EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113412/2019

Held in Glasgow by Cloud Video Platform on 11-15 July 2022

Employment Judge M Sangster
Tribunal Member D McFarlane
Tribunal Member R McPherson

Miss C Urquart	**Claimant** **Represented by** **Mr S Smith -** **Solicitor**
Sky Subscriber Services Limited	**Respondent** **Represented by** **Mr G McGregor -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant's complaint of constructive dismissal succeeds. The respondent is ordered to pay the claimant the sum of **£23,095.12** by way of compensation;

- The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is **£14,499.76** and relates to the period from 7 September 2019 to 6 September 2020. The monetary award exceeds the prescribed element by **£8,595.36**;

- The claimant's complaint of indirect discrimination does not succeed and is dismissed; and

- The claimant's complaints of discrimination arising from disability and failure to make reasonable adjustments are dismissed following withdrawal.

REASONS

Introduction

1. The claimant presented complaints of constructive unfair dismissal and disability discrimination (discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments). Early conciliation took place from 30 September to 13 November 2019. The claim was lodged on 24 November 2019.

2. The respondent resisted the complaints.

3. The claimant made an application to amend her claim to include a claim of indirect sex discrimination. That application was refused, by Judgment dated 8 March 2021.

4. Case management preliminary hearings took place on 2 April, 3 July, 18 August and 16 December 2020. At the last of these, it was agreed that evidence in chief at the final hearing would be given by way of witness statements, which would be taken as read. The case was set down for a five day final hearing on that basis, in March 2021.

5. The final hearing then was postponed on 4 separate occasions, as a result of requests from both parties. A further request, from the respondent, to postpone the hearing set down for July 2022, as a result of a key witness being on holiday, was refused.

6. A joint bundle of documents was lodged in advance of the hearing, extending to 340 pages. 13 further pages were added to the bundle by the claimant, with consent, at the outset of the hearing.

7. Despite the agreement reached at the preliminary hearing on 16 December 2020, the parties did not lodge witness statements. Evidence in chief was therefore taken orally.

8. The claimant gave evidence on her own behalf. The respondent led evidence from Elaine Fullerton (**EF**), Senior Operations Manager for the Respondent and David McQueen (**DM**), Sales Manager.

9. The other individuals referenced in this judgment are as follows:

a. Mark Birkin (**MB**), note taker at meetings conducted by the respondent;

b. Martin Green (**MG**), Sales Manager for the respondent;

c. Francis Mahon (**FM**), Elected representative for Customer Experience Leaders, including the claimant;

d. Paul Miller (**PM**), Individual Consultation Manager for the claimant's individual consultation process; and

e. David Tonner (**DT**) Senior Sales Manager for the respondent.

Issues to be determined

10. The complaints brought were discussed at the outset of the hearing. It was noted that the respondent accepted that the claimant was a disabled person at the relevant times by reason of anxiety and depression and that the respondent had knowledge of the disability.

11. An agreed list of issues was included in the bundle.

12. During submissions, the claims of discrimination arising from disability and failure to make reasonable adjustments were withdrawn. Mr Smith, for the claimant, also confirmed during submissions that, in relation to the complaint of constructive dismissal, the claimant was not relying on part 1.e. from the list of issues lodged, nor the words 'and below' in part 1.g.

13. The issues to be determined by the Tribunal, by the conclusion of the hearing, were accordingly as follows:

Constructive Unfair Dismissal - s95(1)(c) Employment Rights Act 1996 (ERA)

14. Did the respondent treat the claimant in a manner that amounted to a repudiatory breach of the express or implied terms of the claimant's contract of employment? The claimant relies on the cumulative effect of the following alleged breaches of her contract of employment:

a. FM in October 2018 informing her that she would be able to amend her working hours later in the process, because she had young children, which she was informed later was not in fact the case;

b. Failing to investigate adequately her grievance dated 30th March 2019 regarding this, and also the discriminatory effect that the duration and delay in the process was having on her, or to take proper account of this;

c. Failing to take proper account of information provided in an Occupational Health report in April 2019 about the effect that the process was having on the claimant's health, and that her childcare situation was a barrier to her being able to continue in employment;

d. Failing to answer the claimant's grievance for a period of three months to June 2019, and failing to take proper account of or answer her flexible working request for another three months, to September 2019;

e. Informing her in July 2019 that she would be given 48 hours' notice to leave the respondent if she was to decline the new hours that the respondent had given her;

f. Acting in a discriminatory fashion as detailed above.

15. Did the above alleged acts amount to a repudiatory breach of the implied term of trust and confidence in the claimant's employment contract?

16. If the cumulative effect of the above did amount to a repudiatory breach of the claimant's employment contract, did the claimant resign in response to this alleged breach?

17. If so, did the claimant delay unreasonably before resigning on 28 August 2019?

Indirect disability discrimination - s19 Equality Act 2010 (EqA)

18. Did the manner in which the respondent conducted the consultation, grievance and flexible working process relating to the claimant's change of shift pattern constitute a PCP for the purposes of section 19 of the EqA?

19. If yes, did this PCP place persons with the claimant's disability at a particular disadvantage in comparison with persons who do not share the claimant's disability of anxiety? The claimant alleges she was placed under the following disadvantage:

a. being affected more adversely by the duration of the process, and the prolonged uncertainty compared to non-disabled employees.

20. Insofar as there was such treatment, was this treatment a proportionate means of achieving a legitimate aim? The respondent relies on the following legitimate aims:

a. ensuring that a fair and detailed collective and individual consultation process was carried out with the respondent's employees including the claimant; and

b. thoroughly investigating the claimant's grievance and flexible working appeal in a thorough and fair manner to ensure that a detailed response to the multiple complaints and grounds of appeal raised could be provided.

Remedy

21. What award, if any, is the claimant entitled to recover for injury to feelings?

22. What award, if any, is the claimant entitled to recover for financial loss?

23. Should the Tribunal award an uplift or reduce any award for failure to comply with the ACAS Code due to the claimant's failure to comply with the ACAS Code to reflect the fact that the claimant did not exhaust the internal grievance process by failing to appeal against her grievance outcome before resigning on 28 August 2019?

24. Should the Tribunal apply any reduction to a compensatory award under section 123(6) ERA on the grounds that the claimant contributed to her dismissal by her conduct in refusing to accept the rota patterns offered to her and choosing to resign.

Findings in Fact

25. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

26. The respondent is satellite broadcasting, broadband and telephone services company. They operate from numerous sites throughout the UK.

27. The claimant's employment transferred to the respondent with effect from 1 July 2016, retaining her continuity of employment from 28 July 2003.

28. The claimant was employed by the respondent as a Customer Experience Leader (**CEL**) at the respondent's call centre site in Glasgow. The claimant's role involved managing a team of customer service advisers. The claimant worked 26 hours per week. From her return to work following maternity leave in 2008, she worked those hours in a fixed pattern of: Tues (10am-2pm) Wednesday (10am-5pm); Thursday (10am-5pm); and Friday (10am-6pm).

29. On her transfer to the respondent's employment, she was provided with a contract of employment (but not asked to sign or agree to this) which stated, at clause 4 *'Sky products are used by our customers 24 hours a day, 7 days a week. In order to be there for our customers when they need us, Sky operates a flexible shift pattern scheme. You will work 26 hours per week and will be required to work evenings and weekends as part of this shift pattern. Changes to your shift pattern will be communicated to you giving you 4 weeks' notice.*'

30. Commencing on 20 September 2018, the respondent conducted collective consultation process with employee representatives in relation to proposals to amend the shift patterns of its Customer Experience Teams. The consultation process required to last for a minimum of 45 days. The proposals potentially impacted the working patterns of approximately 1,800 employees across different locations. Employee representatives were elected and informed, at the start of the consultation process, that *'all documents provided in the collective meetings are for your information only and not for forwarding on'.* They were informed that the respondent would like them to communicate with their constituents between each collective meeting and feedback any question or discussion points, prior to the next collective consultation meeting. It was suggested that email may be the most effective way for the employee representatives to communicate with their constituents. The main information communicated by the employee representatives was a Q&A document, which was updated on a weekly basis.

31. The consultation process resulted in 'Shift Principles' being agreed, on or around 2 October 2018. The agreed Shift Principles included the following statements:

    a. *'All shift patterns will include an evening and/or weekend element – whether it's a full time/part-time/fixed/rotational shift patters – fairly distributed across the estate.*

    b. *CEL – Advisor coverage must be 90%-100%.'*

32. The collective consultation process ended at the start of November 2018. Impacted staff were then sent a document entitled *'Employee Guide to Choosing Shift Preferences & Frequently Asked Questions'*. This set out the process for choosing shifts in the shift preferencing window, which was due to run from 23 November 2018 to 7 December 2018. The frequently asked questions comprised the questions asked in the course of the collective consultation process. There was no reference within this document to the 90% requirement for CELs.

33. There were 9 part time shift patterns. All involved evenings and/or weekends. None could be adjusted by up to 10% to avoid working evenings and/or weekends. The respondent did not agree to any adjustments to the identified shift patterns beyond 10% in any circumstances, even if there were medical or childcare reasons which prevented a worker undertaking one of the identified shift patterns.

34. The claimant was absent from work from 23 August to 24 October 2018. Her medical certificates confirmed that the reason for her absence was anxiety and depression. She returned to work, on a phased basis, from 25 October 2018. On her return to work, the claimant remained on prescribed anti-depressant medication.

35. On her return the claimant was informed that she would require to choose from the 9 part time shift patterns, during the shift preferencing window. The shift patterns presented difficulties for the claimant, who had two daughters, aged 2 and 11. Grandparents provided daycare for her preschool aged daughter, but they could only do so during the week, and not at weekends. The claimant

was unable to start work prior to 9.30am on weekdays, as she needed to take one of her daughters to school and her other daughter to her grandparents, before starting work. She could not work evenings or weekends.

36. FM was the elected employee representative for the constituency the claimant fell within. The claimant asked FM what she should do if none of the shift patterns suited her. He sent an email to the respondent's Ask A Question Team, which had been set up for the purposes of the consultation process. On 19 November 2018, FM forwarded their response to the claimant, which was as follows:

'We aim through the collective and individual processes to reach agreement on the shifts with each individual and we will work very hard with everyone to achieve this. If you can't see any shift that you like, please choose shifts closest to what you can do and we will address any concerns you have in individual consultation. If you decide not to choose any preferences at all, we may allocate you a shift that is undersubscribed and we'd prefer not to do this.'

37. FM and the claimant discussed matters further and he stated to her that this meant she should choose the shift pattern with the days she could work. Adjustments would then be addressed in individual consultation.

38. At the start of December 2018, the claimant asked FM when she should put in a flexible working request. He again sent an email to the Ask A Question Team. On 4 December 2018 FM informed the claimant of their response, which was as follows:

'You will be able to do that following individual consultation conversations where we have confirmed the shift pattern you have been allocated and explored all adjustments we may be able to make with you. This would be considered in line with a slightly adapted business as usual process and along with any others which are submitted following this shift review process. Please note that we will accept flexible working applications as part of this shift review even if you had made one within the past 12 months as we appreciate that we're in unique circumstances at the moment.'

39. During the shift preferencing window, the claimant chose one shift pattern, which was a two week rotational pattern with the following hours:

    a. Week 1 Friday & Saturday OFF Sun -Thurs 08:30 13:30

    b. Week 2 Friday 08:30 13:30 Saturday & Sunday OFF Monday - Thursday 08:30 13:30

40. The claimant chose this shift pattern as it only required individuals to work one weekend day out of every two weeks. The others all required at least one weekend day every week. Removing the requirement for one weekend day every two weeks, and moving the remaining shifts forward by an hour each day, would have made the shift pattern workable for the claimant.

41. The claimant attended her first consultation meeting on 9 January 2019. She was informed that she had been allocated the shift she had chosen. She stated that none of the shifts suited her, but she chose the one that was closest and she wanted to propose changes to it so that she would start at 09:30 each day and not work weekends, due to childcare commitments. She was advised that this would be put forward, but may not be approved, as moving the start of each shift by 1 hour per day would constitute 20% of her shift, and she would require to be present for at least 90% of the time her team were working. The claimant indicated that she had not been made aware of this requirement. She stated that *'the reps have advised her to pick a shift when she really didn't want any of them and she was told that she could change the shift (make tweaks) after the shift was picked. If [she] had understood the process she would have picked a different shift that would have required less changes.'* The claimant's concern was recorded in the minutes of the consultation meeting, which were reviewed by senior managers overseeing the consultation process. No action was taken in relation to the claimant raising this matter.

42. Given what she now knew, the claimant felt Shift Pattern 8 would have been a more appropriate choice for her. This involved working from 09:30-14:30, Tuesday to Saturday. This would only have required an adjustment to the Saturday shift. Even if it was not possible to entirely remove the Saturday shift,

with adjustments of up to 10%, she may have been able to put in place arrangements to accommodate that.

43. A second consultation meeting took place with the claimant on 30 January 2019. She was informed that her request to amend the shift pattern allocated had been declined 'due to CEL coverage with team'. The claimant stated that she was misled by FM about the shift allocation process and the flexibility within shifts and asked for this to be investigated, asking for a named person to be assigned to do so. The claimant's concerns and request were recorded in the minutes of the consultation meeting, which were reviewed by senior managers overseeing the consultation process. No action was taken in relation to the claimant raising these concerns or in relation to the claimant's request.

44. On 12 February 2019, the claimant, together with her manager at the time, completed a formal flexible working request form. The form highlighted that the changes requested were required due to childcare. The claimant requested the following shift pattern:

    a. Tuesday 09:30 – 14:15

    b. Wednesday 09:30 – 17:00

    c. Thursday 09:45 to 17:00

    d. Friday 09:30-18:00

45. The claimant met with PM on 25 February 2019 to discuss her flexible working request. During this meeting it was agreed that the claimant would be referred to occupational health and a referral form was also completed in relation to that.

46. In mid-February 2019, the claimant raised with DT that she felt that she had been misled by FM, who stated that she should chose a shift pattern close to what she could do and tweaks to that shift pattern would be accommodated. She asked about when her employment would terminate if she did not accept a shift pattern and what notice she would receive. DT asked MG to investigate the concerns raised by the claimant.

47. MG spoke to the claimant on/around 21 February 2019. She reiterated her complaint to MG. She stated that she was unaware of the requirement for CELs to be on shift for at least 90% of the time that the advisors in their team were, as stated in the Shift Principles. She stated that she had never been informed of this. She stated that she had been trying to make this complaint for weeks, but no one had spoken to her about it, prior to MG doing so. MG reported the terms of this conversation to DT, by email dated 21 February 2019.

48. MG them spoke to FM, on or around 5 March 2019. FM stated to MG that he had advised the claimant that she would require to *'pick a shift with days that she could work'*. He stated that he told the claimant that changes to shifts *'would be dealt with at [individual consultation] and not collective consultation.*' When asked whether he discussed the 90% coverage requirement with the claimant, FM stated *'not directly with Claire but it was spoken about generally, this was told to us by ask a question'.* MG reported the terms of this conversation to DT by email dated 6 March 2019.

49. On 5 March 2019, MG also met with the claimant and advised her that he '*could not find anything to uphold in the concerns she raised about the information that was she given during collective consultation.*' The claimant stated to MG that she could not move to any shift involving weekend work. She asked MG about the dismissal and reengagement process and whether she would receive notice of the termination of her employment. The claimant was very upset and tearful throughout the conversation and stated to MG that the whole process was having an effect on her mental health. She stated that she was a single mum with two children and was worried that she may be in a position where she did not have a job in three weeks. MG reported the terms of this conversation to DT by email dated 6 March 2019.

50. MG reported the terms of this conversation to DT and PM the following day, by email. No action was taken thereafter. No one investigated what notice the claimant would be entitled to, if her employment were to terminate, or responded to her query in relation to this.

51. On 15 March 2019, the claimant asked her individual consultation manager at the time how much notice would she get if her contract was terminated. The manager posed the question to the Ask A Question Team, noting that *'the person asking the question is very stressed and anxious about the full situation and is looking for a straight answer ASAP.'*

52. The Ask A Question Team responded on 28 March 2019 as follows:

'Most importantly we want to get to a positive resolution for each person impacted by the shift review. Only once the shift review process has been fully exhausted for Clare i.e. that the FW Appeal process had been exhausted would there be a conversation about the possibility of being invited to a final meeting with her IC manager. The invite to the meeting would be provided in written format and give Clare at least 48 hours notice. It would also advise that she has the right to be accompanied. If Clare would like further information on what would be discussed this can be provided.'

53. This did not answer the question posed. The manager sent a further email to the Ask A Question Team highlighting this and asking for a clearer answer.

54. The claimant raised a formal grievance on 29 March 2019 regarding:

a. the shift allocation process, how it had been dealt with and being misled FM;

b. the lack of flexibility in the shift patterns offered;

c. The fact that her concerns in relation to this had not been addressed to date and the questions she raised had not been answered, particularly in relation to the notice she would receive if her employment was terminated. She stated *'I have asked will I be dismissed without any notice? Will I get 4 weeks? will I get 15 weeks, a week per year for working at SKY? Nobody seems to know';* and

d. The stress and anxiety the process and delay was causing her.

55. By this time all shifts were allocated and the majority of individuals had started, or were about to start, working in their new shift patterns.

56. On/around 1 April 2019, the occupational health referral forms in relation to the claimant's referral, initially discussed on 12 February 2019 were finalised. The claimant was contacted by occupational health in relation to an appointment on 4 April 2019.

57. On 17 April 2019, the claimant attended for a consultation with occupational health and then attended a grievance meeting with EF. Each of the grievance points was discussed at the grievance meeting. The claimant stated that she was told by FM to pick the shift pattern closest to her days off, and then address matters in individual consultation. She stated that she was not told about the 90% coverage rule. She stated that she followed FM's advice and picked the pattern with fewest weekend shifts, but she cannot do the shift pattern, as it involves 08:30 starts and flexing that involves a change of more than 10%. The other shift patterns, which may have been workable with tweaks, have now been allocated to others and are not available.

58. EF asked the claimant what she could take away for her to get answers to and the claimant confirmed she wanted to know how much notice she would get if her employment was terminated. She stated she had been asking this question and no one seemed to be able to tell her how much notice she would get. She stated she would need to find another job and asked whether she was just going to be sacked. It was discussed that the process had exacerbated the claimant's mental health issues and EF highlighted that the claimant had stated that the timescales of the process had caused the claimant stress. At the conclusion of the hearing, EF stated that she expected to be in a position to confirm the outcome within 14 days.

59. A report was prepared by occupational health, following the claimant's consultation with them. The report stated that:

'Clare has suffered from depression and anxiety for around 10 years. In that time, she has been subject to various appropriate supports and treatments including medications and counselling. As is often the case with depression and anxiety her symptoms have gone through periods of relative stability at times and at other points they have been more exacerbations. Again, as is

often the case periods of exacerbation can commonly be attributed to periods of perceived stress.

Clare reports that her anxiety and depression has been exacerbated in the last 6-9 months and in recent months she does feel that this is attributable to the shift review process at work which she is perceiving to be stressful. More specifically Clare is concerned that she is unable to do the proposed shift due to childcare commitments at the weekends and early in the morning when she takes her kids to school. Clare reports that she is concerned that if this flexible working issue cannot be resolved then it may impact her on-going employment

Clare reports symptoms of disturbed sleep, low mood, heightened emotions, panic attacks and reduced concentration. Clare reports that her GP has made some adjustment to her long-term medication regime in the last month with some degree of perceived benefit. They have also referred her for cognitive behavioural therapy through the NHS and she is currently awaiting an appointment for this.'

60. The report recommended that the claimant have a fixed working pattern, which did not involve 6 consecutive days and highlighted that there were non-medical barriers to the claimant undertaking the proposed shift pattern, namely childcare, and the stress related to this was exacerbating her condition.

61. On 9 May 2019, the claimant attended a 3rd individual consultation meeting with PM. She was informed at the meeting that her flexible working request had been rejected, as there would be a negative impact on quality and performance and the respondent could not reorganise work among existing staff. The question she had asked on 15 March 2019 (as set out at paragraph 51 above) was discussed. The claimant was provided with the answer provided by the Ask A Question Team, as set out in paragraph 52 above, notwithstanding the fact that the manager at the time had noted that the response provided did not answer the question the claimant had asked.

62. Following the grievance meeting, EF took the followings steps:

a. She obtained a summary of events from PM and the claimant's previous individual consultation manager;

b. She reviewed the occupational health report prepared in relation to the claimant;

c. She held brief meetings FM, MG, PM and MB on 9 May 2019 and DT on 16 May 2019.

d. She reviewed MG's emails to DT, dated 21 February and 6 March 2019 (as referred to in paragraphs 47, 48 & 49 above), which MG forwarded to EF following their meeting.

63. In the investigation meeting with FM, and contrary to what he had stated to MG on 6 March 2019, FM stated to EF that he did not advise the claimant what shift to choose, or provide her with any direction in relation to this, beyond providing the response from the Ask A Question Team to her. EF asked FM whether the claimant had brought any issues to him during the collective consultation process, for him to discuss with the business. FM indicated that she had not. FM stated to EF that he had made the claimant aware that there would be a minimum 90% coverage of teams to CEL. Again this was contrary to what FM had stated to MG on 6 March 2019. When asked if the claimant received clear 'comms' about the 90% coverage, FM stated *'probably, I can't remember in great detail.'* When asked if it was in the comms from the business at the time, FM stated *'I would need to go back and check but it is in there'*. EF did not ask FM to provide her with evidence of what he sent to the claimant, or what was sent to the claimant by the business, to check whether this referenced the requirement for 90% coverage.

64. On 27 May 2019 the claimant submitted a flexible working application appeal form. She reiterated in her appeal form that she felt she had been misinformed about the shift allocation process. She highlighted that she had *'been on the same hours for 10 years and everything is set up to facilitate this. Since having my second child I have been struggling with my mental health and suffered a breakdown last year. I cannot make into work any earlier than 9:30am.'* The claimant agreed to the respondent's suggestion that consideration of her appeal would not commence until her grievance outcome had been determined.

65. The claimant received a written outcome, in relation to the grievance which she submitted on 30 March 2019, on 20 June 2019. Her grievance was not upheld.

66. EF's findings were, in summary, that:

a. The claimant was not misled by FM. The information given to the claimant by FM was provided to him by the Ask A Question Team. FM advised the claimant to pick a shift with days that she could work. He correctly advised her that individual circumstances and concerns would be addressed at individual consultation and if she was looking to adjust her shift this would be picked up then. FM had a conversation with claimant about the minimum of 90% CEL coverage principle and advised her of this. He distributed a pack to all the CELs, including the claimant, that included details of the 90% coverage principle.

b. The shift changes were agreed in collective consultation. EF found it particularly significant that the claimant did not:

   i. raise any points with FM during the collective consultation stage, for him to take forward with the business; or

   ii. attend any of the drop in meeting sessions organised by FM for people to come and discuss the collective consultation process.

c. There was flexibility in the shift process. Whist the business had specific shift patterns, there was a process available to submit a flexible working request, even if someone had done so in the last 12 months.

d. The claimant's occupational health report was taken into account, prior to her flexible working application being rejected.

e. There was no evidence to suggest that DT had acted without empathy towards the claimant.

f. Whilst the timescales for dealing with matters were longer than the business would have liked and were not ideal, it was not possible to draw a definitive conclusion that this had impacted the claimant's health.

g. Whilst it would have been preferable for MG to have provided a written outcome to the claimant in/around March 2019, the complaints process was not otherwise flawed.

67. In response to the particular point which the claimant had asked during the grievance meeting, and EF had agreed to take away and obtain an answer to (as referenced at paragraph 58 above), EF stated in her outcome letter:

'During my investigation, it's clear that throughout this process you have continued to ask questions of a similar nature and this seems to be causing you frustration as you feel you have not been able to get clear answers. You have asked Francis Mahon, David Tonner, Paul Miller, Martin Green and also myself in your Grievance meeting about timelines, specific next steps relating to the dismiss and re-engage process and information on redundancy. You have not been provided with an answer to the dismiss and re-engage process as we absolutely don't want to get to this stage with any of our employee's affected by the shift changes. We would not start talking to you about this unless we had absolutely exhausted all options. I want to clarify that we will not be making anyone redundant as part of the shift consultation, your role is not redundant therefore there is no further information we can give you on this.

We want to get to a positive resolution for each person impacted by the shift review process, only once the shift review process has been fully exhausted i.e. the Flexible Working Appeal process, would there be a conversation about the possibility of being invited to a final meeting with your IC manager. The invite to the meeting would be provided in written format and give you at least 48 hours-notice. It would also advise that you have the right to be accompanied. The meeting would be to talk to you again to understand if you are able to accept the shift and timelines for moving onto the shift If during the meeting you could accept the shift, consultation would close. If you were unable to accept the shift offered, it would be a dismissal meeting and a letter would be provided confirming the details of the dismissal along with an offer to re-engage on a new shift pattern. I would like to re-iterate at this point we really don't want to get to this stage as there is a shift for you.'

68. The claimant was offered the opportunity of appealing against the grievance outcome, but decided not to. She felt there was little point in doing so, as it appeared to come down to her word against FM's and she did not have any new evidence to add beyond that. She felt that no one had listened to her so far and the same process would simply be followed again, which appeared to be pointless.

69. The claimant attended a Flexible Working Appeal meeting on 5 July 2019 with DM. At that meeting DM offered the claimant the option of working on one of two new part time shift patterns, which had recently been introduced. The shift patterns did not involve 6 consecutive days or starting at 8.30am on weekdays. Both however involved working solely in the evenings during the week, commencing at 17:00, and a full weekend day, from 08:30 to 17:30. The claimant rejected both shifts as unsuitable. This was due to her childcare responsibilities, which she had repeatedly informed the respondent of. At the conclusion of the appeal hearing, DM informed the claimant that he expected to be in a position to confirm the outcome of her appeal in 7-14 days. There was no suggestion that this was dependent upon any action on the claimant's part, for example the claimant agreeing that the minutes of the meeting were accurate.

70. On 23 July 2019 the claimant was sent a copy of the minutes of the meeting and was asked to confirm they were accurate. She returned these to DM with her approval. On 27 August 2019, he indicated that there was a page missing in the notes she had returned and asked her to confirm that the missing page was also accurate. There was no suggestion that the flexible working outcome was dependent upon her doing so.

71. By 29 August 2019, the claimant had still not received a response to her flexible working appeal. As she had never been informed, despite her repeated requests, whether she would receive notice if her employment was terminated, she was concerned that her appeal would not be upheld and she would then be invited to a meeting on 48 hours' notice and be dismissed without payment in lieu of notice. She was concerned that she would, on very little notice, be in a position where she had no job and no income. She found it very difficult to

cope with the ongoing uncertainty and this was adversely impacting her mental health. She was worried every day that her employment would be terminated without notice. She felt she needed to take steps to secure alternative employment, so she would not be in that position. She obtained temporary employment with Argos, from 9 September to 23 December 2019.

72. On 29 August 2019 the claimant resigned. She felt she could not wait any longer and needed to take some element of control of the situation. She completed an online form with her manager as her formal notification, selecting the option 'unable to balance personal responsibilities and work' from a list of options as the reason for her resignation. She agreed with her line manager to work one week's notice until 6 September 2019, so as not to leave the respondent without cover.

73. After submitting her resignation, the claimant contacted DM, chasing for the flexible working appeal outcome. DM responded that he hoped to have the outcome confirmed 'by next week at the latest' and asked her to confirm that she agreed the page of notes, previously missed, was accurate. She did so by return. The claimant chased DM again on her last day of employment for the outcome. It was sent to her that day. Her appeal was not upheld.

74. The claimant earned £423.88 gross/£356.63 net per week with the respondent. The respondent contributed £29.13 to the claimant's pension each week.

75. The claimant earned £2,433.92 net in her temporary position with Argos. The claimant has not been able to secure alternative employment, which suits her childcare commitments, since her role with Argos came to an end. The claimant has applied for approximately 14 alternative roles, since her employment with the respondent ended. The claimant has been in receipt of universal credit, since her role with Argos came to an end.

Claimant's submissions

76. Mr Smith, for the claimant, lodged a written submission, which he supplemented with an oral submission. His written submission set out the relevant legislative provisions and case law relied upon, then summarised the factual position. In summary, he submitted that:

Constructive Dismissal

a. The claimant's decision to resign was predominantly motivated by the acts and omissions of the respondent and the cumulative effect of these. He summarised the evidence in relation to each point relied upon. He submitted that it is relevant for the Tribunal to consider whether the employer has acted reasonably in how it has conducted matters: ***Burton, McEvoy & Webb v Curry*** UKEAT/0174/09/SM, and that failure or delay on the part of the employer in allowing an employee to have matters of concern addressed can amount to a breach of trust & confidence: ***Goold WA (Pearmak) Ltd v McConnell*** [1995] IRLR 516, EAT.

Indirect Discrimination

b. In relation to the claim of indirect discrimination, the consultation process – and, crucially, its application – was a PCP which created particular disadvantage for the claimant. Given the interaction between the flexible working process, which was related to the allocation of shifts, and the grievance, this can be regarded as one 'process.' It was clear that a panel determined the allocation of shifts and they would have been aware of the claimant's concerns. Between February and July 2019 the claimant repeatedly stated that the delay and uncertainty caused by process caused her stress.

c. The delays acted to the claimant's disadvantage in 2 ways: the progress of the consultation process saw shifts allocated to others, so there were less potential alternatives the claimant could do; and it also continued to cause her anxiety for a longer period, something she had made known to the respondent and was also recorded by OH.

d. In particular, the claimant was uncertain about her rights as an employee to notice pay. It was this uncertainty which led her to resign – to take an element of control, rather than wait to be told the respondent was not able to find a solution, or to answer her query about her rights.

e. On the facts, the manner in which the respondent conducted the consultation policy acted to the particular disadvantage of claimant.

f. The steps taken by the respondent cannot be regarded as proportionate. The aim of the respondent in meeting customer demand and staff request for weekend shifts to be more evenly spread out was legitimate. But this could have been achieved in a way which could have avoided the effect this had on the claimant. Had the respondent conducted matters with greater efficiency and transparency, the claimant would not have been put to the particular disadvantage that she was.

Remedy

g. It is not accepted that the claimant was likely to have either resigned or been dismissed under a fair process. Had the Claimant's misconception of the shift allocation process been identified and cured earlier, her employment could have continued.

h. Had the claimant been dismissed, she would have been paid 12 weeks' notice. The respondent did not tell her about this. She lost out on 11 weeks' notice as a result.

i. Vento – the duration of the period of stress for the claimant was one year, from Sept 2018 to Sept 2019.

j. Lockdown and childcare responsibilities have restricted the claimant's ability to obtain a new role. The Schedule of Loss has taken account of this.

Respondent's submissions

77. Mr McGregor lodged a written submission extending to 32 pages (albeit that 9 pages of this were rendered redundant by the withdrawal of two of the complaints during the claimant's submission). He spoke to and supplemented the remainder of the submission. In summary, he submitted that:

a. The respondent's evidence should be preferred to that of the claimant.

Constructive Unfair Dismissal

b. The alleged treatment that the claimant believes amounted to a repudiatory breach of the express or implied terms of her contract of employment did not individually or cumulatively amount to repudiatory breaches of her contract which entitled her to resign without notice.

c. The reason for the claimant's resignation was not the alleged breaches of her contract. Rather, the claimant resigned due to her reluctance to accept a rota pattern that did not suit her childcare arrangements. She did not want to agree to working weekends, evenings and could not start at 8.30am due to childcare and logistics with dropping her children at school or with grandparents.

d. The trigger for the claimant's resignation was because she had accepted the role to start with Argos on 6 September 2019.

e. The respondent had a contractual right to ask the claimant to work evenings or weekends. It was therefore unreasonable for the claimant to resign because she was being asked to change shift patterns which still complied with the terms of her contract. In any event, the respondent carried out a fair and lawful consultation process with the claimant and addressed her concerns during a grievance and flexible working application process, in order to try to accommodate a shift pattern that was appropriate for her and met the shift principles.

f. The respondent denies that the manner in which it consulted with the claimant and addressed her flexible working requests or grievance complaints amounted to a fundamental breach of her employment contract that entitled her to resign. The alleged breaches did not go to the root of the employment contract.

g. The claimant did not appeal against the grievance outcome on 20 June 2019. She subsequently delayed in resigning until 29 August 2019. The claimant also voluntarily agreed to work one week of her notice period until 6 September 2019. It is submitted that these factors undermine her constructive unfair dismissal claim as the claimant delayed unreasonably in

resigning and had previously affirmed her contract by accepting the alleged breaches.

Indirect Discrimination

h. The respondent denies that "the manner in which the respondent conducted the consultation, grievance and flexible working process relating to the claimant's change of shift pattern" can constitute a PCP in law.

i. The alleged PCP identifies circumstances unique to the claimant's case. The Tribunal heard no evidence to establish that this PCP was applied to all CELs in the claimant's comparator pool. The manner of how these processes were conducted were not a universally applied provision, criterion or a repeated practice. Accordingly, the s19 EqA claim should be dismissed.

j. The Tribunal has not been presented with any evidence to establish that the duration of the consultation process had more of an adverse effect on those employees suffering from depression and anxiety or place them at a disadvantage, compared to non-disabled employees.

k. Further, even if the Tribunal finds that the alleged PCP described above did constitute a PCP, it is submitted that this PCP was a proportionate means of achieving the legitimate aims relied upon.

Remedy

l. The claimant did not take appropriate steps to mitigate her loss.

m. If she had not resigned, she would have been fairly dismissed 2 weeks later, with 12 weeks' notice. Polkey accordingly applies and any losses should be limited to a 14 week period.

n. The claimant contributed to her dismissal. Any basic and compensatory awards should accordingly be reduced by 100%.

o. The claimant unreasonably failed to follow the Acas code by failing to appeal against the grievance outcome. Any award should accordingly be reduced by up to 25%.

p. Any award for injury to feelings should be at the lower end of the lower Vento band – c£500-£1,000. There is no basis upon for any award for financial loss.

Relevant Law

Indirect Discrimination

78. Section 19 of the Equality Act 2010 (**EqA**) states:

(1)'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.

(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.'

79. S23 EqA states:

'On a comparison of cases for the purposes of section…19 there must be no material difference between the circumstances relating to each case.'

80. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS*** [2010] IRLR 136

'Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may

have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.'

81. In the case of ***Essop v Home Office; Naeem v Secretary of State for Justice*** [2017] IRLR 558 SC, at [25] Lady Hale stated:

'Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'

82. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in EqA. The Equality and Human Rights Commission Code of Practice on Employment (the **EHRC Code**) at paragraph 4. 5 states as follows:

'The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.'

83. The Court of Appeal in ***Ishola v Transport for London*** [2020] IRLR 368 considered the term 'provision, criterion or practice', noting that it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. In context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated. 'Practice' connotes

some form of continuum in the sense that it is the way in which things generally are or will be done.

84. 'Particular disadvantage' essentially means something more than minor or trivial. That was determined in ***R. (on the application of Taylor) v Secretary of State for Justice*** [2015] EWHC 3245 (Admin) where the following comments were made:

'The term 'substantial' is defined in section 212(1) to mean 'more than minor or trivial'. I do not perceive any significant difference between the phrase 'substantial disadvantage' and the phrase 'particular disadvantage' used in section 19 of the Act.'

85. Paragraph 4.17 and 4.18 of the EHRC Code state

'The people used in the comparative exercise are usually referred to as the 'pool for comparison'. In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider.'

86. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (***Land Registry v Houghton and others*** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (***Hardys & Hansons v Lax*** [2005] IRLR 726, CA).

Burden of Proof

87. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

88. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

89. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Unfair Dismissal

90. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract

under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

91. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).

92. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

93. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

94. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see ***Nottinghamshire County Council v Meikle***

[2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

95. The Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

e. Did the employee resign in response (or partly in response) to that breach?

96. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

Indirect Discrimination

97. The Tribunal firstly considered whether the 'manner in which the respondent conducted the consultation, grievance and flexible working process relating to the claimant's change of shift pattern' constituted a PCP for the purposes of s19 EqA.

98. The PCP was pled as specifically unique to the claimant's circumstances and the Tribunal accepted that this was the case. The manner of the consultation process with the claimant, and the grievance and flexible working processes were individual and unique to the claimant. No evidence was led to establish or suggest that the manner and timing of these processes was similar to that of other employees, or would be repeated again for other employees. Indeed, the evidence was that the majority of employees accepted the shift pattern offered and started working their new shift patterns on or before 1 April 2019. Further, the claimant was the only employee who the respondent was not able to reach agreement with, in relation to a new shift pattern.

99. In ***Nottingham City Transport Ltd v Harvey*** UKEAT/0032/12 it was held that a one-off flawed application of a disciplinary did not amount to a PCP. Mr Justice Langstaff confirmed, at paragraph 20, that *'A one-off application of the Respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least.'* Taking this into account, together with the guidance from the court of appeal in ***Ishola v Transport for London***, the Tribunal concluded that the claimant did not demonstrate that the respondent had the provision, criterion or practice relied upon, or that it constituted a valid PCP for the purposes of s19 EqA. The claim of indirect discrimination accordingly does not succeed and is dismissed.

Unfair Dismissal

100. The claimant claimed that the respondent was in breach of her contract of employment by their actions which, cumulatively, breached the implied duty of trust and confidence.

101. In considering the claimant's claim of constructive dismissal based on actions which she asserts cumulatively breached the implied duty of trust and confidence, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element are set out below.

What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

102. The most recent act relied upon by the claimant was the failure to respond to her flexible working appeal timeously.

Has he or she affirmed the contract since that act?

103. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, her resignation. She was informed that DM would issue her flexible working appeal outcome around 19 July 2019. The Tribunal accepted that the delay became clear to the claimant at the end of the following month. She did not affirm the contract following that. The Tribunal did not accept the respondent's submission that the claimant had affirmed the contract by resigning with one week's notice. The terms of s95(1)(c) provide that a dismissal takes place where an employee resigns, with or without notice, in circumstances in which he is entitled to terminate the contract without notice by reason of the employer's conduct. Thus, in an unfair constructive dismissal claim the act of giving notice cannot, by itself, constitute affirmation.

If not, was that act (or omission) by itself a repudiatory breach of contract?

104. The claimant did not assert this to be the case, so there was no requirement to consider this.

If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

105. The Tribunal noted that the Court of Appeal in ***Omilaju*** stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence.

106. The Tribunal found that the delay in responding to the claimant's flexible working appeal was not an innocuous act and could, in principle, amount to a final straw.

107. The Tribunal then considered whether the actions/omissions relied upon, viewed cumulatively, amounted to a repudiatory breach of the claimant's contract of employment. In doing so, it considered each of the acts relied upon by the claimant as cumulatively breaching the implied term of trust and confidence. The Tribunal reached the following conclusions in relation to each:

a. **FM in October 2018 informing her that she would be able to amend her working hours later in the process, because of she had young children, which she was informed later was not in fact the case.** The Tribunal concluded that no guarantees were given by FM, but that he did inform the claimant that she should simply chose a shift pattern closest to the days she could work and changes to shift pattern allocated would be addressed during individual consultation. He did not indicate to the claimant that there were any limits on the amendments which could be made at that stage. In particular, he did not inform the claimant that she would only be able to amend her shift pattern by up to 10%, given the requirement for CELs to be present for at least 90% of the time their teams were working. Given that he did not provide any indication of any limitations on the changes which could be made, the claimant, reasonably, took this as an assurance that there would not be any

difficulties with the changes which she wished to make to whichever shift pattern she selected.

b. **Failing to investigate adequately her grievance dated [29] March 2019 regarding this, and also the discriminatory effect that the duration and delay in the process was having on her, or to take proper account of this.** The Tribunal concluded that EF did fail to adequately investigate the claimant's grievance of 29 March 2019. The Tribunal found that EF's investigation was deficient in the following respects:

i. EF did not conduct any investigation into why the claimant's concerns, raised on 9 and 30 January 2019, were not addressed or investigated.

ii. EF placed significance on the fact that the claimant did not raise any points with FM during the collective consultation process, or attend any of the drop in sessions organised by FM, without investigating why this was the case. Had she done so she would have discovered that the claimant was absent from work due to illness for the majority of the collective consultation period.

iii. The evidence before EF demonstrated that FM had informed MG that he had not spoken to the claimant directly about the 90% requirement. In her meeting with FM, he changed his position and stated that he had informed the claimant of this. EF did not notice or question FM in relation to this significant change in position.

iv. She did not investigate what was sent to the claimant by FM or the business, and whether this included reference to the 90% principle, despite FM's ambiguous response when asked about this point and the claimant's position that she was unaware of the principle. There was no evidence to support EF's conclusion that FM distributed a pack to all the CELs, including the claimant, that included details of the 90% coverage principle.

v. She did not properly consider the claimant's position, the terms of the occupational health report and all other available evidence (such as MG's email to DT confirming the claimant's distress and the terms of the email from the claimant's manager to Ask A Question Team on 15 March 2019), when stating that it was not possible to conclude that the claimant's health was being adversely impacted by the process and the delays within this.

vi. Despite expressly asking the claimant about the question she felt had not been answered, namely what notice she would receive if her employment were to terminate, so she could take this away, obtain the response and provide this to the claimant, she failed to do so.

c. **Failing to take proper account of information provided in an Occupational Health report in April 2019 about the effect that the process was having on the claimant's health, and that her childcare situation was a barrier to her being able to continue in employment.** The Tribunal concluded that the respondent paid little heed to the terms of the report. The report indicated that the claimant was finding the shift review process, and the fact that she could not commence working at 08:30 due to childcare, stressful and this was exacerbating her underlying health condition. No action was taken to consider adjustments to alleviate this stress, such as taking steps to accelerate the process.

d. **Failing to answer the claimant's grievance for a period of three months to June 2019, and failing to take proper account of or answer her flexible working request for another three months, to September 2019.** The Tribunal concluded there were delays in each process, as asserted. This was not disputed by the respondent. In relation to the grievance, given the very limited investigation undertaken, the Tribunal concluded that no satisfactory reason was demonstrated by the respondent for the delay in that process. In relation to the claimant's flexible working application, section 80G ERA provides that, in relation to flexible working applications, employers require to notify employees of the

decision on the application within three months, beginning with the date the application was made. Where an employer allows employees to appeal against an initial decision to reject a flexible working application, the reference to 'decision on the application' is a reference to the decision in relation to the appeal. The claimant's flexible working application was made on 12 February 2019. The process, including the appeal, should accordingly have concluded by 11 May 2019. She did not receive the outcome of her appeal until 6 September 2019, 7 months after her application was made. In fact, both the initial decision and the appeal each, individually, took in excess of the three-month period of themselves. No satisfactory reason was put forward by the respondent for these delays. The Tribunal found the respondent did not have reasonable or proper cause for failing to address the claimant's flexible working application sooner.

e. **Informing her in July 2019, through another representative Davina Glen, that she would be given 48 hours' notice to leave the respondent if she was to decline the new hours that the respondent had given her.** This was not established. The Tribunal noted however that the claimant had repeatedly requested details of the notice she would receive if her employment terminated, but the respondent failed to provide confirmation of this.

f. **Acting in a discriminatory fashion as detailed above**, namely discriminating against the claimant as a result of disability. As indicated, the complaints of discrimination arising from disability and failure to make reasonable adjustments were withdrawn during the course of the hearing. The claim of indirect discrimination did not succeed. The Tribunal accordingly concluded that this asserted conduct was not established.

108. The Tribunal concluded that the points established above, particularly the delays in the grievance process, the failure to adequately investigate the points raised by the claimant and then the significant delays the flexible working process, viewed cumulatively, amounted to a breach of the implied term that the employer will not, without reasonable and proper cause, act in

such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties.

Did the employee resign in response (or partly in response) to that breach?

109. The Tribunal did not accept the respondent's assertion that the claimant resigned because she had been offered a role at Argos, commencing from 9 September 2019. It is not credible that the claimant would leave a secure role, which she had been undertaking for 16 years, to take up a temporary 3 month appointment. Rather, the Tribunal accepted that the claimant resigned in response to the respondent's conduct which, cumulatively, amounted to a breach of the implied duty of trust and confidence.

110. Given these findings the Tribunal concluded that the claimant was constructively dismissed by the respondent. The Tribunal found that this was an unfair dismissal.

Remedy

111. Having found that the complaint of unfair dismissal succeeds, the Tribunal moved on to consider remedy.

Acas Code

112. The Tribunal firstly considered whether the claimant had unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures (2015) (the **Acas Code**). The Tribunal noted that that the claimant had not appealed against the grievance findings. While she had reasons for not doing so, such as the delay in the procedure to date and the fact that she was pursuing an appeal in relation to her flexible working request, the Tribunal concluded that she ought to have submitted an appeal in relation to the grievance also. This would have enabled someone at director level in the respondent's organisation to consider the claimant's grievance. This could have run in tandem with her flexible working appeal, given that that process was delayed, pending the outcome of the grievance. While it was not reasonable in the circumstances for the claimant not to appeal, the Tribunal did note the various reasons advanced by the claimant for not doing so and,

in the circumstances, determined that a 10% reduction in any award would be just and equitable.

Polkey

113. The Tribunal did not accept the respondent's submission that the claimant would have been dismissed in any event. Instead the Tribunal concluded that, if the concerns which the claimant identified, from January 2019 onwards, had been properly and timeously addressed by the respondent claimant's employment would likely have continued. Given this finding, the Tribunal did not consider it appropriate to make any reduction to the award on the basis of Polkey.

Contribution

114. The respondent submitted that the claimant contributed to her dismissal and compensation should be reduced by 100%. The Tribunal accordingly required to consider whether the claimant's dismissal was to any extent caused or contributed to by the actions of the claimant. If so, the Tribunal required to reduce the amount of the basis and/or compensatory award by such proportion as it considers just and equitable having regard to that finding. In reaching a conclusion on this point the Tribunal must consider whether the claimant's actions were culpable or blameworthy. The Tribunal concluded that the claimant's actions were not culpable or blameworthy in any respect and that no reduction should be made to any award on this basis.

Basic Award

115. Given the claimant's age at the date her employment terminated (40 years' old), length of service (16 years) and gross weekly salary (£423.88) the claimant's basic award is **£6,782.08**.

Compensatory Award

116. The claimant's employment terminated on 6 September 2019. She had not secured alternative employment by the date of the hearing and sought an award covering financial losses for over two years, from the effective date of termination to 25 December 2021. The respondent indicated that an award

for this period was not reasonable, given that the claimant had only taken limited efforts to secure alternative employment. The Tribunal determined that it was, in the circumstances, just and equitable to make an award for losses for 12 months from the effective date of termination. They concluded that the claimant ought to have been able to secure alternative employment within 12 months.

117. The Tribunal calculated the financial losses incurred by the claimant as follows:

Loss of earnings – 52 weeks at £356.63	£ 18,544.76
Pension contributions – 52 weeks at £29.13	£ 1,514.76
Loss of statutory rights	£ 500.00
Less sums received in alternative employment	£ (2,433.92)
Sub-total	£ 18,125.60
Decrease re Acas Code	£ 1,812.56
Total Award for Financial Loss	**£ 16,313.04**

Employment Judge: **M Sangster**
Date of Judgment: **3 August 2022**
Entered in register: **11 August 2022**
and copied to parties