Case No: 3325154/2017

EMPLOYMENT TRIBUNALS

Claimant: Mrs B Fitzgerald

Respondent: Casual Dining Group Limited

Heard at: **London Central** **On:** **19-23 March 2018**

Before: **Employment Judge K Welch**
Mrs L Moreton
Ms T Breslin

Representation
Claimant: Mr M Foster (Solicitor)
Respondent: Mr M Fitzgerald (Husband)

WRITTEN REASONS

1. Following a request for written reasons from the Respondent, the Tribunal has produced this document from its notes of the case, and after provision of an unmarked copy of the bundle of documents referred to below, since the recording of the Judgment had not been successfully retained and the original case bundles had been destroyed.
2. This is a complaint brought by Mrs Fitzgerald against her former employer, Casual Dining Group Limited for unfair constructive dismissal, direct and indirect race discrimination, direct and indirect marital discrimination, victimisation and claims for breach of contract for non-payment of bonuses and salary in respect of a pay review which did not take place.
3. The claim form was submitted on 19 June 2017 and the response filed on 13 October 2017. The Claimant's claim was not fully particularised and the Respondent sought to reserve its right to amend its response once further info had been received.
4. The case had been before REJ Potter on 24 November 2017 for a preliminary hearing on case management, which had subsequently resulted in a further open

preliminary hearing to consider whether the TUPE failure to consult claim should be allowed, since it was out of time, and whether the Claimant should be allowed to amend her claim.

5. The Claimant subsequently withdrew her claim under the TUPE regulations. The Claimant also confirmed at the beginning of the hearing that she was not claiming sex discrimination, as originally outlined in her claim form and referred to in the case management order. Therefore, these were both dismissed upon withdrawal by the Claimant.
6. The claims that the Claimant was pursuing before the Tribunal were constructive unfair dismissal, direct and indirect discrimination on the grounds of race and marital status, victimisation and breach of contract for failure to pay a salary increase, a Christmas bonus and a Quarter 3 bonus.
7. Further particulars of the Claimant's discrimination and constructive unfair dismissal complaints were provided and the Respondent filed an amended response in light of the further information provided.
8. The Respondent's representative at the beginning of the hearing asserted that part of the particularised claim of the Claimant was not a valid claim, since it was a claim for harassment on grounds of marital status, which is not a protected characteristic relevant for a claim under section 26 Equality Act 2010 ("EqA"). The Claimant sought to amend this part of her claim to be a victimisation complaint under section 27 EqA.
9. Having considered this, and heard representations from both parties, this amendment was allowed in part. Some of the allegations were not allowed to form part of a victimisation complaint, since the Claimant confirmed that they predated the protected act relied upon by the Claimant (namely her complaint in an email dated 9 May 2016) and so could not form the basis for her claim under section 27 EqA. However, we considered the request relating to the remaining allegations in light of the decision in Selkent Bus Co Ltd v Moore, and therefore considered the balance of hardship and injustice between the parties.
   We considered the nature of the amendment was a relabeling exercise, since the facts relied upon were the same and had been known to the Respondent since at least when the further particulars were provided.
10. The Tribunal considered that the claim if made on the first day of the hearing would have been out of time, however, accepted that being out of time was not a bar to allowing an amendment, as time can be extended where appropriate. However, the Tribunal did take into account the timing and manner of the application – which was on the first day of a 5 day hearing. The lateness of the application again was not a bar to the application succeeding.

11. Therefore, the Tribunal was satisfied that the other elements of which the Respondent was aware should be dealt with under the victimisation head, as this was a relabeling exercise and the balance of hardship therefore, in our view, rested with the Claimant.
12. The Tribunal was provided with an agreed bundle of documents and reference to page numbers in this judgment relate to those pages within that bundle. The Respondent sought to adduce additional documents relevant to the case, namely the marriage certificate and divorce documentation for one of the comparators relied upon by the Claimant (Ms Friess) for her martial discrimination complaint. The Claimant, represented by her husband, objected to their insertion. Having heard the application and objection, we ruled that the documents were clearly relevant and would be added to the bundle. However, the Tribunal noted with surprise that these had not been disclosed by the Respondent sooner. Even though we accepted that the Respondent's representative had not been provided with these documents until just before the hearing, the Respondent should have been aware that they were relevant and disclosed them sooner.
13. As a result of this, the Claimant confirmed that, where appropriate, her comparator for the direct marital discrimination complaints was Mr Pinto.
14. We were also provided with witness statement from all of the witnesses giving evidence. These statements stood as their evidence in chief, but the witnesses answered questions under cross-examination and from the panel. We heard from the following witnesses:
    a. The Claimant herself;
    b. Ms Friess, the General Manager at the Wembley restaurant where the Claimant worked;
    c. Mr Crawshaw, the Regional Director for the Respondent's Las Iguanas brand; and
    d. Mr Porter, the Head of Operations for the Respondent's La Tasca brand.
15. The issues were agreed as follows:
16. Constructive dismissal
    a. Did the Respondent breach the Claimant's contract by:
        i. Mr Crawshaw's refusal to pay her the Christmas Co-ordinator bonus
        ii. Ms Friess' refusal to authorise her holiday request for March 2017
        iii. Mr Williams' refusal to authorise her holiday request for April 2017
        iv. The ongoing failure to promote the Claimant to a Deputy Manager role
    b. Was this a repudiatory breach of contract?
    c. If so, did the Claimant resign in response to that breach?

d. If so, did the Claimant resign without delay following the breach so as not to affirm the contract.

17. Race discrimination - Direct discrimination under section 13
    a. Was the Claimant treated less favourably than the comparators referred to below by:
        i. Paying her a different increase in pay to other keyholder/ supervisors on 14 November 2014;
        ii. Failing to pay her any additional salary for taking on the social media lead role in early 2016;
        iii. Preventing her from attending the area meeting on 18 October 2016;
        iv. Failing to carry out a salary review in November 2016;
        v. Failing to appoint her to a Deputy Manager role in November 2016 and/or February to April 2017;
        vi. Failing to pay a Christmas bonus in February 2017;
        vii. Failing to pay her a Quarter 3 bonus on 28 April 2017;
        viii. Failing to properly handle her complaint contained in an email of 29 April 2017 about her bonus payment between 29 April and 8 May 2017.
    b. The comparators relied upon by the Claimant are as follows:
        i. Mr Machin and Ms Tudor for (i) above;
        ii. Hypothetical comparator for (ii) and (iv) and (viii);
        iii. Mr Pinto for (iii), and (v);
        iv. Mr Pinto and Ms Friess for (vi);
        v. Mr Pinto and Ms Sykala for (vii).
    c. If so, was the less favourable treatment because of her race or was this a contributory cause?
18. Indirect discrimination on grounds of race/ marital status
    a. Did the Respondent have a practice of promoting staff without following a formal and equitable process in November 2016 and/or 23 February to 21 April 2017?
    b. If so did any such provision criterion or practice (PCP) put persons with whom the Claimant shares the protected characteristic of race at a particular disadvantage;
    c. If so, did any such PCP put the Claimant at that disadvantage
    d. If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim.
19. Direct discrimination because of marital status
    a. Was the Claimant treated less favourably than her actual comparator, Mr

Pinto by:

i. Being given worse shift patterns between November 2015 and May 2017;

ii. Having requests for leave refused in December 2015, 24 August 2016, September 2016, October 2016, February 2017, and 18 February 2017.

b. Was the Claimant treated less favourably than a hypothetical comparator by:

i. Failing to handle the Claimant's complaint about working conditions and flexible working request correctly on 9 May 2016.

20. Victimisation

a. Did the Claimant do a protected act? The Claimant relies upon her complaint of 9 May 2016 [page 123].

b. If so, was the claimant subjected to any of the following detriments:

i. Was she disengaged by Ms Friess

ii. Was she excluded from management meetings

iii. Was she refused leave in December 2015, 24 August 2016, September 2016, October 2016, February 2017 and/or 18 February 2017?

iv. Was she not allowed to attend the Area Meeting on 18 October 2016?

v. Did the Respondent fail to review her salary in November 2016?

vi. Did the Respondent fail to pay her Christmas bonus in February 2017

vii. Did Ms Friess fail to take adequate steps to protect the Claimant from abuse and sexual harassment in June 2016?

21. Other payments

a. What payments does the Claimant say are owed? The Claimant claims payment for a salary review in November 2016, the Christmas bonus in the sum of £1,500 in February 2017 and the Q3 bonus in the sum of £407 in April 2017.

Findings of fact

22. The Claimant is a black African female. At all material times she was married, which was known by the Respondent.

23. The Claimant was employed by the Respondent in its Las Iguanas brand restaurant in Wembley from 26 February 2014 to 19 May 2017. She was originally employed as a waiter on the NMW.

24. The Respondent had a bonus policy relevant for the bonus claim for Quarter 3

('Q3') dated November 2016, [pages 93 to 94] which stated:

"***Timing of bonus payments***

Annual bonus payments are calculated on a yearly basis at the end of August each year, with first payments in the September pay run. Quarterly bonuses are calculated at the end of each quarter (Q1 – August, Q2 – November, Q3 – February, Q4 – May). Payment is at the end of the following month. This is in line with CDG policy.

Payment

All bonuses are discretionary and eligibility to join the bonus scheme does not guarantee bonus payment, even if bonus criteria have been met.

Operations & Restaurant bonuses

These are based on the annual bonus schedule which is communicated at the beginning of each financial year. Bonuses are also communicated in the 'Incentasaurus'".

25. The staff handbook dated October 2016 [page 95] also referred to bonus & incentives by stating, "*We recognise our teams for their hard work and for the behaviours that support the business. We also reward achievement. As a result, we run a number of incentive schemes within the Company at restaurant, area, brand or Company level. Your line manager will have details of schemes that are relevant to you. Incentive and bonus schemes are non-contractual, subject to review and may be withdrawn at any time. Your offer letter, Statement of Terms and Conditions or other formal Company documentation issued to you will set out any entitlement to participate in any Company scheme*."
26. It was clear that the Claimant was considered to be a good employee with an excellent work ethic throughout her employment by the Respondent and all of her managers.
27. The Claimant was promoted to keyholder supervisor on 30 November 2014 the pay for which will be dealt with below. She started the Manager in Training programme (MIT) on 19 January 2015 [p105], whilst remaining at that time paid as a keyholder supervisor.
28. In March 2015, the Claimant was sent on an MIT support day workshop, which Mr Crawshaw called 'an induction training course' for managers in training following which MITs would be expected to continue their own development on return to their restaurants. The Claimant asserted that having been on this course, she had completed the necessary training in order to become an assistant manager. We accept the evidence of Mr Crawshaw and Ms Friess that there was a clearly developed programme of activities, which had to be completed and signed off before a MIT would progress to the next level.

29. We considered that the evidence of a defined programme for management progression was supported by the Claimant's evidence concerning Mr Pinto's failure to pass the assessment for Deputy Manager on his first attempt. Whilst the Claimant suggested that he did not go through an assessment on his second attempt, when he was promoted by Ms Ritchie to Deputy Manager on 14 December 2016 [page 348] we are satisfied that there was such an assessment from the evidence of Ms Friess.
30. Also, there was evidence within the bundle [page 269] of a management competency based development plan for the role of Deputy Manager. This document provided a gap analysis so that individuals would know how far they were from achieving the required competencies.
31. In support of the Claimant's assertion, she referred to the appointment of Claudia Tudor as an Assistant Manager on 6 November 2017 directly from a keyholder/ supervisor role without going through the MIT stage. However, it is clear from the Claimant's own progression and from the evidence of the Respondent's witnesses, that employees could still follow the MIT programme whilst being paid as a keyholder/ supervisor should they prefer to do so, and not become salaried at that point. We are therefore satisfied that there was a process followed in respect of promotions within the Respondent and more particularly, the Wembley restaurant.
32. The Claimant then moved to become a salaried manager in training on 31 May 2015 for which she was provided a new contract [pages 76-79]. This contract provided at clause 7.4 "*The Company reserves the right to refuse a request for holiday at a particular time*."
33. The Claimant queried the contract with which she had been provided on 23 May 2015 [p112], and stated that, as far as she was concerned, she had completed the MIT programme and was ready to take up an Assistant Manager position. We were satisfied from Ms Friess' evidence that the Claimant was not, at that time, ready to become an assistant manager, but that she was promoted to Assistant Manager in November 2015, which was noted to be one of the first to progress to Assistant Manager through the MIT programme. The Claimant was promoted from Keyholder/ Supervisor to Assistant Manager in less than a year, whereas other people had taken a year and a half to do the same.
34. In mid April 2016, Ms Friess' father became critically ill and the Claimant lent Ms Friess £1,000 in order for her to fly home to visit him. In evidence, it was stated that the Claimant had lent Ms Friess money on a further occasion although there is no evidence as to when this was.
35. Ms Friess was away for 2 weeks, during which time it was necessary for the other managers within the Wembley branch to cover her shifts. This meant that

the Claimant and Mr Pinto would have had to work more evening shifts, which would otherwise have been shared between the 3 of them.

36. On Ms Friess' return, there was a management meeting on 9 May 2016 at which the Claimant complained that she was doing too many late shifts and that the rotas were unfair. It is uncontested that during the meeting Ms Friess made reference to the fact that it was "*silly*" to work in a restaurant and be able to work 9-5 since it was necessary to work in the evenings. This upset the Claimant who abruptly left the meeting.
37. Ms Friess immediately apologised by text [p113e] at 17.43 which states, "*I'm really sorry if I upset you, please don't take it in a wrong way I do understand family its first and I will try to do my best to balance more the rotas as per your request but I don't really want you to be upset with me for this. Love you and I'm sorry again*."
38. The Tribunal was taken to numerous text messages between the Claimant and Ms Freiss during their employment. The nature of these messages indicated to us that there was a very close friendship between the 2 and indeed Ms Friess' evidence was that the Claimant was her best friend at the time and was, in her words, her "sister". The texts frequently used the words, "love you" from both Ms Friess and the Claimant. These continued right through the Claimant's employment even after she decided that she was leaving and had told Ms Friess of this.
39. The Claimant sought to explain that the texts were standard for those working in the Wembley restaurant. However, the Tribunal accepted the evidence of Ms Friess that the pair were very close friends throughout the Claimant's employment.
40. This is supported by the texts we saw in the bundle between Ms Friess and Mr Pinto [pages 264b] which we found to be much more business like and did not demonstrate similar closeness between Ms Friess and Mr Pinto.
41. Following on from this meeting, at 18.40 on 9 May 2016 the Claimant sent an email to Ms Friess copied into Mr Porter, Operations manager [p123]:

    "*Dear Ale*

    Following our management meeting today, I am very concerned about my working conditions at Las Iguanas and want to formally raise the following concerns about my working hours.

    I am mainly rostered on closing and double shifts, including working both days on weekends. I have a young family and my husband works full time weekdays. The time that I can spend with my family is therefore severely limited. I understand that this is a restaurant business, and I don't mind doing a range of different shifts. I do mind, however, that you referred to my concerns today as about "silly

things". You previously laughed when Carlos compared my responsibilities towards my children to him looking after his cats.

I find your attitude towards my family, and my legal rights, highly offensive. I have a legal right to a family life as set out in Article 8 of the European Convention of Human Rights, and I hope that a manager would take these issues more seriously. I also have a legal right to flexible working arrangements, and the ability to apply to an employment tribunal if you do not reasonably consider them, which I believe that you have not done.

All I am asking for is a range of shifts, I am not asking for a 9-5 job as you stated in our conversation today, as I do understand that I work in a restaurant that is open 7 days a week. I never asked for this, and it is inappropriate for you to raise it.

My preferred shift pattern would be two openings, two closing and one double shift in each week. This should include at least two weekend days off in each month. I am, of course, prepared to be flexible when there are events or other issues that require cover.

Please treat this as a formal request under flexible working legislation, and provide me with a full written response. If this is not possible, please do let me know, as it will affect my intention to remain with Las Iguanas or to seek alternative employment.

Binta".

42. Ms Friess sent a further lengthy text on receipt of the email to the Claimant, explaining that the rotas had been imbalanced during her recent absence and that she always tried to be fair and flexible when setting the rotas.
43. Mr Porter acknowledged receipt of the Claimant's email and arranged a meeting for 16 May 2016.
44. The meeting took place on 16 May 2016 and during this meeting, the Claimant confirmed that she did not wish to make a formal complaint or application under the Flexible working policy/ legislation. Mr Porter's evidence, which we accept, was that he was going to treat the email from the Claimant as a grievance under the formal process until he met with her. Having resolved the issue, and the Claimant having stated that she did not wish to take it further, Mr Porter confirmed what had been agreed in an email to the Claimant on 22 May [p150]. He offered the option to take this further to the Claimant in his email and she did not do so.
45. The Claimant gave evidence that Ms Friess' behaviour following her complaint, namely by crying and discussing the complaint with the Claimant, put pressure on her to drop her complaint. Ms Friess' evidence was that she was simply being honest with her best friend and was genuinely, extremely upset that the Claimant

could consider that she had treated her unfairly. We accept Ms Friess' evidence that she was very upset, as evidenced by the texts at this time. We do not find that the Claimant was so inhibited from making complaints, since it was clear to us that she was ready to complain later in her employment when she felt justified in doing so.

46. We do not accept that the email dated 9 May 2016 [p123] was a formal flexible working request under the relevant statutory provisions. Neither was it a request following the Respondent's flexible working policy [p68] since it had not been submitted to the HR department and, more importantly, did not provide the necessary information.
47. Around the same time, the Head Chef at Wembley Las Iguanas, Ms Skyala, had resigned. She had been unhappy working for Ms Friess due to Ms Friess' requiring her to work evenings and weekends in line with the Operations Manager's objectives. There had been a recent unfavourable Environmental Health visit, which resulted in a requirement for standards being raised. Therefore, it was deemed necessary for the head chef to work these unsociable hours. Mr Porter's evidence, which we accept, was that Ms Skyala did not resign due to Ms Friess' management style, rather she wanted to leave the industry altogether, and has in fact done so.

Shift rotas

48. The Claimant considered that she had been given worst shifts than Mr Pinto for a period of time prior to her complaint on 9 May 2016. In her complaint [p123], the Claimant places reliance on the reason for being unable to work closing and double shifts, as being because she has a young family and wants to spend time with them.
49. Following on from the meeting with Mr Porter on 16 May the Claimant asserts that her shift rotas got worse, in that she was working more double shifts and evening shifts than Mr Pinto.
50. The Claimant confirmed in evidence that at no time did she consider that any difference in her treatment was due to the fact of her marriage (i.e. the piece of paper confirming her marriage). She was questioned under cross-examination about whether a person in a long term relationship with children without being married, would have been treated differently. She did not adequately answer these questions, and instead gave the example of Ms Friess, who, since having a baby was no longer able to work some of the unsociable shifts. However, Ms Friess was not married at the time.
51. We were provided by the Respondent with a summary of the Claimant's, Ms Friess and Mr Pinto's shift rotas, [pages 373 to 375]. However, the analysis for Ms Friess was queried by the Claimant since there appeared to be errors in the

information provided. In particular, there was reference to working 31 shifts in December 2016, which would not be possible since the restaurant was closed on Christmas Day.

52. The Respondent failed to provide legible data supporting the analysis they had given, although the Claimant's own analysis of her shifts p376 to 379 closely matches the data provided by the Respondent at p373, albeit in a different format.
53. Whilst the Claimant queried the validity of the data, and we were not in a position to test it fully, we are satisfied on balance that the Claimant was not given significantly more evening or double shifts than Mr Pinto during the period November 2015 to April 2017. This is based upon the following:
    a. the evidence of Ms Friess, including that the Clamant sometimes worked on days booked as holiday, which were then marked on the system as having been worked.
    b. the need to cover shifts when other managers were absent (e.g. in March 2016, when Ms Friess' was on leave to visit her father) together with absences of other managers.
    c. on occasions the Claimant specifically requested to work evenings in order to look after her children during the school holidays. [pages 164, 172, 173b and 173c].
    d. On considering the tables, Mr Pinto was shown to do more evenings/ late shifts than the Claimant generally.
    e. Ms Friess was pregnant, having left on maternity leave in February 2017, and therefore did not work as many evening/ late shifts in the run up to her maternity leave.
54. We noted that the Claimant worked more evenings than Mr Pinto in March, June, July and October 2016, January and April 2017. However, this appeared to be in line with the school holidays as reflected above. In other months, Mr Pinto worked more evenings than the Claimant.
55. The Tribunal saw significant evidence that the Claimant's shifts were changed on a number of occasions at her request due to her personal circumstances.

Nuisance phone calls

56. From early June 2016, the Claimant was subjected to nuisance phone calls whilst at work, mainly at night. These were of an offensive and sexual nature and clearly caused her some upset. There was a difference in the evidence as to how promptly the Respondent took action to support the Claimant, and whether the action taken was sufficient.
57. The Claimant said that she told Ms Friess immediately, and the Tribunal accepts that the Claimant did so. The Claimant said that Ms Friess had not taken any

action for some weeks, whereas Ms Friess said that she knew about the calls for only a few days, and had told the Claimant not to answer the phone.

58. We are satisfied that Ms Friess was aware prior to 21June 2016 that these calls had been received and that this had been going on for a few weeks. However, from the Claimant's email to Ms Friess and Ms Ritchie of 21 June 2016 [p152], it was clear that the frequency of the calls, and that they had been made at night when the Claimant was in the restaurant by herself, meant that the Claimant escalated her concerns. This included asking the company to obtain the phone number for the caller and asking the company to take appropriate steps to ensure her safety at work. The Claimant also contacted the police concerning these calls.
59. Ms Friess sent an email asking to obtain the records on 22 June 206 [p153]. We are satisfied that the Respondent made every effort to obtain the phone records, but was unable to do so since the caller had withheld his number.
60. On 23 June 2016, Ms Ritchie replied to the Claimant and told her not to answer the phone. In evidence, the Claimant said that she should not have been asked to work at night, but Ms Friess gave evidence that she never made such a request not to work at night at this stage. Further, on 22 June 2016, the Claimant herself requested to be off in the mornings on various dates, in order to attend events at her daughter's school, which supports Ms Friess' evidence.
61. However, Ms Friess conceded that she did not offer to take the Claimant off evening shifts at this time, which we believe could have been offered.
62. The Respondent told the Claimant not to work in the restaurant alone in the evenings on 25 June 2016 [p161]. She was to leave with the last member of the team (usually the kitchen porter) if she was closing up, and that she should be escorted to her car.
63. The Claimant suggested that it was not her choice to remain working in the restaurant after all other staff had left, due to the need to submit reports concerning the shift. It was accepted that these reports were required but the Respondent's evidence, which we accept, was that these could be submitted remotely from a smart phone, ipad, laptop or other device.
64. The calls in fact stopped from the beginning of July 2016 and the matter was never raised again.

Annual leave

65. The Respondent's holiday year ran from April to March. Therefore, it was accepted that many employees sought to take holiday at the end of the year to avoid losing it.
66. The Claimant gave evidence that on a number of occasions her requests for holiday were refused when in similar circumstances, Mr Pinto's requests for

holiday were authorised.

67. The Claimant made a request on an unknown date to take holiday on the day of her daughter's birthday on 24 August 2016. This was refused as evidenced by the Claimant's holiday record [p442]. However, the Claimant raised this with Ms Friess by text on 17 August 2016 [p173a] saying, "*hey hun I think you forgot again about my request. Is Zahra's bday on the 24th and I have also put this request on forth*……" Ms Friess replied on the same date to say, "I will change it don't worry.".
68. It was accepted that the Claimant swapped her shift so that she was able to take this day off.
69. On 8 Oct 2016, the Claimant sent a text to Ms Friess asking that she work particular evening shifts during the October half term, and be given set days off together with 2 days' holiday. This was immediately agreed by Ms Friess.
70. There was evidence in the bundle and from Ms Friess' evidence that there were many occasions on which the Claimant requested to take holiday which were agreed. The Tribunal accepts that this was the case.
71. The Claimant made a request to take 2 weeks' holiday after 23 December 2016 on or around 15 September 2016. Ms Friess referred this to Ms Ritchie [p 179], the Operations Manager at the time. Ms Friess indicated that she would refuse the request, as cover would need to be arranged and would prove difficult over the Christmas period. However, it was clear to us that Ms Ritchie was to make the decision, and that this was not an automatic refusal of holiday during busy periods. Ms Friess was highlighting the operational difficulties to her manager in submitting the Claimant's request for holiday, which appeared to the Tribunal to be understandable.
72. Mr Pinto did have holiday authorised during early December for 3 years in succession. Mr Pinto booked this leave off as his birthday was on 10 December. The Tribunal considered that Mr Pinto had been treated more favourably than the Claimant in respect of his holiday requests during December 2016. We accept the Respondent's evidence that Mr Pinto submitted his requests much further in advance, however we do not accept that this in itself, should have affected the decision whether or not to grant the holiday.
73. In February 2017, the Claimant sent a text to Ms Friess requesting holiday from 6-13 and 28-31 March 2017 [p264i]. Ms Friess confirmed that 28- 31 March 2017 could not be authorised, as Mr Pinto had already requested the same days a few months previously. The Claimant also had the week of 6 – 12 March refused due to the 6 events being held at the Arena that week. However, the Claimant did take holiday from 13 March 2017 to 26 March 2017, although there was evidence, which was not disputed, that the Claimant had in fact worked one day

during that holiday period for which she was paid an additional £90.

74. There was evidence that Mr Pinto had other holidays refused by Ms Friess during the same period. Notably, the weekend of 25-26 March, when his request was refused due to events being held at the Arena and Mothers' Day, and to accommodate the Claimant's leave.

75. The Claimant requested leave from 5 to 14 April 2017 on 18 February 2017. This was refused by Mr Williams, the temporary Operations Manager, on 22 February 2017 [page 265] due to Ms Friess being on maternity leave, so that, if granted, it would leave Mr Pinto alone during half-term which was busy. He also explained that for operational reasons it would not be possible to obtain alternative cover. He asked the Claimant to look at alternative dates and give as much notice as possible to provide a better chance of getting cover.

76. It was clear to the Tribunal that leave was not automatically refused during busy periods, as requests were considered in relation to operational demands, some of which were accepted and others declined.

Management meeting 18 October 2016

77. Ms Ritchie sent an email to Ms Friess, copying in the Claimant, on 12 October 2016 [p195] concerning a management meeting due to be held on 18 October 2016. This included a list of proposed attendees, including Ms Frees, and the Claimant *"(if possible Ale)*". Ms Friess was not able to attend due to a medical appointment. She therefore sent a Whatsapp group message to both the Claimant and Mr Pinto asking for one of them to volunteer and that whoever did not attend this meeting, would go to the next one. Mr Pinto responded first and therefore was allowed to attend. We are happy that Ms Friess' offer to both the Claimant and Mr Pinto, even though not complying with Ms Ritchie's suggestion, was not less favourable treatment.

78. The Claimant had not been rostered to work on 18 October, but following Mr Pinto's acceptance to attend the meeting, the Claimant's rota was initially changed to provide cover. However, following the Claimant's complaint concerning this, this was changed back so that the Claimant should have been off work. Despite this, the Claimant then attended work on Tuesday 18 October and informed the management group by Whatsapp message on 20 October 2018, that as she had worked on Tuesday 18 October, she would be taking Saturday 22 October off. This does not appear to have been authorised by Ms Friess, and Ms Friess deemed this to be poor behaviour showing a lack of respect by the Claimant. Ms Friess considered this to be such unacceptable behaviour, that she considered both submitting a formal complaint/ grievance against the Claimant and if it could not be resolved, she indicated that she would resign.

79. The Claimant gave evidence that she had spoken with Ms Ritchie and outlined her concerns at some point in October 2016. Ms Ritchie arranged to come and have a meeting with the Claimant and Ms Friess on 20 October.
80. Prior to the meeting, on 20 October 2016, Ms Friess sent an email to Ms Ritchie complaining about the Claimant's behaviour, and attaching the message informing her that she was to take the Saturday off.
81. The Claimant had already prepared with her husband a note entitled 'Issues for discussion' [p198] although this note was not provided to the Respondent at the time and was not referred to specifically in the meeting.
82. Ms Ritchie sat down with the two of them to try and resolve the issues. A summary of what was discussed at the meeting appears at page 201. This contained a range of areas for development for the Claimant, it recommended that they had to be "*adult and sensible*" about the rotas, and provided that the Claimant would work on Saturday 22 October. The email ended with Ms Ritchie saying that she considered that both of them had "*immense potential and Binta I look forward to seeing you progress as you're a star*."
83. The Claimant asserted that Ms Ritchie had agreed with all of her concerns, although from the outcome email, we do not find that to be the case. For example, her note states concerns about not getting formal feedback or a response to her flexible working request, and yet this is not mentioned in the summary of actions.
84. On 7 November 2016, Ms Freiss updated Ms Ritchie that the Claimant seemed "much better and motivated" and the Claimant raised no further concerns about these topics.

Pay review November 2016

85. The Claimant's letter promoting her to Assistant Manager referenced the possibility of a pay review in mid-November. The Claimant's evidence was that she heard nothing further about this.
86. Having received a response to her subject access request, the Claimant was provided with a document, which indicated what her salary would have been had she been awarded a 2% pay increase. This was not sent to the Claimant during her employment. The evidence from Mr Crawshaw was that this had been carried out for all staff, including the Claimant, but that when the figures had been considered in light of the difficult trading times, no pay awards were made. We accept his evidence in this regard, and do not accept that the Claimant was entitled to a pay rise at this time.

Christmas bonus

87. The Claimant agreed in August 2016 to be the Wembley restaurant's Christmas co-ordinator for the period from mid November to New Year's Eve. She had

carried out this role in 2015 and had received a bonus in the sum of £1,500.

88. The Claimant attended a meeting for the Christmas co-ordinators on 16 August 2016, at which the terms for the bonus were explained. The Claimant's witness statement made clear that she was told, in contrast to the earlier year, that the bonus would be based on the amount of covers during the Christmas period (including walk-ins and pre-booked meals) and not deposits, as had previously been the case.
89. There was evidence within the bundle that the Claimant provided the number of deposits taken for the Christmas period on a number of occasions. However, we accept the evidence of Mr Crawshaw, that this was one of the indicators used by the senior management to assess how the Christmas period was progressing, but it was not the criteria used for the Christmas bonus.
90. Despite being told that the criteria for the bonus was based on covers, the Claimant gave evidence that she still believed that it was based on deposits.
91. The Finance Director provided an analysis for the number of covers during the Christmas period at page 257. This stated that in 2016, 1,632 covers had been taken, whereas in 2015, 2,221 covers had been taken.
92. The Claimant's representative sought to persuade us that this figure was improbable in light of the increased profit shown for the month of December 2016 in the profit and loss accounts. However, Mr Crawshaw's evidence was that the profit and loss figure was based on a 4 week period only and therefore did not provide a good comparison for the Christmas period covered by the bonus scheme. Further, during Christmas, spend per head was recognised to be higher, which could result in greater profits with fewer covers. Bar spend in particular was noted to rise considerably.
93. Page 590 provided an analysis prepared by the Finance Director "Total Christmas covers target by week". The number of covers within the Wembley restaurant during the Christmas period was significantly down, and therefore the bonus for the Claimant was not triggered.
94. The Claimant queried this with Ms Friess who, not being clear on the terms for the bonus, in turn queried this with Mr Crawshaw. Ms Friess had not attended the Christmas co-ordinator meeting. Mr Crawshaw was clear that the covers' target had not been met. Ms Friess confirmed to the Claimant that the bonus was based on covers and not deposits, which is why it was not paid.

Failure to promote to Deputy Manager

95. The Claimant's appraisal from 6 July 2016 (which we believe was mistakenly dated 2015, although refers to her being an Assistant Manager which she did not become until November 2015) stated, "*Lets work on your sign off as a DM by the beginning of next year, we will work together on your training and development.*

Thank you for all your amazing handwork. Ale". The appraisal was extremely positive.

96. The Claimant therefore considered that she should have been promoted to Deputy Manager in November 2016 when Mr Pinto was informed that he would be appointed to a Deputy Manager in December. Ms Friess sent a text to the Claimant on 14 December 2016 [p348] saying, "*Shereen came in today on a unannounced visit, she promoted Carlos as a Dm. In January will be you*."
97. The Claimant's argument was that Mr Pinto had been promoted without any formal process being undertaken, and without a formal assessment. Mr Pinto had previously failed to achieve Deputy Manager status, but the evidence was that he had subsequently improved his performance such that he was successful on his second attempt. We do not find that Mr Pinto had been promoted without any formal process as detailed above.
98. Mr Pinto had joined the Respondent as an Assistant Manager and had worked in this role for 3 years prior to his promotion to Deputy Manager.
99. It was clear to us that the Claimant was well thought of at this time, and was in the process of moving towards being promoted to a Deputy Manager role. Whilst Ms Friess recommended the Claimant wholeheartedly for this promotion, this does not, in our view, constitute a contractual entitlement to become a Deputy Manager.
100. Ms Ritchie left the Respondent in January 2017, and was covered by Mr Crawshaw in addition to his other roles for the Respondent. At the time Mr Crawshaw's evidence was that he was undertaking 4 roles.
101. On 23 February 2017, Ms Friess sent an email to Mr Crawshaw a week prior to leaving for her maternity leave [p268]. This said "…*This email is to let you know that I'm more than happy to sign off our AM Binta as a Deputy Manager as she has demonstrated confidence, knowledge and passion about running our business on a daily basis.*

We have worked closely together in her training gaps and now these are completed, please see attached her Management Competency Base Development Plan.

Shereen promised that she will sign Binta off by January as a DM, but now that Shereen is not here I don't want to disappoint Binta and let her think that her development and promotion has been forgotten.

Shes doing really good and I trust that her and Carlos will do a superb job looking after our site while Im away on my maternity absence.

Will be good if you set a day to come and see her and sign her off as she truly deserves her promotion, and she has worked hard for it.

Also wanted to let you know as Binta expressed her worries the other day and I

don't want her to feel that way as she plans to stay with the company for a long time and become a General Manager near in the future.

Please let me know your thoughts…"

102. The Claimant was blind copied into this email and so was aware of its contents.

103. This positive recommendation shows how much Ms Friess was doing to try and assist the Claimant's promotion at this time.

104. On 7 April 2017 the Claimant met with Ms Friess for a coffee at the Claimant's request as evidenced by the text messages [p258c] where the Claimant is asking for a chat and to meet Ms Friess' newborn baby girl.

105. At this meeting, the Claimant expressed her emerging intent to leave the Respondent and sought Ms Friess' counsel as to her proposed course of action. As a result of that meeting, Ms Friess emailed Mr Crawshaw [p292] to say that she had heard 'rumours' that the Claimant might be leaving. This email confirmed that "…*she's been complaining about not delivering our promise of her development and promotion and she's quite upset about it to the point that she's strongly thinking to leave too*…".

106. On 11 April 2017 the Claimant emailed Ms Friess to thank her for contacting Mr Crawshaw and saying that he had phoned her and offered an increase in pay and that they were due to meet.

Pay

107. When the Claimant was initially offered the keyholder/ supervisor role she was offered an increase of 30p per hour. She queried this and was instead started on an increase of £1 an hour.

108. The Claimant considered that Ms Freiss, in handling her pay increase, had been dishonest in immediately increasing the initial offer once the Claimant had suggested that she wanted to email the Operations Manager, Mr Peckham, as can be seen from the text messages at page 325. However, the Tribunal was satisfied in Ms Friess' evidence that the initial pay was a suggested amount from her manager and that she felt uncomfortable having listened to the Claimant. Therefore, she decided not to proceed with the 30p per hour increase.

109. The Claimant considered the 30p showed how Ms Friess wished to exploit her, although acknowledged that this was never in fact paid. We do not find that Ms Friess was exploiting or intending to exploit the Claimant.

110. The Claimant claimed that Mr Machin and Ms Tudor received a higher differential from the national minimum wage ('NMW') paid to waiting staff, when they were promoted to Keyholders/ supervisors from when the Claimant had initially been offered a 30p increase. We do not know what Kieran Machin or Claudia Tudor were initially offered. However, we know that the Claimant was

paid £1 more than the NMW at the time of her promotion as was Claudia Tudor. Mr Machin received 80p more than the NMW at the time of his promotion. Therefore, we do not accept this argument.

111. The Claimant and Claudia Tudor in 2015 were both keyholder supervisors and received the same rate of pay, namely £8 an hour. 18 months later, Kieran Machin became a keyholder/ supervisor and received the same rate of pay at this time.

112. The Tribunal noted that the Claimant had been paid £25,000 for an Assistant Manager role in November 2015, and Claudia Tudor received the same remuneration in November 2017 for the same role, despite being some 2 years later.

113. The Claimant had a meeting with Mr Crawshaw on 20 April 2017 to discuss her proposed resignation. This is evidenced by Mr Crawshaw's email on 21 April 2017 [page 295]. He had tried to "*head off*" her resignation and that it was a "*shame as she was nearly ready to be signed off as a DM. Her new role had a salary of £32k and she gave the reason as leaving as undervalued, under developed and underpaid. the first 2 she thinks I can sort but she doesn't think I can match 32… which I can't*."

114. The Claimant in contemporaneous texts to Ms Friess said, "*he still thinks I should stay. He declined me being a keyholder on a part time basis which I really wanted to do but never mind. He offered me more pay but could not push it to 30k*." Ms Friess said "*I guess you are leaving then*" to which the Claimant replied, "*Sadly yes*".

115. The Claimant thanked Ms Friess for her support and the opportunity she had been given.

116. The Claimant submitted her letter of resignation on 20 April 2017 [p293]. This letter made no reference to any complaints. The Claimant asserted that this was because of her need for a reference. However, the tone of her letter together with the text messages sent at the time, and the social media posts [p 323a] in which she posted a compilation video of "*happy memories*" and stated that today was one of the "*Hardest days I have ever had with my Wembley family. I have had the best time in the past three years. Thank you to all my friends for the beautiful memories*."

Quarter 3 bonus

117. The Claimant was not paid her Q3 bonus, which was due for payment in her monthly pay on 28 April 2017. All other managers received theirs. Mr Crawshaw gave evidence that their bonus policy had changed at some point prior to the Claimant's resignation, believed to be approximately 2 years prior to the Claimant's resignation, such that employees having resigned and working their

notice would not be entitled to receive any bonus. This was not reflected in the Respondent's bonus policy dated November 2016 [pages 93 to 94].

118. The policy states:

"***Payment***

All bonuses are discretionary and eligibility to join the bonus scheme does not guarantee bonus payment, even if bonus criteria have been met…..

Finally

The policy can be amended at any time …Any changes to the policy will be communicated via the usual channels and will be published on the company's intranet…".

The bonus scheme rules for all managers for the 2015-2016 incentive programme stated:

*"**Conditions for payment of Incentive Compensation** A participant must be in the employment of the Company at the set time of payment to receive the bonus…".*

Further the handbook states at p 95 *"Incentive and bonus schemes are non-contractual, subject to review and may be withdrawn at any time*…".

119. The Respondent relied upon a table [p500] showing the employees who were working their notice at the time of payment for the Q3 2016 and Q4 2016 bonuses. This showed that only one person received a bonus and that was for the Q3 bonus in these circumstances. There was evidence that 10 employees, including the Claimant, were not paid a bonus for both Q3 or Q4 whilst working their notice. Of these, 3 of those not receiving a bonus were white British.

120. Mr Crawshaw gave evidence that the reason it was not paid was due to the change in policy as evidenced by a table of employees who had resigned, all bar one had not been paid their bonus [p506]. The only one which had been paid, was managed by a different Regional Director (for the North), and no explanation could be provided as to why this was the case.

121. There was an email from Mr Crawshaw to Mos Shamel CEO which confirmed, "*she is leaving us, left us in the shit, is not supporting Carlos, so I [made] a decision with Steve not to pay her bonus*." This appeared to suggest that this was done on a case by case basis, as opposed to a general change in policy, which may have occurred following the Claimant's resignation.

122. Mr Shamel replied "*its policy now that if you resign you don't get bonus*." Mr Crawshaw further responded 2 minutes later that, " *im not wasting cash on people who don't want to work for us*." [p306]

Social media lead

123. The Claimant complained that she had not been paid for taking on the role of social media lead for the Wembley restaurant. We accept the evidence of

the respondent that no one was paid an enhancement for carrying out this role.

124. The Claimant, at no point prior to her claim, made any complaints concerning this, as evidenced by the discussion on 20 October 2016 with Ms Ritchie, during which the social media responsibilities were discussed and there was no reference to payment. Further, even when chased to provide more social media material, the Claimant did not raise payment as an issue.

Failure to deal with the Claimant's complaint concerning her Q3 bonus

125. The Claimant emailed 8 May 2017 [p302] asking Mr Crawshaw to reconsider his decision concerning her Q3 bonus and stating that if refused, the Claimant would be forced to pursue this formally.

126. There was no response to the Claimant concerning her email.

Submissions

127. Both parties were given the option of attending the Tribunal on Thursday 22 March to have longer time in which to address us for their submissions. Both parties preferred that their submissions be heard at the close of evidence on 21 March.

128. The Respondent provided us with written submissions and was given the opportunity to orally highlight the particular evidence and points he wished to make.

129. The Claimant's representative addressed the Tribunal orally. Both sets of submissions were considered by the Tribunal before coming to its decision.

Law

130. The Claimant complains that she has been constructively unfairly dismissed.

Section 95 Employment Rights Act 1996 ('ERA') Circumstances in which an employee is dismissed provides:

"*For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—*

(c) 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."

131. It does not matter whether the Employee terminates the contract with or without notice providing that she was entitled to terminate it without notice.

132. An employee must show that the employer was in repudiatory breach of contract. If there is a repudiatory breach, then the employee must resign in response to that breach, not for some unconnected reason. Also, the employee must not have accepted the breach by continuing to work and waiving the breach.

133. The Tribunal reminded itself that the breach does not have to be the only

cause of the employee's resignation. It had regard to the case of Abbeycars (West Hornford) Limited v Ford UKEAT/0472/07 which at paragraph 35 states: "*It follows that once a repudiatory breach is established, if the employee leaves then even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. We respectfully agree with this reasoning. We think it would be invidious for tribunals to have to speculate what would have occurred had the employee been faced with the more limited grounds of legitimate complaint than he had perceived to be the case.*

Moreover, if there is a repudiatory breach which entitles the employee to leave and claim constructive dismissal, we see no justification for allowing the employer to avoid that consequence merely because the employee also relies on other, perhaps unjustified or unsubstantiated, reasons. The employee ought not to be in a worse position as a result of relying on additional, albeit misconceived, grounds."

134. The repudiatory breach may be of an express or implied term (including the implied term of trust and confidence, which is relied upon by the Claimant in this case) and can consist of a one-off act or a continuing course of conduct extending over a period, culminating in a "last straw" for the employee. The final straw does not have to be a fundamental breach in its own right but must not be innocuous.

135. Should there be a fundamental breach, the tribunal is then required to consider what the reason was for the claimant's deemed dismissal and whether the employer acted reasonably in all of the circumstances in accordance with section 98(4) ERA.

Discrimination

Section 13 Equality Act 2010 ('EqA'): Direct Discrimination

(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*.

136. It is necessary to consider whether the Claimant has been treated less favourably because of a protected characteristic. In this case, the Claimant relies upon the protected characteristics of race and marital status. The approach to be adopted in direct discrimination cases is as set out in the Employment Appeal Tribunal decision in the Law Society v Bahl [2003] IRLR 640 paragraph 91:

"*It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error*."

137. It is not possible to infer unlawful discrimination merely from the fact that

an employer has acted unreasonably (Glasgow City Council v Zafar [1998] ICR 120). Tribunals should not punish employers by finding discrimination when their procedures or practices are unsatisfactory or where commitment to equality is poor (Seldon v Clarkson, Wright & Jakes [2009] IRLR 267). However, the Tribunal was clear that direct discrimination need be consciously motivated.

138. The protected characteristics do not need to be the only reason for the treatment in order to succeed in a direct discrimination complaint, however it must be an "*effective cause*" O'Neill v Governors of St Thomas More Roman Catholic Voluntary aided upper school and another 1997 IRC 33 EAT.

139. The Claimant must show that she has been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to her as set out in section 23(1) and (2) EqA which states: "*On a comparison of cases for the purposes of section 13 …… there must be no material difference between the circumstances relating to each case*."

140. The EHRC Code confirms at paragraph 3.23 that "*it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator*."

141. However, from the case of Stockton on Tees Borough Council v Aylott 2010 ICR 1278 the Tribunal reminded itself that the comparator need not be a "*clone*" of the Claimant, and further from the same case, that there is no obligation on the Tribunal to construct a hypothetical comparator in every case, and that failure to do so will not necessarily lead to an error of law in the decision. Mummery LJ stated at paragraph 43 of this case:

"…*I am of the view in this case the issues of less favourable treatment of the Claimant as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the Tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*."

142. Direct discrimination because of marriage and civil partnership in the workplace only occurs if the less favourable treatment is because the Claimant is married or a civil partner (Section 13(4), EqA 2010). Accordingly, unlike other protected characteristics, it is not possible to have marriage and civil partnership

discrimination by perception or association. There is therefore no scope for the individual to be treated less favourably because she is perceived to be married or a civil partner, or because of her association with someone who is married or a civil partner. The less favourable treatment must be because of the fact the Claimant is married or in a civil partnership.

143. The Tribunal reminded itself that direct discrimination is not capable of justification.

Indirect discrimination on grounds of race and/or marital status

144. Section 19 (1) EqA 2010: A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B's.

Section 19 (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.

145. The concept of a PCP is broader than that of "requirement or condition", covering such things as recruitment criteria (whether compulsory or merely desirable), provisions in the employment contract, employment policies, informal practices and even one-off decisions. In United First Partners Research v Carreras [2018] EWCA Civ 323, the Court of Appeal held that an expectation for an employee to work long hours, though not a strict requirement, was a PCP.

146. The EqA 2010 requires an indirect discrimination claimant to show that the employer's PCP puts (or would put) persons sharing a protected characteristic at a particular disadvantage when compared with others.

147. The EHRC Code (Paragraphs 4.21 and 4.22.) states that a tribunal considering an indirect discrimination claim will generally ask the following

questions:

a. What proportion of the pool has the particular protected characteristic under consideration?
b. Within the pool, how does the provision, criterion or practice affect people without the protected characteristic? How many are not (or would not be) disadvantaged by it?
c. Within the pool, how does the provision, criterion or practice affect people with the protected characteristic? How many of these are (or would be) put at a disadvantage by it?
d. Finally, compare "x" (the proportion of people without the protected characteristic who are, or would be, disadvantaged by the provision, criterion or practice) with "y" (the proportion of disadvantaged people with the characteristic) to determine whether the group with the protected characteristic experiences a "particular disadvantage" in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

148. Even if a claimant establishes that a PCP puts persons with a protected characteristic at a particular disadvantage, the PCP will not be indirectly discriminatory if the employer can show that it is objectively justified (Section 19 (2) (d), EqA 2010).

Discrimination by way of victimisation

149. **Section 27 (1) of the EqA** provides that: "*A person (A) victimises another person (B) if A subjects (B) to a detriment because:*

(a) B has done a protected act, or

(b) *A believes that B has done, or may do, a protected act*."

Section 27 (2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

150. The Claimant relied upon section 27(2)(c) or (d).

151. The Tribunal noted that no comparator was required for a victimisation complaint.

152. Victimisation need not be consciously motivated. In Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL), the House of Lords upheld the tribunal's decision confirming it had been entitled to find in the circumstances of that case that the interviewers' decisions (in rejecting Mr Nagarahan's application for roles) had been affected by Mr Nagarahan's previous proceedings, regardless of whether the interviewers consciously took the "protected act" into account.

153. The Tribunal had to consider whether the Claimant's email of 9 May 2016 constituted a protected act, and whether she was subjected to detriments following on from the email, in which the contents of the email played any significant part in the decision to subject her to those detriments.

154. The Tribunal had regard to the burden of proof in discrimination cases and notes that this is reversed to fall upon the Respondent once the Claimant has established facts from which the Tribunal could conclude, in the absence of an adequate explanation, that discrimination has occurred.

155. For the breach of contract claim, the Tribunal needs to be satisfied that the Claimant was entitled to receive the payments due and that these were either unlawfully deducted from her pay, or were not paid in breach of contract.

Conclusions

Constructive unfair dismissal.

156. The Tribunal considered that the Respondent was not in repudiatory breach of contract. The Claimant was relying upon the failure to pay the Christmas bonus, the refusal to authorise holiday in March and April 2017 and the ongoing failure to promote her to Deputy Manager. We do not find that there was an express contractual right to any of these, and therefore no repudiatory breach of an express term of her contract. Insofar as this amounted to a repudiatory breach of the implied term of mutual trust and confidence, we do not find that this implied term has been breached by any of these allegations. Therefore the Claimant's complaint of constructive unfair dismissal fails.

157. However, even if we are wrong on that point, we are satisfied that the Claimant did not resign in response to any such breach. She got an alternative job with more money – and it was clear from the meeting with Mr Crawshaw that

the Respondent could not meet the Claimant's salary expectations.

158. Whilst we accept that letters of resignation do not have to identify complaints to support a constructive dismissal complaint, the Claimant's actions at the time, notably her request to continue working part time as a keyholder/ supervisor is in conflict with her suggestion that the implied term of mutual trust and confidence had been damaged to such an extent that she could not continue in employment. Rather, she really wanted to remain a keyholder/ supervisor. Also, the nature of the relationship between the Claimant and Ms Friess, as evidenced in the text messages during the time leading up to the Claimant's resignation and beyond, are not indicative of a broken down relationship. The Claimant's social media posts at the time also suggest that our understanding is correct.

159. Turning to the Claimant's Direct race discrimination claim, we considered each of these as follows:

Increase in pay on promotion

a. Offering a 30p increase on promotion to the keyholder/supervisor role – This claim is out of time, since it relates to an offer made in 2014, and we were not satisfied that there was conduct extending over a period. In any event, even if this claim were in time, we do not believe that the Claimant was subjected to less favourable treatment concerning the rates of pay offered to herself and her comparators, for whom the Tribunal had no evidence as to their racial background.

   The claimant was initially offered a rate of £6.80, being an increase of 30p from the NMW rate she received for her waiter role, but we accept that once this had been highlighted by the Claimant, Ms Friess immediately increased this to a £1 differential between a waiter's role and the Claimant's promoted role of keyholder/supervisor.

   We had no evidence concerning the amount the comparators relied upon were initially offered. However, it was clear that they had in fact been given the same rate of pay as the Claimant, although for Kieran Machin this was some 2 years later.

   In any event, the Claimant was paid no less than Kieran Machin or Claudia Tudor at any time, and therefore, if they are appropriate comparators, we find that there has been no less favourable treatment. We do not accept the Claimant's assertion that when looking at the differential between the NMW and the Claimant's pay, she was treated less favourably.

b. **Social media lead**

   We are satisfied that no employee received additional remuneration for

taking on the role of Social media lead and therefore, we again find that a hypothetical comparator, being a white Assistant Manager would have been treated in the same way as the Claimant – i.e. would have received no additional remuneration. Therefore we find no less favourable treatment.

Preventing the Claimant attending the Area Meeting on 18 October 2016

c. As regards this allegation, we do not consider that the Claimant was treated less favourably than Mr Pinto. Whilst we accept that the initial request from Ms Ritchie suggested the Claimant should attend if possible, to ensure equity of treatment, Ms Friess offered the opportunity to both of them. Mr Pinto replied first, and we are satisfied that had the Claimant done so, she would have been the one to attend. Not only that, we are clear that whoever did not attend the October meeting, would attend the next one.

Even if this were less favourable treatment, we are satisfied that there is no link between this and her race.

Failure to review the Claimant's salary in November 2016

d. As to the Salary review in November 2016, we accept the evidence of the Respondent that no one received a salary increase at this time. Whilst there was a consideration of a review, it was decided not to proceed. A hypothetical comparator, being a white Assistant Manager would also not have had a pay increase at this time. Therefore, there can have been no less favourable treatment.

Failure to appoint the Claimant as Deputy Manager

e. The Claimant's allegation that there had been a failure to appoint her to a Deputy Manager role in November 2016 and from February to April 2017, is also not well founded. We did not consider that Mr Pinto was a correct comparator for this in November 2016, since his material circumstances were different as he had been an Assistant Manager for longer than the Claimant, namely for 3 years from his commencement, and also that he had been assessed as competent to be promoted to the Deputy Manager post by Ms Ritchie.

Further, in February to April 2017, Mr Pinto was not a correct comparator since, as at that time he was a Deputy Manager and not an Assistant Manager.

However, even if he was a correct comparator at either of those times, there was clear evidence that the Claimant had not been assessed as ready for the Deputy Manager role at the times suggested. She had been

recommended for promotion by her manager, who was not authorised to sign off promotions to Deputy Manager, as evidenced by Mr Pinto's promotion by Ms Ritchie, but we do not accept this to be the same thing. We accept the Respondent's evidence of the formal process for promotion, and whilst Ms Friess did all she could to arrange her promotion prior to her maternity leave, we have no doubt that she would have shortly been formally assessed and signed off as a Deputy Manager. Therefore, we find no less favourable treatment.

Mr Pinto was appointed at a time when there was an operations manager in post, and it is unfortunate that at the time when the Claimant would have been formally assessed, Mr Crawshaw was carrying out 4 roles, and therefore was not able to visit the Wembley restaurant as frequently as might otherwise have been the case.

We are satisfied that this was not less favourable treatment, since had Mr Pinto been ready to be assessed at that time, he would have been treated in the same way. In the event that the delay in assessing the Claimant was found to be less favourable treatment, we find in any event, that there was no connection to the protected characteristic of race.

Failure to pay the Christmas bonus

f. The failure to pay the Christmas bonus was not direct race discrimination. There are no appropriate comparators for this, as neither Ms Friess nor Mr Pinto were entitled to receive the Christmas bonus since they were not Christmas co-ordinators. Even were we to use a hypothetical comparator who was a white Assistant Manager, who had been the Christmas co-ordinator in the Wembley restaurant, there was no less favourable treatment, since we are satisfied that they would not have been paid a Christmas bonus, since it was not due. The bonus was not triggered due to the covers' target having been missed. Whilst we understand that the restaurant may have taken more deposits than the previous year and the profit for December had increased, it was clear from the evidence that the number of covers was significantly down, and therefore, the bonus did not trigger. There was therefore no less favourable treatment even for a hypothetical comparator.

Failure to pay the Q3 bonus

g. The failure to pay the Quarter 3 bonus was possible of constituting less favourable treatment. However, the comparators chosen, namely Mr Pinto and Ms Sykala had a material difference in their circumstances such that they were not appropriate comparators to the Claimant for a direct discrimination complaint – namely for Mr Pinto, he had not resigned prior

to the bonus being paid. Ms Sykala had resigned some time earlier than the Claimant, namely in May 2016, and was employed in a different role, namely as head chef. Once again, we had been provided with no evidence as to the comparators' race. However, in any event, we are satisfied that even had the Claimant chosen a hypothetical comparator, being a white Assistant Manager, also having resigned prior to the Q3 bonus being paid at the Wembley restaurant, we are satisfied that they would also not have received their Q3 bonus, because the reason the bonus was refused was because she had resigned and was not in any way linked to her race. We considered the Claimant's contention that the evidence provided by the Respondent at page 500, being a table of those who had or had not received a bonus at or around the time the Claimant had resigned, meant that a black employee had no chance of receiving a bonus whereas a white employee had a 50% chance of receiving a bonus was flawed. The only bonus paid following resignation was in a different region, for whom Mr Crawshaw was not the person deciding this. Therefore, we consider that there was no less favourable treatment because of race in these circumstances.

Failure to deal with the Claimant's complaint

h. The failure by Mr Crawshaw to deal with the Claimant's complaint about her Q3 bonus correctly also fails. This is because we consider that he would have responded in the same way to a hypothetical white Assistant Manager, who had resigned and sent an email complaining about non-payment of bonus. Whilst there could have been a response to the Claimant's concerns raised, we consider that Mr Crawshaw would have acted in a similar way to anyone else in these circumstances. There was no evidence before us, nor was it put to Mr Crawshaw that his failure to respond or otherwise deal with the Claimant's complaint was because of the Claimant's race.

Indirect race discrimination

160. The Claimant relies upon a PCP in existence in November 2016 and 23 February to 21 April 2017, being a practice to promote staff without a formal and equitable process. We are satisfied in light of the facts found and the management competency based development plan at p269 that the Respondent did have a formal process it followed in relation to promotion. This is evidenced by Ms Friess and to some extent the Claimant's own evidence that training was provided (e.g. the MIT programme), and we are satisfied that there had to be an assessment in order to achieve the role of Deputy Manager. We therefore find

that there was no PCP to promote staff without following a formal and equitable process. The complaint of indirect race discrimination therefore falls at this point.

Direct discrimination because of Marital status

161. The Claimant considered that she had been given worse shift patterns between November 2015 and May 2017 than her actual comparator Mr Pinto. As stated above, the Tribunal had to consider this from the evidence available. We do not consider on balance that the Claimant's shifts were worse than Mr Pinto's. Whilst there were times when the Claimant worked more evening shifts, we are satisfied that this was due to particular times when the Claimant requested to work evenings during school holidays, in order to care for her children, or when other managers were absent. We therefore do not find that there was less favourable treatment. Even if we are wrong on this, we find no causal link between the Claimant's protected characteristic of marriage and the shifts she was rostered to work. We do not therefore accept that the Claimant's complaint of direct marital status discrimination should succeed.

162. Regarding refusal of holiday, generally we do not accept that the Claimant's holiday refusals were less favourable treatment when taking into account the clear evidence that her comparator, Mr Pinto, was likewise refused holiday on a number of occasions due to business needs. For example, during times when the Arena had a number of events on or during the school holidays when it was accepted that the restaurant was busier. There was in any event significant evidence of holidays being granted for the Claimant and Mr Pinto.

163. The only occasion where we considered that there might have been less favourable treatment than Mr Pinto, was the request to take holiday in December 2016. This is because it is clear that Mr Pinto was allowed to take holiday earlier in December for 3 consecutive years. Whilst we accept that Mr Pinto requested his holiday significantly in advance, and the Claimant gave less notice of her requested holiday, we do not consider that this alters the fact that the Claimant was treated less favourably than Mr Pinto. However, we do not find that the reason for the treatment was in any way connected to her marital status. We therefore find that there is no causal link between the less favourable treatment and the fact of the Claimant's marriage. We understand why the Claimant felt that she was treated unfairly, but as we do not consider this to be tainted by discrimination, this complaint also fails.

Indirect discrimination on grounds of marital status

164. The Claimant relies upon two PCPs in support of her complaint for indirect discrimination. The first is that between November 2015 and May 2017 there was a PCP not to take account of individual circumstances when setting rotas.

165. The tribunal considered that there was overwhelming evidence suggesting that this was not the case. The text messages confirming changes to the rota to allow the Claimant to be off so that she could look after her children, or attend her daughter's birthday, which were very often agreed, shows that this PCP was not applied generally. Therefore, this complaint is bound to fail.

166. The second PCP relied upon is that on various dates, the Respondent had a practice of automatically refusing holiday in busy periods. Whilst we accept that in busy periods, the Respondent was likely to refuse holiday requests, there is clear evidence throughout the bundle, including emails between Ms Friess and her manager, that there was no such practice. Therefore, this complaint cannot succeed.

Victimisation

167. The Claimant relies upon a protected act for her victimisation complaint being an email sent on 9 May 2016 at page 123.

168. In order to be a protected act, this email is required to be either 'doing any other thing for the purposes of or in connection with' the EqA or making an allegation (whether or not express) that the Respondent or another person has contravened the EqA.

169. Taking this at its broadest interpretation, we cannot find this email to be a protected act. The complaint relates to her shift pattern, but does not even obliquely refer to any protected characteristic.

170. We therefore find that this email is not a protected act for the purposes of the Claimant's victimisation complaint under the EqA. The flexible working legislation is not connected with the EqA, nor is the Human Rights Act, and there is no complaint of discrimination under the EqA. Therefore, as we do not find there to have been a protected act, there was no victimisation against the Claimant.

Breach of contract

171. Finally, the Claimant asserts that she is entitled to receive payment for the following:

a. The pay increase of 2% from November 2016;
b. The Christmas bonus payment; and
c. The Q3 bonus payment.

172. As previously stated, we do not accept that the Claimant was entitled to a pay increase in November 2016. This was not a contractual right and therefore she cannot claim this payment.

173. The Christmas bonus was not due and owing, and therefore she is not entitled to receive any payment for it. Therefore, this is not due.

174. Finally, as regards the Q3 bonus, we recognize that the Respondent says in its bonus policy, dated November 2016, that the bonus was discretionary. It makes clear that there is no guarantee of payment even if the bonus criteria have been met. There was no express term in the written contract of employment of the Claimant concerning her bonus entitlement. The handbook also confirms this.

175. However, just because it is stated to be discretionary is not in itself conclusive. We have to consider whether in light of the terms of the bonus, and how it has been paid, whether this has at some point crystalised into being a contractual right.

176. In these circumstances, we do not consider that the bonus was contractual. It was clear from the wording that there should be no guarantee of payment to those on the bonus scheme, even if the criteria were met.

177. As we have found this to be a discretionary bonus scheme, we have to then consider whether the exercise of the discretion by Mr Crawhaw and Steve Nudegg (Financial Director) was perverse or irrational.

178. We considered very carefully the email of Mr Crawshaw dated 8 May 2017 to Mr Mos Shamel [p305], which referred to the Claimant "*leaving them in the shit and not supporting Carlos*", although accept that he went on to say 2 minutes later "*I'm not wasting cash on people that don't want to work for us*."

179. Therefore, we consider the reason for the non-payment of bonus to be her resignation and as such was not irrational or perverse.

180. We accept that bonuses are often not paid to employees who are working their notice and that their bonus policy may have at some point been changed by the Respondent. Unhelpfully, their written policy does not refer to this. It makes specific reference to the fact that the bonus will not be paid whilst someone is in their probation, but fails to go on to say that this will also apply in the case of someone working their notice. However, on balance we consider that we should not interfere with the exercise of this discretion in these circumstances.

Employment Judge Welch

Date 8 May 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 May 2019
FOR THE TRIBUNAL OFFICE