EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105208/2023

Held in Glasgow on 4-8 December 2023, 25-28 March and 28-30 May 2024

Employment Judge A Strain
Members D McDougall & J Gallacher

Ms R Malcolm	**Claimant** **In Person**
Blackwood Homes and Care	**Respondent** **Represented by:** **Mr G Cunningham - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the Claimant's claim of constructive dismissal is successful;

(2) the Claimant's claims of discrimination under sections 18 and 19 of the **Equality Act 2010 (EA 2010)** are successful; and

(3) The Tribunal orders the Respondent to pay the Claimant the sum of **£18,684.35 (comprising a Basic Award of £607.20 and a Compensatory Award of £18,077.15).**

REASONS

Background

1. The Claimant represented herself. She asserted claims of (i) Constructive Unfair Dismissal and Discrimination under sections 18 and 19 of the **Equality Act 2010 (EA 2010).** The Claimant sought a Basic Award, Compensatory Award and damages for injury to feelings as detailed in her schedule of loss.

2. The Respondent was represented by Mr G Cunningham, Advocate.

3. The Parties had lodged a Joint Bundle of Documents (which was added to as the Hearing progressed) with the Tribunal for the purposes of the Hearing.

4. The Parties lodged an agreed statement of facts and issues.

5. The Tribunal heard evidence from the Claimant and Tracey Leggate (**TL**) (Former House Supervisor) for the Claimant and Jane Ritchie (**JR**) (Respondent's Area Supervisor), Erica Blair (**EB**) (Respondent's HR Manager), Marshall McDowell (**MM**) (Respondent's Head of Customer Service) and Douglas Moyes (**DM**) (Director of Customer Service) for the Respondent.

Findings in fact

6. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:

   a. The Claimant was employed originally by Abbeyfield Scotland Limited on 29 July 2019. Her employment transferred to the Respondent by operation of **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)** on 1 September 2022.

   b. The Claimant was employed as a House Supervisor initially working one day per week (9 hours on a Monday). This was expressly agreed at the Claimant's interview for the job with JR and EB prior to commencement of her employment.

   c. The Claimant was one of 3 House Supervisors working within the Respondent's premises at Beech House. Killearn. The Respondent's premises at Beech House are a Sheltered Housing complex with 8 Residents. One House Supervisor works at Beech House each day of the week on a 7 day rota. The other 2 House Supervisors (TL and Helen Smith (**HS**)) worked the other days of the week.

   d. There was also a relief House Supervisor, Sandra Beattie (**SB**), who covered during periods of absence. She did not have any fixed days and worked on an *"as required"* basis.

e. JR was the Claimant's line manager during her employment with the Respondent.

f. The Claimant was provided with a contract of employment dated 24 July 2019 (Pages 102-104). This contract provided that the Claimant would work 9 hours on a Monday 8.30 am to 6.30 pm. At the foot of page 103 and 104 the contract contained the wording *"The rota may from time to time be amended by Abbeyfield Scotland Limited and you will be given reasonable notice of this"*. Underneath that wording was a signature and date box which was unsigned.

g. The Claimant signed and returned this contract by post to the Respondent. The signed contract was not produced by the Respondent.

h. The Claimant received a new contract of employment dated 1 November 2021 (Pages 97-101) following her agreement to work an additional day (9 hours on a Friday) with effect from 22 March 2021.

i. The new contract of employment provided that the Claimant was *"contracted to work 18 hours per week, working 2 days out of 7. The rota may from time to time be amended by Abbeyfield Scotland Limited and you will be given reasonable notice of this."*

j. The Claimant worked Mondays from the commencement of her employment until its termination and Fridays from 22 March 2021 until its termination. The Claimant worked additional shifts to cover for her colleagues when she was able to do so and provided she had sufficient notice .

k. The Claimant could not commit to a variable rota due to her personal circumstances. She worked as a carer for her partner's grandmother Tuesday, Wednesday and Thursday every week. She had no childcare available at weekends and her partner worked Sundays every week. The Respondents were aware of her personal circumstances.

l. The Claimant's oldest daughter was in childcare at Heron House Nursery on the Claimant's working days (Monday and Friday). The Nursery required the Claimant to commit to set days and would not allow any change or flexibility to this. This was confirmed in a letter from the Nursery (Page 90).

m. JR made derogatory and disrespectful remarks about the Claimant to TL and HS during the Claimant's employment with the Respondent. Examples were, to the effect that "if childcare was an issue for RM why was she having another child" (during the Claimant's pregnancy); RM "has no intention of doing the rota so she won't be back any way" (whilst the Claimant was absent on maternity leave).

n. In or around July/August 2021 TL and HS raised issues with JR regarding the rota. In particular, they wished to work less weekends to have more family time and also to reduce the number of occasions where they were being rostered back to back shifts which could result in, for example, working 2 consecutive weekly shifts.

o. The rota was discussed by JR along with TL and HS. The Claimant was not party to these discussions until a staff meeting on 3 September 2021 which she attended along with JR, TL and HS.

p. The Claimant reiterated her personal circumstances to JR and the others at this meeting.

q. On 9 September 2021 JR issued an email to the Claimant, TL and HS with a new rota that was stated to be effective from 10 October 2021 (Page 216-218). The new rota required the Claimant to work one Sunday in addition to her normal Monday and Friday in a 3 week cycle.

r. The Claimant responded to JR by email dated 10 September 2021 (Page 221-222). This email reiterated the personal circumstances of the Claimant which meant that she could not commit to working on a Sunday.

s. A staff meeting was organised by JR for 1 February 2022. JR informed the Claimant by telephone. JR informed HS and TL that the rota would be discussed at the staff meeting and not to tell the Claimant. The Claimant was not told the rota would be discussed in advance of the meeting.

t. At the staff meeting the rota was discussed between the Claimant, JR, HS and TL. JR produced and referred to a proposed rota that had been prepared by TL and HS (Pages 176-178). The Claimant had not seen this proposed rota before.

u. No conclusion or agreement was reached on the proposed rota at the meeting.

v. Subsequent to the meeting the Claimant called JR and told her she was pregnant.

w. Discussions then continued between JR, HS and TL regarding a new rota to accommodate their requests. These discussions included email exchanges regarding the rota between JR, TL and HS (Pages 223-224). The Claimant was not involved in these discussions or email exchanges.

x. On 14 February 2022 JR emailed a new rota to the Claimant, TL and HS which she stated would take effect from Sunday 3 April 2022. This rota had the Claimant working 1 Saturday and 1 Sunday in a 3 week cycle.

y. The Claimant responded to JR by email of the same date (Pages 225-226). This email reiterates the personal circumstances of the Claimant which prevent her from working the rota and states that she cannot accept the new rota.

z. JR responded to the Claimant by email of 17 February 2022 (Page 133). JR stated that the Claimant, TL and HS would have to submit a flexible working request (**FWR**) under the Respondent's Flexible Working Policy (Pages 135-138).

aa. The Claimant was absent from work due to hyperemesis (a pregnancy related illness) from 17 February 2022 to 28 March 2022.

bb. The Claimant, TL and HS all submitted FWRs after being told to do so by JR.

cc. JR advised HS and TL to include cost savings to the Respondent as a reason for the FWR as this would help with their FWRs.

dd. TL submitted a FWR dated 19 February 2022 (Pages 188-191).

ee. The Claimant submitted a FWR to JR dated 21 February 2022 (Pages 139-140).

ff. HS submitted a FWR dated 21 February 2022 (Pages 192-194).

gg. On 29 April 2022 the Claimant emailed JR regarding SB covering her shift for 6 May 2022. An email was sent from JR's laptop to the Claimant on 2 May 2022 stating "I hate her". This email was sent by JR.

hh. EB emailed the Claimant on 30 May 2022 and 6 June 2022 with updates regarding the progress of her FWR (Pages 141-142).

ii. On or around 11 July 2022 the Respondent was notified by the Claimant of her proposed maternity leave dates.

jj. The Claimant emailed EB on 20 July 2022 seeking an update on her FWR.

kk. The Claimant and EB agreed to conduct a Zoom meeting on 29 July 2022 with JR to discuss her FWR by emails of 22 to 26 July 2022 (Pages 143-145).

ll. The Claimant was admitted to hospital on 26 July 2022 for a pregnancy related illness and remained absent from work until she commenced her maternity leave..

mm. The meeting to discuss the Claimant's FWR took place on 29 July 2022 by telephone. The Claimant participated from hospital. The meeting was conducted by JR with EB. Notes of the Meeting were produced (Page 157).

nn. By email of 29 July 2022 EB informed the Claimant, TL and HS that all 3 members of staff had their FWR meetings and that she would issue a decision following her return to work after annual leave in 2 weeks. The email also stated that the rota would be changing on a temporary basis whilst the Claimant was on maternity leave (Pages 151-156).

oo. The Claimant commenced maternity leave on 24 August 2022 which was also the date of birth of her daughter.

pp. JR considered the Flexible Working Applications Summary Document produced by EB in arriving at her Decision (Pages 162-165).

qq. EB verbally informed TL and HS on 28 August 2022 that their FWRs had been approved. EB also asked TL and HS not to tell the Claimant.

rr. The Respondent implemented a new rota which included weekend working for the Claimant's post with effect from 1 September 2022.

ss. During her maternity leave a male colleague covered the Claimant's duties and worked to the new rota implemented on 1 September 2022.

tt. EB issued a letter dated 12 September 2022 to the Claimant confirming that her FWR had been refused and detailing the reasons for that decision (Pages 159-160).

uu. Although the letter of 12 September 2022 was issued in EB's name the decision to refuse the Claimant's FWR had been made by JR.

vv. There was no additional burden of costs to the Respondent in covering periods of absence on a Monday and Friday apart from those incurred as a consequence of the Claimant's higher level of absence due to pregnancy related illness.

ww. TL and HS did not inform JR that they would not cover the Claimant's shifts or that they would resign unless the rota was amended.

xx. The Claimant appealed the decision to refuse her FWR by email of 28 September 2022 (Page 167).

yy. The Appeal Hearing took place by MS Teams on 24 November 2022. The Appeal Hearing was conducted by MM who was accompanied by Yvonne Abbott (HR Adviser and Note Taker). Notes of the Hearing were produced (Pages 170-172).The Claimant was advised of the Appeal Outcome by letter of 12 December 2022 (Pages 173-174).

zz. The Claimant submitted a Grievance by email of 10 March 2023 in respect of the way her FWR had been dealt with (Pages 227-229).

aaa. The Claimant was invited to attend a Meeting to discuss her grievance by email of 14 March 2023 (Pages 230-231).

bbb. The Claimant attended a grievance meeting by MS Teams on 16 March 2023. The Meeting was conducted by DM and he was accompanied by Jane Reilly, the Respondent's Head of HR. Notes of that meeting were produced (Pages 232-234).

ccc. Following the meeting DM spoke to members of staff involved in the FWR process. He met with JR and EB by MS Teams on 22 and 23 March 2023. Notes of the meetings were produced (Pages 237-242).

ddd. The outcome of the grievance was notified to the Claimant by letter of 7 April 2023 (Pages 246-248).

eee. The Claimant's grievance was not upheld and the Claimant was advised that a meeting would be arranged to discuss her return to work and that there had been staff changes in Beech House during her maternity leave which needed to be considered along with her

personal circumstances. The Claimant was also advised of the right to appeal the grievance outcome.

fff. DM considered the Claimant's levels of absence in reaching his decision.

ggg. The Claimant did not appeal the grievance outcome.

hhh. The Claimant emailed her resignation to DM on 16 June 2023 (Page 253).

iii. DM acknowledged her resignation by email of 19 June 2023 (Page 252).

jjj. The Claimant was due to return from maternity leave on 19 June 2023.

kkk. The Claimant sent a fit note from her GP to cover her notice period of one month by email of 19 June 2023 (Pages 252 and 254).

lll. The Claimant has not worked since the termination of her employment on 15 July 2023.

mmm. The Claimant has taken no steps to obtain alternative employment.

nnn. As at the date of termination of her employment the Claimant earned £202.40 (Gross) £196.20 (Net) per week and the Respondent paid £6 per week pension contribution.

ooo. The Claimant suffered distress, anxiety and trauma as a consequence of the actions of the Respondent. The actions of the Respondent left her devastated and lacking confidence to enter into employment. The actions of the Respondent have had a significant impact on her mental health and that effect is long lasting

ppp. The Claimant produced an updated Schedule of Loss dated 27 May 2024.

The Relevant Law

7. The Claimant asserts constructive unfair dismissal.

Unfair Dismissal

8. 'Dismissal' is defined in s 95(1) ERA 1996 to include ‘constructive dismissal’, which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

9. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***).

10. Was there a repudiatory breach of the claimant’s contract? If so, was the breach a factor in the claimant’s resignation? If so, did the claimant affirm the breach? Was there a repudiatory breach of contract?

11. There must be a breach of contract by the employer. The breach must be “a significant breach going to the root of the contract” (***Western Excavating***). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd [1998] AC 20***).

12. Other terms may be implied into a contract of employment. For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express

term of the contract. (***B.P. Refinery (Westernpoint) Pty Ltd v Shire of Hastings (1977) 180 C.L.R. 266***).

13. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively there may be a continuing course of conduct extending over a period and culminating in a “last straw” which considered together amount to a repudiatory breach. The “last straw” need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***).

14. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: "The test does not require a Tribunal 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 his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…" (***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT***).

15. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98(4) of the ERA 1996, which provides - ‘’ (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case’’.

16. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach (***Berriman v Delabole Slate 1985 ICR 546***) and whether it was within the range of reasonable responses for an employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

Direct Pregnancy and Maternity Discrimination

Unfavourable Treatment

17. Section 18 of EA 2010 provides:

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in or after the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her in that protected period as a result of the pregnancy.

…

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(aa) if she does not have that right, but has a right to equivalent maternity leave, at the end of that leave period, or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have a right as described in paragraph (a) or (aa), at the end of the period of 2 weeks beginning with the end of the pregnancy.

(6A) For the purposes of this section—

"equivalent compulsory maternity leave" means a period of leave—

(a) which is of a substantially similar nature (regardless of its length) to compulsory maternity leave, and

(b) which is provided for under a statutory or contractual scheme;

"equivalent maternity leave" means a period of leave—

(a) which is of a substantially similar nature (regardless of its length) to ordinary or additional maternity leave or both, and

(b) which is provided for under a statutory or contractual scheme.

18. In the case of ***Trustees of Swansea University Pension and Assurance Scheme and another v Williams (SC(E) [2019] ICR 230)*** the phrase *"Unfavourably"* was defined as *"placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person"* at paragraph 24. The EHRC Code expresses the view that the threshold for "disadvantage" is relatively low. At paragraph 27 the Supreme Court agree that there only needs to be a *"relatively low threshold of disadvantage".*

19. Although the ***Williams*** case above was a case involving discrimination arising from disability the Supreme Court's consideration of *"treats … unfavourably"* is applicable to the use of those words in section 18 of the EA 2010.

20. Following ***Williams***, a Tribunal must address 2 questions of fact (paragraph 12):

a. what was the relevant treatment; and

b. was it unfavourable to the Claimant?

21. A Claimant must establish a causal link between the unfavourable treatment and the pregnancy or illness as a result of her pregnancy (Section 18 (2) (a) or (b)). In so doing, a Tribunal should apply the *"reason why test".*

22. A comparator is not required to prove unfavourable treatment ***(EHRC Code of Practice, para 8.19)***.

Indirect Sex Discrimination

23. Section 19 of the EA 2010 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

24. A *"provision, criterion or practice"* is referred to as a PCP.

25. Generally, the pool for comparison is those workers which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively.

Childcare Responsibilities

26. In the context of childcare disparity the EAT in the case of ***Dobson v North Cumbria Integrated NHS Foundation UKEAT/0220/19/LA*** stated that a Tribunal could take judicial notice of a childcare disparity between men and women. The EAT states at paragraph 47(a) *"the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions".*

27. ***Dobson*** concerned a Flexible Working Request and considerations of childcare disparity. The EAT found that the specific circumstances of each case will need to be considered in order to establish whether or not women were in fact put to a particular disadvantage by the PCP taking judicial notice of the childcare disparity did not inexorably lead to the conclusion that any form of flexible working puts or would put women at a particular disadvantage (paragraph 50).

Proportionate means of achieving a legitimate aim

28. Section 19(2)(d) of the EA 2010 provides even if it is established that a PCP puts or would put a person at a particular disadvantage then an employer may justify that PCP as a proportionate means of achieving a legitimate aim. This is a question of fact for a Tribunal. A Tribunal should apply an objective test and make its own assessment based on the evidence before it.

29. A Tribunal should consider firstly, whether the aim is legitimate and secondly whether it is proportionate (***Chief Constable of Yorkshire Police v Homer [2012] ICR 704***). The Supreme Court found that a measure should be appropriate and no more than is reasonably necessary to achieve the legitimate aim of the employer.

Remedy

Compensation

30. Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of sections 18 and/or 19.

31. An award in discrimination cases can include:

i. Financial Loss

Such as past and future loss of earnings.

ii. Injury to Feelings

A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039).***

Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

Submissions

32. Both Parties lodged Written Submissions which were supplemented by oral submissions at the conclusion of the case and referred to the Schedule of Loss.

The Claimant (Summary)

Constructive Dismissal

33. The Claimant submitted that she had no wish to leave her employment but she was left with no other option due to the Respondent's breach of contract. The term that was breached was the implied term of trust and confidence.

34. In particular, the Respondent had breached the implied term in the way they had managed the FWR Process and their treatment of her throughout this process, culminating in the grievance meeting. She considered the outcome of the grievance meeting to be the last straw.

Direct Pregnancy and Maternity Discrimination

35. The refusal of her FWR was due to her level of absences from work due to pregnancy related illness.

36. This constituted unfavourable treatment and as such she was discriminated against.

Indirect Sex Discrimination

37. The Respondent applied a PCP to her which put her at a particular disadvantage to those who did not share her protected characteristic (sex).

38. The PCP was not justified. It was not a proportionate means of achieving a legitimate aim.

Remedy

39. The Claimant sought a Basic Award, Compensation in respect of loss of injuries and injury to feelings all as set out in her Schedule of Loss.

40. The Claimant also asserted that any award in respect of Constructive Unfair Dismissal and Injury to Feelings should be uplifted by 25% due to the Respondent's failure to follow the ACAS Code of Practice.

The Respondent (Summary)

Constructive Dismissal

41. The Respondent submitted that there was no agreement for the Claimant to work only Mondays and Fridays. A term could not be implied to that effect. The Claimant's contract required her to work 2 days out of 7 and the rota was subject to amendment by the Respondent on reasonable notice. The conduct

of the Respondent did not, in any event, amount to a breach of the implied term of trust and confidence.

42. If it did, then the Claimant affirmed the contract by virtue of the delay in her resigning from the date of the grievance on 7 April 2023 to resignation on 16 June 2023.

43. If the Tribunal were of the view that the Claimant was constructively dismissed then the dismissal was for conduct or some other substantial reason and within the band of reasonable responses.

Direct Pregnancy and Maternity Discrimination

44. The refusal of the Claimant's FWR was not related to a pregnancy related illness during the protected period.

45. The Respondent' conduct towards the Claimant did not constitute unfavourable treatment.

Indirect Sex Discrimination

46. The Respondent accepts the PCP asserted by the Claimant. The Respondent did not apply the PCP to the Claimant prior to the termination of her employment.

47. The PCP did not put the Claimant at a particular disadvantage and, in any event, was justified.

Remedy

48. In the event of the Tribunal finding in the Claimant's favour:

    a. The Claimant failed to mitigate her losses;

    b. Any injury to feelings award should be at the lower end of Vento.

    c. Any award should be subject to a ***Polkey*** reduction;

    d. Any award should be reduced for the Claimant's failure to follow the ACAS Code and appeal the grievance outcome;

e. Any basic and/or compensatory award should be reduced for contributory conduct; and

f. The Tribunal cannot make a recommendation as the Claimant is no longer employed by the Respondent.

Observations on the Evidence

49. The Tribunal accepted that the Claimant, her witness and the Respondent's witnesses (apart from JR) all gave their evidence in a credible and reliable way.

The evidence of JR

50. The only issues of credibility and reliability related to JR's evidence. The Tribunal identified a number of contradictions in her evidence and unsatisfactory explanations, vagueness with regard to her responses to questions surrounding her actions and the justification for them.

51. The Tribunal detail some (not all) of the contradictory and unsatisfactory evidence provided by JR and the reasons why it was contradictory and unsatisfactory.

Instruction to Submit FWRs and Assistance to TL and HS

52. An example of this is her clear instruction to the Claimant, TL and HS to submit FWRs. Her evidence to the Tribunal was that she had discussed this with the CEO of the Respondent and also taken advice from HR. In response to questioning from the Tribunal she accepted that the request submitted by the Claimant was not a flexible working request. In fact, it was an application to have her contract changed.

53. She further disputed having prompted and assisted TL and HS with regard to their FWRs and the content of them. This contradicted the evidence of the Claimant and TL. TL was clear in her evidence (as was the Claimant) that the instruction to submit FWRs was given by JR. TL was also clear as to the assistance from JR with the content of her FWR.

54. TL gave evidence on JR's suggestion to include cost benefits to the Respondent in support of her FWR. This evidence was clearly supported by the copy of TL's and HS's FWRs in the bundle (Pages188-194).

TL would resign if the Rota wasn't changed.

55. JR also stated in evidence that TL has said she would resign if the rota didn't change. TL categorically denied that.

Author of Flexible Working Summary

56. JR stated in evidence that EB had written the Flexible Working Summary Document (Page 162-165). EB gave evidence that she was not the author of this document and in fact it was the Respondent's CEO (**NT**) who had compiled it.

Sending of email to the Claimant

57. JR's explanation as to how the email sent to the Claimant (Page 249) stating "I hate her" had been sent was not at all credible.

58. JR's evidence was that young children had sneaked into her office in Haddington, accessed her computer, opened her email inbox and responded to an email from the Claimant that had been sent over 3 days previous. JR had attempted to recall that email unsuccessfully.

59. JR's explanation was beyond belief. It appeared to the Tribunal that this situation was not at all probable. In fact, JR sending the email to the Claimant herself was more consistent with TL's evidence that JR would regularly make derogatory and dismissive comments about the Claimant in conversation with her.

60. It is also consistent with the Claimant's evidence, TL's evidence and the documentary evidence regarding JR's purposeful exclusion of the Claimant from discussions about the rota (Page 181, 223-224).

61. For all these reasons where there was any conflict between JR's evidence and that of any of the other witnesses' evidence the Tribunal preferred and accepted the other witnesses' evidence.

62. The Tribunal then considered the various claims advanced.

Constructive Dismissal

Breach of Contract

63. The Tribunal considered the terms of the Claimant's contract of employment (express and/or implied) in so far as relevant to the claim and whether or not they had been breached by the actions of the Respondent.

What were the Claimant's contractual working hours and pattern?

64. It was the Claimant's position that at interview she had told JR and EB that she could only work Mondays and that she had been recruited on that basis.

65. This was also corroborated by the Claimant's contract of employment dated 24 July 2019 (Pages 102-104). This contract provided that the Claimant would work 9 hours on a Monday 8.30 am to 6.30 pm. At the foot of page 103 and 104 the contract contained the wording *"The rota may from time to time be amended by Abbeyfield Scotland Limited and you will be given reasonable notice of this".*

66. JR and EB could not recall agreeing that the Claimant would only work Mondays and the notes produced during the course of the Hearing (Page 354) did not contain any reference to this.

67. It was submitted that the reference to rota meant that the Respondent could amend the working pattern of the Claimant on reasonable notice.

68. The Tribunal considered that the evidence was consistent with the Claimant's position that it was expressly agreed she would only work Monday's 8.30am to 6.30pm. There was no reference in her written contract to other working days or hours.

69. It was also evident that the Respondent's witnesses accepted their knowledge of the restrictions the Claimant had on her ability to work any other days/hours. JR and EB accepted this knowledge during the course of their evidence.

70. The Claimant subsequently agreed to work a Friday (same hours) in addition to her Monday shift. This was confirmed in writing to her in a new contract of employment dated 1 November 2021 (Pages 97-101) following her verbal agreement and she commenced Fridays with effect from 22 March 2021.

71. The new contract of employment provided that the Claimant was *"contracted to work 18 hours per week, working 2 days out of 7. The rota may from time to time be amended by Abbeyfield Scotland Limited and you will be given reasonable notice of this."*

72. The Claimant worked Mondays from the commencement of her employment until its termination and Fridays from 22 March 2021 until its termination. The Claimant worked additional shifts to cover for her colleagues when she was able to do so and provided she had sufficient notice.

73. The Claimant could not commit to a variable rota due to her personal circumstances. She worked as a carer for her partner's grandmother Tuesday, Wednesday and Thursday every week. She had no childcare available at weekends and her partner worked Sundays every week. The Respondents were aware of her personal circumstances as was confirmed by both JR and EB in their evidence.

74. The Claimant's oldest daughter was in childcare at Heron House Nursery on the Claimant's working days (Monday and Friday). The Nursery required the Claimant to commit to set days and would not allow any change or flexibility to this. This was confirmed in a letter from the Nursery (Page 90).

75. The Tribunal considered the reality of the employment situation and the hours and days the Claimant worked along with the knowledge of the Respondent of her personal circumstances.

76. The Claimant invariably worked set days from the commencement of her employment with the Respondent (9 hours Mondays initially with the addition of 9 hours on a Friday). It is correct to say that she covered additional hours for colleagues when she could.

77. The Tribunal considered that the wording of the latest contract of employment was consistent with that as it reflected she was to work 18 hours per week working 2 days out of 7.

78. The Tribunal concluded that the only reasonable interpretation of that contractual provision alongside the factual matrix was that the Claimant was contracted to work her 2 days (Monday and Friday). That was the reality of the situation which also appeared to be consistent with the intention of the Parties.

79. The Tribunal consider that in any event such a term would have been implied into the Claimant's contract as being reasonable and equitable, give business efficacy to the contract, obvious in light of the factual matrix, clear and consistent with the express terms of the contract (***BP Refinery case***).

Was the conduct of the Respondent a repudiatory breach of the Claimant's Contract of Employment?

80. The Tribunal considered the conduct of the Respondent in the context of the contract of employment between the Parties and in particular whether or not the Respondent was in breach of the implied term of trust and confidence (***Malik***) and/or the express/implied term of the Claimant's contract to work Mondays and Fridays.

Changes to the Claimant's working pattern

81. It is asserted by the Claimant that the Respondent sought to change her fixed working pattern which had an adverse impact upon her childcare commitments.

82. The Tribunal considered and found that the Claimant was contracted to work fixed days (Mondays and Fridays).

83. It is not in dispute that following discussion between JR and the Claimant's colleagues TL and HS there were meetings to discuss a changed rota which culminated in JR instructing the Claimant, TL and HS to submit flexible working requests.

84. The Claimant's FWR was ultimately refused and whilst on maternity leave an alternative rota was introduced.

85. It is evident from the evidence that the Respondent wished the Claimant to work a flexible rota. This was clear from the evidence of JR, EB, the Claimant and TL. It was also supported by the documentary evidence before the Tribunal.

86. It is equally evident from the evidence that the Claimant's colleagues TL and HS were told by EB that their FWRs were granted.

87. The Claimant appealed the refusal of her FWR and subsequently lodged a grievance regarding the way her FWR had been dealt with. Her grievance was refused and it was confirmed to her in writing that a meeting would be arranged to discuss her return to work and that there had been staff changes in Beech House during her maternity leave which needed to be considered along with her personal circumstances.

Was the Respondent's conduct a breach of contract

88. The Tribunal conclude that the evidence supports the fact that the Respondent sought to change the Claimant's working pattern through an FWR process.

89. Utilising such a process in the circumstances was ill conceived, unreasonable and mismanaged by the Respondent.

90. The Respondent has an FWR Policy (Pages 135-138). This provided for requests to be dealt with as soon as possible and in any event within 3 months of receipt of the FWR.

91. The FWR application form asks the applicant to detail the flexible working pattern they wish to work that is different to their current working pattern (at paragraph 1).

92. This led to the situation whereby JR instructed the Claimant to lodge an FWR which did not seek any alteration to her current working pattern.

93. JR conceded in her evidence that this was not (with the benefit of hindsight) an application for flexible working at all. JR explained this was in actual fact an application for the Claimant to have her working pattern fixed.

94. This also led to the Respondent issuing a decision on the Claimant's FWR which refused her application to work her existing work pattern.

95. The reasons given in the letter of 12 September 2022 for refusing the Claimant's FWR were without foundation save in so far as there were additional costs to cover the Claimant's periods of absence which included periods of absence due to pregnancy related illness.

96. The Claimant' colleagues had not stated a refusal to cover the Claimant's shifts nor had they threatened to resign as was claimed. TL's evidence was preferred and accepted on this.

97. There was no additional burden of costs to cover the Claimant's shifts in comparison with that of her colleagues – MM and DM confirmed this. The only additional costs were in respect of a higher level of absence.

98. The Respondent had cover for provision of services to the residents over the 7 day period on the basis of the existing staff complement and existing rota.

99. The Tribunal considered the whole FWR process to have been mismanaged and misconceived from start to finish. It appeared to be used unjustifiably as a device to enforce a new rota on the Claimant.

100. If the Respondent truly believed (as was advanced at the Hearing) that the Claimant's contract was for no set days, 2 days out of 7 and a rota that could be changed by them on reasonable notice why was the Claimant instructed

by JR to submit an FWR? The Respondent could have, on reasonable notice, advised the Claimant of a change to her working pattern.

101. To utilise the FWR policy and procedure in the circumstances was., considered objectively, a breach of the implied term of trust and confidence.

102. It was clear to the Tribunal that the FWR procedure was being utilised inappropriately and unfairly as a means of justifying changes to the Claimant's working pattern.

103. The Respondent was well aware of the impact the changes to the Claimant's working pattern would have upon her. She would be unable to work the new working pattern and, as such, would be unable to return to work following her maternity leave.

104. The inescapable conclusion is that the actions of the Respondent in seeking to change the Claimant's working pattern in the circumstances was likely to destroy or seriously damage the relationship of trust and confidence. It also appeared to the Tribunal that such conduct was deliberate given the state of knowledge of the Respondent (JR in particular).

105. This is further substantiated by the conduct of the FWR process and their treatment of the Claimant through that process in contrast to her colleagues as detailed below.

Was the Claimant excluded from discussions about the rota which had an impact upon her

106. The Claimant asserted that she had been excluded from discussions about changes to the rota. The Tribunal consider that this is established by the Claimant's evidence, that of her colleague TL, JR and also the documentary evidence produced.

107. It was accepted in the evidence of JR and TL that discussions were taking place between JR, TL and HS regarding changes to the rota in July to September 2021. The Claimant was not involved in these discussions until the staff meeting on 3 September 2021.

108. A meeting was convened by JR for 1 February 2022 to discuss a new rota which had been prepared by JR, TL and HS. JR instructed TL and HS not to tell the Claimant that this rota would be discussed at the meeting.

109. No conclusion was reached at this meeting and further discussions and email exchanges continued between JR, TL and HS regarding a new rota until 14 February 2022 when a new rota was issued by JR to the Claimant, TL and HS.

110. Evidently and deliberately, the Claimant was excluded from discussions and email exchanges between JR, TL and HS. On 1 February 2022 when the Claimant was included she was deliberately not informed the matter would be discussed and TL and HS were instructed by JR not to tell her.

111. JR gave advice and assistance to TL and HS regarding completion of their FWRs. No such advice or assistance was given to the Claimant.

112. It was also accepted by JR and EB that the Claimant's colleagues were informed on 28 August 2022 that their FWRs had been granted resulting in a changed rota coming in to place whilst the Claimant was on maternity leave. TL and HS were expressly told not to inform the Claimant.

113. The Claimant was not informed her FWR had been refused until 12 September 2022.

114. The Respondent contends that such a changed rota was temporary and only for the duration of the Claimant's maternity leave. It would be reviewed upon her return to work.

115. The Tribunal prefer and accept the evidence of the Claimant and TL which is consistent with the facts that the changed rota was permanent.

116. The documentary evidence confirms the Claimant's FWR was refused. It is accepted TL and HS were informed their FWRs were granted and the changed rota was implemented during the Claimant's absence on maternity leave.

Was the Respondent's conduct a breach of contract

117. The Tribunal consider the conduct of the Respondent to be conduct that was likely to destroy or seriously damage the relationship of trust and confidence and was clearly in breach of the implied term of trust and confidence.

118. The Claimant was systematically and deliberately excluded from discussion regarding the rota and treated differentially and detrimentally to her colleagues throughout the FWR process.

119. The FWR process took considerably in excess of the 3 month period required under the Respondent's own FW Policy.

The Decision to refuse the Claimant's FWR

120. The Respondent communicated the decision to refuse the Claimant's FWR by letter of 12 September 2022. The letter detailed the reasoning behind the refusal. The letter was sign by EB with the decision having been made by JR.

121. The Tribunal considered the following reasons given by the Respondent:

a. Impose an unreasonable burden of additional cost to cover absence on Mondays and Fridays.

122. The Respondent contended that allowing the Claimant to work fixed days Monday and Friday would cause additional costs to be incurred due to the cost of agency cover, relief staff from other locations and TL and HS having stated that they would not cover the Claimant's shifts.

123. TL's evidence was that she had never said she would not cover the Claimant's shifts.

124. EB and DM confirmed that there were no additional costs for covering the Claimant's shifts. The costs for each member of staff were the same when it came to covering for periods of absence.

125. Both MM and DM who conducted the FWR Appeal and Grievance respectively sought to distance themselves from the reference to "absence on Mondays and Fridays". It was significant however that both conceded cover

was only required for absences and that consideration had been given to levels of absence by the Claimant detailed on Pages 131-132 in contrast to her colleagues in reaching the decision.

126. The wording of the reason for refusing the FWR application was specifically regarding absences on the Claimant's working days. The Claimant's absences included periods of absence due to pregnancy related illness. The Claimant was absent from work due to hyperemesis from 17 February 2022 to 28 March 2022. She was also absent from work from 26 July 2022 until she commenced her maternity leave on 24 August 2023 following the birth of her child. These absences were included on Pages 131-132.

127. It is evident therefor that in specifying the burden of additional costs for covering periods of absence on Mondays and Fridays the Respondent was taking into account periods of absence and costs relating to them incurred during pregnancy related periods of absence.

128. Absent any consideration of the Claimant's level of absence the reason given for refusal is completely unfounded on the Respondent's own evidence from EB and DM and that of TL.

b. Detrimental effect on the Respondent's ability to meet customer demands due to increased risk of staff resignation as a result of weekend working not being spread equally.

129. The Respondent contended that allowing the Claimant to work fixed days Monday and Friday would potentially cause the other two staff members (TL and HS) to resign. JR's evidence was that TL and HS had threatened to leave if the rota was not changed.

130. TL refuted this position and stated that she had not threatened to resign.

131. As previously stated the Tribunal prefer and accept the evidence of TL on this point. This reason is unfounded on the evidence.

c. Have a detrimental impact on the Respondent's performance due to the negative impact on motivation and potential loss of staff.

132. This is broadly the same reason as (b) above and considered unfounded for the same reasons by the Tribunal on the evidence of TL.

Was the Respondent's conduct a breach of contract

133. The Respondent's decision making was flawed for the reasons given by the Tribunal above.

134. The reasons given were unjustified and unsubstantiated on the evidence.

135. The Tribunal consider that the decision was so flawed as to amount to a breach of the implied term of trust and confidence. It was likely to destroy or seriously damage the relationship of trust and confidence given that it was informing the Claimant she could no longer work her fixed days on grounds that were transparently unjustified. The Respondent knew the Claimant could not work the changed rota that was being suggested and that would lead to her leaving their employment.

JR's email to the Claimant on 2 May 2022

136. The Claimant contended that JR had issued this email to her in response to the Claimant's email of 29 April 2022.

137. The email stated "I hate her". There was no other content.

138. JR gave evidence that the doors to her office in Haddington were open and that children playing nearby must have accessed her laptop and sent the message. When she noticed this had been sent she tried to recall the email but was unable to do so.

139. The Tribunal find JR's explanation to be beyond belief. It is quite incredible that an experienced Senior Manager would have allowed such open access to her unsecure laptop containing highly sensitive information in the circumstances. The proposition that a random child could have entered her workplace, accessed her laptop and responded to a particular email which had been received some 3 days prior was simply not credible.

140. The Tribunal's inescapable conclusion was that JR had sent the email to the Claimant. This was consistent with TL's evidence of the derogatory remarks made by JR about the Claimant and of her attitude to the Claimant.

Was the Respondent's conduct a breach of contract

141. The Tribunal consider that the sending of this email clearly amounted to a breach of the implied term of trust and confidence. It was likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant.

The refusal of the Claimant's Grievance – the last straw

142. The Claimant contends that the Respondent's refusal to uphold her grievance was a breach of contract. Her grievance was with regard to the FWR process

143. The Claimant raised the issue of additional burden of costs in the context of her grievance. This was only one of the issues raised by her.

144. The grievance was conducted by DM. In the course of his investigation he was referred to the Claimant's level of absences by EB (Page 241) and that the Claimant's colleagues were refusing to do these shifts.

145. He was also referred to the Claimant's assertion that TL and HS had been informed of their FWRs before the Claimant and that she had been excluded from discussion regarding changing the rota between JR, TL and HS.

146. The Claimant also raised the issue of the email from JR stating "I hate her" on 2 May 2023.

147. Following his investigation DM refused to uphold the grievance and this was communicated to the Claimant on 7 April 2023.

148. The Claimant contends that this was the last straw. She was on maternity leave at the time. The grievance decision was confirmation that she would no longer be working fixed days – which she could not commit to.

149. The concerns and issues raised by her had not been upheld by DM despite the clear evidence in support of her position.

150. She had no option other than to resign. She did not consider that the Respondent would change their mind and allow her to return to her fixed days.

151. She did not resign until 16 June 2023 as she took time to consider her position and take advice. She was not at work and did not return to work.

152. The Tribunal reminded itself of the law in cases of constructive dismissal. A fundamental breach of contract may be constituted by a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***).

153. Applying the law to the facts the Tribunal considered and found that the Respondent's conduct as detailed above constituted a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amounted to a repudiatory breach. The conduct clearly showed that the Respondent no longer intended to be bound by one or more of the essential terms of the contract (***Western Excavating***). The Claimant resigned in response to these breaches and there was no unreasonable delay.

154. The Respondent contended that the Claimant's delay in resigning until 16 June 2023 and remaining in employment until the expiry of her notice period constituted affirmation of the contract. The Tribunal rejects that argument on the basis that the Claimant was on maternity leave at the time she resigned and did not return to work at all. It was perfectly reasonable for her to take time to obtain advice and decide on her course of action.

155. The Claimant's claim of constructive dismissal is successful.

Was the dismissal for some potentially fair reason

156. The Respondent submitted that if the claim of constructive dismissal was successful the reason for the dismissal related to the conduct of the Claimant or some other substantial reason.

157. In support of this the Respondent submitted that the Claimant failed to work the required hours under the contract, refused to accept the proposed alternative working pattern and that this constituted a failure to comply with a reasonable request.

158. The Tribunal consider that there was no evidence to support this contention. There was no evidence that the Claimant failed to work the required hours under the contract. The Claimant was entitled to refuse to accept the proposed alternative working pattern which in any event the Respondent's say was never imposed upon her and there was no evidence to support the submission that she was instructed to work the proposed alternative working pattern.

159. The Tribunal find that the dismissal was not for conduct or for some other substantial reason. The Respondent had clearly not acted reasonably in all of the circumstances of the case and it was the Respondent's conduct that had led to the dismissal.

Direct Pregnancy and Maternity Discrimination (Section 18)

Was the refusal of the Claimant's FWR due to pregnancy related illness

160. The Claimant asserts that the refusal of her FWR was due to a pregnancy related illness during the protected period.

161. The Decision to refuse the Claimant's FWR was made by JR with HR advice and support from EB. The decision letter specifically referenced the additional cost burden due to covering absences on Mondays and Fridays.

162. The Tribunal consider that the principal reason the Claimant's FWR was refused was on the basis of the asserted additional burden of costs to the

Respondent in covering periods of absence on a Monday and Friday – the Claimant's working shifts.

163. The evidence before the Tribunal was to the effect that there was an additional burden due to (1) TL and HS refusing to cover the Claimant's shifts (which was not substantiated on the evidence of TL) and (2) the Claimant's level of absence which is detailed in the document produced by the Respondent at pages131-132 and also referred to by EB in the Grievance Meeting Notes. The Claimant's level of absence was disproportionately higher than that of her colleagues. Periods of absence in February – March 2022 and July 2022 were due to pregnancy related illness.

164. Despite JR, MM and DM's evidence that the level of her absence was immaterial to the decision to refuse the FWR on 12 September 2022 this was clearly contradicted by the terms of the decision letter and their own evidence.

165. The decision letter makes it clear that it is the absences on Mondays and Fridays which were causing the additional burden of costs.

166. DM agreed in evidence that there were no additional costs incurred in covering periods of absence for any member of staff.

167. Both MM and DM accepted that they had regard to the level of absences and both, along with JR, were aware that the Claimant's was higher than her colleagues at the time of the decision.

168. It was also established on the basis of TL's evidence that the Claimant's colleagues were not refusing to cover her shifts during periods of absence.

169. The only conclusion or inference that may be drawn in light of that evidence is that the additional burden of cost was a reference to the level of the Claimant's absences and that this included periods of absence where the Claimant was absent due to pregnancy related illness.

170. It was only on this basis that it could be said there were additional costs in covering Mondays and Fridays.

Unfavourable treatment

171. The Tribunal applied the "reason why" test (***Williams***) and concluded that the reason for refusal of her FWR was her level of absence which was higher than that of her colleagues due to periods of absence for pregnancy related illness.

172. Clearly this disadvantaged the Claimant in her FWR application as against her colleagues and, as such, was unfavourable treatment for the purposes of section 18.

Protected Period

173. The treatment afforded to the Claimant was in implementation of a decision taken in the protected period. The refusal of her FWR was communicated on 12 September 2022 which was during her maternity leave which commenced on 24 August 2022.

Did the Respondent decide to terminate the Claimant's employment during her maternity leave but not communicate this to her until she returned to work

174. The Tribunal found no evidence to support the assertion that the Respondent had decided to dismiss the Claimant. The Tribunal accepted the evidence from the Respondent's witnesses EB, JR, MM and DM that no decision had been made to terminate the Claimant's employment.

175. As a matter of fact the Claimant did not return to work.

Did the Respondent decide to exclude the Claimant from discussions surrounding the rota constitute unfavourable treatment due to a pregnancy related illness within the protected period.

176. Whilst it is clearly established that the Claimant was excluded from discussions regarding the rota in February 2022, the communication of the outcome of TL and HS's FWRs and the implementation of a new rota there was no evidence to support the Claimant's assertion that this was unfavourable treatment as a result of a pregnancy related illness.

Indirect Discrimination (Section 19)

177. The Claimant asserted that the Respondent's requirement that the Claimant work to the new rota was a PCP which put her at a disadvantage to those who did not share her protected characteristic (sex) and was not a proportionate means of achieving a legitimate aim.

178. The new rota would have required the Claimant to undertake weekend working and not every Monday and Friday.

179. The Respondent accepted that they had the PCP identified by the Claimant but denied that they applied it to the Claimant. The Respondent contends that the new rota was introduced on a temporary basis and they intended to discuss it on the Claimant's return to work.

Was the PCP applied to the Claimant

180. The Tribunal found that by confirming to TL and HS that their FWRs had been granted, implementing a new rota on 1 September 2022 and refusing the Claimant's FWR on 12 September 2022 the Respondent applied the PCP to the Claimant. The Tribunal do not accept the Respondent's contention that the rota change implemented on or around 1 September 2022 was in any way temporary.

181. The actions of the Respondent by refusing the Claimant's application to only work her fixed days and the grant of her colleagues FWRs, the new rota being implemented all substantiated the application of the PCP to the Claimant on the date of communication of the refusal of the Claimant's FWR on 12 September 2022. This is further supported by the refusal of the Claimant's Appeal and Grievance.

182. The date of refusal (12 September 2022) being the first application of the PCP.

Did the Respondent apply the PCP to persons who did not share the Claimant's protected characteristic.

183. The Respondent accept that the PCP did apply to such persons and applied it to the male colleague that covered the Claimant's shifts from 3 September 2022 as maternity cover.

Did the PCP put persons who share the Claimant's protected characteristic at a particular disadvantage when compared with persons that did not.

184. The Claimant contended that the PCP put women at a particular disadvantage compared to men.

185. The Respondent contended that it did not. It was further contended that the appropriate pool for comparison was the Claimant's colleagues who were all female – disregarding the male colleague who was recruited as maternity cover for the Claimant.

186. When considering the application of a PCP and whether or not it is discriminatory a Claimant may establish discrimination if the Respondent applied, or would apply, the PCP to male colleagues and that application would put women at a particular disadvantage.

187. The Tribunal consider and found that the Claimant clearly had childcare responsibilities for her 2 young children. This, in the main, was the reason why she could not comply with the PCP to work the new rota. The Tribunal take judicial notice of the childcare disparity between men and women (***Dobson***). The Tribunal was satisfied that the PCP placed, or would place, women at a particular disadvantage to men due to the childcare disparity. A male comparator would be more likely to be able to comply with the PCP.

Did the PCP put the Claimant at that disadvantage

188. The Claimant clearly established that it did put her at that disadvantage. She could not comply with the PCP due to her childcare commitments.

Was the PCP a proportionate means of achieving a legitimate aim.

189. The Respondent contends that the PCP was objectively justified. The legitimate aim was to protect the Respondent's ability to organise staff, to avoid incurring unreasonable costs, to protect the ability to meet customer demands and to ensure the business performs to the best of its ability.

190. It was submitted that the Respondent adopted a "cost plus" approach.

191. The PCP was proportionate as it took into account the wishes and circumstances of employees as well as cost. The PCP was appropriate and reasonably necessary. It maintained weekend working and reduced the additional costs of agency workers in providing cover.

192. The Tribunal accept that, on the face of it, the aim asserted by the Respondent is potentially legitimate. However, on the evidence it was clear to the Tribunal that this legitimate aim was satisfied by the status quo. The Claimant had been employed on a fixed day basis since the commencement of her employment. The Respondent, as a matter of fact, had all 7 days of the week covered by staff and a relief member of staff to provide cover as and when required. Customer demands were met.

193. It was established on the evidence that there was no additional burden of costs for providing cover for the Claimant's absence on a Monday or Friday. The cost for providing cover for employee absence was the same for all employees – save in so far as the Claimant's level of absence was higher than that of her colleagues.

194. JR's evidence that TL and HS had threatened to resign and refused to cover the Claimant's shifts was rejected on the evidence.

Was the PCP a proportionate means of achieving a legitimate aim

195. Given that the legitimate aim was achieved by the status quo why was the PCP necessary at all?

196. The Tribunal found that the PCP was unnecessary to achieve the legitimate aims of the Respondent. As such, it was not a proportionate means of achieving these aims.

197. The Tribunal conclude that the Respondent discriminated against the Claimant in the circumstances on the basis of her sex.

Did the Claimant fail to mitigate her loss

198. The Respondent contends that the Claimant failed to mitigate her losses.

199. The Claimant has not taken any steps to obtain alternative employment. Her explanation for this is that her treatment at the hands of the Respondent left her devastated and she no longer has the confidence to enter into employment.

200. The Claimant also produced and referred to a letter from her GP (Page 322) confirming that she feels unable to work due to stress, anxiety and felt that she has post-natal depression. Her mood is low and she has had suicidal thoughts.

201. The Claimant asserted that the actions of the Respondent have had a significant impact on her mental health and that effect is long lasting.

202. The Claimant further cited the lack of suitable childcare as a reason for her not seeking alternate employment.

203. The Respondent submits that the Claimant's evidence does not support the suggestion that her mental health issues and inability to work were caused by the actions of the Respondent. Further, the inability to find suitable childcare breaks the chain of causation.

204. The Respondent contends that the Claimant ought to have been able to find alternate employment within the care sector within 6 to 8 weeks. It relied upon evidence from the Respondent's witnesses regarding the availability of care sector jobs for which the Claimant would have been qualified.

205. The burden of proof is on the Respondent as wrongdoer. The Respondent must show that the Claimant has acted unreasonably. What is reasonable or unreasonable is a matter of fact to be determined by the Tribunal.

206. The Tribunal consider that the Respondent has established that it was unreasonable for the Claimant not to have taken any steps at all to secure alternate employment. Whilst it may have been reasonable in the circumstances and in the aftermath of her resignation for her to have taken some time to consider, reflect and then commence job seeking it was not reasonable for her to have done nothing at all.

207. The Tribunal accept the significant detrimental impact the Respondent's treatment of her had upon her but this did not justify taking no steps at all.

208. The Tribunal considered that the Claimant should have taken steps to secure alternative employment and, on the evidence, could be expected to secure alternative employment at or in excess of the amount she was receiving from the Respondent within 6 months of the date of termination of her employment.

Polkey Reduction

209. The Respondent contends that if the Tribunal finds the Claimant was dismissed unfairly for procedural reasons then the Claimant would have been dismissed in any event 12 weeks after the actual date of termination.

210. In support of that the Respondent cites the evidence of DM to the effect that any disciplinary process would have taken 2 – 3 months to conclude.

211. On the basis of that evidence the Respondent submits that any compensatory award should be reduced as there was a 75% chance that she would have been dismissed fairly in any event.

212. The Tribunal reject this argument on the basis that it did not find the dismissal to have been for some potentially fair reason. In any event the Respondent's own evidence did not support the proposition.

213. The Claimant terminated her employment as she was entitled to so by reason of the Respondent's conduct. The Tribunal found that the dismissal was not

for conduct or for some other substantial reason and as such was substantively unfair.

Failure to follow the ACAS Code

214. The ACAS Code of Practice applies to Disciplinary and Grievance Processes. This was a case of constructive unfair dismissal and alleged discrimination. The Code did not apply in the particular circumstances claimed by the Claimant.

Contributory Conduct

215. The Respondent contends that the actions of the Claimant in making a deliberate decision not to accept the new rota was central to the dismissal. As such her conduct caused or contributed to the dismissal to the extent that any compensatory award should be reduced by 100%.

216. The Tribunal do not find that the actions of the Claimant in any way contributed to the dismissal. The dismissal was entirely caused by the unacceptable, unfair and unreasonable conduct of the Respondent.

Remedy

Basic Award

217. The Claimant is entitled to a Basic Award of **£607.20.**

218. This is calculated on the basis of the Claimant having completed 3 years service and her gross weekly pay being £202.40.

Compensatory Award

Financial Loss for Discrimination

219. The Tribunal awards 6 months net pay as compensation for discrimination.

220. This equates to 26 weeks x £196.20 = £5,101.20.

221. The Respondent paid an employer pension contribution of £6 per week. This equates to 26 x £6 = £156.

222. The Tribunal awards the Claimant loss of statutory rights at £500.

223. The total compensatory award financial loss element is **£5,757.20.**

Injury to Feelings

224. The Tribunal considers and finds that the Claimant did suffer distress, anxiety and upset as a consequence of the discriminatory treatment by the Respondent. The treatment had a detrimental impact on her mental health and impacted on her family life and self-confidence.

225. The Tribunal reminded itself that it is the actual injury to the Claimant and not the gravity of the acts of the Respondent that was relevant for this purpose.

226. The Tribunal considers the injury to feelings ought to reasonably be assessed at the upper end of the lower range in ***Vento***. The Tribunal awards the sum of **£11,200** in respect of injury to feelings.

227. The Tribunal considered the application of interest on the award of injury to feelings in accordance with ***Komeng v Creative Support Limited UKEAT/0275/18/JOJ.*** The first act of discrimination took place on 12 September 2022 which was the date of communication of the decision to refuse the Claimant's FWR.

228. The Tribunal accordingly applied interest at the rate of 8 per cent from 12 September 2022 until the date of the Hearing (4 December 2023). This equated to 65 weeks x £17.23 = £1,119.95.

229. The total compensatory award for discrimination is £18,077.15.

Employment Judge: **A Strain**
Date of Judgment: **31 July 2024**
Entered in register: **01 August 2024**
and copied to parties