



EMPLOYMENT TRIBUNALS

Claimant: Ms L Cotterill

Respondent: Wm Morrison Supermarket Limited

HELD at Leeds in person

ON: 8 to 12 April 2024

BEFORE: Employment Judge Miller

Members: Mr M Lewis

Mr J Howarth

REPRESENTATION:

Claimant: Mr A Halsall – lay representative

Respondent: Mr T Welch – counsel

JUDGMENT having been sent to the parties on 16 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and background

1. The claimant was employed by the respondent, a large supermarket chain, as a checkout operator. She was employed from 24 July 2000 until her resignation on 8 February 2023. The claimant undertook Early Conciliation with ACAS from 15 February 2023 until 2 March 2023 and she submitted her ET1 claim form on 31 March 2023.
2. In her claim, the claimant brought claims of constructive unfair dismissal and race discrimination. The claimant attached a copy of her grievance to her claim form as details of her claim. That set out some details about what the claimant said had happened at work, but it was not clear what claims specifically the

claimant was making. There were two preliminary hearings for case management. At the first on 6 June 2023, Employment Judge Buckley identified that there were claims for unfair constructive dismissal, harassment related to race, breach of the Working Time Regulations 1998 in relation to rest breaks and a failure to follow the ACAS code of practice. A further preliminary hearing was arranged to finalise the list of issues and the parties were directed to try to agree a list of issues in advance.

3. There was a second preliminary hearing on 4 July 2023 before Employment Judge James, and at that hearing a detailed list of issues was agreed. It is recorded in his orders that

“6. At the preliminary hearing the parties co-operated with the Judge in order to clarify the legal and factual basis of the claims brought by the claimant. The list of issues attached at Annex A reflects those discussions. Mr Ward took a pragmatic view, accepting that the clarifications that had been provided were by way of relabelling of facts set out in the claim form. Similarly, the claimant took a pragmatic view, by not pursuing matters which would amount to entirely new claims, and where amendment of the claim in that way would have been opposed by Mr Ward.

7. The claimant’s claim is deemed to be amended, to the extent necessary, by including the matters set out in Annex A. However, the issue of time limits remains, and will be determined at the next preliminary hearing, if the Working Time Regulations and Equality Act claims are pursued”.

4. The issues at that time included a claim that the respondent had breached the Working Time Regulations 1998 by not providing rest breaks of 20 minutes and a claim of a failure to make reasonable adjustments in addition to the claims of direct race discrimination, harassment relating to race and constructive unfair dismissal that we considered.
5. The Working Time Regulations claim was dismissed by withdrawal on 25 August 2023 and the claimant was found, on 13 December 2023, not to have been disabled at the relevant time so that her reasonable adjustments complaints were then dismissed.

6. In the list of issues identified by EJ James, the claimant relied on the allegations of harassment and direct discrimination (which were the same factual allegations) as part of the reason for her constructive dismissal together with the following allegation:

“... did the respondent fail to carry out a fair grievance process by failing to interview Michelle Platts; and telling the claimant that Jayne Purnell had not been interviewed, when she had been”?

7. By the time of the final hearing the list of issues has changed and the final list of issues is attached as an appendix to these reasons. It was of concern to the tribunal that the claimant had changed the basis of her claim in such a significant way.
8. At this hearing, the claimant was represented by Mr Halsall who is not legally qualified. He has been representing the claimant since at least the first preliminary hearing and he represented the claimant at the second preliminary hearing.

9. The respondent was represented at this hearing by a barrister – Mr Welch – and has been advised by solicitors throughout.
10. Although both sets of representatives were very helpful to the tribunal (and we record our thanks for their assistance) we were mindful of the possibility that the imbalance in knowledge of tribunal procedure mean that Mr Halsall and the claimant did not appreciate the significance of the change in the list of issues.
11. We therefore checked with the parties – and particularly the claimant – that the claimant was no longer relying on the allegations of race discrimination and harassment as part of the reason for her dismissal. We allowed the claimant the time while we were reading on the first morning to consider her position and clarify that the claims she was bringing and the allegations she was making were only those set out in the new list of issues. Mr Welch said that the list had been changed at the claimant's insistence and the respondent had gone to great pains to agree the new list.
12. After the break, Mr Halsall confirmed that the new list of issues did represent the claims and allegations the claimant was relying on. We have therefore dealt only with those issues.
13. We also noticed that there was detailed legal advice in the bundle from the claimant's former trade union solicitors to the claimant about the merits of her claim. We explained to the claimant the meaning of legal privilege and checked that the claimant wanted the document in the bundle. Mr Welch said that it had been included at Mr Halsall's insistence. Again we gave Mr Halsall and the claimant time to consider this but they were very clear that they did want the advice correspondence to be included.
14. We therefore accept that the claimant waived legal privilege and the document was included.
15. We started to hear the claimant's evidence on the afternoon of the first day. The claimant is of Filipino background and English is not her first language. It became clear that the claimant's knowledge of English was not sufficient to answer the detailed and specific questions being put in cross examination. We therefore adjourned until a Tagalog interpreter could be found. We were able to resume the claimant's evidence on the second morning of the hearing with the assistance of an interpreter.
16. We had the following evidence:
17. An agreed bundle of documents of 445 pages. Further documents were produced in the hearing which we admitted.
18. Two witness statements produced by the claimant. The claimant also attended and gave evidence.
19. Witness statement for the respondent from the following people:
 - a. Diane Fall – former team leader at the Dewsbury Road Store and the claimant's line manager
 - b. Anna Moakes – Customer Service Manager at the Dewsbury Road store
 - c. Beverley Green – Regional People Specialist for the North and grievance investigator
 - d. Heather Woollin – People Manager at three stores

20. At the conclusion of the claimant's evidence, Mr Welch made a submission that there was no case to answer in respect of the harassment and discrimination claims and that those claims should be dismissed. This was refused for reasons given at the time. The respondent then chose not to call any of their witnesses except Ms Green, who dealt with the claimant's grievance. We have therefore given the respondent's witness statements less weight when coming to our conclusions.

Findings of fact

21. The issues in dispute arise in the period from June 2022 to the claimant's resignation on 8 October 2023. However, it is relevant background that prior to June 2021 employees had worked fixed hours. From June 2021, the respondent introduced a new system which meant that employees had to provide their availability for shifts. The claimant provided her availability in June 2021 which said that she was not available on Mondays, Saturday afternoons or Friday evenings. She could work any other time. There was an expectation that weekends would be shared out fairly.
22. It is also relevant to explain that staff could be put on different tasks which included self-scan and normal checkouts. It was not made explicit but it appeared to be accepted that the self-scan was a more difficult job. Not all staff were trained on the self-scan so the people who were trained spent longer on there and it was a higher stress job than the normal checkouts – requiring the worker to have to resolve more customer issues and standing for long periods.
23. We make findings relating to each of the factual allegations.
24. The first allegation is that in June 2022 Diane Fall provided the claimant with a rota which was unacceptable because it took no account of when the claimant had said that she was available for work.
25. Ms Diane Fall was a Team Leader at the time and her job included preparing checkout rotas as well as line management responsibility for the claimant.
26. We find that this did happen. Ms Fall agrees as much in her statement. However the overwhelming evidence that came out in the course of the grievance investigation and as found in the grievance outcome, was that this was because Ms Fall did not have access to all the staff information and was in fact struggling to keep up with staff rotas. We prefer the contemporaneous evidence and find that this was the reason that Ms Fall did not take account of the claimant's availability when doing the rotas.
27. The next allegation is that in the autumn of 2022 Diane Fall humiliated the claimant when sending her on an early break that she had not been informed about in advance by saying "go go go" to her in a condescending tone.
28. Again we find that this did happen. Although the date it happened is not clear, the contemporaneous evidence from the grievance interviews particularly, leads us to conclude that this allegation is entirely consistent with Ms Fall's demeanour.
29. However, we find on the basis of the grievance interviews that this was because Ms Fall was "stressy and a bit off" which we interpret as meaning, and which Ms Green gave evidence to say meant, that she was stressed and not coping. Team leaders were under-resourced and the clear evidence from the grievance

investigation is that Ms Fall was not coping well with the job at that time. We also find that Ms Fall behaved in this way to a number of other staff who were not Filipino. The reality is that Ms Fall was not coping well with the pressure of her job and this was manifesting itself as “stress” behaviour towards many staff.

30. We now consider the allegations on 8 October 2022.
31. The first one is that the claimant was told by Ms Fall to work on the self-scan at 6.30am when not contracted to start at that time.
32. The claimant was asked to come in and start the shift at 6.30 am and she did. Since the introduction of the new system on June 2021, employees were given the rotas in advance. There were certainly issues about the timing of the provision of the rotas and the adequacy of their preparation as already explained, but on this occasion the claimant agreed to start that shift at 6.30am. To that extent it was part of her contract that she would work at that time because she agreed to work that shift.
33. The claimant might have felt pressured to agree to that shift, but we have not seen or heard any evidence that the claimant objected to it at the time or asked not to be put on that rota because it was not part of her availability. In fact, the claimant was regarded as helpful and flexible when asked to work. We therefore conclude that the reason the claimant was asked was because someone was needed to cover the shift and the claimant agreed to do it. Ms Fall could not have known the claimant was unhappy about this if the claimant did not tell her.
34. The next allegation is that Diane Fall asked a colleague Lisa Webb to take over from the claimant on the self-scan in the morning so she could work on the tills.
35. We accept again that this happened. It is not at all clear however on what basis this is said to be detrimental or unwanted or unfavourable treatment to the claimant. In evidence the claimant said that she was happy that Lisa took over at that time. We find therefore that this did happen but that the claimant was not in any sense unhappy with it.
36. The next allegation is that Diane Fall told the claimant to carry out different jobs such as returns (trolley) when other staff were available to do those jobs. This means collecting and returning trollies.
37. Again we find that this did happen. In evidence the claimant accepted that this was part of her job and she did not give any evidence that Ms Fall acted in a high handed or an offensive way when she did this. In fact in oral evidence when she was answering questions, the claimant gave the impression that she was just doing different jobs as part of her role as she would do every day. We therefore find that this did happen but that it was an entirely innocuous every day event.
38. We consider the next two allegations together. They are
 - a. that after break at noon Diane Fall ordered the claimant to cover Lisa Webb’s break in the self-scan and then after 30 minutes when Lisa had not returned the claimant asked Ms Fall where Lisa was but was ignored, and
 - b. the claimant left at 1.30 to collect her belongings upstairs to leave work because she was upset at being ignored by Diane Fall regarding Lisa Webb not returning back to self-scan for so long.

39. We also find that this happened. It is clear that the claimant had to stay on the self-scan longer than she was expecting. The claimant covered Lisa Webb but was not immediately replaced when Lisa Webb returned from lunch. We think it likely that the claimant did call for attention and was ignored by Ms Fall. This had happened a couple of weeks earlier and on that occasion the claimant had not been given permission to leave the self-scan area and had wet herself. The claimant was obviously, therefore, concerned and upset about being ignored and left on the self-scan again. When the claimant saw another worker, Ms Platt, walking towards the check-out instead of relieving her on self-scan she became upset and went upstairs to the offices.
40. Having regard to the grievance investigation evidence, again we find that it was most likely that the reason that the claimant was ignored was that Ms Fall was just too busy. The claimant was upset about being left on the self-scan and being ignored. As mentioned above, we did not hear any real evidence about what is objectionable about the self-scan but we conclude that it is because there is a great deal of standing and it is more challenging. There was a suggestion from another worker during the grievance process that the claimant struggled with it because English was not her first language and she was required to interact with more customers and in a more detailed way than she would have been on the other tills.
41. However, the claimant did not in fact herself give that evidence and the fact that the claimant might have found it more difficult because English is not her first language, does not of itself give us a reason to conclude that the reason she was left on the self-scan was because English was not her first language or because of her race. We find therefore, that the reason she was left on the self-scan was simply because Ms Fall was too busy and forgot about the claimant.
42. In respect of the second part of this allegation, about Lisa Webb returning from her break to work on the tills rather than self-scan, this is not actually an allegation of something done by the respondent. It merely sets out what the claimant said she did next and how she felt about it.
43. The next allegation is that Heather Woollin falsely accused the claimant of shouting at her.
44. The context of this is that when the claimant saw Lisa Webb returning to the tills, she became frustrated and upset. She took her headphones off, gave them to a colleague and said "that's it, I've had enough". She then went upstairs to the office where Ms Woollin, Ms Fall and Jayne Purnell were working.
45. The grievance interviews of the people at that meeting are consistent that the claimant was shouting and she was upset. This is also consistent with the claimant's own evidence that she had had enough, all her concerns about rotas and the problems with not having toilet breaks had got too much. We think it very likely, and find, that the claimant was being loud because she was upset and that, in reality, she was shouting. It was therefore entirely reasonable for Ms Woollin to ask the claimant to stop shouting and we find that she did ask her to stop shouting and the reason for that was because the claimant was shouting.
46. The final allegation of harassment and discrimination is that when the claimant raised concerns about Diane Fall putting her down to work on successive

weekends and being ignored, Ms Woollin asked the claimant if the claimant would like her hours reduced.

47. It is not clear whether this conversation happened on 8 October in the office at the same time as the previous allegation. In oral evidence, the claimant said that it happened when only she and Ms Woollin were in the office, which may have been on a different occasion.
48. Although Ms Woollin did not give oral evidence, the evidence in her witness statement is consistent with the evidence that she gave to the grievance investigator, namely that perhaps spreading the claimant's hours out over more days might help. Mr Halsall suggested that this was a meaningless suggestion given the claimant was already working virtually seven days a week, but it is clear and we find that Ms Woollin was in fact looking for a resolution to the claimant's problems about not being able to go on breaks. This did not, of course, address the claimant's concerns about weekend working.
49. However we find on the balance of probabilities that the reason for this comment was to try to find a resolution to what Ms Woollin believed was the presenting problem. We prefer the contemporaneous evidence in the grievance meeting notes and find that Ms Woollin was genuinely trying to be helpful. There was no suggestion that the claimant's overall hours would be reduced. Such a suggestion seems inherently unlikely given the chronic staff shortages that the respondent seemed to be experiencing, and we find that it was in fact a suggestion to simply spread the same number of hours over a longer number of days.
50. 8 October 2022 was a Saturday. The claimant was not scheduled to work on the Sunday or the Monday and on 11 October she was signed off sick from work. The claimant did not then return to work.
51. Next we consider the allegations of 10 October and 17 October 2022. These are that
 - a. on 10 October Diane Fall claimed to have forgotten to log a break which the claimant says was booked two months in advance. The Claimant had agreed to swap with Ms Amal Kahn (Checkout Assistant) so she could have the Tuesday which was previously booked.
 - b. Beginning 17 October 2022 did Diane Falls tell Ms Amal Kahn to tell the Claimant to work Saturday and Sunday, knowing that the Claimant had not agreed with Ms Kahn to swap shifts, and denied the Claimant's reasonable request of not working every weekend and early Saturdays?
52. We think this is most clearly explained in the grievance statement of Ms Kahn when she was interviewed by Ms Green on 7 January 2023. In response to a question from Ms Green Ms Kahn said

"I think it was around 24 October. (Ms Green corrected her to say it was in fact 11 October). My shift started at 10. She asked me to work her Tuesday and she worked my Sunday. I texted Diane and asked and Diane said it was okay as long as the shifts were covered. I asked Diane for someone to cover my Sunday, she supported me with Luisa again".
53. The claimant had agreed to swap shifts with Ms Amal Kahn so she could have Tuesday 11 October 2022 off and work at the weekend on Sunday 16 October

2022 instead. This had been booked a couple of months previously as the claimant was going away. Then, when Ms Kahn asked to swap the following week, Ms Fall asked the claimant to cover Ms Kahn's day off.

54. We accept that the claimant was unhappy about working two or more full weekends in a row and we are prepared to accept that Ms Fall did not check with the claimant before rostering her on for a second weekend to accommodate Ms Kahn as the claimant says in her witness statement. However we think that if there was a failure to check it was more likely because of the difficulties Ms Fall was having managing the rotas as we have already explained.
55. In her witness statement, the claimant said about this incident
"Diane told Amal to tell me I had to work again Saturday and Sunday as if we had already agreed to swap. That was a lie. She was malicious. She was dishonest. I never made such an agreement with her. Diane put me to work on Saturday and Sunday again. I texted her again and asked her why she was doing this to me? I later confronted her at work and she admitted to making the 1st and 2nd week of my rota. I then spoke with her face to face and asked her for some favours regarding not working some early mornings and working one week but she instead forced me to continue working early Saturdays and then every successive weekend totally dismissing my reasonable request, knowing it would affect my work-life balance and may cause ill health".
56. We have seen the claimant's rotas. From September to the end of November, the claimant was scheduled to work on 3 Saturday afternoons contrary to her availability. There were at least 4 occasions when she was not required to work Sundays at all, although Sundays were part of her availability, and two weeks when she was not scheduled to work at the weekend at all. In fact, the claimant did not actually work any of the weekends after 8 October because she was absent from work because of her health.
57. We do accept that the claimant was unhappy with her rotas. However, there is no evidence at all to support the claimant's assertion that Ms Fall acted maliciously or dishonestly. In oral evidence, the claimant said she didn't know if Ms Fall had just not been trained on the rotas and was short staffed, or if she might have forgotten. The claimant also said in evidence that she didn't know whether Ms Fall was picking on her specifically and it didn't know and thought it was not relevant whether other workers were treated the same way. In our view, the claimant was happy to make unsubstantiated allegations about her former colleagues on the basis of no evidence except her own unevicenced beliefs.
58. We consider whether there is any other evidence to support the claimant's suspicion that the treatment she experienced was in any way at all connected with her race.
59. In this case there just is no such evidence. We gave the claimant an opportunity in oral evidence to explain why she thought race was a factor, she could not do so. When questioned by Mr Welch, the claimant said she did not know if the treatment she was alleging was because of her race.
60. We understand that the claimant felt that she was singled out. However, we find that many staff were treated badly in terms of breaks and rotas even if the

claimant was unaware of this at the time. The claimant, however, believed that she was singled out for the poor treatment (in terms of not having adequate breaks and being scheduled to work when she had said she was not available). She was looking for an explanation and wondered if it could be because she was the only Filipino person there. However, the claimant has been unable to explain any objective basis for this belief. She relies on the fact that there was a series of incidents going back to 2021. However not all of those incidents were said to be by Ms Fall, and the evidence we have seen suggests that many staff were treated the same way.

61. In oral evidence the claimant herself said “it could have been race I don’t know”, and Mr Halsall positively advanced a suggestion in his submissions that any negative treatment by Ms Fall might relate to a falling out at the claimant’s house between the claimant and Ms Fall the previous year. The alleged incident (about which we heard no evidence) leading to the supposed falling out was that Ms Fall visited the claimant’s house but was left alone for a long time while the claimant was otherwise engaged. This was wholly unconnected with the claimant’s race. The only other reason the claimant relied on was her own suspicion. In our view, the difference in treatment between different employees seemed, in fact, to depend on how willing to stand up to the manager each employee was.
62. We now address the facts relating to the constructive unfair dismissal claim.
63. The claimant’s claim for constructive unfair dismissal is that the respondent acted in a repudiatory breach of contract by failing to carry out a fair grievance process by:
 - a. Failing to include Michelle Platts’ testimony in the grievance outcome in that the claimant “was treated differently by new management” and that she was not asked if the claimant “may have been bullied or unfairly treated”, and
 - b. failing to include that Michelle Stead in her formal meeting said Diane Fall “did rotas for family and friends” and upon being asked believed the claimant had been “treated unfairly”; and
 - c. telling the claimant/contradicting that Jane Purnell was on compassionate leave so could not be interviewed, when she had been, and also the actual date of the completed investigation.
64. The claimant submitted a grievance on 7 November 2022. The grievance included 21 distinct points but they were grouped by Ms Green (who was appointed to investigate the grievance) as follows:
 - a. Concerns about breaks and an incident where the claimant was told not to clock on too early
 - b. Comments made by Jane Purnell that the claimant should not speak to anyone about her beliefs or she would be disciplined
 - c. Problems with two checkout managers and being told not to clock in early
 - d. Concerns about changes to rotas outside the claimant’s availability
 - e. The behaviour of Diane Fall who the claimant said was dishonest about the shift swap with Ms Kahn and who spoke to the claimant like a little kid

- f. The incident when the claimant wet herself
 - g. Concerns about 8 October 2022
 - h. That the claimant felt bullied, victimised and harassed. In her grievance the claimant said about this “Maybe there was an unconscious racial bias about why they would treat me in such a manner. The colour of my skin? Being a Filipino? I cannot figure the reason”.
65. In the course of the grievance, Ms Green interviewed 19 people including Ms Platts and Ms Stead as well as the claimant. Ms Green produced a detailed report and grievance outcome which she sent to the claimant on 3 February 2023. Ms Green upheld parts of the claimant's grievance.
- a. She agreed that there had been a problem with breaks. People had not been able to take adequate breaks, but this had improved with a new manager. She upheld that allegation.
 - b. She agreed that people spent too long on self-scan with little relief and that a programme was now in place to resolve it. That was upheld.
 - c. The comments allegedly made by Jane Purnell about the claimant's beliefs were neither upheld nor rejected.
 - d. The issues with rotas from 2021 were a problem historically but had improved since Ms Moaks took over responsibility.
 - e. The issue about late communication of rotas was upheld and the system had now improved
 - f. That Ms Fall did forget to ask the claimant about the rota swap with Ms Kahn but that it was a genuine oversight.
 - g. That more could have been done by Ms Fall to support the claimant on 8 October. Steps were being taken to address this but she could not provide any more detail because of GDPR.
66. Ms Green agreed that she could implement the first 4 outcomes that the claimant wanted from the grievance:
- a. For you to be able to work shifts with a 1 hour lunch break to support your health and well being
 - b. Your availability to be adhered to when rotas are being planned
 - c. For any rota changes to be communicated in a timely and professional manner
 - d. To be able to use the toilet as and when required whilst working
67. The last two required outcomes were:
- a. To have your trust in Morrisons restored and your rights and dignity be respected.
 - b. Heather Woollin People Manager, Jane Purnell, Cafe manager and Diane Falls, team leader to be removed from Dewsbury Road store before your return to work.
68. It is helpful to set out part of the grievance response in full:

“I do believe there have been several issues at the Dewsbury Road store which have impacted not only you but other colleagues too, in regards insufficient colleagues trained on self-scan, poor rotoring, break times and issues with colleague flexibility. I have put several next steps in place to address these with Steve and Heather and feel certain that improvements have already begun.

I feel the checkout department has suffered due to the lack of a consistent manager leaving team leaders responsible for tasks they have not been trained for and being ill equipped to deal with a large team of colleagues.

I agree that on occasions your availability has not been adhered to and on your return to work would like to arrange a meeting for you with Anna to complete a new flexibility form and discuss amendments to your shifts to give you the hours lunch break you requested, alongside a Medigold referral to discuss suitable duties and tasks.

In regards point 5 I hope that this full investigation and next steps taken have been able to restore your trust in Morrisons and that you feel your rights and dignity are respected by the company and specifically the Dewsbury Road store

I believe that whilst there have been situations which have not been dealt with correctly as I have explained in my outcome, I can find no evidence of malice or bullying towards you as an individual or any unconscious bias towards your Filipino origin, and therefore I cannot implement point 6 of your grievance.

I would just like to share with you that all those interviewed spoke highly of your work ethic, character and dedication to the store and with this in mind I would like to recommend mediation with Diane Falls, Jane Purnell and Heather Woollin for you to be able to return to the job you told me you love .

Please let me know if this is something you would like me to organise for you.

I have asked Anna Moaks to continue the welfare process with you as your line manager and she will be in touch shortly to arrange to speak with you”

69. We address the first two parts of the allegations relating to Ms Platts and Ms Stead.

70. The relevant part of Ms Platts’ evidence to the grievance investigator was

“[The team leaders] are all highly strung on the job as stressed but nice people. With Luisa and others there is a language barrier as she is hard to understand and they don’t speak up so get treated differently”.

71. Ms Platt also confirmed that she had been left a whole shift without a break but she told the managers because she was outspoken.

72. The relevant part of Ms Stead’s evidence is

“yes [in response to the question whether the claimant raised concerns about being bullied] on a Thursday. Crying saying that she was on self-scans too long. [Ms Fall] used to tell me to leave her on there. “Luisa gets stressed on there as her English is not good...I just ignored her and swapped her on it, not fair for you to do 2 – 11 at night on there...”

No [in response to a question whether she thought Ms Fall treated her fairly] “[Ms Fall] did rotas and it was friends and family rotas. She used to go out with some of them on checkouts and give them better shifts”

73. Ms Stead also said that other colleagues (not just the claimant) talked about unfair rotas with Ms Fall.
74. We find that Ms Green did include Ms Platts' and Ms Stead's evidence in her grievance outcome. She did not refer to it directly but she did not refer to any of the witnesses' evidence directly. She did not ignore the evidence or sweep it under the carpet. Ms Green considered that evidence and made a decision about it. This is what she was required to do when conducting the grievance investigation and coming to a decision.
75. Furthermore the weight that Ms Green gave to that evidence was not in our view unreasonable. Ms Green gave a clear and consistent account of why she treated the evidence as she did. She weighed the evidence of Ms Platts and Ms Stead against all the other evidence she had and preferred the other evidence.
76. We did consider whether Ms Green had ignored the only evidence in favour of the claimant thereby pre-judging the outcome. But we find that she did not. In fact she upheld the substance of the complaints that Ms Stead and Ms Platts' evidence addressed.
77. The claimant is unhappy that Ms Green did not find in her favour about bullying, but in making that decision Ms Green did not ignore the evidence of Ms Platts and Ms Stead. She took it into account and made a decision.
78. The third allegation, putting it at its highest, is that the claimant believed that Ms Green had conducted the grievance without interviewing Ms Purnell. This was a mistaken belief by the claimant – Ms Green did interview Ms Purnell – but it was a reasonable mistake. Ms Green did not make it clear in her correspondence with the claimant who she had and had not interviewed. There were two different people on compassionate leave at different times and it is easy to see how the confusion about Ms Purnell being on compassionate leave arose. Ms Green told the claimant that she had been unable to interview a colleague who was on compassionate leave and the claimant mistakenly assumed that was Ms Purnell.
79. Ms Green did, however, say in the grievance outcome that she had been able to interview all the people named in the claimant's grievance except for four people who she named. They did not include Ms Purnell.
80. Finally, the last allegation arises from the fact that there was some confusion about the date of the grievance outcome. This related to the fact that the date on the grievance outcome letter was dated a week or so before the claimant received the outcome.
81. Mr Halsall fairly recognised that this might have been a mistake, but in any event Ms Green gave clear evidence about that. She started writing the outcome on the 26 January 2023 (the date of the letter) and then finished it and sent it to the claimant on 3 February 2023. That was the reason for the different dates. We prefer Ms Green's evidence and in our view this is a perfectly understandable not uncommon occurrence and wholly innocuous.
82. The claimant did not appeal the grievance outcome and on 8 February 2023 two days later, the claimant handed in her resignation. The reasons for her resignation were bullying and harassment and unfair and/or unreasonable treatment including

- a. "From 05/07/2021 being subject to bullying, harassment and discrimination, by inflicting psychological stress, causing depression and anxiety, as well as physical ill-health violate The Equality Act 2010, Human Rights Act 1998, the Safety at Work Act 1974, and Employment Rights Act 1996 and Morrison's policies on multiple incidents carried out from management to checkout team leaders until the 08/10/2022. I then submitted my formal grievance on 07/11/2022.
- b. I entrusted the regional people specialist to investigate my formal grievance fairly and objectively, but I strongly disagree with the final report's outcome. Recent evidence has now come to light, suggesting the investigation was unfair. That is the last straw".

Law and conclusions

83. The claimant says that she has been subject to harassment related to sex and/or direct discrimination as set out in the appendix.
84. Under section 212 of the Equality Act 2010, if an act amounts to harassment, it cannot also be direct discrimination. This means that the alleged acts will be one or the other, but not both.

Harassment

85. We therefore consider first the allegations of harassment.
86. Section 26 Equality act 2010 says
 - (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B....
 - (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
 - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
 - (5) The relevant protected characteristics are—
...
sex;
87. This breaks down into a number of questions:

(1) The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test – was it actually unwanted?

(2) The purpose or effect of that conduct: Did the conduct in question either:

(a) have the purpose *or*

(b) have the effect

of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for her 2 ?

(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?

88. The real issue in this case is whether any of the alleged conduct was related in anyway at all to the claimant's race.
89. The question of whether any of the alleged conduct was related to the claimant's race is a question of fact for the tribunal It is a less onerous test that "because of" but the conduct must itself be related to the relevant protected characteristic. The fact of the claimant's race cannot be just context.
90. We also refer to the burden of proof provisions of s 136 Equality Act 2010. This says that
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
91. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.
92. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her sex.
93. We have set out our findings of fact about each of the allegations above. In our judgment, none of the alleged conduct is related in any way to the claimant's race or race in general. We understand that people who experience discrimination might not know for certain that someone is acting in a discriminatory way towards them, but in this case the claimant was unable to advance any positive reason for thinking that the treatment she experienced was related to her race. It was only a suspicion – possibly not even that.
94. In fact Mr Halsall advanced a positive case that the treatment by Ms Falls was for a reason other than the claimant's race – namely the falling out at the visit by Ms Falls to the claimant's house.

95. We have found that some of the alleged acts did happen and some did not happen as described. Some of the acts relied on were not acts of the respondent and some of them the claimant did not even say were unusual or disadvantageous. We have set out our findings about these above.
96. However, in all the cases there was no evidence before us from which we could conclude in the absence of an explanation that the conduct was in any way related to the claimant's race.
97. We considered the evidence that Ms Stead and Ms Platt gave in the grievance that "Luisa gets stressed on [the self-scan] as her English is not good" and "With Luisa and others there is a language barrier as she is hard to understand and they don't speak up so get treated differently" respectively.
98. This is the only evidence we saw or heard that potentially relates to the claimant's race.
99. Ms Stead's assertion relates to the impact on the claimant of working on the self-scan. There is nothing in what she says that suggests the claimant's language has any bearing on Ms Fall's or Ms Woollin's conduct towards the claimant. This evidence does not support the claimant's case.
100. Ms Platt's evidence appears at first to suggest a link between the claimant's language, which in our view is part and parcel of her national origins, and Ms Fall's conduct towards her. However, it is apparent when considered in detail that she is saying that the reason the claimant is treated differently (along with some other people) is because she does not speak up. We have heard no evidence to suggest that a reluctance to speak up is inherently linked to the claimant's race or national or cultural background. It was also not the claimant's case that her alleged unwillingness to speak up was related other race.
101. In our judgment, this evidence is not sufficient for us to conclude, in the absence of any explanation to the contrary, that the alleged conduct of Ms Falls or Ms Woollin was related to the claimant's race and her claims of harassment related to race are unsuccessful and are dismissed

Direct discrimination

102. We now consider the allegations of direct race discrimination. Section 13 of the Equality Act 2010 provides:
 - (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
103. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.
104. Section 136 of the Equality Act 2010 also applies to direct discrimination as set out above. The difference is that the unfavourable treatment complained of must be because of the claimant's race. If the claimant proves facts from which we could conclude that she was treated less favourably than a person who was not Filipino would have been treated then the respondent must prove that the treatment was in no way whatsoever because of the claimant's race.
105. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They

are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

106. This means that there must be something more than just unfavourable treatment and a difference in status.
107. As with the allegations of harassment, we have made findings about the allegations above. In this case, the real question is, was any of the treatment of the claimant because of race. For the same reasons that we have explained in respect of harassment, the claimant has not shown facts from which we could conclude that any of the treatment (to the extent that it was detrimental or done by the respondent) was because of the claimant’s race or race more generally. We have explained in our findings of fact the reason for each of the acts.
108. For these reasons therefore, the claimant’s claims of direct discrimination are unsuccessful and are dismissed.
109. We note, however, that we do understand that the claimant felt that she was singled out, although in our view many staff were treated badly in terms of breaks and rotas even if the claimant was unaware of this at the time. However, believing herself to be singled out, we think that the claimant was looking for an explanation and wondered if it could be because she was the only Filipino person there. While this might be understandable, it is not sufficient to bring a successful claim of race discrimination. There must be some piece of objective evidence that race was a factor in the decision making of Ms Fall or Ms Woollin.
110. In this case there just is no such evidence. Even when the claimant was given an opportunity to explain why she thought race was a factor, she could not do so. In our judgment there is no evidence at all from which we could conclude that the treatment the claimant complains about was because of or related to race in any way at all. For these reasons the claims of direct race discrimination and harassment related to race fail and are dismissed.

Unfair dismissal

111. In respect of the claimant’s claim for unfair dismissal, the question is whether the claimant was dismissed within the meaning of s 95(1) Employment rights Act 1996 (ERA) in that she resigned in response to a repudiatory breach of contract.
112. Section 95 ERA sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.
113. In *Western Excavating (ECC) Ltd v Sharp* [\[1978\] QB 761](#) the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of ‘reasonable conduct by the employer’.

114. In *Malik v Bank of Credit and Commerce International SA* [\[1997\] IRLR 462](#), [\[1997\] ICR 606](#) it was held that contracts of employment include the following implied term:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

115. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant

116. The claimant relies on the following conduct as breaching the implied term of mutual trust and confidence:

117. Did the respondent fail to carry out a fair grievance process by:

- a. failing to include Michelle Platts' testimony in the grievance outcome in that the Claimant "was treated differently by new management" and that she was not asked if the Claimant "may have been bullied/unfairly treated"; and
- b. failing to include that Michelle Stead in her formal meeting said Diane Falls "did rotas for family and friends" and upon being asked, believed the Claimant had been "treated unfairly" (a and b being the Claimant's primary allegations); and
- c. telling the Claimant/contradicting that Jane Purnell was on compassionate leave so could not be interviewed, when she had been, and also the actual date of the completed investigation? (Claimant's secondary allegation).

118. In our judgment the conduct in (a) and (b) was not conduct that was capable of breaching the implied term of mutual trust and confidence. Firstly, the allegations that Ms Platts' and Ms Stead's evidence was not included in Ms Green's considerations. The reality is that the claimant was unhappy with the grievance outcome. However, in our judgment Ms Green considered, weighed and took into account all relevant evidence including Ms Platts' and Ms Stead's evidence. She did not fail to carry out a fair grievance process - she carried out a detailed and thorough grievance investigation which upheld significant parts of the claimant's grievance.

119. We also find that Ms Green had a reasonable and proper cause for doing this as she was investigating the grievance that the claimant had raised.

120. The third and fourth allegations of repudiatory conduct amount to no more than a miscommunication. It might be that a miscommunication which was reinforced and caused serious problems for an employee could amount to a breach of the implied term of mutual trust and confidence in some circumstances. However, in circumstances where substantial parts of the claimant's grievance have been upheld and there was still an opportunity for a grievance appeal, in our judgment this does not amount to a repudiatory breach of contract on this occasion. It does not by itself reach the high threshold that entitled the claimant to treat the respondent as if it had acted in a way that

demonstrated that it considered it was no longer bound by the contract of employment.

121. For these reasons, we find that the respondent did not act in a way that was calculated or likely to breach the implied term of mutual trust and confidence, the claimant was not entitled to resign in accordance with section 95 of the Employment Rights Act 1996 and consequently she was not dismissed. Her claim of unfair dismissal is therefore not well founded and is dismissed.

Time limits

122. Finally, we address time limits as they apply to the claims of harassment and direct discrimination.
123. The last alleged act of race discrimination or harassment related to race was on 17 October 2022. The claimant started early conciliation on 15 February 2023 and that finished on 2 March 2023. The claimant submitted her ET1 claim form on 31 March 2023.
124. A claim for discrimination must be brought within three months of the last alleged discriminatory act where the allegations form part of an allegedly continuing act. The time spent undergoing early conciliation with ACAS is ignored for the purpose of calculating the three months.
125. That means that the time expired for bringing a claim initially on 16 January 2023. This was wholly before the ACAS period started so the early conciliation period does not operate to extend time in this case. The ACAS conciliation period is not relevant to the time limits in this case.
126. The claimant brought the claim on 31 March but in fact she did not get her early conciliation certificate from the solicitor until 22 March 2023.
127. The question for us is, is it just and equitable to extend time for the claimant to present her claim?
128. Relevant factors include the length of and the reason for delay, the impact of any delay on the cogency of the evidence, whether there has been any co-operation with the respondent for any requested information, the promptness with which the claimant acted, what steps the claimant has taken to obtain advice and the merits of the case.
129. It is for the claimant to show why it is just and equitable for us to extend time.
130. While the factors referred to above are relevant matters to take into account the overall test is whether it is just and equitable.
131. The claimant was unwell at the time, we accept that and we have seen the medical records. Although the claimant had the assistance of a lay representative and trade union advice early on it was still up to the claimant to make decisions about that case and she was unable to engage even with work meetings towards the end of 2022. The medical records show that the claimant was quite unwell until at least the end of February 2023.
132. It was said by the respondent to be contradictory that as well as her ill health the claimant was also relying on the fact that she was awaiting the grievance outcome before deciding whether to put in her claim or not. We do not agree that this is necessarily contradictory. We accept the claimant at that time wanted to return to work and it was reasonable to allow the respondent in this

particular case, after such a long service, an opportunity to resolve her complaints. Once the claimant was aware the matters would not be resolved to her satisfaction she resigned and acted promptly in pursuing early conciliation.

133. Initially, and certainly from the claimant's perspective, the allegations of race discrimination and unfair dismissal were tied up together. It was reasonable in our view in this particular case for the claimant to await the grievance outcome before making the decision to apply to the Employment Tribunal. That short delay has not produced any impact on the evidence that the respondent produced and in the event the respondent did not call any witnesses to deal with the race discrimination claims.
134. We agree with Mr Welch that the case is poor on its merits and that is a fact that we can take into account, but we only know that now because we have heard all the evidence. If the decision on time limits had been made at an earlier stage the outcome might have been different. In this case, however, having regard to all the factors that we have set out, it is just and equitable to extend time for the claimant to present her claims of discrimination and harassment to 31 March 2023.

Employment Judge Miller

Date: 10 May 2024

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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 16 November 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/Acas Early Conciliation commenced 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. In relation to any failure to do something, when did the Respondent decide not to do that something; alternatively when did the respondent do an act inconsistent with doing that something; or if there was no inconsistent act, by what date might the respondent recently have been expected to do it?

1.2.4. Was the claim made to the Tribunal/Acas Early Conciliation commenced within three months (plus early conciliation extension) of the end of that period/decision/inconsistent act/date?

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

1.2.5.1. Why were the complaints not made to the Tribunal in time?

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

2. Harassment related to race (Equality Act 2010 section 26)

2.1. Did the respondent do the following things:

2.1.1. In June 2022, did Diane Falls provide the Claimant with a Rota which was unacceptable, because it took no account of when the Claimant had said that she was available for work? [10]

2.1.2. In the Autumn of 2022 did Diane Falls humiliate the Claimant when sending her on an early break that she had not been informed about in advance by saying "go go go" to her in a condescending tone? The Claimant says this was witnessed by Mandy Hetherington (Checkout Assistant) who told the Claimant she had been "treated like a little kid" by Ms Falls. [13]

2.1.3. On 8 October 2022:

2.1.3.1. was the Claimant told by Diane Falls to work on the selfscan at 6.30AM when not contracted to start at that time;

2.1.3.2. did Diane Falls ask a colleague Lisa Webb to take over from Claimant on self scan in the morning, so she could work on the tills;

2.1.3.3. did Diane Falls tell the Claimant to carry out different jobs, such as returns (trolley) when other staff were available to do those jobs;

2.1.3.4. after a break at noon, did Diane Falls order the Claimant to cover Lisa Webb's break in self-scan. After 30 minutes when Lisa had

not returned, did the Claimant ask Ms Falls where Lisa was, but was ignored;

2.1.3.5. did the Claimant leave at 1.30pm to collect her belongings upstairs to leave work because she was upset at being ignored by Diane Falls regarding Lisa Webb not returning back to self scan for so long;

2.1.3.6. did Heather Woollin falsely accuse the Claimant of shouting at her;

2.1.3.7. on the Claimant raising concerns about Diane Falls putting her down to work on successive weekends and being ignored, did Ms Woollin ask the Claimant if the Claimant would like her hours reduced? [16]

2.1.4. On 10 October 2022 did Diane Falls (Team Leader) claim to have forgotten to log a break which the Claimant says was booked two months in advance. The Claimant had agreed to swap with Ms Amal Kahn (Checkout Assistant) so she could have the Tuesday which was previously booked. [11]

2.1.5. Beginning 17 October 2022 did Diane Falls tell Ms Amal Kahn to tell the Claimant to work Saturday and Sunday, knowing that the Claimant had not agreed with Ms Kahn to swap shifts, and denied the Claimant's reasonable request of not working every weekend and early Saturdays? [12]

2.2. If so, was that unwanted conduct?

2.3. If so, did it relate to race?

2.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Direct race discrimination (Equality Act 2010 section 13)

3.1. The Claimant is of Filipino national/racial origins.

3.2. Did the respondent do the following things:

3.2.1. See the matters complained of at 2.1 above.

3.3. Was that less favourable treatment?

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

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

3.4. If so, was it because of race/national origins?

3.5. Did the respondent's treatment amount to a detriment?

4. Remedy for discrimination or harassment

- 4.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
- 4.2. What financial loss has the discrimination caused the Claimant?
- 4.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 4.4. If not, for what period of loss should the Claimant be compensated?
- 4.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 4.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 4.7. Did the respondent or the Claimant unreasonably fail to comply with it by [see 5.1.2 below for the breach]?
- 4.8. If so is it just and equitable to increase or decrease any award payable to the Claimant?
- 4.9. By what proportion, up to 25%?
- 4.10. Should interest be awarded? How much?

5. Unfair dismissal (Constructive)

5.1. Was the Claimant dismissed? In a constructive dismissal claim, the tribunal will decide:

5.1.1. Did the respondent fail to carry out a fair grievance process by:

5.1.1.1. failing to include Michelle Platts' testimony in the grievance outcome in that the Claimant "was treated differently by new management" and that she was not asked if the Claimant "may have been bullied/unfairly treated"; and

5.1.1.2. failing to include that Michelle Stead in her formal meeting said Diane Falls "did rotas for family and friends" and upon being asked, believed the Claimant had been "treated unfairly" (5.1.1.1 and 5.1.1.2 being the Claimant's primary allegations); and

5.1.1.3. telling the Claimant/contradicting that Jane Purnell was on compassionate leave so could not be interviewed, when she had been, and also the actual date of the completed investigation? (Claimant's secondary allegation).

5.1.2. Did those things breach the implied term of trust and confidence? The Tribunal will need to decide:

5.1.2.1. 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

5.1.2.2. whether it had reasonable and proper cause for doing so.

5.1.3. Did those things breach any other term of the Claimant's contract?

5.1.4. 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. A breach of the implied term of trust and confidence is by definition a fundamental breach.

5.1.5. Did the Claimant resign in response to the breach under the concept of “last straw”? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant’s resignation.

5.1.6. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant’s words or actions showed that she chose to keep the contract alive even after the breach.

5.2. 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?

5.3. Was it a potentially fair reason?

5.4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

6. Remedy for unfair dismissal

6.1. Does the Claimant wish to be reinstated to her previous employment?

6.2. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

6.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.5. What should the terms of the re-engagement order be?

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

6.6.1. What financial loss has the dismissal caused the Claimant?

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

6.6.3. If not, for what period of loss should the Claimant be compensated?

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

6.6.5. Did the respondent or the Claimant unreasonably fail to comply with it by – see 5.1.2?

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

6.6.7. Does the statutory cap of fifty-two weeks’ pay apply?

6.7. What basic award is payable to the Claimant, if any?