



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss N Hasumat

**Respondent:** EE Ltd

**Heard at:** East London Employment Tribunal (by Cloud Video Platform)

**On:** 5 and 6 November 2020 by CVP  
and on 1st and 15th December 2020 in Chambers

**Before:** Employment Judge Lewis  
**Members:** Mrs W Blake Rankin  
Mr P Lush

## **Representation**

**Claimant:** In person

**Respondent:** Stephen Butler of Counsel

# RESERVED JUDGMENT

## ***Unfair dismissal***

1. The unanimous judgment of the tribunal is that the Claimant was unfairly dismissed
2. The Claimant is entitled to a basic award in the sum of £587.40 (5 x £117.48).

## ***Sex discrimination***

3. The claims for sex discrimination contrary to the Equality Act 2010 fail and are dismissed

**Holiday pay**

4. The Claimant has failed to establish that she is owed any outstanding holiday pay and her claim for unpaid holiday pay is dismissed,

## REASONS

### 1. The issues

The issues were identified at a preliminary hearing on 29 June 2020 before Regional Employment Judge Taylor, as follows:

#### 1.1 Constructive dismissal

Did the Respondent do the following things

- 1.1.1 When the Claimant returned to work following a period of sick leave that ended July 2018 Mr Abu Hassan, acting store manager, refused her request for a staged return to work (as a direct result of this refusal the Claimant was immediately forced to take a second period of sick absence.)
- 1.1.2 When the Claimant returned to work on 14th of January 2019 she voluntarily reduced her contractual hours from 30 hours to 20 hours. However, her working hours had already been reduced by the Respondent on 1 September 2020, without her consent. (If this is correct this change would not have made any difference to her pay.)
- 1.1.3 Between the 1 September 2018 and 14 January 2019 Mr Hassan telephoned the Claimant on six or seven occasions when she was on sick leave and asked her what her intentions were about returning to work. The telephone calls and manner of Mr Hassan were conducted in a very abrupt tone. (The Claimant will say, for example, he did not ask how she was in any of the calls, but just wanted to know if and when she was going to return to work).
- 1.1.4 The Claimant returned to work on 14 January 2019, Mr Hassan was so hostile towards her that the Claimant felt she no longer wanted to work at the Stratford Westfield store.
- 1.1.5 The Respondent failed to transfer the Claimant to another store (East Ham), as she had requested, in early November 2019 because of negative comments made about her to managers of the store by Mr Hassan. (The Claimant relies on this behaviour as being "the last straw".
- 1.1.6 On an occasion between 14th January and 31st March 2019, Mr Hassan did not grant permission for the Claimant to take holiday leave as she had requested, giving as his reason that other staff members had booked all available holiday leave. However, a male employee (Mr Mohammed

Ibrahim Hussain) was permitted by Mr Hassan to take one week's leave even though his leave request was made after she had made hers.

1.1.7 The Claimant's contractual hours were reduced to 12 hours from 1 June 2019, without her consent.

1.1.8 If it did these things, did that breach the implied term of trust and confidence?

The tribunal will need to decide:

1.1.9 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and if so

1.1.10 whether it had reasonable and proper cause for doing so

1.1.11 did that breach the term of the contract?

1.1.12 if it did, was the breach a fundamental one?

The tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

1.1.13 Did the Claimant resign in response to that breach?

The tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

## **1.2 Direct sex discrimination (Equality Act 2010 section 13)**

1.2.1 Did the Respondent do the following things:

1.2.2 On an occasion between 14th January and 31st of March 2019, Mr Hassan refused permission for the Claimant to take requested holiday leave, because he said other staff members had booked all available holiday leave for that period.

1.2.3 When the Claimant returned to work following a period of sick leave that ended July 2018, Mr Abu Hassan refused her request for a staged return to work. Then she immediately took a second period of sick absence when she returned on 14 January 2019 she reduced her contractual hours from 30 hours to 20 hours. Later she found the hours had already been reduced on 1 September 2018. (This would not have made any difference to her pay.)

1.2.4 Between 1 September 2018 and 14th January 2019 Mr Hassan telephoned her on six or seven occasions when on sick leave and asked the Claimant what were her intentions about returning to work.

1.2.5 When the Claimant returned to work on 14 January 2019 Mr Hassan was so hostile towards her the Claimant felt she no longer wanted to work at the Stratford Westfield store.

1.2.6 The Respondent failed to transfer the Claimant to another store in early November 2019 (East Ham) because of negative comments made about her to other store managers by Mr Hassan.

1.2.7 Was that less favourable treatment?

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

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

The Claimant says she was treated worse than a male employee (Mr Mohammed Ibrahim Hussain) in relation to not being permitted to take holiday. The Claimant has not named anyone in particular who she says was treated better than she was in relation to the remaining alleged discriminatory treatment.

**1.3 Holiday pay (Working Time Regulations 1998)**

1.3.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when her employment ended?

1.3.2 What was the Claimant's leave year?

1.3.3 How much of the leave year had passed when the Claimant's employment ended?

1.3.4 How much leave had accrued for the year by that date?

1.3.5 How much paid leave had the Claimant taken in the year?

1.3.6 How were any days carried over from previous holiday years?

1.3.7 How many days remain unpaid?

1.3.8 What is the relevant daily rate of pay?

**2. The hearing**

2.1 The tribunal was provided with electronic copies of the bundle and additional pages together with witness statements from Mr Abu Hassan, Ms Husna Uddin, Mr Serkan Hassan and from the Claimant. The tribunal took time at the beginning of the hearing to read the witness statements and the documents referred to therein.

2.2 Mr Butler provided written closing submissions on the law and the Claimant provided a note of her summary submissions. In her closing note the Claimant raised a number of criticisms of the Respondent's solicitor and suggested she had been disadvantaged by not understanding that she had to put her evidence in a witness statement and not having had the bundle until 2 days before the hearing. The Claimant had however provided a witness statement. She also referred to the contents of a 1:2:1 meeting and of her detailed grievance. The Claimant indicated to the Tribunal at the outset of the hearing that she wished to proceed with the hearing. She was cross-examined in respect of the issues and the tribunal heard

her account of events from her first hand in the course of her cross- examination as well as having read her witness statement and grievance document. The Tribunal were satisfied that no application to postpone had been made and that there was no prejudice to the Claimant in continuing with the hearing.

2.3. The Respondent's Counsel set out a summary of the relevant law in his written closing submission and the applicable law was not in dispute. There was insufficient time to conclude the deliberations on the second day of the hearing and time was set aside on the afternoon of 1 December 2020. The parties were invited to send in further information requested by the Employment Judge in respect of the holiday pay calculations. Unfortunately, the time set aside 1st December was insufficient and the tribunal met again by CVP on 15 December 2020 to conclude its deliberations.

### 3. The relevant law

#### Constructive unfair dismissal

- 3.1 A breach of the implied term of mutual trust and confidence will be a 'fundamental' breach – i.e. a repudiatory breach.
- 3.2 The implied term provides that an employer “*shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*” (*Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493; [2005] ICR 481, per Dyson LJ at ¶14).
- 3.3 Where there has been a repudiatory breach of contract, C may choose to accept the repudiatory breach, resign, and claim constructive (unfair) dismissal.
- 3.4 Whether there has been a repudiatory breach is an objective test (*Omilaju*, per Dyson LJ at ¶14).
- 3.5 A final event “*contributing to a series of earlier acts*” may constitute a “*last straw*” breach (*Omilaju*, per Dyson LJ at ¶¶19-22). An act will not be a “*last straw*” if it is “*an entirely innocuous act on the part of the employer ... even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer*” (*Omilaju*, per Dyson LJ at ¶22).
- 3.6 A Claimant will lose the right to accept the repudiatory breach if she affirms the contract, including by remaining in employment for a significant period of time after the alleged breach (*Bournemouth University Higher Education Corporation v Buckland* [2010] EWCA Civ 121; [2011] QB 323, per Sedley LJ at ¶44):

*“That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination ...”*

## Sex discrimination

3.7 Section 13(1) of the Equality Act 2010 provides:

*“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”.*

3.8 A Claimant must show less favourable treatment by reference to a comparator (actual or hypothetical). There must be *“no material difference between the circumstances relating to”* C and to the comparator (s.23(1) EA 2010).

3.9 The Claimant bears the burden of proving a prima facie case of discrimination – i.e. facts from which the Tribunal could conclude, on the balance of probabilities, that R had committed unlawful acts of discrimination.

- a. C must show sufficient evidence that the Tribunal could conclude on the balance of probabilities that the alleged events occurred.
- b. C must show sufficient evidence that the Tribunal could conclude on the balance of probabilities that any alleged less favourable treatment was done because of C's sex.
- c. A difference in treatment plus a difference in sex does not amount to a prima facie case – something more is required (*Madarassy v Nomura International plc* [2007] ICR 867, per Mummery LJ at ¶56):

*“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.”*

- d. A Tribunal cannot infer discrimination from mere unreasonableness or lack of justification on the part of the employer (*Chief Constable of Kent Constabulary v Bowler* (2017) UKEAT/0214/16/RN, per Simler J at ¶97):

*“Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.”*

3.10 If the Claimant is able to prove a prima facie case of discrimination, R bears the burden of proving a non-discriminatory reason for the less favourable treatment (s.136(2) EA 2010).

## Holiday Pay

3.11 A worker is entitled to be paid upon termination of her employment for accrued (untaken) annual leave which: (i) has accrued in either the leave year in which her employment terminates; as well as (ii) that which has been carried over from a previous leave year because the worker was unable or

unwilling to take that annual leave because she was on sick leave (NHS Leeds v Larner [2012] EWCA Civ 1034; [2012] ICR 1389, per Mummery LJ at ¶¶90-91):

*“90. First, in relation to the carrying forward of unused annual leave, regulation 13(9) would be construed to read as follows:*

*‘Leave to which a worker is entitled under this regulation may be taken in instalments, but (a) it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave.’*

*91. Secondly, in relation to payment on termination of employment, regulation 14 would be read and interpreted to include the following insertion:*

*‘(5) Where a worker’s employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.’”*

- 3.12 This right applies to ‘basic annual leave’ (four weeks) under reg.13 Working Time Regulations 1998 (“WTR”), and not to ‘additional annual leave’ under reg.13A WTR. This is because the entitlement indicated in Larner arises from interpreting the domestic WTR to ensure compatibility with the art.7 EU Working Time Directive (Directive 2003/88/EC) which provides that “Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice”.

#### **4.Findings of fact**

4.1 The tribunal made the following findings of fact from the evidence before it, so far as is relevant to the issues it had to decide.

4.2 The Claimant commenced employment with the Respondent in November 2014, she completed the acceptance form on 4 November 2014 confirming that she had received the employment contract and supporting documents [page 65]. We are satisfied that the Claimant was sent the letter from Human Resources [page 66] with her job and contract details. The Claimant denied that she had been provided with a contract and also denied receiving a number of letters in the bundle setting out changes to her hours, however she accepted receiving all of her payslips, which were sent out monthly. We find that she was provided with a copy of her contract in electronic form and confirming receipt of this was a precondition of her commencing work. We accept that the documents in respect of her contract and hours were produced contemporaneously, and find on the balance of probabilities that they were either provided, or sent, to the Claimant on the dates that they bear. We find that it is more likely than not that those documents were sent to the Claimant and received by her, even if she does not recall receiving

them.

**Issue 1.1** *When the Claimant returned to work following a period of sick leave that ended July 2018 Mr Abu Hassan, acting store manager, refused her request for a staged return to work (as a direct result of this refusal the Claimant was immediately forced to take a second period of sick absence.)*

**Issue 1.2** *When the Claimant returned to work on 14th of January 2019 she voluntarily reduced her contractual hours from 30 hours to 20 hours. However, her working hours had already been reduced by the Respondent on 1 September 2020, without her consent. (If this is correct this change would not have made any difference to her pay.)*

**Issue 2.1.2** *When the Claimant returned to work following a period of sick leave that ended July 2018, Mr Abu Hassan refused her request for a staged return to work. Then she immediately took a second period of sick absence when she returned on 14 January 2019 she reduced her contractual hours from 30 hours to 20 hours. Later she found the hours had already been reduced on 1 September 2018. (This would not have made any difference to her pay.)*

4.3 The Claimant alleges that following a period of sick leave that ended in July 2018 Mr Abu Hassan refused her request for a staged return to work and as a result she was forced to take second period of sickness absence. Mr Hassan denied that he conducted her return to work interview in July or August 2018 for that period of absence and denied that she had ever asked him for a staged return to work. A copy of the return to work interview checklist was in the bundle [page 88] and signed by Mr K Rahman. It contains a reference to an adjustment to the Claimant's hours of working but no mention of a request for a phased return. The Claimant maintained in her evidence before us that she had asked for a phased return and that she was entitled to a phased return to work and as such the Respondent should have considered it. The Claimant strongly refuted requesting a reduction to her hours. We do not find that the Claimant requested a phased return to work from Mr Hassan. We are satisfied that the return to work interview was conducted with Mr Rahman and not Mr Hassan. The Claimant makes no the complaint about Mr Rahman. We are satisfied that the document completed by Mr Rahman records a request for an adjustment to the Claimant's hours not a phased return. The Claimant has not suggested any reason why Mr Rahman would not record her request for a phased return if that is what he had understood her to be requesting.

4.4 Mr Hassan told the tribunal that the Claimant had been rostered to work her full contractual hours on her return to work in August 2018 [ page 91], she approached him at some time in August telling him that she couldn't commit to working 30 hours a week as she did know what's going to happen with her jaw, and asked to reduce her hours to 20 hours per week. As the roster had already been drawn up he asked her if the change could be made from 1 September and she agreed. He notified HR and a letter was sent out from HR in his name [page 84 letter] dated 21st of September 2018. In the meantime the Claimant went off sick and remained absent until January 2019. The Claimant had exhausted her sick pay by this time and the impact of the reduction in her hours was only on her holiday pay entitlement.



4.5 The Claimant denied any knowledge of the letter dated 21 September 2018 or of the change to her hours in September 2018. She told us that she only realised that her hours had been changed from September after she left the Respondent's employment and was told that she had been overpaid which resulted in a deduction from her final pay.

4.6 Mr Hassan considered whether it was possible that when the Claimant approached him she had mentioned a phased return to work, however he did not think that was her intention, she had told him that it was possible that she would have to undergo surgery and that she wanted to reduce her hours for the foreseeable future as she could not commit to the full 30 hours. We accept his evidence on this point and find that letter sent by HR on 21 September 2018 reflected what he understood had been agreed with the Claimant following her request.

4.7 The Claimant was off sick in September 2018 and did not return to work until January 2019. The Claimant says this was as a result of being refused a phased return to work but we find no record of her requesting that formally and we do not see any and evidence that she asked Mr Hassan for a phased return rather than a reduction in her hours. We accept Mr Hassan's evidence that he would have had no reason not to allow her a phased return and that on her return and that he was happy to agree to her doing back room duties, which did not involve talking to customers, on her return in August and again in January 2019.

4.8 There is no reference in the notes of the return to work meeting in January 2019 conducted by Mr Hassan to any change in hours being requested at that time. We find this to be consistent with the change in hours already having been agreed and implemented in September. There was also no letter in January 2019 confirming any new arrangement, nor was there any reference in any of the WhatsApp conversations to there being a reduction in hours in January.

4.9 We find that the change to the Claimant's hours was made as a result of her request to alter her hours in light of her circumstances, including the uncertainty as to date of the anticipated operation on her jaw and the difficulty she was having attending work in the interim.

4.10 We do not find any evidence from which we could conclude that there was any connection with the Claimant's sex. The Respondent had reasonable and proper cause for reducing her hours and there was no breach of any implied term of the employment contract.

**Issue 1.3** *Between the 1 September 2018 and 14 January 2019 Mr Hassan telephoned the Claimant six or seven occasions when she was on sick leave and asked her what her intentions were returning to work. The telephone calls and manner of Mr Hassan were conducted in a very abrupt tone. (The Claimant will say, for example, he did not ask how she was in any of the calls, but just waited to know just wanted to know if and when she was going to return to work).*

**Issue 2.1.3** *Between 1 September 2018 and 14th January 2019 Mr Hassan telephoned her on six or seven occasions when on sick leave and asked the Claimant what were her intentions about returning to work.*

4.11 The Claimant alleges that Mr Hassan telephoned her on six or seven occasions while she was on sick leave and asked what her intentions were in respect of returning to work. She alleges that he was a very abrupt and did not ask how she was. In evidence the Claimant revised her estimate of the number of times Mr Hassan called her during this period and said that she thought it was three or four times. Mr Hassan did not remember phoning the Claimant but accepted that it was possible that he did phone the Claimant once a month to find out how she was and when she would be coming back. He did not recall their conversations but denied he would have been abrupt and he denied not asking how she was, this made no sense to him as this would have been the purpose of the call. Mr Hassan told us that he would contact any of his members of staff who were off sick for number of weeks, he would then check in with them on a regular basis. He did not think once a month or so was excessive, depending on the nature of the illness he might check more frequently. Mr Hassan checked his phone bills for any record of calling the Claimant's mobile number and could find no record of having called the her (the phone records were in the bundle). He believed that it might have been Kai Rahman who contacted the Claimant as it made more sense that he would have contacted her as he was responsible for managing staff absences at this time. The Claimant was covered by a sicknote throughout September to December 2018 and her last sick note covered her until 30 January 2019 when she returned to work. He did not see anything wrong with contacting someone in the days before their sicknote is about to end to find out if they would be coming back to work.

4.12 We accept Mr Hassan's evidence. We find that any calls made to the Claimant would have been part of his or Mr Rahman's normal checking in with the Claimant as they would with any absent member of staff and that he would have asked how she was as this would have been the purpose of the call. We do not find it likely that he would have been rude to the Claimant during any calls and we do not find that he was abrupt. There is no evidence to suggest Mr Hassan treated the Claimant any differently to any other member of staff who was off sick.

4.13 We do find any evidence from which we could conclude that he treated the Claimant any less favourably than he treated or would have treated a man in the same circumstances. Nor do we find that his conduct amounts to a breach of the implied term of trust and confidence, we are satisfied that he had reasonable and proper cause to contact the Claimant while she was absent from work and to make enquiries as to when she might return. We find that the frequency of calls was not such that it was unreasonable in the circumstances.

**Issue 1.4 and 2.1.4** *The Claimant returned to work on 14 January 2019, Mr Hassan was so hostile towards her that the Claimant felt she no longer wanted to work at the Stratford Westfield store.*

4.14 Mr Hassan explained that he found this allegation very vague and he did not know how to respond to it. He thought they had a good working relationship at that time. She was an experienced member of staff and on her return to work in January 2019 he trusted the Claimant to carry out back office tasks which relied on her handling sensitive data, as a way of easing her back into work. This is reflected in the WhatsApp conversations in January 2019. He acknowledged that in her grievance she raised a number of points but those related to the one-to-one meeting on 26 March 2019 that the Claimant recorded. She made other

allegations in her grievance which he denied.

4.15 The Claimant did not provide evidence about any specific incidents in either January or February 2019. She relied on the contents of the 1:2:1 meeting on 26 March 2019 [page 103 to 109] and told us that if we listened to the recording we would hear that Mr Hassan was clicking his pen, and that he did this when he was becoming hostile. The 1:1 was clearly an uncomfortable meeting for her, there are parts where Mr Hassan challenges the Claimant in respect of her approach to sales, her failure to meet targets despite the fact that the targets were lower than they would normally have been due to the Claimant having been off sick and due to her jaw problems, and her conduct on the shop floor which he thought needed improvement. Mr Hassan described the Claimant as seeming disinterested, or being on her phone and at times looking as though she was asleep whilst on the shop floor. However at the conclusion of the one-to-one meeting Mr Hassan makes constructive suggestions to assist her in meeting her targets, including suggesting that she seek support from named managers on the floor who had particular skills or expertise. It appears that he concluded the 1:2:1 by coaching the Claimant in a positive manner. Having read the transcript we do not find he has crossed over into bullying her.

4.16 The Whatsapp messages [page 202 onwards] also show that Mr Hassan was direct but we do not find it crosses the line to being hostile. There were some ongoing issues with the Claimant's performance that he raised with her, for instance on 30 April 2019, after covering the issue in the one-to-one meeting in March he again had to take the Claimant to task for being on the phone while serving a customer [210]. We are satisfied that the managerial role Mr Hassan held required him to coach the Claimant and monitor her targets

4.17 We heard from Miss Uddin who described Mr Hassan as a tough manager who expected you to work hard; if you did he would recognise and praise accordingly. She also described a tough sales culture on the shop floor. She had worked with him since 2014 and had also worked alongside the Claimant during her time at Westfield. Ms Uddin had never seen Mr Hassan single out any of the female staff or behave in a sexist manner.

4.18 We do not find that he acted without reasonable cause or that his conduct amounts to a breach of the implied term. Nor do we find that he treated her this manner because she was a woman, there was no evidence to support that contention.

**Issue 1.6 and Issue 2.1.1**

*On an occasion between 14th January and 31st March 2019, Mr Hassan did not grant permission for the Claimant to take holiday leave as she had requested, giving as his reason that other staff members had booked all available holiday leave. However, a male employee (Mr Mohammed Ibrahim Hussain) was permitted by Mr Hassan to take one week's leave even though his leave request was made after she had made hers.*

4.19 This allegation became clearer during the course of the Claimant's evidence in which she explained that she had requested to take 4 weeks annual leave before the end of the holiday year which was 31 March 2019. She had been unable to

take leave while she was off sick and told us that in the previous year when she had been off sick for a substantial part of the year and was still off sick towards the end of the holiday year she had spoken to her then manager, Mr Abdul Wahid Khan, and he had agreed that she could receive payment for her accrued but untaken holiday for the year 2017/ 2018 in March and April 2018 that is half in March and half in April, April being in the next holiday year. The Claimant had returned to work in January 2019 and in February asked to be allowed to take her 4 weeks accrued holiday before the end of the holiday year. She alleged that he refused her request stating. "Everyone's already booked leave".

4.20 The Claimant compares her treatment that of Mr Mohammed Ibrahim Hussain in March 2019 who she says she heard asking to take his annual leave before the end of March and that his request was approved immediately by Abu Hassan on the spot without consulting the rotas. On hearing this she asked again to be allowed to take her annual leave and her request was declined by Mr Hassan without giving a reason. She asked if she could carry over the full allowance to the next year and was told that he would look into it but she never got a response. The Claimant also told the Tribunal that she asked in the alternative to be paid for the leave she could not take it in one go.

4.21 Mr Hassan told us that he would never let someone take four weeks all at once unless they had exceptional circumstances. Having checked the leave records for February 2019 he told us there were already five people on holiday in the week commencing 11 February, six people the following week, and 2 people the week commencing 25th of February and also someone was leaving that week, he told us that he would have struggled even if the Claimant had only asked for one week off and would not be able to grant a request to not come in at all during Ramadan, which is what the Claimant suggested in evidence. We do not find that she suggested this to him at the time.

4.22 We accept the Claimant's evidence that Mr Hassan had introduced a practice whereby staff were meant to ask him first before formally requesting their leave through the Kronos system and that is why she did not make a formal request.

4.23 Mr Hassan told us that the Claimant was wrong about Ibrahim Hussain's leave: he only took two days of annual leave in March which had already been approved a few months before, he had asked for an additional day over a weekend for a specific family event; the conversation the Claimant heard was not in respect of leave in that holiday year i.e. March 2019 but later in the year and that he cancelled those holidays in any event. Mr Hassan denies that the Claimant repeated her request for annual leave following this conversation with Mr Hussain, he had no recollection that she had asked him for the annual leave at that time.

4.24 We accept Mr Hassan's evidence in respect of Mr Mohammed Ibrahim Hussain's circumstances: he had not accrued 4 weeks of untaken leave and was not asking to take all 4 weeks leave in one go; we accept that he took two days annual leave in March which was prearranged holiday over a weekend due to particular personal circumstances. Mr Hassan recalled the Claimant came into the office in the middle of his conversation with Mr Hussain in which he was asking for time off later in the (calendar) year, that is in the next holiday year. We find that whatever the Claimant heard or thought she heard in the conversation between Mr

Hussain and Mr Hassan she was not aware of the full circumstances.

4.25 We find that the circumstances of the comparator named by the Claimant were not materially the same. We are satisfied that Mr Hussain was asking for a much shorter period of leave, not four weeks and that the conversation was in respect of booking a period of leave in the later part of the year and not to use up a substantial amount of leave at short notice before the end of March.

4.26 We do not find any evidence from which we could conclude that he treated her differently or less favourably than he would have treated a man. The allegation of sex discrimination has not been made out.

4.27 We find that Mr Hassan had reasonable and proper cause to turn down the Claimant's request.

***Issue 1.7 The Claimant's contractual hours were reduced to 12 hours from 1 June 2019, without her consent.***

4.28 The Claimant gave evidence that this reduction was made at the insistence of Mr Hassan who confronted her in May 2019 telling her he had reduced her hours and 20 to 12 from 1 June, alleging that when she asked him if she had a say in this, he replied, "No, your sickness is affecting my business" she alleges that the resulting stress caused to her visit her GP who advised her to take time off, she was signed off for two weeks. During this period she had a phone consultation with occupational health, the report [115-116] noted that she would require time off for medical appointments, surgery and recovery, there was no mention of stress at work. The Claimant's evidence was that when she returned to work for a period of sickness she was on the rota for 12 hours per week three days a week which she says was not enough hours to meet her financial commitments and so she began asking for overtime but that she eventually adjusted to the new working hours having been provided with financial support from her family so that by October 2019 she was only seeking to work 12 hours a week

4.29 Mr Hassan denied unilaterally imposing the change on the Claimant he accepts that her hours were reduced from 1 June 2019 and that she was issued with a letter to confirm the change [page 85]; he recalled the Claimant approaching him about a change and referred to the WhatsApp messages around that time [209 pages to 202] which show that the Claimant had a lot of complications with her jaw around that time and that she had a lot of time off work often notifying him on the day of the shift or the day before and made numerous last minutes requests to change her shifts. It was in this context that he believes that he told her he could not keep changing the rota for her at short notice and she came to him and asked if she could reduce her hours and he agreed. She asked to work 12 hours over three days and said that she would let him know if she could work overtime depending on her situation. Some weeks the Claimant would tell him that she would want to want to work her 12 hours and other weeks she would do overtime, on some occasions she asked to work 12 hours over two days due to other commitments and he accommodated her requests wherever possible. He believes that in the months following the change to her hours the Claimant had a lot of medical appointments and missed a lot of work, he also knew that she was due to have more operations. He pointed out that there was no objection to the reduction in hours in the messages between them and no reference to it being at his

instigation. He pointed to the message on 9 October 2019 [ 215] in which the Claimant states that she wants to stick to the 12 hours and not do any overtime as her circumstances had changed.

4.30 We find that the Claimant was missing shifts and asking for shifts to be altered when she was not able to attend work at short notice. The Claimant told us that she expected those absences be accommodated within her shifts and that she did not think that she should be forced to take time off or miss work for medical appointments.

4.31 We find that as a result of her having missed a number of shifts and asked to change shifts at short notice there was a conversation between Mr Hassan and the Claimant, the outcome of which was that her hours would be reduced to 12 to allow her to accommodate her medical appointments. We accept that the Claimant was told it was in the interests of the business and that her absences were causing disruption to the rotas. However we do not find that the variation was made at the Claimant's request, we find the reduction was put in place in order to ensure her attendance a regular attendance on the shifts for which she was rostered to attend.

4.32 Whilst imposing a unilateral change in hours is capable of being a fundamental breach of contract we are satisfied that in this case the Respondent had reasonable and proper cause for introducing the change, discussed it with the Claimant and explained the reason for it before changing her hours and that Mr Hassan thought that the Claimant had agreed to the variation. We find that in any event had there been a breach the Claimant affirmed the contract by continuing to work under the new terms and that by the time which she decided to resign she only wanted to work 12 hours per week.

**Issue 1.5 and 2.1.5** *The Respondent failed to transfer the Claimant to another store (East Ham), as she had requested, in early November 2019 because of negative comments made about her to managers of the store by Mr Hassan. (The Claimant relies on this behaviour as being "the last straw").*

We have addressed this allegation in its chronological order.

4.33 The Claimant told us that she realised in July 2019 that she was not meeting her targets and would never be up to Mr Hassan's high standards and began to apply for jobs elsewhere. In October 2019 she was shortlisted for an interview with the London Borough of Waltham Forest and having been told initially that she had been unsuccessful, on 13 November she received a call from them offering her a full time post working Monday to Friday, which she accepted immediately. On Friday 15 November she was scheduled to attend a stage 1 sickness absence meeting with Ms Uddin the result of which was that she was placed on a stage 1 formal absence caution to improve her attendance. Mr Hassan was present as a notetaker and after the meeting concluded the Claimant requested a change to her hours so that she only worked at the weekends. Mr Hassan told her he could not accommodate her request at the Westfield store but that she should speak to other stores to see if they could. The Claimant makes no complaints in these proceedings about that, her complaint is that EE failed to transfer her to another store, i.e. a store where those hours could be accommodated. The Claimant accepted that there was no obligation on the Respondent to move her.

4.34 The Claimant complains that when she contacted other stores part of the

reason that she was turned down was because of comments made about her by Mr Hassan to an unnamed manager or assistant manager of one of the other stores. She relied on this as the final straw.

4.35 The Claimant attended the East Ham branch to speak to the manager about a possible transfer, she initially spoke to Yasser the assistant manager and was informed there it was unlikely that it would be possible to work just at weekends but she could come back to speak to the manager. She returned and spoke to Mr Serkan Hassan and told him she was looking for of 12 hours at the weekend could not be accommodated because he already had a number of part time staff and the Claimant told him she only wanted to work two shifts which would make it very difficult for him to cover the rota. Serkan Hassan denied having had a conversation with Abu Hassan about the Claimant or telling her that he had. Yasser was interviewed as part of the Claimant's grievance and he denied that Abu Hassan had said anything derogatory to him about the Claimant.

4.36 The Claimant refused to name the manager she spoke to as she did not wish to get them into trouble but was adamant that she was told that Abu Hassan had said words to the effect that, "She's shit and off sick all the time," "she's just another body in the store" (a phrase the Claimant referred to an number of times as being used about her in the 1:2:1), "Her attitude is shit, she doesn't know what she's doing and doesn't know how to engage with customers" She readily accepted that these comments were not repeated to her by Mr Serkan Hassan and she accepted that the reason given to her by Mr Serkan Hassan and by his assistant manager, Yasser, was they could not accommodate the 12 hours she wanted to work at weekends only to fit in round her new job that she had already accepted with the London Borough of Waltham Forest.

4.37 We accept the Claimant's evidence that what prompted her resignation and to announce it on the WhatsApp group as well as in writing, was her upset at being at hold by a manager at another store that Mr Hassan had described her in these terms.

4.38 We do not find that Mr Hassan had used an offensive swearword to describe the Claimant, as she subsequently alleged, nor do we find that he used the precise words quoted by the Claimant, however we are satisfied that the gist of what he had said was relayed back to the Claimant by a third party.

4.39 We find this is capable of amounting to a breach of the implied term of trust and confidence and that there was no reasonable or proper cause for using those descriptions about the Claimant. We are satisfied that this was the final straw which caused her to resign when she did.

## **5. Conclusions**

### **Constructive unfair dismissal**

5.1 For the reasons set out above we have found that the conduct of the Respondent in speaking about her in such disparaging terms to a manager at another store was without repairable and proper cause and was a breach of the implied term of trust and confidence and that the Claimant was entitled to resign

as a result. The claim for unfair dismissal succeeds.

### **Sex discrimination**

5.2 For the reasons we have set out above we do not find that the Claimant was discriminated against because of her sex and that claim is dismissed.

### **Holiday pay**

5.3 The Tribunal spent some time trying to work out the Claimant's holiday pay entitlement. Based on our finding that the contractual change took place in September 2018 and was agreed by the Claimant we have used the first of the calculations (numbered 1) in the Respondent's email provided on 13 November 2020.

5.4 The holiday year ran from 1 April to 31 March [contract at page 71], the Claimant was entitled to 25 days holiday a year. The Claimant accepted that she was paid for 20 hours accrued holiday carried over from the previous holiday year. The Respondent maintained that it overpaid the Claimant by 19.33 hours, paying her a total of 116 hours when she had only accrued 96.67 hours and she had taken 36.6 hours, the 20 hours carried forward in April 2018 into the subsequent holiday year were paid on termination, and she was paid an additional 60 hours after the termination of her employment.

5.5 The Claimant's claim arose from her contention that she had agreed with that she could carry forward holiday accrued but untaken whilst she was on sick leave from the year ending in March 2018 and that she was owed a further week's pay. The Claimant's evidence was unclear in relation to how much of that leave she was paid for in 2018 and 2019 and how much was allegedly still outstanding on termination. The Respondent's records show that she took leave in March and April 2018 which the Claimant did not recall.

5.6 We note that the burden was on the Claimant to establish the loss. We are satisfied that the Respondent's records are likely to be accurate and find that the Claimant's evidence as to whether she took leave or was paid for it and if so how much, was vague and unclear. From the information provided to us we find on the balance of probabilities that there has been an overpayment to the Claimant by the Respondent of 19.33 hours which together with the leave that was taken in April 2018 which the Claimant did not recall taking but accepted that she was paid for, appear to extinguish her claim for holiday pay. On the evidence before us we are unable to find that there was any outstanding accrued but unpaid leave we therefore dismiss that claim.

## **6. Remedy for unfair dismissal**

6.1 We find that the claimant had already accepted the full time job at London Borough of Waltham Forest. She had wished to remain working additional part time hours for EE, seeking to work 12 hours at the weekend, in evidence expanded to any hours she could pick up in the evenings after work but we find that at the time she resigned she was only looking to work 12 hours over 2 shifts at the weekend. These hours were simply not available. The Claimant accepted that these hours could not be accommodated at Stratford Westfield, nor could they be



accommodated at East Ham, nor on the claimant's evidence could they be accommodated at the alternative West Ham store where she had made enquiries. The claimant could not travel as far as Woolwich. We find therefore that there was no possibility of her finding hours that would be compatible with her new job at a store within an acceptable travelling distance and she would have resigned in any event in order to take up her new job. The Claimant has therefore not suffered any financial loss as a result of the dismissal.

**Basic award**

6.2 The Claimant is entitled to a basic award. She was employed by the respondent for five complete years, in each one of which she was over the age of 18 and under the age of 41, she is entitled to one week's pay for each complete year. At the date of dismissal her week's pay based on her then annual salary of £6109 was £117.48; five weeks £117.48 at per week = £587.40. The total basic award is the sum of £587.40.

**Employment Judge Lewis  
Date: 23 February 2021**