a less demanding role.

60. Further, Mrs Stanley was very supportive of the claimant. Introduced into the bundle on the first day of the hearing were a series of WhatsApp messages on various dates between the claimant and Mrs Stanley. On 30 August 2020 Mrs Stanley sent a WhatsApp message to the claimant to the effect that she *"never want[s] to get rid of you".* This is at page 266 of the bundle.

61. Mrs Stanley and the claimant formed a close personal friendship. Regrettably, they are now estranged. Mrs Stanley fairly recognised when giving evidence before the Tribunal that she may have overstepped the mark in forming such a close bond with the claimant as this compromised her ability to manager her. We consider that this was the cause of some of the problems which later beset the relationship between the parties (as we shall see). Nonetheless, given the close affection which Mrs Stanley and the claimant had for one another in 2020 the Tribunal find it against the probabilities that Mrs Stanley would threaten the claimant with her job.

62. The claimant led no evidence in any case that Mrs Stanley or Mrs Flynn had suggested simply *"sticking"* X with anybody to free her up to work. In our judgment, it is against the probabilities that Mrs Stanley would so act for the reasons given in paragraphs 60 and 61. Likewise, although Mrs Flynn and the claimant did form a personal friendship such that Mrs Flynn was supportive of the claimant with domestic difficulties in 2018, they were never as close as were Mrs Stanley and the claimant. The zenith of the friendship between Mrs Flynn

and the claimant appears to have been reached in 2018. Relations between them then became more professional and detached. The claimant said in evidence that she found Mrs Flynn to be something of an intimidating figure.

63. That is of course a subjective sentiment upon which the Tribunal can make no judgment. That said, we consider it against the probabilities that Mrs Flynn would be so crass as to suggest simply *"sticking"* X anywhere given the professional position which she holds and the constructive approach which she took to the claimant's flexible working request made in August 2020 (per paragraph 52 above). Not only did she not object to Mrs Stanley agreeing to the claimant's request, she made constructive suggestions for alternative sources of help for the claimant.

64. Therefore, the Tribunal finds that:

64.1. The claimant's position was not threatened in August 2020.

64.2. The respondent did not request the claimant simply to *"stick"* X with any childminder or after school club.

64.3. Mrs Stanley did question the claimant as to why she had childcare difficulties.

64.4. Those questions were proportionate and reasonable given the nature of the claimant's flexible working request.

65. The next incident with which we are concerned arose in July 2022. The claimant's case is that Mr Flynn-Williamson said he was *"highly disappointed"* in the claimant for refusing to complete weekend cover for another site because she was looking after X and unable to work.

66. There appears to be no dispute that this incident took place on 7 July 2022. The claimant gives her account of matters in paragraph 34 of her witness statement. There also appears to be no issue between the parties that the claimant was that day seated near to Mrs Stanley who was relaying to Mr Flynn-Williamson over the telephone the claimant's inability to take the on-call duties for the over branch. Obviously, the claimant could only hear Mrs Stanley's side of the conversation. The claimant says that Mrs Stanley said to her that Mr Flynn-Williamson was *"highly disappointed"* in her inability to assist.

67. Mr Flynn-Williamson accepts in paragraph 19 of his witness statement that he felt disappointment that the claimant was unable to assist as he valued her work.

68. In his grievance investigation meeting with Mrs Dulku held on 25 November 2022 Mr Flynn-Williamson said that he was disappointed. He thought it was only a *"small ask."* He commented, *"she refused as she had plans with her child and I was disappointed."* The claimant makes a valid point that this was a different rationale for disappointment than that given by Mr Flynn-Williamson in paragraph19 of his witness statement.

69. Mrs Stanley was interviewed by Mrs Dulku on 29 November 2022 (pages 163 to 166). She told Mrs Dulku that Mr Flynn-Williamson had said he was disappointed with the claimant. She said that she had informed the claimant of Mr Flynn-Williamson's comment. Before the Tribunal and in evidence given under cross-examination, Mrs Stanley went further and said that Mr Flynn-Williamson had said that he was *"really disappointed"* in the claimant.

70. Upon this issue, therefore, we prefer the evidence of the claimant. We do not go quite so far with her as to accept that Mr Flynn-Williamson said that he was *"highly disappointed"* in her, but we do accept that he made an adverse comment to Amanda Stanley which was immediately relayed to the claimant to the effect that Mr Flynn-Williamson was "*really disappointed"* in her. The word *"really*" as opposed to *"highly"* is in our judgment a distinction without much of a difference. It is credible that Mrs Stanley would have relayed Mr Flynn-Williamson's comments to her given her close friendship with the claimant. We agree with the claimant that Mr Flynn-Williamson's credibility upon this issue is not helped by the inconsistency to which we have referred in paragraph 68.

71. The next issue is the claimant's contention that when she returned to work in September 2022 the respondent reneged on an agreement to assist the claimant with her childcare hours. The background to this is to be found in the claimant's flexible working requests dated 8 March 2022 and 25 April 2022.

72. The claimant's flexible working request of 8 March 2022 was made in an email of that date at pages 107 and 108. She informed Mrs Stanley and Mrs Flynn of her need for additional support given that X "*is really struggling in school to the point he has been excluded for two days recently because they don't know how to manage his needs."* She informed them that X was awaiting an autism assessment. She asked to change her hours given the difficulties which she was experiencing.

73. Mrs Flynn replied the same day (page 106). She expressed sympathy with the claimant's position. She said, "*As you know we have always tried to support but we do also have to balance against the needs of the business. It is more difficult when you are deputy as fundamentally we need you or Amanda [Stanley] to be there until 5pm."* (By this stage, the claimant had been promoted to the position of deputy. Mrs Flynn was referring here to the core hours issue referred to above).

74. It is not in dispute that the respondent agreed to amend the claimant's hours in March 2022. This was a supportive measure on the part of the respondent.

75. On 25 April 2022 the claimant emailed Mrs Stanley (page 113). She said, *"I've exhausted every possible avenue [of childcare] at present with no luck."* Having exhausted other avenues, she contemplated placing X with a childcare provider who sits within the respondent's building. She volunteered that, *"this is going to cost me £107 per week for 4.5 hours and I just cannot afford to pay that."* She asked for an extension of the hours which had been agreed for her by the respondent the previous month.

76. Again, this was granted by the respondent. Mrs Stanley agreed to extend the flexible arrangement arrived at in March 2022 to the end of the school term that July.

77. Unfortunately, matters then took a turn for the worse in July. As the claimant says in paragraph 10 of her witness statement, *"In July 2022 my son was excluded from his mainstream school as they couldn't meet his needs."* She says in her evidence that she was reticent to raise the issue with Mr Flynn-Williamson given his reaction to matters on 7 July 2022. Mrs Stanley was not in the office on the day of the exclusion. The claimant was signed as unfit to work by her General Practitioner.

78. Her absence due to stress and anxiety commenced on 26 July 2022. She returned to work on 12 September 2022. (In fact, the period of sickness ended on 31 August 2022 and the claimant used a period of annual leave before physically returning to the workplace on 12 September as noted in the return-to-work form at pages 129 to 131).

79. Mrs Stanley was aware of the difficulties being experienced by the claimant. We can see from the WhatsApp messages that the claimant was complaining of exhaustion on 21 July 2022 (page 250). Eight days earlier, on 12 July 2022, the claimant informed Mrs Stanley that she had had *"a breakdown in the doctors and then in the pharmacy."* She informed Mrs Stanley that X had been excluded from school that day (page 267). On 22 July 2022 the claimant then informed Mrs Stanley that X had been excluded from school for three-and-a-half days (page 269).

80. During the summer break, the claimant kept Mrs Stanley informed of developments regarding X's schooling by WhatsApp messaging. She informed her on 16 August 2022 that she had been to look at three schools. This followed some welcome news on 10 August 2022 to the effect that X had been accepted for a private assessment for ASD (*autism spectrum disorder*) (page 255). There was then some doubtless very welcome news that a placement for X had been found in a specialist school to start on 5 September 2022. We refer to pages 284 to 286.

81. Prior to her return to work on 12 September 2022, Mrs Stanley agreed with the claimant of her to do the work pattern that we see in the email dated 9 September 2022 from Mrs Stanley to Mrs Flynn. Mrs Stanley made a comment to the effect that Carrie (a senior consultant) had made a slight change to her hours to accommodate the request made by the claimant. A note to this effect is made on the agreed excel spreadsheet to which we referred above.

82. The rota devised by Mrs Stanley was that she or the claimant would be present in the office during the core hours of 9am to 5pm every Thursday and Friday. This was the work pattern that pertained after 12 September 2022 until 17 October 2022. The work pattern had the claimant finishing at 4:00pm every other Thursday and Friday and at 5:00pm the other Thursday and Friday. On the Thursday where the claimant worked until 5pm, Mrs Stanley would be off.

83. The day off was provided to compensate Mrs Stanley for being on-call. It is not in dispute that the introduction of on-call hours into the Doncaster office was something which had been mooted and was planned to be introduced in March 2022. Again, there is a note on the agreed excel spreadsheet to the effect that the planned introduction of on-call had been deferred several times to accommodate the claimant. On-call was introduced in June 2022.

84. On 17 October 2022 the claimant emailed Mrs Flynn and Mrs Stanley (pages 133 and 134). She wrote,

"*I'm sorry to be writing this and need to be honest.*

X has settled into his new school which is a huge relief, but things are still really tough at home. Liam (the claimant's new partner) has been doing the transition for the taxis until I am eligible for funding for a PHB [personal health budget] to employ a 1:1 but can no longer do this. It is too much for him to deal with as X's behaviours are really bad daily, I myself had two bust lips last week and I'm covered in bruises. I always knew the transition would be hard but didn't

anticipate it would be this hard for him. I'm pushing the referral for funding so I can employ someone directly who can support X after school. As a temporary measure please can I change my hours to the below until I can secure a 1:1 for him. Then I would request if possible I could do 08:30 to 16:30.

I am sorry for this and have dreaded sending this over. I've tried all sorts, but realistically I can't do anything until he has a diagnosis."

85. The claimant then suggested a two weeks' rota *"as [the] temporary measure."* Her suggestion was:

"Week 1 – Monday – 08:30 to 15:30; Tuesday – 08:30 to 15:30; Wednesday – 08:30 to 17:30; Thursday – 08:30 to 15:30; Friday - 08:30 to 18:00.

Week 2 – Monday – 08:30 to 15:30; Tuesday – 08:30 to 15:30; Wednesday – 08:30 to 18:00; Thursday – 08:00 to 18:00; Friday 08:00 to 15:30"

86. On the same day Mrs Flynn emailed Mrs Swift (page 132). She suggested discussing the claimant's request the next day and commented that she *"can't believe it"*. Mrs Flynn said in evidence that this misgiving was not about the request in and of itself but rather the quick turnaround time as the claimant was seeking to amend her hours with effect from 20 October 2022. The Tribunal accepts Mrs Flynn's explanation. While doubtless this was unwelcome news for her, she did conscientiously consider the claimant's application with other members of the management team such as to be able to formulate a response for the claimant on 20 October 2022.

87. On 20 October 2022 Mrs Flynn emailed Mrs Stanley (pages 139 and 140). She said, "*Laura was well aware when she came back in September [2022] she needed to revert back to full time hours either 9 - 5 or 08:30 to 4:30 which she did. Nothing has changed. We still need her to do that but we have took into consideration the situation and agreed to a further amendment. I'm not keep having these conversations, we need to go back and say the other hours were temporary, she was well aware of that and that they couldn't be sustained. Did we write to her at any time about that?"*

88. This must have been an uncomfortable email for Mrs Stanley to have received. Mrs Flynn said in evidence before the Tribunal (under questioning from the Employment Judge) that she would not have been prepared to agree to the arrangement reached on the claimant's return to work in September 2022 by Amanda Stanley and recorded at pages 126 and 127 (*per* paragraphs 82 and 83 above). However, Mrs Stanley had emailed Mrs Flynn about arrangements on 9 September 2022 (pages 126 and 127). Mrs Flynn accepted fault that she had not responded to this email or dealt with the matter herself and had overlooked to do so.

89. She said that Mrs Stanley had not, for her part, reminded her (Mrs Flynn) of the need to discuss matters nor had Mrs Stanley notified the respondent's HR of the new arrangement. Mrs Flynn says that she was reminded of the new arrangement only on 17 October 2022 upon receipt of the claimant's flexible working request.

90. Mrs Flynn and Mrs Stanley both fairly recognised deficiencies in how they had managed the situation. Of course, none of this was the claimant's doing. She was entitled to rely upon her line manager's sanction for the working hours upon which she embarked when she returned to the workplace on 12 September 2022.

91. Before the letter of 20 October 2022 at pages 139 and 140 was sent to the claimant, there was some back and forth amongst the respondent's management about the situation. Of particular concern was ensuring management cover on Thursdays and Fridays. Mrs Stanley emailed Mrs Swift to this effect on 19 October 2022 (page 137).

92. It is also right to observe that Mr Flynn-Williamson did not welcome this development. He expressed the opinion to Mrs Flynn (on 20 October 2022 at page 144) that, *"To be demanding these new hours within a few days when there has been no mention of anything since she returned on 5 September is unbelievable."* He then asked as to the length of her contractual notice period. Mr Flynn-Williamson told the Tribunal that he enquired about this because he had been informed by Mrs Stanley that the claimant had been seeking other jobs.

93. That this is the case is corroborated by Mrs Stanley's email to Mrs Flynn and Mrs Swift (copied to Mr Flynn-Williamson) of 20 October 2022 at 9:40 (pages 145 and 146). Mrs Stanley said that she had spoken to the claimant and that she, *"is adamant she can't do the Thursday to 5 on week 1 or the Friday on week 2 … she is applying for other jobs she has told me, I did try and explore things further but could only delve so deep into her relationship/financial situation."* In the light of this, it appears that the respondent's senior management resigned themselves to agreeing to much but not all of the claimant's flexible working request.

94. So it was that on 20 October 2022 Mrs Stanley wrote to the claimant (page 148). Due to a combination of postal strikes and the claimant's annual leave, she did not in fact receive this letter (which was posted and not emailed) until 29 October 2022.

95. Mrs Stanley wrote to offer the claimant flexible working on the following rota:

Monday – 8:30 to 3:30; Tuesday – 8:30 to 3:30; Wednesday – 8:30 to 5:30; Thursday – 8:30 to 5pm; Friday – 8:30 to 5pm.

96. Mrs Stanley informed the claimant that the new working arrangement was to begin from 31 October 2022. She was also informed that, *"The variation to your contract will last from 31 October 2022 until 31 December 2022."*

97. Mrs Stanley's offer was not on a fortnightly cycle. That said save for every other Thursday and Friday, the start times accorded with those asked for by the claimant. There was no issue with the respondent's proposed start times as far as the claimant was concerned.

98. The respondent was prepared to agree the finish times proposed by the claimant for Monday, Tuesday and Wednesday of week 1 (at page 133). (The claimant had in fact proposed working until 18:00 every second Wednesday (page 134)).

99. The difficulty was the proposed finish times on Thursday and Friday. The claimant has suggested finishing at 3:30 pm every other Thursday and Friday and 6:00 pm the alternative Thursday and Friday. The respondent's response to the flexible working application was to set her finish times on every Thursday and Friday at 5pm. This meant finishing an hour and a half later than the claimant had requested every other Thursday and Friday. In other words, she had to finish one and a half hours later than she had proposed on one day each week (alternate Thursdays and Fridays).

100. On 1 November 2022 the claimant appealed against the rejection of the flexible working request of 17 October 2022. Her appeal is dated 1 November 2022 and

is at pages 186 and 187. The claimant asked why it was not possible to accommodate the hours that she had suggested. She said that she had checked the rotas and there was adequate cover on all days during core hours. She said, *"I appreciate that I have had to request previously around my hours due to my son's needs, but I am struggling to understand why 1.5 hours is impossible to facilitate given that the other days I have requested we either have a manager and one or both seniors in the office as well as the other consultants."* She said that X *"requires a specialist 1:1 and I cannot just stick him with anyone. The funding for this takes time and I cannot personally afford £35.40 for an hour and a half per day."*

101. The claimant's appeal was acknowledged by the respondent on 2 November 2022 (page 185). Mrs Swift said that her appeal was being reviewed and the respondent would contact her "*in due course."*

102. On 10 November 2022 Mrs Swift wrote to the claimant (page 189). She invited the claimant to attend a flexible working appeal meeting which had been arranged for the following day at 10.30am via Microsoft Teams. The claimant was informed that the hearing was to be chaired by Mr Flynn-Williamson.

103. This invitation was sent the day after the claimant had resigned. On 9 November 2022 the claimant emailed Mr Burrows and Mrs Stanley with her resignation. The email is at page 196 and the letter of resignation is at pages 197 to 201.

104. The claimant said in her letter of resignation that she loved her time working with the respondent. She was very complimentary of Mrs Stanley. She said (towards the end of the letter), *"Amanda you are the most kind, supportive and compassionate manager and an absolute credit to Apollo."* She thanked Mrs Stanley for supporting her through *"the toughest times in my life."*

105. She mentioned (at page 198) being "*a single mother, who has no family and when I say no family it is quite literally that – I have no one. It is just me and my son who is eight years old, who has autism, possibly ADHD and learning difficulties."* She then mentioned the difficulties with X's schooling.

106. She referred on the same page to Mrs Flynn *"continually asking why she can't do this, why can't she do that. Get a childminder."* She complained that this created a pressured situation for her. She also mentioned the incident with Mr Flynn-Williamson of 7 July 2022.

107. She referred (at page 199) to how she had felt upon X's exclusion from school and the need to inform Mr Flynn-Williamson that she would have to leave work to attend to matters. She then recounted the need to continue with flexible working arrangements upon her return to work in September 2022 due to X *"hurting my partner to the point where he said he cannot do it and so he shouldn't. X is my child and my responsibility."*

108. She then said at page 199 that, *"I had to ask again to change my hours slightly and this has been declined due to my role and the office being manned. As you are probably aware I have appealed this due to the reasons given that it was not possible … the reasoning that I couldn't understand was that me and Amanda cannot be off at the same time, yet we have two seniors in our office who have both been here for a long period of time."* Plainly, this was a reference to the flexible working request of 17 October 2022 which at the date of her resignation was still under appeal.

109. The claimant then mentioned Carrie (page 200). She said, *"What I don't like is that and this is no disrespect to Carrie but when I'm being asked how to do certain things that she doesn't know how to do, but no one knows that it is me doing these things."* She then mentioned "*Carrie asking me what to do."*

110. On 11 November 2022 the flexible working appeal meeting was held (pages 190 and 191). The claimant was informed of the outcome on 15 November 2022 (pages 194 and 195). The appeal was rejected upon the basis of three of the statutory grounds to be found in section 80G of the 1996 Act. Mr Flynn-Williamson pointed out that a managerial presence was required during core office hours.

111. On 16 November 2022 the claimant raised a grievance (pages 169 and 170). A copy of the grievance itself appears not to be in the bundle. However, the Tribunal does have the benefit of grievance meeting notes at pages 172 to 176. The claimant was interviewed about her grievance by Kate Higgins, quality manager in the presence of Mrs Dulku.

112. The claimant pointed out (at page 173) that on every other Thursday Mrs Stanley would be in the office until 5pm and then *"on the affected Friday"* she would be there until 5pm also. What the claimant was saying, in essence, is that the rotas could be arranged such that her alternative Thursdays and Fridays when she finishes early could be made to mesh with Mrs Stanley's alternate Thursdays and Fridays to ensure a managerial presence until 5pm. She also pointed out that a senior consultant would also be present.

113. The claimant's grievance was not upheld. The grievance outcome is at pages 179 and 181. It was found against the claimant that she had been discriminated against following her resignation, about the effect upon her mental health caused by senior management, and inappropriate comments made by Mr Flynn-Williamson during the flexible working appeal outcome meeting. (This was in connection with an allegation raised by him about the claimant allegedly breaching her contract of employment by seeking to entice others to leave the respondent).

114. The latter allegation was also not upheld. It was found that Mr Flynn-Williamson had simply reminded the claimant of her contractual obligations against solicitation of others. In the event, no internal proceedings were taken against the claimant upon this allegation.

115. During the claimant's grievance investigation meeting held on 28 November 2022 (page 159) an issue was raised by Mrs Stanley about an emerging pattern of the claimant leaving work. It was noted that she had left on 11 November 2022 due to ill health. She had had a doctor's appointment on 17 November 2022 and then had walked out on 25 November 2022.

116. On the first of these dates, the claimant defended her position upon the basis that she had just come out of the flexible working appeal meeting with Mr Flynn-Williamson held on 11 November 2022. She said that she had emailed Mrs Stanley to let her know she was leaving. We accept the claimant's evidence upon this as there is an email of that date to that effect at page 151.

117. The claimant said in evidence under cross-examination that on 11 November 2022 she had been physically sick at the workplace. She accepted that the email at page 151 was not seeking permission as such but was simply informing Mrs

Stanley that she was leaving. Nonetheless, she said that Mrs Stanley had given her permission so to do.

118. Mrs Stanley wrote to Mrs Swift on 16 November 2022 to confirm that the claimant would be absent on 17 November 2022 due to a doctor's appointment. She was therefore to leave at 3.30pm. Mrs Stanley said that *"I have asked Laura if she feels fit to be in work at present to which she answered yes but she feels like she is in a no-win situation if she leaves or stays in work and that financially she cannot afford to be off work."* Mrs Stanley did not say that the claimant did not have her permission to attend the GP appointment. Mrs Stanley did not give any evidence in her witness statement about the claimant's absence upon these three days. No points were put to her by the claimant about this in cross-examination.

119. That said, the Tribunal finds it credible that the claimant absented herself with the sanction of Mrs Stanley. Their friendship was still very strong at this point. Indeed, on 11 November 2022 (at 20:38) (page 294) Mrs Stanley sent a message to the claimant to say, *"Hope your [sic] ok sweetheart I love you."* The claimant replied, "*I do love you Amanda…"*

120. Further, on 22 November 2022, the claimant had asked Mrs Stanley to give her away at her wedding. Mrs Stanley had readily agreed. (No date was set for the claimant's wedding. The claimant asked Mrs Stanley to give her away as and when that happy day arrives).

121. The claimant's request of Mrs Stanley to give her away at her wedding and Mrs Stanley's acceptance of her request is indicative of an extremely close friendship. It is therefore simply not credible that Mrs Stanley would be anything other than supportive of the claimant having to leave work early on these three days.

122. It should be observed that 11 November and 25 November (both Fridays) coincided with the week 2 pattern proposed by the claimant on 17 October 2022. Thursday 17 November 2022 coincided with her week 1 work pattern. Upon each of these three days she had wanted an early finish of 15:30.

123. There may have been some muddle in the respondent's minds about the claimant's request made on 17 October 2022. This is because the tables produced by Mrs Stanley on 9 September 2022 at page 127 mixed up weeks 1 and 2. Plainly, the claimant's intention was that her week 2 (at page 134) would coincide with Amanda Stanley's day off every other Thursday. It stands to reason therefore that the tables in Mrs Stanley's email had got transposed. Self-evidently, the claimant was not and would not be proposing an early finish by her on a Thursday when Mrs Stanley was having her lieu day following undertaking on-call work.

124. Had the respondent investigated matters properly they would have discerned that on the two days of most concern (Thursday and Friday) the claimant's proposal of 17 October 2022 ensured that either the claimant or Mrs Stanley would be in the office over the core hours.

125. The Tribunal does accept the respondent's case that the claimant's reliance upon Carrie and the other consultants was misplaced. The claimant accepted in cross examination that the respondent works in a highly regulated environment. The claimant also fairly accepted in cross-examination that she did not have a full understanding of CQC requirements. The claimant in any case, in our judgment, contradicted her position on this issue before the Tribunal as within her

resignation letter in which, as we have seen (per paragraph 109), she made some criticism of Carrie and her lack of experience and know-how. This made the respondent's point for them that a management presence was required.

126. The Tribunal therefore does accept the respondent's case that during core hours on Thursday and Friday it was imperative to have the deputy manager or manager in attendance. That matters were not so imperative upon the other three days is evident from the respondent's response to the claimant's flexible working application. Allowing the claimant to finish at 3:30pm on Monday and Tuesday would result (on the week 1 rota at page 127- *wrongly transposed as the second block of text*) in no manger being present between 4:30pm and 5pm every other Monday and Tuesday.

127. On 29 November 2022 the respondent initiated disciplinary proceedings against the claimant. This is at pages 167 and 168. This concerned the claimant's absences on 11 November, 17 November, and 25 November 2022. The claimant was informed of her right to be accompanied by a work colleague or trade union representative. There was no suggestion within the letter that the claimant was at risk of dismissal.

128. In the event, the respondent took the decision to place the claimant on garden leave for the remainder of her notice period. She was notified of this on 2 December 2022 by Mrs Stanley (pages 205 and 206). A letter of confirmation to this effect was sent to the claimant on 5 December 2022 (page 207). The disciplinary process was abandoned.

129. The claimant started her new position with Sure Healthcare and Support Living UK Limited. She commenced her employment with them on 9 February 2023. This was the day after her contractual notice period with the respondent expired.

130. As we know, the claimant had informed Mrs Stanley that she was looking for other employment before she resigned. This was confirmed in Mrs Stanley's email to Mrs Flynn of 20 October 2022 at page 145.

131. The claimant gave some late disclosure consisting of WhatsApp messages between the claimant and Sure Healthcare. The first of these is dated 31 October 2022. This evidently followed a conversation between the claimant and a representative of Sure Healthcare. We refer to the WhatsApp message at 18:13 which the claimant says that it *"lovely talking to you."* On 7 November 2022, the claimant was asked for her home address in order that a contract of employment could be sent to her.

132. The claimant said that she was in fact interviewed in-person on 8 November 2022 by Sure Heatlhcare but that before that day she had had what effectively amounted to a telephone interview on 31 October 2022. On 8 November 2022, the claimant declined an offer which she had received from another prospective employer (page 310).

133. The claimant had also informed Amanda Stanley on 20 July 2022 that she had had an approach from another prospective employer. We refer to page 248.

134. The claimant was giving serious consideration to the prospect of working for that prospective new employer. In the event however it appears that matters went no further. The claimant of course remained in the respondent's employment until 18 February 2023 having resigned only on 9 November 2022.

135. From this, the Tribunal concludes that the claimant was open to offers of employment from other prospective employers. While that may be unwelcome from the respondent's perspective, it is a fact of commercial life. The Tribunal's view is that the claimant came across as an impressive individual. There was no issue about her competence. She had received two promotions in her time with the respondent. It is unsurprising that she should be sought after, particularly given the well-publicised staff shortages in this sector. Many employees approached by other employers will give matters serious thought.

136. We find as a fact that the claimant had lined up alternative employment with Sure Healthcare to commence on 9 February 2023 before she resigned her position with the respondent. She tendered her resignation on 9 November 2022, a couple of days after the job offer had been confirmed and her new employer had sent the contract to her.

137. We are satisfied the claimant did not decide to resign from her position with the respondent until after the refusal of the flexible working request dated 17 October 2022. She had taken the opening (that she informed Amanda Stanley of in July 2022) no further. The telephone interview with her new employer was after the refusal of the flexible working request. On balance of probabilities, we are satisfied that the claimant's resignation was precipitated to a material degree by the refusal of that flexible working request. She expressly mentions this in the letter of resignation. It is simply not credible to suggest that this had no influence upon her actions. The timings and the evidence suggest otherwise.

138. This concludes the Tribunal's findings of fact.

The issues in the case

139. Having made our findings of fact, we now turn to a consideration of the issues in the case. These are at pages 65 to 70 of the bundle. We set them out here as they appear in Employment Judge Armstrong's order of 16 June 2023.

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 4 October 2022 may not have been brought in 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 three 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 extension) 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?

1.3 Was the complaint of refusal of a flexible working request made within the time limit in section 80H (5) of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the relevant date as defined by section 80H (6) ERA 1996?
1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:
2.1.1.1 The acts set out below in relation to the direct discrimination claim and the flexible working request complaint.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 The claimant has confirmed that she does not allege a breach of any express term of the contract.

2.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation. The respondent alleges that the claimant resigned because she wished to commence alternative employment.

2.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract? *[Respondent to confirm whether a potentially fair reason for the breach of contract is asserted as directed above].*

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 The claimant is not seeking an order for reinstatement or reengagement.

3.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

- 3.2.1 What financial losses has the dismissal caused the claimant?
- 3.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.2.3 If not, for what period of loss should the claimant be compensated?
- 3.2.4 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?
  - 3.2.4.1. The respondent alleges that the claimant was likely to have been dismissed in any event due to alleged unauthorised absences and breach of non-solicitation clauses during her notice period.
- 3.2.5 If so, should the claimant's compensation be reduced? By how much?
- 3.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 3.2.7 Did the respondent or the claimant unreasonably fail to comply with it?
- 3.2.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 3.2.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
- 3.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 3.2.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

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

3.4 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. **Disability**

4.1 Did the claimant's son, X, have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment, namely: Autism Spectrum Disorder (ASD) or Attention Deficit Hyperactivity Disorder (ADHD) type symptoms for which he is awaiting an assessment?
4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
4.1.3 If not, did L have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.1.4 Would the impairment have had a substantial adverse effect on X's ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

5. **Direct (associative) disability discrimination (Equality Act 2010 section 13)**

5.1 The protected characteristic relied on is X's disability.

5.2 Did the respondent do the following things:

5.2.1. In July 2022, Brody Flynn-Williamson stated that he was highly disappointed in the Claimant for refusing to complete weekend cover for another site when the Claimant was looking after X and unable to complete this task;
5.2.2. On each request for flexible working from August 2020, Michelle Flynn and Amanda Stanley questioned the claimant as to why she cannot put X in childcare;
5.2.3. That the Claimant's position was threatened on 2 occasions from August 2020 onwards when she was told to 'stick X in any child minder or after school club'.
5.2.4. In October 2022, when raising childcare issues, the claimant was allegedly questioned on her finances, personal circumstances and relationship;
5.2.5. After the Claimant's return to work in September 2022 the Respondent reneged on an agreement to assist the Claimant with her childcare hours;
5.2.6. In March 2020, during the Covid Lockdown, the respondent refused the claimant's flexible working request to work from home.

5.3 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.

The claimant says she was treated worse than: Vicky Oxley (branch nurse), Kylie Fear (equality assistant); Amber Quigley (care consultant); Brody Flynn-Williamson (regional manager); Amanda Swift (head of HR); Jodie Lloyd (senior consultant).

The respondent says that the circumstances of the claimant's alleged comparators were materially different.

5.4 If so, was it because of disability?
5.4.1. The respondent denies that it knew that L was disabled.

5.5 Did the respondent's treatment amount to a detriment?

6. **Remedy for discrimination**

6.1 The claimant does not seek any recommendations.

6.2 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

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

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

6.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?

7. **Refusal of flexible working request on incorrect grounds**

7.1. Did the claimant submit a Formal Flexible Working Request in accordance with the requirements of s.80F ERA 1996 on 8 March 2022, 25 April 2022 and/or 17 October 2022?

7.2. If so, are the later Flexible Working requests dated 25 April 2022 and/or 17 October 2022 void in accordance with 80F (4) ERA 1996, on the basis that they were submitted within a 12-month period of the previous application?

7.3. If the claimant did submit a Request in accordance with the statute, did the respondent refuse this request on incorrect facts (s.80H(1)(b) ERA 1996)?

8. **Remedy for Refusal of flexible working request on incorrect grounds**

8.1. There was insufficient time to identify these issues during this hearing. The issues regarding remedy for the claimant's complaint of refusal of flexible working request on incorrect grounds will be identified at the full merits hearing if the claimant's claim is successful.

140. Before going on to consider the relevant law, we make several observations about the issues. Firstly, the Tribunal, as directed, shall only deal with the remedy issues upon the unfair dismissal complaint at sub-paragraphs 3.2.4 and 3.2.5, 3.2.9 and 3.2.10, and 3.4 of paragraph 139. There is now no issue around X's disability, that having been conceded by the respondent. We do not need to decide the issues in sub-paragraph 4. The issues at sub-paragraph 6 and sub-paragraph 8 do not arise given the Tribunal's determination that the direct discrimination and flexible working claims fail.

The relevant law

141. We now turn to our consideration of the relevant law as it applies to this case. We shall start with the complaint brought under the 2010 Act.

142. By section 13 of the 2010 Act, *"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."* Section 13 does not refer to the protected characteristic having to be that of B. As a result, direct discrimination can occur in a workplace context when an employer treats an employee less favourably because of a protected characteristic that the employee does not personally possess. This is commonly known as discrimination by association or associative discrimination.

143. The Equality and Human Rights Commission's Employment Code says (at paragraph 3.19) that this form of discrimination can occur in various ways – for example, where the employee is the parent, son or daughter, partner, carer or friend of someone with a protected characteristic.

144. In this case, the claimant is not disabled. The complaint arises out of the alleged treatment of her by reason of her association with her son. It is for the claimant to prove that the protected characteristic of disability was the reason for the treatment. Was the protected characteristic of the other person (X in this case)

an effective cause of the treatment of the complainant? In this case, it is for the claimant to show that X's disability was an effective cause of any less favourable treatment of her.

145. The respondent puts in issue the question of their knowledge of X's disability. The EHRC Code deals with this issue at paragraphs 5.13 to 5.16 of the Code. (This is in the context of complaints of unfavourable treatment for something arising in consequence of disability where lack of knowledge of disability is a defence but the same principles hold good in a case of direct disability discrimination). The Code says that it is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. An employer must do all they reasonably can be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. In the context of complaints of a failure to make reasonable adjustments, the Code (at paragraph 6.19) makes a similar point that an employer must do all they can reasonably be expected to do to find out whether a person has a disability.

146. It is irrelevant that a formal diagnosis has not yet been made. Within the bundle is an autism diagnosis assessment report together with a covering letter dated 16 November 2023 (pages 226 to 243). It appears therefore that X was not diagnosed with autism until November 2023. The question which arises is not whether there is a formal diagnosis but whether there are circumstances from which a long term and substantial adverse effect on day-to-day activities from a mental or physical impairment can reasonably be deduced.

147. On a question of knowledge of disability, Miss Laxton referred (in her helpful written submissions) to several authorities upon the issue. One of these was **A Limited v Z** (UK EAT/0273/18). HHJ Eady in that case set out the tests for establishing constructive knowledge - (what an employer ought to know if they did not actually know of disability). **A Limited v Z** was a complaint of unfavourable treatment for something arising in consequence of disability and not one of direct disability discrimination. Nonetheless this guidance is helpful. At paragraph 23 she said:

> *"In determining whether the employer had requisite knowledge for section 15(2) purposes [a complaint of unfavourable treatment for something arising in consequence of disability], the following principles are uncontroversial between the parties in this appeal:*
>
> *(1) …*
>
> *(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) [was of] long term effect …*
>
> *(3) The question of reasonableness is one of fact and evaluation …*
>
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance:*

(i) because, in asking whether the claimant has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes … and

(ii) because without knowing the likely cause of given impairment, "it becomes much more difficult to know whether it may well last more than 12 months, if it has not already done so …

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the [EHRC] Code …

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so …

(7) Reasonableness, for the purposes of section 15(2) must entail a balance between the strictures of making enquires, the likelihood of such yielding results and the dignity and privacy of the employee, as recognised by the [EHRC] Code.

148. As we have said already, it is the claimant who bears the burden of proving that she was less favourably treated by reason of her association with X by the respondent than the respondent treats or would treat others. By section 23(1) of the 2010 Act*, "on a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."*

149. Direct discrimination therefore is based on the concept of less favourable treatment and envisages a comparative exercise and consideration of appropriate comparators with whom the complainant's treatment can be compared. The circumstances of the comparator must not be materially different from those of the complainant.

150. In the case of a complaint of associative disability discrimination, the comparison must therefore be made between those of the complainant on the one hand and those of a comparator associated with a non-disabled person in similar circumstances on the other. In a case such as this, the comparator is someone who is a carer for someone without a disability (more particularly, someone who is a carer for a non-disabled child). Authority for this proposition may be found in **The No 8 Partnership v Simmons** [2023] EAT 140.

151. The burden of proof provisions are found in section 136 of the 2010 Act. This provides that where there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court or tribunal must hold that the contravention occurred. However, that does not apply where A can show that A did not contravene the provision.

152. In **Hewage v Grampian Health Board** [2012] ICR 105, Lord Hope suggested that it is appropriate to go straight to the question of the reason why the complainant was treated as they were unless there is room for doubt. He said, *"… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another."*

153. Similarly, in **Shamoon v Chief Constable of the Royal Ulster Constabular**y [2003] ICR 337, HL Lord Nicholls said, *"No doubt there are cases where it is convenient and helpful to adopt th[e] two step approach [in section 136] to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? Especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."*

154. It follows that where *the "reason why"* question cannot be determined on the evidence, the initial burden is on the claimant to prove, on the balance of probabilities, a *prima facie* case of discrimination; **Royal Mail Group Limited v Efobi** [2021] UK SC 33.

155. In **Madarassy v Nomura International Plc** [2007] EWCA Civ 33, Mummery LJ said that *"The bare facts of a difference in status and a difference in treatment 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."* Therefore, even where the Tribunal believes that the respondent's conduct requires an explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's protected characteristic in the first place. The "*something more"* (as it is often referred to) may often be found from indirect evidence and inference. It can arise, for example, where there is shown to be gender stereotypes, statistical evidence, lack of transparency, inconsistent explanations, and unreasonable behaviour.

156. Where a decision is made 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). The Tribunal should ask itself why the alleged discriminator acted as they did. What, consciously or unconsciously, was the reason for the treatment? (**Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830).

157. Section 123 of the 2010 Act sets out the statutory limitation period for the bringing of discrimination complaints. Proceedings on a complaint of discrimination in the workplace may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks to be just and equitable. Conduct which extends over a period is to be treated as done at the end of the period for the purposes of setting time running. The three-month time limit is adjusted by the time spent in early conciliation.

158. It is for the complainant, on an out of time complaint, to show that it would be just and equitable to extend time. The exercise of discretion has been said to be the exception and not the rule (see **Bexley Community Centre Ltd (trading as Leisure Link) v Robertson** [2003] EWCA Civ 576. In **Jones v Secretary of State for Health and Social Care** [2024] EAT 2 HHJ Tayler reminded practitioners that the proposition of law for which **Robertson** is authority is that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds. Time limits are relatively short but should be complied with in the context of the wide discretion permitting an extension of time on just and equitable grounds.

159. In **Adedeji v University of Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, in considering an extension of time all the circumstances of the case must be considered including the balance of prejudice and the length of and reasons for any delay.

160. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, it was observed that Parliament has chosen to give Employment Tribunals the widest possible discretion when considering an extension of time. Unlike section 33 of the Limitation Act 1980 (which applies in personal injury cases), section 123 of the 2010 Act does not specify any list of factors to which the Tribunal is instructed to have regard. Factors which are almost always relevant are the length of and reasons of the delay and whether the delay has prejudiced the respondent in some way (for example, by preventing or inhibiting them from investigating the claim while matters were fresh). It was also observed that a complainant's inability to explain the delay (or where no explanation is offered) is but one factor to be considered. The inability to offer a satisfactory explanation for delay does not necessarily mean that an extension of time will not be granted. The potential merits of a claim may also be a factor (**Kumari v Greater Manchester Mental Health Foundation Trust** [2022] EAT 132.

161. We now turn to a consideration of the constructive unfair dismissal claim. By section 94 of the 1996 Act, an employee has the right not to be unfairly dismissed by their employer. This right is usually dependent upon the complainant having sufficient qualifying service. There is no dispute that in this case the claimant has a sufficient qualifying service to pursue a claim nor is there any dispute that she has the requisite employee status.

162. To pursue a complaint of unfair dismissal, the employee must have been dismissed. In this case, the claimant was not expressly dismissed by the respondent. She resigned. She can still pursue a complaint of unfair dismissal having resigned if she can bring herself within section 95(1)(c) of the 1996 Act. This provides that for the purposes of the 1996 Act, an employee is dismissed where the employee terminates the contract under which they employed (with or without notice) in circumstances in which they were entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal.

163. In **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it, "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

164. In order to claim constructive dismissal, the employee must establish that: there was a fundamental breach of the contract on the part of the employer (that is to say, one that goes to the root of the contract); the employer's fundamental breach of contract caused the employee to resign; and that the employee did not delay too long before resigning, thus affirming the contract by waiving the right to resign in response to the breach and losing the right to claim constructive dismissal.

165. Implied into every contract of employment is a term that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. A breach of the implied term of trust and confidence is a fundamental breach as it goes to the root of the contract (**Woods v W M Car Services (Peterborough) Limited** [1991] ICR 666, EAT).

166. Acts of discrimination may amount to a breach of the implied term of trust and confidence. However, this will not always amount to a fundamental breach of the implied term of trust and confidence (**Amnesty International v Ahmed** [2009] ICR 1540, EAT).

167. The formulation of the test by Lord Denning in **Western Excavating** refers to an employer's intention no longer to be bound by the contract. The legal test for repudiatory contract generally is whether looking at all the circumstances objectively, from the perspective of a reasonable person in the innocent party's position, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. Authority for this proposition may be found in the non-employment case of **Eminence Property Developments Limited v Heaney** [2010] EWCA Civ 1168.

168. This brings into question the relevance of the employer's intentions. Just as a breach of the implied term of trust and confidence will not occur simply because the employee subjectively feels that a breach has occurred, the legal test entails looking at the circumstances objectively such that an employer cannot escape a finding of constructive dismissal simply because they have acted with good intentions or a wish to maintain the employment relationship. As was said in **Eminence Property,** the question of whether a breach is repudiatory is to be answered not by reference to what the party involved in an alleged breach wanted or what was wished for *"in the recesses of their minds"* but by reference to whether the party's conduct objectively showed an intention no longer to be bound by the contract.

169. Guidance about how the breach is to be tested and the role of the employer's intentions in that assessment was given in **Tullett Prebon Plc v BGC Brokers** [2011] EWCA Civ 1131. The Tribunal directed the parties' attention to this case during the hearing.

170. An issue arose in that case about the extent to which the court may consider an employer's intentions. On the facts, it had been found that the employer had been acting with the intention of seeking to persuade the employees to stay, when reminding them of their contractual obligations (in particular, in the context of a team move to a rival, of their post-termination covenants). The employee's contention was that the employer was putting improper pressure upon them which amounted to repudiatory conduct. This was rejected by the trial judge.

171. In the Court of Appeal, Kay LJ held that where an employer's conduct is directed at an employee and directly impacts upon the employment relationship it may be necessary for the court to objectively assess the true intentions of management. The court is therefore entitled to look at the employer's intentions in judging what is the objectively assessed intention. He held that the employer in **Tullett Prebon** did not show an intention to abandon and altogether refuse to perform the contract of employment. The situation was quite the reverse – the employer wanted to preserve the contract with the employees.

172. Therefore, while a party's intentions may be relevant, that intention is to be judged objectively and the Tribunal is not required to make a factual finding as to what the actual intention of the employer was. The employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that their conduct was likely to destroy or seriously damage the relationship of trust and confidence (without reasonable and proper cause) then they will be taken to have the objective intention in question. Where conduct is repudiatory, a subjective desire to maintain the contract cannot prevent the other party from relying on the consequences of the guilty party's actions. The employer is to be judged by what they do and not by their private intentions.

173. Once it has been established that the employer has committed a repudiatory breach of contract, the employee must go on to show that they have accepted the repudiation. Pursuant to section 95(1)(c) of the 1996 Act, this means that the employee must terminate the contract by resigning, either with or without notice.

174. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in question. It is not necessary for the employee to inform the employer as to why they are resigning. The reason given by the employee in a resignation letter is merely one piece of evidence for the Tribunal to consider when reaching a conclusion as to the true reason for the resignation.

175. It is sufficient that the employer's conduct must be an effective cause of the resignation. It need not be the sole cause. Even if the employee leaves for a whole host of reasons, they can claim constructive dismissal if the repudiatory breach is one of the factors relied upon. Authority for this proposition may be found in **Wright v North Ayrshire Council** [UK EAT/0017/13). This case is referred to in Miss Laxton's written submissions. Similarly, the Court of Appeal confirmed this to be the position in **Meikle v Nottinghamshire County Council** [2005] ICR 1, CA.

176. An employee may lose the right to resign and claim constructive dismissal if they wait too long before doing so after the breach has occurred. Where there is affirmation of the contract, the breach itself is not waived and remedy for the breach is not lost. What may be lost however is the right to accept the breach and claim to have been constructively dismissed for it. Affirmation is a question of conduct and not simply passage of time. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than to resign.

177. Once the employee has established that they have been dismissed then it is for the employer to make out a potentially fair reason for dismissal. The permitted reasons for dismissal are to be found in sections 98(1)(b) and (2) of the 1996 Act. It is for the employer to show the reason for dismissal and that it was a potentially fair and statutory permitted reason. If the employer does not advance a potentially fair or permitted reason for dismissal or the Tribunal rejects the employer's asserted potential fair reason, then the dismissal will be unfair.

178. Constructive dismissals can pose problems for employers when explaining their reasons for dismissal. In constructive dismissal cases, the reason for the dismissal will be the reason for which the employer breached the contract of employment.

179. In this case, the respondent relies upon the claimant's conduct as a potentially fair reason for her constructive dismissal (if such be established). In the alternative, they argue there to be a substantial reason such as to justify the constructive dismissal.

180. In a case which concerns employee conduct, it is for the employer to establish a genuine belief in the acts of conduct (or misconduct) in question. If that burden is discharged, then the Tribunal must consider whether the employer had reasonable grounds upon which to sustain that belief and had formed that belief after having carried out as much investigation into the matter as was reasonable in the circumstances of the case. There is no burden of proof upon the issues of reasonableness of belief or of investigation. Authority for these propositions may be found in **British Home Stores Limited v Burchell** [1978] IRLR 379 EAT.

181. Where the Tribunal is satisfied that the employer had a genuine and reasonable belief in the conduct in question after carrying out as much investigation into matters as was reasonable then the issue will be whether the dismissal of the employee was one that fell within the range of reasonable management responses. (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439 EAT).

182. Similar principles arise where the employer maintains there to be a substantial reason for dismissal (being a reason other than those set out in section 98(2) of the 1996 Act). This is often invoked where the trust and confidence necessary for the employment relationship has broken down. The Tribunal must identify why the employer considered it to be impossible to continue to employ the employee. A breakdown in trust and confidence is not a convenient label to stick on any situation in which the employer feels let down by an employee. There must be substance to the employer's case that there has been a breakdown in working relations and not merely assertion that this is the case.

183. The Tribunal notes that Miss Laxton's submissions focus on the question of whether there has been a dismissal of the claimant. Little was said about there being a potentially fair reason for her constructive dismissal or the fairness of the dismissal.

184. Where the employee is unfairly dismissed, the Tribunal will consider remedy. No question arises here about re-employment. The Tribunal's focus therefore will be on monetary remedy.

185. Monetary remedy will normally consist of a basic award and a compensatory award. The basic award is the equivalent of a redundancy payment. It is to compensate for the loss of the employment and is not dependent upon any financial loss shown by the employee. It may be reduced where the Tribunal considers that any conduct before dismissal was such that it is just and equitable to reduce or further reduce the amount of the basic award to any extent. In that circumstance the Tribunal shall reduce the amount accordingly. Culpable or blameworthy conduct must be found to enable the Tribunal to make a reduction from the basic award. However, there need be no causal connection between the impugned culpable or blameworthy conduct on the one hand and the dismissal on the other.

186. The compensatory award, likewise, may be reduced on account of culpable and blameworthy conduct. However, for the compensatory award, there must be a causal connection between the conduct on the one hand and the dismissal on the other. The Tribunal must make a finding that there was conduct on the part

of the employee in connection with the unfair dismissal which was culpable or blameworthy. Culpability extends to conduct which may be said to be perverse, foolish, or bloody minded. Then, there must be a finding that the matters to which the complaint relates were caused or contributed to some extent by action that was culpable or blameworthy. Finally, there must be a finding that it is just and equitable to reduce the assessment of loss to a specified extent.

187. The Tribunal may also make a reduction to the compensatory award to reflect the chance of the employment ending at some determinate point in the future in any case. The question that arises is whether the particular employer, acting fairly, would have fairly dismissed the employee. This is the assessment to be undertaken upon the authority of **Polkey v A E Dayton Services** Limited [1987] IRLR 503 HL. This is not an all or nothing assessment. The Tribunal may decide there was a chance of dismissal in which case compensation may be reduced to reflect that chance: (**Software 2000 Limited v Andrews** [2007] IRLR 568 EAT).

Discussion and conclusions

The discrimination claims.

188. We now turn to our discussion and conclusions. We shall apply the relevant law to the factual findings to arrive at a determination of the issues in the case. We shall start with the direct associative disability discrimination claim.

189. There is no issue that X was a disabled person for the purposes of the 2010 Act. This was conceded by Miss Laxton on the respondent's behalf.

190. It is right that there was no diagnosis of X's autism until November 2023. This was around nine months after the claimant's employment with the respondent had ended. However, that is not the issue. On the authority of **A Limited v Z** (above) in the context of a complaint brought under section 15 of the 2010 Act it is for the employer to show that it was unreasonable for them to be expected to know that a person had suffered an impairment to their physical or mental health, that the impairment had a substantial (in the sense of more than trivial) effect upon day-to-day activities and was long term effect.

191. In the context of a section 15 claim, the respondent has the burden of proving the defence of lack of knowledge. The Tribunal is cognisant that the instant case is not a section 15 claim but rather a complaint brought under section 13. The burden therefore is upon the claimant to prove that the employer had actual or constructive knowledge's disability.

192. We are quite satisfied that she has discharged this burden. In evidence before the Tribunal:

    a. Mr Flynn-Williamson said that he was aware that X had been excluded from school and that he had hit others while playing rounders.

    b. Mrs Stanley, in supplementary evidence in chief, said that she knew that X was having issues around behaviour in school, was attending therapy and there was suspected autism and ASHD. She said that there were issues around X's behaviour, in particular that he was struggling in school, was becoming more violent, swearing, behaving badly towards other children and having *"meltdowns".*

    c. Mrs Flynn said that she was aware of incidents in school and that X was prone to acting up when he returned to the claimant after visiting his father. His behaviour had led to exclusions from school and after-school clubs.

193. Mrs Stanley was aware that X was wetting at school (page 259). We have seen how the claimant was messaging Mrs Stanley about X's behaviour. The claimant was quite open with Mrs Stanley about this aspect of matters. The claimant confided in Mrs Stanley as a very close friend.

194. The premise of the flexible working request was all around X's needs. The critical flexible working request for 17 October 2022 was made after violent behaviour towards the claimant and her partner by X.

195. From all of this, it must follow that the respondent (in particular Mrs Stanley who was the claimant's line manager) knew that X was suffering from a mental impairment. Mrs Stanley has an autistic grandson herself and said to the Tribunal that she has some understanding of the condition. Plainly, the impairment had a substantial adverse effect upon the day-to-day activities of social interaction and of behaviour challenging for other people to deal with and continence issues. By 2022, the claimant had needed to make flexible working requests to adjust her hours to care for X over a period of several years. X's condition was therefore long term, something of which the respondent would be aware given the length of time that these issues had been presenting. The Tribunal therefore determines that the respondent had knowledge of X's disability.

196. We now turn to consider the six matters in paragraph 139.5.2. It is convenient to take these in chronological order and not in the order in which they were set out by Employment Judge Armstrong.

197. The first issue is that which arose in March 2020 (paragraph 139.5.2.6). This concerned the respondent's refusal of the claimant's flexible working request to work from home.

198. The factual findings are at paragraphs 38 to 46 above. In accordance with the principles in **Hewage**, the Tribunal can make a positive finding as to the reason why the claimant was treated as she was. The reason why she was treated as she was because the respondent was responding to the global pandemic. Mrs Flynn said that she was seeking to follow the Government's guidance. The reason why the claimant was refused permission to work from home was because of the respondent's perceived need for the claimant to be in work as a keyworker and the practical difficulties of her fulfilling her duties if at home caring for X.

199. As can be seen from sub-paragraph 5.3 of the list of issues, the claimant identified several comparators. The respondent's amended grounds of resistance deal with each of the six comparators in turn and sets out their circumstances. Miss Laxton is right to suggest (as she does in paragraph 54(a) of her written submission) that the claimant was unable to contest any of the reasons given by the respondent for the treatment of the others.

200. It is right to say that the claimant has been unable to identify any actual live comparators whose circumstances are not materially different from hers. That said, where a complainant can identify somebody else who cannot stand as a statutory comparator (because their circumstances are in some respects materially different) then they may serve as evidential comparators from which a hypothesis may be drawn as to how a comparator in the same or similar circumstances of the complainant would have been treated.

201. In **D'Silva v NATFHE** [2008] IRLR 412, Underhill P observed that where the evidence available necessarily answers the question as to the reason why the complainant was treated as they were such as to exclude the possibility that the

acts complained of were done because of a protected characteristic, recourse may not be needed to a comparator. He memorably observed that, *"It might reasonably have been hoped that the Frankensteinian figure of the badly constructed hypothetical comparator would have been clumping his way rather less often into discrimination appeals since the observations of Lord Nicholls in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary****".* By way of reminder, in **Shamoon** (referred to above) Lord Hope said that "*The vital question … is the reason why [the complainant] was treated as she was by her employer or whether … the difference in treatment was on the grounds of [the protected characteristic]".* In other words, if there is a dispute about the identity of a comparator it is permissible for the Tribunal to go straight to the reason why the complainant was treated as they were.

202. The Tribunal therefore find it unnecessary to make findings of fact about the circumstances of the six named comparators when considering this issue. The reason why the claimant was treated as she was upon this issue was quite simply the result of the respondent's need to react to the global pandemic and was nothing to do with her association with X.

203. In any case, this complaint is out of time to pursue this claim. It is a stand-alone complaint as it appears to be unconnected with any of the other events in question. The next matter complained about did not take place until August 2020. The March 2020 episode is a one-off stand-alone act. The limitation period had long expired before the claimant commenced early conciliation on 28 November 2022.

204. In our judgment, it is not just and equitable to extend time to vest the Tribunal to consider this complaint in any case. The claimant was unable to give any explanation as to why she did not pursue proceedings in respect of this matter sooner. That is of course not fatal to her prospects of achieving an extension of time per **Morgan.** It is perhaps understandable that she did not pursue the claim and subjectively she considered the matter to be an ongoing process to seek adjustment to her working patterns to accommodate her caring responsibilities for X.

205. However, decisively in our judgment, the respondent did suffer forensic prejudice upon this issue. They were unable to locate the flexible working papers for the March 2020 request. They were therefore less well equipped to defend the claim than was the case for the flexible working request which the claimant made in August 2020. The balance of prejudice favours the respondent and time shall not be extended upon this issue.

206. The Tribunal therefore now turns to the two complaints arising from August 2020 in paragraph 139.5.2.2 and 139.5.2.3. Our findings are at paragraphs 48 to 64 above. These matters can be quickly disposed of. Quite simply, they fail on the facts for the reasons given.

207. The Tribunal exercises its discretion to extend time to enable us to deal with these complaints. Unlike with the March 2020 complaint, the respondent did not suffer forensic prejudice. The papers around the August 2020 flexible working request were located. Mrs Flynn and Mrs Stanley did not complain that they were unable to recollect matters sufficiently to give evidence in defence of their positions. Therefore, although the claimant was unable to explain her delay in pursuing Employment Tribunal proceedings about these issues, that is not necessarily

fatal when weighing the balance of prejudice between the parties. Accordingly, time is extended but these complaints fail on their merit.

208. The next issue is that concerning Mr Flynn-Williamson in July 2022. The factual findings are at paragraph 65 to 70 above.

209. We find as a fact that Mr Flynn-Williamson did express real disappointment that the claimant could not cover the on-call hours for the other office. However, there is nothing to suggest that he would have reacted any differently in the case of childcare difficulties being experienced by an employee with caring responsibilities for a non-disabled child who likewise was unable to cover the on-call duties. None of the six named comparators' circumstances help with the construction of a hypothesis as to how Mr Flynn-Williamson would have reacted to such unwelcome news from an employee who had childcare responsibilities for a non-disabled child.

210. We are satisfied that the reason why Mr Flynn-Williamson reacted as he did was because it left him with the problem of seeking cover elsewhere. It was not because of the claimant's association with X. Even if the Tribunal is wrong to go straight to the reason why question upon this issue, we are satisfied that the claimant has not satisfied the burden of proof provisions in section 136 of the 2010 Act that there was discriminatory conduct such as to call upon the respondent to explain it. The lack of any evidence about how Mr Flynn-Williamson would have treated a comparator in the same or similar circumstances is fatal to this aspect of the claimant's claim.

211. The next issue is the claimant's contention that when she returned to work in September 2022, the respondent reneged on an agreement to assist the claimant with her childcare hours. This is the allegation in paragraph 139.5.2.5. This is a difficult allegation to understand. Our findings of fact are at paragraphs 71 to 83. The respondent did not renege on any agreement. On the contrary, as we have seen, Amanda Stanley agreed to a further alteration to the claimant's working hours from the already adjusted hours which had pertained from March 2022. This therefore fails on the facts.

212. The final issue upon the direct discrimination complaint is the contention that when raising childcare issues in October 2022, the claimant was questioned on her finances and personal circumstances and relationship: (paragraph 139.5.2.4). Our findings of fact are at paragraphs 84 to 100 above.

213. It is right that the claimant was questioned on these issues. Mrs Stanley says so in her email to Michelle Flynn at page 145. However, the claimant had volunteered difficult personal circumstances when making the request of 17 October 2022 (pages 133 and 134). She had also not been slow in volunteering on several occasions that her finances were such that childcare was too expensive for her: (see paragraphs 75, 93, 100 and 118).

214. It is, we suggest, unrealistic for the claimant to argue that it was unreasonable for the respondent to explore her circumstances with her to determine the flexible working request. A similar issue in fact arose around the August 2020 request. Further, Mrs Stanley and the claimant (as has been seen) were extremely close friends. The claimant was plainly willing to open up to Mrs Stanley. Mrs Stanley was aware of her issues. They were open with one another about finances and the claimant's relationship issues. They had during their friendship loaned one another money.

215. As with the July 2022 incident, the difficulty for the claimant is the absence of any evidence as to how a comparator employee with the care of a non-disabled child would have been treated when making such a request as that which she made on 17 October 2022. None of the comparator cases cited by her appear to concern an allegation that a compactor was not asked intrusive questions.

216. One of the comparators relied upon by the claimant was Jodie Lloyd whom she says had had several informal flexible working requests granted. Mrs Lloyd does not give any evidence in her witness statement that these had been readily granted without the questioning put to the claimant.

217. The reason why the respondent questioned the claimant was because they wanted to know more about her circumstances when considering her request. Further, to succeed upon a complaint of direct discrimination, it is necessary to show not only less favourable treatment but also that the less favourable treatment has resulted in one of the adverse outcomes in section 39(2). The adverse outcome relied upon by the claimant in this case is being subjected to detriment.

218. The word *"detriment"* is not defined in the 2010 Act. However, it is generally held to mean something that a reasonable employee would consider to be to their disadvantage. Given the open relationship between the claimant and Mrs Stanley and the need for the respondent to explore the claimant's circumstances to determine the flexible working request it is difficult to see in any case how asking the claimant about such matters subjected her to a detriment. The questions were asked to help the respondent decide upon the claimant's requests so could not, in our judgment, reasonably be thought by her to be to her disadvantage.

219. In the Tribunal's judgment, the 2022 discrimination complaints were brought in time. They may be viewed as a continuing course of conduct as the claimant was having to deal with fluctuating circumstances arising from X's care needs. Mr Flynn-Williamson, Mrs Stanley and Mrs Flynn were intimately involved in discussions with the claimant about these needs and the requirement consequent upon them to alter her working hours. The flexible working appeal outcome was communicated to the claimant on 15 November 2022. In our judgment, that was the end of the course of conduct which had commenced with the granting of the flexible working request in March 2022 (and its subsequent amendments in April and September 2022). 15 November 2022 was within three months of the date of commencement of the early conciliation process and therefore those complaints were raised within the relevant time limit and the Tribunal has jurisdiction to consider them. However, they all fail upon the merits. The claimant's complaints of direct associative disability discrimination therefore stand dismissed.

The constructive dismissal claim.

220. We now turn to the constructive unfair dismissal claim. This is based upon the same six issues as form the basis of the disability discrimination claim in paragraph 139.5.2. In addition, the claimant relies upon the refusal of her flexible working requests on incorrect grounds: paragraph 139.2.1.1.1 when read with paragraph 139.7.

221. The Tribunal can deal relatively quickly with these matters save those arising from the request of 17 October 2022. We find there to have been no breach of

the implied term of trust and confidence arising out of the matters of which the claimant complains in March 2020 and August 2020.

222. In relation to the March 2020 complaint, we can accept that it may have been damaging of trust and confidence for the claimant to have been refused her request to work from home. However, this was plainly done with reasonable and proper cause given the respondent's need to comply with the Government's guidance in the early days of the pandemic and the needs for them to service the requirements of their service users.

223. The August 2020 complaints fail on their facts in any case. The Tribunal finds that the respondent's conduct was not damaging of trust and confidence that month for the reasons given in paragraphs 48 to 64.

224. Even if we are wrong, on any view, the claimant, by conduct, affirmed the contract. After March 2020 and August 2020, she showed an intention to continue in employment rather than to resign. It is not in dispute that she worked very hard. She achieved her promotion to the post of deputy manager in November 2021. This demonstrates her intention to carry on with the employment contract.

225. It is difficult to see any basis on which the claimant can complain of a breach of the implied term of trust and confidence arising from the respondent's handling of the flexible working requests of 8 March 2022 and 25 April 2022. This is because the respondent was sympathetic to the claimant and granted her requests on both of those dates. The respondent's conduct could not have been damaging of trust and confidence.

226. The Tribunal can accept that the comment made by Brody Flynn-Williamson on 7 July 2022 was damaging of mutual trust and confidence. In our judgment, however, it was with made with reasonable and proper cause. He was expressing disappointment because he hoped to have utilised the claimant's services that day. It left him with the issue of having to try to obtain alternative cover.

227. Even if we are wrong on this, the claimant did not resign until 9 November 2022. That was over three months after Mr Flynn-Williamson's comment. In the meantime, the claimant had shown every intention of carrying on with the contract. She returned to work after a period of ill health from the end of July to 12 September 2022. She discussed with Amanda Stanley the basis of her return to work on amended hours. She made a further flexible working request on 17 October 2022 demonstrating an intention to carry on in the employment. In our judgment therefore she affirmed the contract following any breach as may be established about Mr Flynn-Williamson's conduct on 7 July 2022 such as to waive her right to resign in response to it.

228. The contention that the respondent reneged on an agreement about return-to-work arrangements in September 2022 fails on its facts: (see paragraphs 71 to 83).

229. The claim that the respondent acted in breach of the implied term of trust and confidence fails in so far as it relates to questioning the claimant about her finance and personal circumstances. The factual findings are at paragraphs 84 to 100. There was reasonable and proper cause for these enquiries to be made. The claimant volunteered a lot of information to Mrs Stanley. The questioning was not oppressive.

230. This therefore just leaves the issue of the 17 October 2022 flexible working request. Miss Laxton says (in paragraph 92 of her written submissions) that a finding in the claimant's favour upon this issue would be such that it would create a precedent that an employer could never decline a request to change hours. We observe that an Employment Tribunal is of course a court of first instance and cannot set a precedent. That said, in our judgment, Miss Laxton's submission goes too far.

231. It is of course right that it is for management to manage. An employee does not have an untrammelled right to request and be granted a change of hours. However, the reasonableness of such a request is very much context specific.

232. There were in facts two limbs to the claimant's request of 17 October 2022 at page 123. The first was, as a temporary measure, for her to change her hours to that suggested on a fortnightly work rota. The second limb was that after the temporary arrangement had run its course and once one-to-one cover for X was arranged, she would revert to regular hours of 08:30 to 16:30. The second limb of this request was never dealt with by the respondent. That is not to criticise the respondent. The parties' focus was very much upon the first limb of the request which had a degree of urgency about it given that the claimant wished for it to be implemented that week. Those were particularly imperative because of the claimant's request to finish earlier on Thursday 20 October 2020 than she had on the previous two Thursdays.

233. We do not therefore hold the respondent to have been in fundamental breach arising from a failure to address the second limb of the claimant's request. The issue therefore is around the respondent's handling of the first limb of the request.

234. The respondent was aware of the acute difficulties which beset the claimant because of her caring responsibilities for X. This had culminated in violent behaviour towards her and her partner. She was in a difficult position following her partner's decision to withdraw from picking X up from school. The claimant was requesting an urgent change only as a temporary measure (see page 123).

235. It is unsurprising that the request caused consternation and disquiet internally within the respondent's senior management. However, their subjective views are not relevant. What matters is to assess objectively the respondent's conduct.

236. The respondent was able to agree with most of the claimant's flexible working request. However, this was in fact the first time upon which they had not acceded to everything which she had asked for. Critically, however, the respondent was unable to agree to her request for the working hours (around finishing times) on the alternate Thursdays and Fridays.

237. The claimant had some difficulty in understanding the respondent's rationale. They were allowing her to finish at 4pm every other Thursday and Friday in any case on the rota agreed with Mrs Stanley at page 127. She could not understand therefore why the respondent was insisting upon a reversion to a 5pm finish as opposed to a 4pm finish every alternate Thursday and Friday.

238. More fundamentally however, she could not understand the respondent's reaction and partial rejection of her request, where the imperative was to have a management presence every Thursday and Friday from 9am to 5pm where this would be achieved by adopting her proposed fortnightly rota. Her suggestion was that she would be in work until 5pm on the Thursday when Amanda Stanley was

off, Amanda Stanley would then be in until 5pm on the other Thursday. The claimant and Amanda Stanley would be in until 5pm on alternate Fridays.

239. Given the context of the claimant's acute needs, that this was a temporary request, and that it was possible to work matters out such as to secure a management presence through core hours every Thursday and Friday the Tribunal accepts that from the claimant's subjective perspective this was damaging of mutual trust and confidence.

240. The subjective feelings of the claimant are of course not relevant. What matters is an objective assessment of the impact of the employer's conduct upon her. We are satisfied that given the three factors in paragraph 239, objectively the respondent's conduct was damaging of mutual trust and confidence.

241. As a further factor, the respondent's witnesses were unable to explain to the Tribunal why it was so critical for the claimant to work the hours proposed in their letter of 20 October 2022. There were generalised assertions of a need for Amanda Stanley to attend meetings in the afternoon which would be difficult were the claimant not to work until 5pm every Thursday and Friday. (The claimant proposed that she work until 5:00 pm on alternate Thursdays and Fridays, with Mrs Stanley to be in until 5pm on the alternate Thursdays and Friday where the claimant was proposing to finish at 3:30). The respondent had worked with the hours agreed upon by Amanda Stanley (for a 4:00 pm finish on alternate Thursdays and Fridays) from 12 September 2022 without any adverse consequences. No specific instances could be given by the respondent of any difficulties to which the claimant's revised working hours from 12 September 2022 had given rise. That being the case, objectively, it is difficult to see why the slight alteration in hours from that being worked to what was proposed by the claimant on 17 October 2022 made such a crucial difference that it could not be accommodated. (The alteration proposed by the claimant would be for a 3:30 finish instead of a 4:00 finish on the alternate Thursdays and Fridays).

242. It is right to observe that the claimant pointed out that she or Amanda Stanley would be in the office until 5pm on Thursdays and Friday at the grievance hearing on 24 November 2022. This post-dated the claimant's resignation. However, that does not in our judgment excuse the respondent's failure to appreciate that the claimant's proposal was eminently workable and met their needs.

243. For these reasons, it is our judgment that objectively the respondent's conduct was damaging of trust and confidence. This is not to say, as Miss Laxton apprehends, that an employee has an untrammelled right to require an employer to agree to a change in working hours. However, there are circumstances however where such a request may be properly made by an employee who has acute needs such as had the claimant in this case. These matters have to be assessed on a case-by-case basis.

244. In our judgment, there was no reasonable and proper cause for the respondent's refusal of the claimant's request. The claimant was only asking for this as a temporary measure. We can understand that objectively there may have been some scepticism on the part of the respondent's management about this. However, the time to address that would have been at the end of the agreed temporary arrangement. There was no reasonable and proper business need, on our assessment, to refuse what was on a proper analysis but a minor change in the claimant's hours by half- an- hour every other Thursday and Friday from that which she had been working from 12 September 2022 and where there would

be met the required management presence until 5:00 each Thursday and Friday. The business need identified by the respondent was based upon assertion and generality with no specific instances of matters having gone awry over the five weeks following the claimant's return to work on 12 September 2022. In any case, the claimant had demonstrated that her proposal catered for the need for a management presence during core-hours on Thursdays and Fridays.

245. In our judgment, therefore, the claimant was constructively dismissed. She did not affirm the contract after the refusal which was communicated to her only on 29 October 2022. She resigned 11 days later on 9 November 2022. She spent the time in-between securing arrangements for a new position. It is of course the case that an employee who wishes to resign and claim constructive dismissal is in a difficult position as they do not wish to find themselves out of work. The claimant moved quickly to secure an alternative position and then resigned. In those circumstances it cannot be said that she showed an intention to carry on with the contractual relationship such as to affirm the contract.

246. We find that the respondent's refusal of the flexible working request was a material reason for the resignation. It is expressly mentioned in the resignation letter (at page 199). The claimant had declined the possibility of alternative employment in July 2022. She had returned to work on amended hours in September 2022. The only thing that changed was the refusal of the flexible working request of 17 October 2022. We are satisfied that that was a material reason for her resignation.

247. The claimant therefore was constructively dismissed. The conduct issues relied upon by the respondent as the basis for a potentially fair reason for her constructive dismissal in fact post-dated her resignation. That conduct therefore could not have been the reason for the employer's fundamental breach of the contract in October 2022. There was nothing more than assertion that there was a substantial reason available to the employer for fundamentally breaching the claimant's contract of employment. No fair reason has been established by the respondent and accordingly the claimant was constructively unfairly dismissed.

248. In our judgment, it is not just and equitable to make any reduction to the claimant's compensatory award on account of the chance that she may have been dismissed for the three absences in November 2022. Although disciplinary proceedings were intimated (pages 167 and 168) there is no suggestion in that letter that the claimant was liable to dismissal for them. It was perhaps in recognition of this that the respondent on compassionate grounds placed the claimant on garden leave rather than pursuing the matter to a disciplinary hearing.

249. In any case, the Tribunal is satisfied that the claimant was absent on those three occasions with the sanction and approval of Mrs Stanley. The claimant would therefore have a defendable position in relation to the absences had matters been pursued by the respondent. She was not liable to dismissal for them. This employer acting fairly and reasonably would not have dismissed her for them.

250. The Tribunal's judgment is that the claimant was not guilty of any culpable or blameworthy conduct. There was nothing improper in her making her flexible working request of 17 October 2022.

251. In principle, a finding of constructive dismissal is not inconsistent with a finding that the employee has by their conduct contributed to that dismissal. For

example, in **Polentarutti v Autokraft Limited** [1991] IRLR 457 no fair reason for the constructive dismissal of the employee was established. The dismissal was unfair. However, there was a causal link between the employee's shoddy work (which had caused the employer significant expense) and the employer's breach of contract in refusing to pay him for the overpayment that he had worked.

252. However, in **Frith Accounts Limited v Law** [2014] IRLR 510 the EAT noted that such a finding will be unusual in a case concerning a breach of the implied term of trust and confidence as there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the employer's conduct which has the effect of destroying or seriously damaging mutual trust and confidence, then there is no breach for the employee to accept.

253. The claimant's impugned conduct here was about events which post-dated her resignation. It was not conduct in any way causally linked with the employer's fundamental breach (as we have found it to be). There was no (or no satisfactory) evidence of the claimant seeking to solicit other employees away from the respondent. The claimant denied that she had done so. Towards the end of the fourth day of the hearing, Miss Laxton confirmed that no issue was being raised or pursued by the respondent about the solicitation of Miss Lloyd by the claimant. The ill health absences in November 2022 were likewise all after the resignation and were effectively sanctioned by Mrs Stanley anyway.

254. As there is no culpable or blameworthy conduct, it is not just and equitable to make any reduction to the basic award. Likewise, it is not just and equitable to make any reduction to the compensatory award and in any case even if the claimant was guilty of culpable or blameworthy conduct after 9 November 2022 such was not causative of the constructive dismissal of her.

255. There just remains to be dealt with the flexible working claims. As has been said, the statutory flexible working regime is prescriptive. The flexible working requests of 8 March, 25 April, and 17 October 2022 (at pages 107 and 108, 113 and 133/134) do not meet the statutory requirements. None of them state that they are flexible working requests on their face. They do not say whether the claimant has previously made any such application. They do not explain what, if any, the effect is of the changes applied for and how in her opinion any such change might be dealt with.

256. Accordingly, the complaints stand dismissed. As has already been said, there is no provision for equity in the Employment Rights Act 1996 or the Flexible Working Regulations 2014 to excuse any technical deficiencies.

257. In any case, the flexible working requests dated 8 March 2022 and 25 April 2022 were presented outside the limitation period in section 80H (5) of the 1996 Act. This provides that a Tribunal shall not consider a complaint unless presented before the end of the period of three months beginning with the relevant date or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months. Early conciliation was not commenced until 30 November 2022. This was, plainly, more than three months after the flexible working requests were made. There is no evidence that it was not reasonably practicable for the claimant to have presented her claims within three months of the employee's determination of them.

258. Even if all of this is wrong, the claimant's requests of March and April 2022 were granted in any case. There was therefore no breach of section 80G of the 1996 Act in failing to deal with the application in a reasonable manner and notifying the claimant of the decision. No issue of refusal arises because the requests were granted. The remedy arising from an improper rejection of a flexible working request because it is based on incorrect facts therefore cannot be engaged.

259. The application based upon the request of 17 October 2022 was presented in time. The Tribunal therefore has jurisdiction to consider it. If (contrary to our primary finding) the request was a valid one, then the complaint is one that the refusal is based upon a refusal on incorrect facts.

260. We were taken to the case of **Commotion Limited v Rutty** (UK EAT/0418/05). There, it was held by the Employment Appeal Tribunal that upon an incorrect facts case the Tribunal is not entitled to look and see whether they regard the employer as acting fairly or reasonably when they put forward reasons for the rejection of a flexible working request. The Tribunal is entitled to look at the assertion made by the employer and see whether it is factually correct.

261. Had the flexible working request been valid then we would have held that this was based upon incorrect facts. The reasons for rejection given by Mr Flynn-Williamson at pages 194 and 195 are not made out on the facts. There was simply no evidence that granting the claimant's application would have had a detrimental effect on the respondent's ability to meet customer demand. There was no inability to re-organise work amongst existing staff as the claimant had demonstrated how this could be done. We do accept that there was an inability to recruit additional staff to cover the shortfall of one and a half hours of work each week.

262. However, that is an alternative finding given that on any view the flexible working request of 17 October 2022 does not meet the statutory requirements. All of the flexible working request complaints therefore stand dismissed.

263. The matter will now be listed for a remedy hearing to determine the claimant's remedy upon the successful constructive unfair dismissal claim. Should the parties consider that a case management will be of benefit, then they may make an application for the listing of such a hearing. That application must be made within 21 days of the date of promulgation of this judgment. If the Tribunal hears nothing from the parties to this effect, then after the 21 days period has expired a one-day remedy hearing will be listed before the full panel.

264. Given the modest value of the claimant's unfair dismissal complaint (as she secured alternative employment the day after her employment finished with the respondent) the parties are encouraged to discuss the matter to avoid the need for a further hearing.

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Employment Judge Brain

_____

Date 26 April 2024