EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000014/2022

Held in Glasgow on 9, 10, 11, 18 and 19 May 2023

Employment Judge Campbell
Members J Ward and J Gallacher

Mrs S Savage	**Claimant** **In Person**
Countrywide Estate Agents	**Respondent** **Represented by:** **Ms L Redman - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is as follows:

1. The respondent did not directly discriminate against the claimant by reason of disability contrary to section 13 of the Equality Act 2010;

2. The respondent did not fail to make reasonable adjustments for the claimant contrary to sections 20 and 21 of the Equality Act 2010;

3. The respondent did not directly discriminate against the claimant by reason of age contrary to section 13 of the Equality Act 2010;

4. The respondent did not directly discriminate against the claimant by reason of sex contrary to section 13 of the Equality Act 2010;

5. The respondent did not discriminate against the claimant indirectly by reason of sex contrary to section 19 of the Equality Act 2010;

6. The claimant was not unfairly constructively dismissed contrary to sections 94 and 95(1)(c) of the Employment Rights Act 1996; and

7. The claims are dismissed.

REASONS

General

1. This claim arises out of the claimant's employment with the respondent which began on 26 May 2008 and ended with her resignation taking effect on 17 May 2022. The respondent is part of a group which offers the public services related to property such as estate agency and residential letting. The claimant acted as a Lettings Manager at the time of her resignation.

2. The claimant has raised a number of complaints including constructive unfair dismissal, sex, age and disability discrimination. Those are set out in more detail in the section below headed 'Issues'.

3. The hearing took place over five days, including submissions. The claimant represented herself and the respondent was represented by Ms Redman, a barrister.

4. Although the claimant was able to represent herself capably in the hearing, and had prepared a number of documents in a detailed and helpful format, the tribunal took time where it felt necessary to explain the conventions and procedures being followed to ensure that as far as possible there was a level playing field.

5. Evidence was heard first from the claimant. The respondent called two witnesses – Ms Sharon Donaldson, Managing Director and Ms Lorraine Ashelby, Regional Director. Each individual was found generally to be credible and reliable in giving their evidence. Further comments where relevant are made below as part of the findings of fact.

6. A joint bundle of documents was prepared for the hearing and numbers in square brackets below correspond to page numbers in the bundle. Ms Redman provided a recommended reading list of documents within the

bundle. The claimant agreed that it would assist the tribunal to review those documents before the witnesses' evidence was heard and some time was taken to do so.

7. The hearing was to deal with liability in relation to the issues and also remedy as appropriate. The claimant provided a schedule of the losses she claimed which was included in the bundle, and spoke to this in her evidence. She also provided documentation to evidence her job-seeking efforts and earnings in her new role.

8. The parties had also prepared a list of issues for the tribunal to determine. Some of the issues were only provisionally included as the respondent did not accept that all of the complaints set out within it had been included in the original claim form, and so it maintained that they were not for the tribunal to determine unless the claim was amended. If the claimant were to seek to amend her claim at this late stage the respondent was opposed to the request. The tribunal summarises the issues in the section immediately below with minor amendments as it saw fit.

9. The parties provided oral submissions after the evidence had been heard. The tribunal reserved its judgment and retired to deliberate, before reaching the findings and conclusions in this judgment.

Legal issues

10. The legal issues to be decided by the tribunal were as follows:

1 UNFAIR DISMISSAL (Section 94, Employment Rights Act 1996 'ERA')

1.1 Did the respondent materially breach the claimant's contract of employment?

1.2 Did the breach occur on a single date or by way of a sequence of events?

1.3 If the latter, what was the last straw?

1.4 Did the claimant resign in response to the respondent's conduct?

1.5 If so, did the claimant affirm the contract prior to resigning?

1.6 If the claimant was constructively dismissed, was the dismissal fair?

1.6.1 Was that reason one which falls within section 98(2) ERA or which was for some other substantial reason such as to justify the dismissal of the claimant holding the position she did?

1.6.2 Did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant in the circumstances, taking into account the size and resources of the respondent's undertaking?

2 DISABILITY STATUS under the Equality Act 2010 ('EQA')

2.1 Did the claimant have a disability as defined in section 6 EQA at the time of the events her complaint relates to (15 February 2022 to 17 April 2022)? The claimant relies upon the condition Long Covid.

2.2 At the material time, did she have a physical or mental impairment?

2.3 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

2.4 Were the effects of the impairment long-term?

2.4.1 Did they last at least 12 months, or were they likely to last at least 12 months?

2.4.2 if not, were they likely to recur?

2.5 At the material time did the respondent know, or could it reasonably have been expected to know, that the claimant had a disability. If so, from what date?

3 DIRECT DISABILITY DISCRIMINATION (Section 13 EQA)

3.1 Did the respondent fail to consider the claimant's flexible working request?

3.2 Did the respondent breach its own Flexible Working Policy by not arranging a meeting with the Claimant within 28 days?

3.3 Did the respondent refuse to discuss the claimant's request for flexible working or an increase in her salary until she had returned to work from illness on a full-time basis?

3.4 Did the respondent fail to offer the claimant the opportunity to conduct a meeting to discuss her flexible working request by telephone or virtually, rather than in person?

3.5 Did the respondent fail to follow the ACAS code of practice on flexible working?

3.6 Did the respondent fail to consider any reasonable adjustments in the workplace or job role to assist the claimant to return in part or full?

3.7 Did the respondent fail to hold a welfare meeting with the claimant under its Absence Policy?

3.8 Did the respondent otherwise breach its own Sickness Absence Policy?

3.9 If any of the above occurred, did it constitute less favourable treatment of the claimant? The claimant relies upon a hypothetical comparator, meaning an employee in circumstances materially the same as hers but who did not have a disability.

3.10 If so, was the conduct because of disability?

4 FAILURE TO MAKE REASONABLE ADJUSTMENTS (Sections 20 & 21, EQA)

4.1 Did the respondent operate a provision, criterion or practice ('PCP') in relation to the claimant as follows:

4.1.1 To fail to consider the claimant's flexible working request;

4.1.2 To breach its own Flexible Working Policy by not arranging a meeting with her within 28 days of her request;

4.1.3 Not to follow the ACAS code of practice on flexible working;

4.1.4 Not to consider any reasonable adjustments in the workplace or job role to assist her to return in part or full;

4.1.5 Not to hold a welfare meeting under its Sickness Absence Policy or ask her how they could help her return to work;

4.1.6 To otherwise breach its own Absence Policy;

4.1.7 To fail to offer the claimant the opportunity to conduct a meeting to discuss her flexible working request by telephone or virtually, rather than in person; or

4.1.8 To refuse to discuss the claimant's request for flexible working or an increase in her salary until she had returned to work from illness on a full-time basis?

4.2 If any PCP above operated, did it put the claimant at a substantial disadvantage compared to a person who was not disabled?

4.3 Did the respondent know or could it reasonable have been expected to know that the claimant was likely to be placed at that disadvantage?

4.4 What steps could have been taken to avoid the disadvantage?

4.5 Was it reasonable for the respondent to have taken those steps?

4.6 Did the respondent fail to take those steps?

5 DIRECT AGE DISCRIMINATION (Section 13 EQA)

5.1 Did the respondent:

5.1.1 Fail to consider a phased return to work request?

5.1.2 Fail to consider the claimant's flexible working hours request?

5.1.3 Breach its own Flexible Working Policy by not arranging a meeting with the claimant within 28 days?

5.1.4 Fail to follow the ACAS code of practice on flexible working?

5.2 If so in any of the above respects, was the respondent's conduct less favourable treatment? The Claimant relies upon a named comparator who was granted a flexible working hours contract.

5.3 If so, was the conduct because of age?

5.4 If so, was the treatment at 5.1 a proportionate means of achieving a legitimate aim?

6 DIRECT SEX DISCRIMINATION (Section 13 EA)

6.1 Did the Respondent:

6.1.1 Fail to help the claimant return to work following Long Covid?

6.1.2 Fail to make any reasonable adjustments to assist her to return to work?

6.1.3 Fail to consider the claimant's flexible working hours request?

6.1.4 Breach its own Flexible Working Policy by not arranging a meeting with the claimant within 28 days of her request?

6.1.5 Fail to follow the ACAS code of practice on flexible working?

6.2 Was any of the conduct at 6.1 less favourable treatment? The claimant relies upon a hypothetical comparator.

6.3 If so, was the conduct because of sex?

7 INDIRECT SEX DISCRIMINATION (Section 19 EA)

7.1 Did the respondent operate a provision, criterion or practice ('PCP') in relation to the claimant as follows:

7.1.1 Requiring all employees to work full-time?

7.2 Did the respondent apply, or would it apply, this PCP to those other than the claimant (and who do not share the protected characteristic of her sex)?

7.3 Did the PCP put, or would it put, those who share the protected characteristic of her sex at a particular disadvantage when compared with persons who do not share that protected characteristic?

7.4 Did the PCP put, or would it put, the claimant at that disadvantage?

7.5 If so, was the operation of the PCP a proportionate means of achieving a legitimate aim?

Preliminary issue

1. The respondent disputed that the claimant's complaints of victimisation set out originally at paragraph 6 of the list of issues had been validly raised. This was on the basis that they were said not to have been included in the original claim form, whether explicitly or by reference to alleged facts or events which would reasonably signal that the claimant intended to make such a complaint.

2. The claimant accepted this was the case and made an oral application to amend her claim. Submissions were heard from Ms Redman in response and the tribunal adjourned to consider the application. The unanimous decision of the tribunal was not to allow the application for reasons which were given orally, but in summary which were:

    a. The claimant, although unrepresented, had had the benefit of discussing her claim with a judge at two earlier case management preliminary hearings, and so had adequate opportunity to explain the complaints she wished to make;

    b. She had not raised the complaints she now wishes to put forward as instances of victimisation, and so the respondent did not have fair notice of those complaints;

    c. The events complained of were historic by a margin of years and would have been out of time as free-standing claims;

    d. The respondent would likely have had to consult witnesses and possibly search for additional documents in order to answer the victimisation complaints. The hearing would have been affected as they may not have been able to do so in the limited time available. In any event the allocated hearing time may not have been sufficient to deal with the new complaints; and

    e. The claimant still had a significant range of claims which the tribunal would decide.

3. Accordingly, the complaints originally listed in section 6 of the list of issues were not determined on their merits by the tribunal, and are omitted from the issues listed above.

Applicable law

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

2. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or 'repudiatory', breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or 'affirmed' the breach.

3. Unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.

4. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

5. A person has a disability in the legal sense if they meet the requirements of section 6 of the Equality Act 2010 ('EQA'). Those requirements are that they have a physical or mental impairment which has a substantial long term effect on their ability to carry our normal day to day activities. The effect of an impairment is substantial if it is more than minor or trivial. The effect will be long term if it has already lasted for 12 months or more, is expected to have that duration or is expected to last for the remainder of the individual's life if that will be shorter. It can also be long term if it has not continued for 12 months before abating, but is expected to recur. Additional guidance is provided as to what may be a substantial effect and what or may not amount to normal day to day activities. Employment tribunals are advised to take into account prevailing guidance at the time of reviewing any particular claim. However, the terms of the EQA itself will always prevail and ultimately any questions in relation to whether the definition applies are for the tribunal to decide.

6. Section 13 EQA prohibits direct discrimination by reason of a protected characteristic. Sex, age and disability are protected characteristics. An employer must not treat an employee less favourably than it does, or would, treat another employee because of a protected characteristic. This requires a comparator, whether real or hypothetical, who is in materially the same circumstances as the claimant except for the protected characteristic being relied on.

7. It is possible that an employer may indirectly discriminate against a person with reference to a protected characteristic under the terms of section 19 EQA. There must be a provision, criterion or practice operated by the employer which puts, or would put, individuals with the same protected characteristic as the claimant at a substantial disadvantage as compared with others who do not have that protected characteristic. The claimant must be put at that disadvantage themselves. If this is so, indirect discrimination will have been established. By default it will be unlawful but an employer has the opportunity to show that it is lawful by being a proportionate means of achieving a legitimate aim, that is to say being no more impactful on the

claimant than is necessary to achieve a more widely justifiable effect or outcome.

8. An employer may be under a duty to make reasonable adjustments for a disabled employee under section 20 and Schedule 8 EQA. For this to be triggered, again there must be a provision, criterion or practice which places the disabled person at a substantial disadvantage by comparison with individuals who do not have that disability but are otherwise in comparable circumstances. The duty can also arise if a physical feature of the employer's property or the absence of an 'auxiliary aid' puts the disabled employee at a similar disadvantage.

9. The duty will only arise if, and from the point when, the employer knew that the individual was both disabled and likely to be put at the substantial disadvantage being alleged. An employer will be deemed to have knowledge of those things if it reasonably should have been expected to know of their existence, and so cannot benefit from its unjustifiable failure to be informed about its employee's circumstances.

10. An adjustment can only be reasonable if it has at least a substantial chance of removing or alleviating the disadvantage. The employer's financial resources, the cost of making the adjustment and any disruptive or detrimental effects of making it may be taken into account when deciding whether it would be reasonable. It is for the tribunal to decide the question of whether an adjustment would be reasonable on an objective basis.

Findings of fact

The following findings of fact were made as they are relevant to the issues.

1. The claimant was employed by the respondent between the dates of 26 May 2008 and 17 May 2022. On the latter date her resignation took effect. She resigned by giving notice by email on 19 April 2022.

2. The respondent is part of the 'Connells' group which operates throughout the UK and specialises in various services related to domestic property. It trades as Countrywide and Slater Hogg & Howison in Scotland. A large proportion

of Scotland and part of the east of England are overseen by Sharon Donaldson, Regional Managing Director. She oversees three business areas – Sales, i.e. estate agency services, Lettings and Financial Services. At the time of the hearing eight Regional Directors report to her, one of whom is Lorraine Ashelby, latterly the claimant's manager.

3. The claimant worked in a number of different offices and in different roles in the course of her employment with the respondent. There was a reorganisation of the respondent's structure in 2015 and all of the relevant events with which the claim is concerned happened after that. At the time of the restructure the claimant was based in an office in the Merchant City in Glasgow where she was the branch manager and most senior employee in that branch.

4. The respondent has a number of policies and procedures for dealing with personnel matters. Those include a Flexible Working Policy [130-137] and a Sickness Absence Policy [138-146].

5. The respondent's approach to fixing remuneration of its employees tends to be specific to matters such as the business sector, location of office, size of turnover of office, profitability and performance of the office, degree of management responsibility involved and the experience of the individual. There are no set pay grades or bands. Thus for example a branch manager within Lettings will not necessarily be paid the same as another Lettings branch manager if one branch is larger, with more staff and generating more business than the other.

6. Similarly, the components of remuneration vary across business areas. Therefore employees within Sales might be paid less in salary but have a greater earning potential through commission than a person at the equivalent level in Lettings. These variations are driven by the nature of the role and not factors such as gender or age.

7. Generally around April of each year individuals would discuss with their line managers what were the targets for the coming twelve months. The targets for each branch are set centrally. Part of the discussion would be rates of

commission achievable on hitting certain revenue targets. Salaries by contrast would not automatically be reviewed annually, and were dealt with on a more ad hoc basis. In some circumstances there is also the opportunity for employees to share in the profit of their branch.

8. In 2015 Ms Donaldson became a Regional Managing Director. Before that she had only managed within the Sales division of the business. Some managers who reported to her before her promotion became managers with responsibility for other parts of the Scottish business.

9. At that time the claimant worked in the Lettings part of the business. That dealt with managing the leasing of domestic properties on behalf of their owners to tenants. It covered evaluation of properties in order to advise owners on rental levels, sourcing tenants, managing the tenancies and organising inspections and repairs of the properties.

10. At the time of the 2015 restructure the claimant was earning £25,000 per annum plus commission and potentially a bonus. Her line manager at the time was a Regional Manager named Stephen McKean whose background was also in residential letting. He left shortly after Ms Donaldson's role was expanded and, after at least one interim line manager, Ms Lorna Meighan became the claimant's line manager in February 2016. She had been one of Ms Donaldson's Regional Managers in the Sales division.

July 2016 grievance

11. The claimant submitted a written grievance to Ms Donaldson and an Employee Relations specialist within the respondent on 18 July 2016 [147-149]. In it she raised concerns about Ms Meighan. She said that the two had met for an initial one-to-one meeting in the February of that year, during which it became evident that Ms Meighan had inadequate knowledge of the lettings side of the business. The claimant said that this had been the root of a number of further issues between the two from that point, which had made her working life more difficult. She also said that when she had taken a six-week period of absence from work due to stress, Ms Meighan had been unsympathetic. She said Ms Meighan was unfairly critical of her work and put her under excessive

pressure to achieve unrealistic targets higher than were budgeted. The claimant said Ms Meighan belittled and bullied her. After conducting observations of the claimant's team earlier in the month Ms Meighan had again met with the claimant and said she was going to put her on a 'PIP' – performance improvement plan – if the sales performance of the team did not improve by the end of the month. The claimant said that despite being so critical of the claimant and her team, Ms Meighan offered no help or support.

12. The claimant alleged that Ms Meighan's treatment of her breached the respondent's Dignity at Work and Prevention of Harassment policies. She had been signed off for a further two weeks after sustaining a panic attack at work, and was contemplating resignation.

13. The tribunal noted that the claimant in her oral evidence said that Ms Meighan threatened to put her on a PIP at the first one-to-one meeting between them. This is inconsistent with her grievance letter which referred to two previous meetings having taken place over a period of some five months. The latter is taken to be correct on this point.

14. The claimant's grievance was considered by a Regional Manager within the respondent's Financial Services division named Kevin Rodgers. He met with the claimant on 10 August 2016 and issued a written response on 5 September 2016. He did not uphold the grievance. He found no evidence of bullying or similar unfair treatment of the claimant by Ms Meighan. He reviewed some of Ms Meighan's notes of meetings with the claimant and drew the conclusion that they showed her attempting to support and develop the claimant. He believed that the sales performance of the claimant's team was such that raising the possibility of a PIP was reasonable. The claimant was given the right to appeal against the decision, which was to be directed to Ms Donaldson.

15. The claimant used her option to appeal and wrote to Ms Donaldson on 14 September 2016 [153-155]. She raised that Mr Rodgers had not dealt with her representations about how she would wish to return to work and what her role would be like after that. She also argued that his outcome letter did not

fully deal with her other grievance points. She believed he did not look at all of the relevant evidence that was available, and what he did consider he interpreted incorrectly.

16. Ms Donaldson acknowledged the appeal on 15 September 2016 and met with the claimant on 29 September 2016. The meeting was minuted by a note-taker in attendance and a typed version was produced [157-160]. The minutes are taken to be a suitably accurate summary of what was discussed.

17. The claimant repeated her issues with the way that Ms Meighan had been managing her. She wanted to know if she would have to go on reporting to Ms Meighan if she returned, which she did not think would work. She asked whether she should move roles or reduce her working hours in order to be able to return to work from her period of illness. She raised resigning as a possibility. Ms Donaldson reassured the claimant that she did not want her to resign. She asked if the claimant would be looking for reduced hours. The claimant confided that *'things have changed'* and that she was pregnant. Ms Donaldson proposed a short break and then asked the claimant to be more specific about what she was looking for. The answer was that she wished to be a part time valuer and could also do some negotiating work. She wished to reduce her hours and no longer report to Ms Meighan. The claimant proposed an arrangement such as working four weekdays until 2pm and Saturdays by rota. Ms Donaldson asked if the claimant appreciated that her salary would reduce to reflect her duties and hours, which the claimant confirmed she understood. She proposed the Shawlands office as her new location. She confirmed that if satisfactory changes to her role could be made, the rest of her complaints would fall away. She confirmed that she could still work with Ms Meighan as long as she was not her day-to-day line manager. She wished to be back working as soon as was possible by making the changes discussed.

18. Ms Donaldson ended the meeting and explored whether changes to the claimant's role as had been discussed could be accommodated. She found that they could and telephoned the claimant later on the day of the meeting to

confirm the details, which were summarised in writing in the outcome letter she sent the claimant the next day. The claimant was very pleased.

19. The day after the meeting Ms Donaldson wrote to the claimant to confirm her decision as to the outcome of the appeal [161-162]. Ms Donaldson said that she had decided to partly uphold the claimant's appeal as the matter of a suitable working pattern for the claimant had not been fully considered at the initial grievance stage. She summarised the aspects of that which the claimant had been able to express, which included reducing her hours, accepting the change in pay which was commensurate with that, focussing on valuing and negotiations, stepping down from being a Branch Manager and having a direct line manager with letting experience (who by implication would be someone other than Ms Meighan).

20. Ms Donaldson summarised the change in role that the claimant had agreed to in principle via the meeting and telephone call the day before. This involved returning to work, being based at the Countrywide office in Shawlands, Glasgow from 3 October 2016, taking the new role of Valuer/Negotiator and therefore stepping down from being a Branch Manager, working 23.5 hours per week (63% of her previous full-time role), and retaining her company car although possibly changing model according to company policy.

21. A 'change of terms' form was completed to record the variations to the claimant's contract [163-164]. It showed that the claimant's salary was to be based on the full-time salary of £20,000 for a Negotiator/Valuer. As her hours were 63% of a full-time role her salary was calculated at £12,600 taking a pro rata approach.

22. The claimant worked under the new terms agreed with Ms Donaldson. Her line manager was changed to Ms Lorraine Ashelby who was a Regional Director at the same level as Ms Meighan had been. The claimant went on maternity leave in or around March 2017, and returned to work in or around March 2018. She resumed working under the same arrangement.

Events of 2019

23. In late 2018 the claimant asked if she could return to full time working. In January 2019 she did so, becoming a Lettings Manager and remaining at the Shawlands office. The overall Branch Manger there was as before, a Ms Katie Filshie. Ms Filshie ran the Sales business at the office. The claimant became the manager of a team again, although not a manager of the branch overall. Her pay increased to £21,390.

24. The respondent changed its policy in relation to provision of company cars and moved to a practice of providing car allowance payments to many employees instead. The claimant received notification on 24 April 2019 that she was to be paid £250 per month. This payment was in line with her role under the policy. She electronically countersigned the letter to confirm acceptance.

First salary grievance

25. On 29 August 2019 and whilst absent from work due to illness, the claimant emailed Ms Ashelby to raise the matter of her pay and terms [169-170]. She referred to a conversation they had had shortly before when the matter had been discussed. The claimant was disappointed that she was earning less than before her 2016 grievance despite again working full time. She said it was *'unfair and discriminatory to be receiving less than the pay for this role I was earning previously given I've had children and I'm a female'.* She also felt that additional training she had delivered to colleagues had not been recognised. She said:

'I find my current pay and conditions to be sexually discriminative and unfair and I now request these are returned to the Branch Manager pay and conditions I was receiving before I went on maternity leave to have my two children and backdated to January when I returned to full time which are:

Branch Manager Salary £25k

Car Allowance £450 pm

Bonus Package £1000 pm

Current

Branch manager Salary £21,390

Car Allowance £250 pm

Was £150 pm until May when it was backdated

Bonus Package £400-500 pm'

This is the email later referred to by the claimant as her first 'salary grievance'.

26. She went on to say that the way the respondent dealt with her request to return to full time work in 2018 was *'discriminative and unfair'.* She said the additional net income she received by working full time as opposed to the previous part time arrangement did not cover her additional childcare costs.

27. By 3 September 2019 the claimant had not received a response and sent a follow up email. Ms Ashelby acknowledged the claimant's email and took advice from a colleague in Human Resources whom she told that she would meet with the claimant on her return to work. The HR colleague assured Ms Ashelby that there was nothing sexually discriminatory in the setting of the claimant's pay and other conditions of employment. Ms Ashelby accepted that to be the case, but had some sympathy with the claimant's request and proposed an increase in salary to £22,500, a car allowance of £450 per month and an increase in monthly commission from 2.63% to 4.9%. She compared the proposed salary to that of another Letting Manager who worked in an office with its own Branch Manager, who was female and received £20,000 per annum although was not as experienced as the claimant. Ms Ashelby did not want to backdate the increases. She emailed the HR colleague on those terms and also asked Ms Donaldson for her view [168].

28. Ms Donaldson approved the changes to the claimant's terms with the exception of the car allowance which was out of line with company policy for a person at the claimant's level. The allowance was kept at £250 per month

and the other changes were officially made on 3 October 2019, but backdated to 1 September 2019 [166-167].

Application for Financial Services role

29. Some time in 2019 the claimant applied for a role in the respondent's Financial Services division. She completed an application form and attended an interview with a Mr Scott McDonald who was a Regional Director. He asked her how she felt about potentially giving financial advice to customers given her own credit history, in relation to which there had been issues resulting from her divorce and the division and sale of matrimonial assets. The claimant was able to deal with the question but it changed her perception of Mr McDonald and she felt she would no longer wish to work for him. She was offered the role but declined it.

30. The claimant had concluded that Ms Donaldson had told Mr McDonald about her credit history as that was something the claimant had divulged in confidence to her manager Mr McKean at the time, who had since left the business. She suspected that he had told Ms Donaldson who in turn had shared it with Mr McDonald. Ms Donaldson denied saying anything to Mr McDonald about the matter. She believed that the information that Mr McDonald relied on was within the respondent's file dealing with the sale of the matrimonial property.

31. The tribunal found that Mr McDonald would have known about the claimant's credit history as part of standard background checks which would have been undertaken for any person applying for a role providing financial services advice. It was also possible that the matter arose when the sale of the claimant's former family home was handled by the respondent's Sales division. Via either source, that would have been enough information to lead him to ask the question which he did. Although the claimant's discomfort is accepted to be genuine, it was a question he was entitled to ask in an interview scenario given the role the claimant was applying for. He was not told about the circumstances surrounding any issue in the claimant's history by Ms Donaldson.

Events of 2020 and 2021 – office move and Covid 19 outbreak

32. The Covid-19 pandemic affected the respondent's business and employees as it did many others. For a time from around March 2020 it had to close its offices and employees worked from home to the extent their duties allowed.

33. By the second half of 2020 the respondent was able to allow employees to return to work in their offices, subject to protocols being in place. Typical measures were implemented such as restriction of staff numbers, wearing of masks, hand sanitising, spacing out of desks and ventilation of working spaces. Members of the public were not initially allowed to enter offices when before they were able freely to do so.

34. The respondent conducted assessments of all of its offices before allowing employees to return, to ensure they conformed to regulations and guidance prevailing at the time. A standardised assessment was created which each Branch Manager had to complete. This was devised by the respondent's Health and Safety team and they reviewed the completed assessments and offered assistance to managers with any particular concerns. The respondent also put in place other rules for minimising the risk of transmission of Covid in its offices and, for example, reporting positive cases [179-184] and temporarily closing offices if three or more employees contracted the virus at the same time.

35. The claimant returned to working at the Shawlands office consistent with the above. At some point around December 2020 or January 2021 she had concerns over whether the Covid-19 protocols were adequate. She did not believe that a proper risk assessment had been carried out.

36. The claimant raised her concerns with Ms Ashelby. The claimant's concerns were escalated to the respondent's Health and Safety team. Ms Filshie then received an email about the issue in her capacity as Branch Manager. This was the first she was aware of the claimant's concerns. Ms Filshie emailed another member of the respondent's Health and Safety team named Sandra Barton on 13 January 2021 [175-176]. She summarised the protocols in place and attached images to illustrate them. She asked for those to be reviewed

and any required changes to be confirmed. She was dismayed at the claimant raising concerns which she did not believe were well founded, and which she believed reflected badly on her as the Branch Manager, and by doing so indirectly.

37. This episode was the culmination of an ongoing situation where the claimant and Ms Filshie had difficulty working together. The root cause, if there was one, was not clear but appeared to be rooted in the fact that both were strong-willed, and it was apparent to members of both of the individuals' teams.

38. Ms Filshie's manager was a Mr Graeme Crockett who was a Regional Director. Ms Ashelby, Mr Crockett and Ms Donaldson took HR advice on how to defuse the situation. They were told that it would be best to try and do so locally and informally rather than for example look to follow a formal disciplinary or performance management process, or wait for someone to raise a grievance. Accordingly they formed the proposal to allow the claimant to move to another of the respondent group's offices directly across the road which traded under the Slater Hogg & Howison brand name. That office was managed by an Eleanor Binnie. There was no existing lettings business in that office. The claimant agreed to the proposal and she and her team moved together on 1 February 2021. As part of the exercise the clients of the claimant's team were written to in order to explain that they would receive the same service, but under the Slater Hogg brand name. All of the clients continued to do business with the claimant's team.

39. One change as a result of the move was in relation to referrals. It is common for clients of the Sales teams to need letting services and those individuals would be referred to the local Letting team. As the claimant's team moved from Countrywide to Slater Hogg, she would no longer receive referrals from the Countrywide team in Shawlands, who would instead refer their clients to other Countrywide offices. The corollary of that was that the claimant's team would receive letting referrals from Sales teams of Slater Hogg. However, the claimant had already been receiving referrals from the Shawlands Slater Hogg office as it did not have a lettings business of its own. This was the one

identifiable downside to the new arrangement, but nevertheless the claimant embraced and accepted the changes.

40. The claimant was very positive about the move and indicated this. Ms Ashelby sent her a text message to ask the claimant to wait before announcing the change to others, and said *'Exciting times ahead. X'.* The claimant replied *'Sure is! I'm very excited about the rebranding! The only way is up [thumbs up icon]. Will do. Thanks Lorraine'* [939]. She had previously worked under the Slater Hogg brand when acting as a Branch Manager before the 2015 restructure and felt invested in it.

September 2021 Covid-19 outbreak

41. In early September 2021 the claimant's office had to be closed temporarily as around six out of the nine staff including the claimant tested positive for Covid-19. The respondent's practice was to close an office if three or more employees based there tested positive. A report was prepared to document the steps taken in response [179-184]. Staff were asked to work at home for a period of around two weeks to prevent further infection.

42. The claimant was wary about returning to the office as she considered there were not adequate measures in place to protect against the spread of Covid-19. The respondent allowed her to remain working from home for a further period while her concerns were considered. In particular she believed that the main shared office space was not adequately ventilated as the windows were painted shut and the main door to the street had to be kept closed in order to prevent members of the public coming in. In addition, she said an air conditioning unit was not fully functional. She raised this with Ms Ashelby who was on, or about to go on, bereavement leave but she raised the matter with Ms Donaldson's Personal Assistant and asked for the windows to be opened and the air conditioning unit to be checked. She update the claimant by WhatsApp message on 10 September 2021 that this was in hand [941].

43. The office was assessed by a member of the respondent's Health and Safety team. The evidence was not clear in relation to whether the air conditioning until was completely broken or merely not working properly, and when it was

either serviced or repaired. The view of the Health and Safety officer was that it had no bearing on the level of Covid-19 risk. It was however accepted that the office could be better ventilated by the windows being allowed to open and they were adjusted to allow this to happen. Again there was a dispute in the evidence as to when this happened, with the claimant saying that it was only addressed around November 2021, some weeks after she returned to work, and Ms Donaldson and Ms Ashelby believing that it was seen to before the claimant came back to the office. The claimant's evidence is preferred on the basis that she was on-site and more likely to recall with accuracy whether the windows were adapted before or after she came back into the office. Ms Donaldson did not work in that office and found out second hand what had happened.

44. Ms Ashelby understood that the office was safe enough to work in and asked the claimant to return. The claimant felt that she was being unsympathetic and could not reasonably know if the office was safe. The claimant however did return to the office some time in October 2021.

Events of 2022

Earnings discussion and request for salary review

45. Ms Ashelby invited the claimant to attend a pay review meeting on 26 January 2022. The meeting was headed 'Letting Manager Pay Deal 2022' in the electronic invitation. At the meeting Ms Ashelby discussed the budget for the claimant's team, her targets and proposed commission levels and profit share. These were set out in a document [979]. It proposed an increase in commission from 4.9% to 5% and a new additional profit share element, payable quarterly if targets were achieved. In the event the profit level of the claimant's branch for 2022 was such that she would have qualified for profit share payments. Ms Ashelby held similar discussions with the other individuals she managed, and these meetings took place more widely through the business between Regional Directors and the managers who reported into them.

46. The meeting lasted for around an hour and Ms Ashelby considered it to have gone well. However, the claimant emailed her two days later asking for further documents to help her understanding of the updated earnings structure. Ms Ashelby had a further discussion with the claimant in the week following. The claimant believed she had more value to offer the business and wished for her remuneration terms to be improved. In particular she wanted her basic salary to be increased from £22,500 to £25,000. Ms Ashelby resolved to consider this and discuss it with Ms Donaldson. She expected to know whether any improvements would be possible in or around April of that year when the new financial year budgets had been firmed up. Ms Ashelby encouraged the claimant to develop her training activity in the meantime.

Further period of Covid-19 infection

47. In mid-February 2022 the claimant contracted Covid-19 for the second time. She had mild symptoms initially which were similar to those she had experienced the first time she tested positive, in September 2021. Over the period of weeks which followed the symptoms got worse and included fatigue, 'brain fog', dizziness, tinnitus, lethargy, impaired breathing, elevated heart rate, fever and sweats. Her sleep quality was impaired. The symptoms were not ever-present or at a constant level. Some days were better than others. Daily functioning in activities such as getting up and dressing, cooking, cleaning and driving was impaired or at some times not possible. The claimant at the time was a regular runner but had to give that up until early April 2022, and slowly resume.

48. The claimant had two or three telephone appointments with her GP between 14 February and 17 April 2022. She was unable to secure an in-person appointment. On the basis of the symptoms she described he advised rest and pain relief medication. After her initial home test which returned a positive result she was not advised to carry out any others. After the claimant self-certified her absence between 14 and 24 February 2022, her GP issued fit notes as follows:

a. 24 February to 4 March 2002 – stating 'covid 19 infection' as the relevant condition [904];

b. 4 March to 21 March 2022 – 'covid' [956];

c. 21 March to 4 April 2022 – 'covid' [905]; and

d. 5 April to 17 May 2022 – 'long covid' [906].

49. The claimant first notified the respondent about contracting Covid-19 on 15 February 2022 when she sent a WhatsApp message to Ms Ashelby to say that her and her partner's tests had returned positive. Ms Ashelby responded sympathetically. She also said she was going to visit the claimant's branch the next day to see her team. The claimant described some of her symptoms to Ms Ashelby, namely fever, a bad headache, no energy and a cough.

Exchanges about the claimant's start time and other matters

50. Ms Ashelby visited the claimant's branch on 16 February 2022 and met with her team. She was expecting to join a daily briefing meeting around 9am but was told by a member of the claimant's team that they did not happen every morning. It was then mentioned to Ms Ashelby that the claimant tended to arrive in work after 9am, which was her original contractual start time.

51. Ms Ashelby sent the claimant an email on 16 February 2022 to say that she wished to discuss the claimant's working hours once the claimant returned from illness. She said it was her understanding that the claimant had been allowed to start at 10am during the Covid-19 pandemic, when she returned to work but her children's school breakfast club had not resumed (or her children had not been offered one of the more limited places at least). Ms Ashelby said that she understood this to be an interim measure but now that normality had resumed, the claimant would have reverted to starting at 9am. Ms Donaldson confirmed in her evidence that Ms Ashelby had sought permission to allow the change on a temporary basis without any variation in pay, which she approved. She was under the impression that it would be for 'a few weeks' until pre-school clubs were re-established with the beginning of the new school year.

52. Ms Ashelby was correct that, in August 2020 when the claimant returned to office working and her children started the new school term, the school's breakfast club did not immediately resume and so there was no pre-school care option for the claimant, and also that Ms Donaldson had given permission for the claimant to start work at 10am rather than 9am as a means of working around this. The claimant had asked only to start at 9.15am as she was able to be at her office by that time on most days [954-955]. She did not require to start at 10am and normally she was at work before that time. She was contactable by telephone in her car between 9am and her arrival time at the office. She participated on calls at those times. The claimant expected the need for the adjustment to be *'only temporary until the restrictions ease further.'* Whilst this allowance was anticipated to be short-term when granted, i.e. for a number of weeks, the claimant could not secure pre-school care for her children and so adhered to the arrangement beyond that time and up until 2022.

53. There was a degree of dispute between the claimant's evidence and that of Ms Ashelby. The claimant's position was that Ms Ashelby was aware of the later start time continuing, and was content that it created no issues for the business. She said Ms Ashelby had referred to it and on occasion offered ways of working around it, for example by scheduling meetings or calls to start later than 9.30 or allowing her to join whilst commuting by car. Ms Ashelby said she had no such knowledge and whilst she approved the adjustment at the time, this was on the understanding that it would only apply for a few weeks. She said that she believed the claimant had reverted to a 9am start thereafter.

54. In effect neither party was entirely responsible or entirely blameless for any misunderstanding around the arrangement continuing. The claimant never reported that it was taking longer than anticipated to obtain breakfast club places for her children and at the same time Ms Ashelby did not have enough visibility of the claimant to know that this was the case. She seemed to accept that the arrangement went on for more than a few weeks and on at least one occasion recognised that the claimant would be unable to participate in a

group call which was scheduled for 9am on 3 June 2021, as she acknowledged the fact to the claimant when circulating an invitation to the call, saying *'Hi Sharon. This is the off line dial in for the 9am call tomorrow. If you can dial in and listen while you're in the car that will be great.'* [177]. By contrast, she took an email from the claimant on 20 January 2022 to suggest that she was back to working from 9am. In that email the claimant apologised for being unable to join a call arranged by Ms Ashelby as she had already arranged a market appraisal visit at 10am [975]. The call was proposed for 10.30am. Ms Ashelby expected that the claimant would have to undertake travel to the location and also preparation, and so would have had to start work at 9am that day in order to do so. It appeared to the tribunal that Ms Ashelby was aware of the arrangement continuing to at least the summer of 2021, and thus for a full school year, but not by the beginning of 2022.

55. The claimant responded to Ms Ashelby's email on 21 February 2022 [198-200]. She said that she was disappointed at what she saw as Ms Ashelby wishing to make a formal change to her 10am start time which had been in place by some 18 months by that point. She also took issue with Ms Ashelby discussing the reinstatement of 9am daily meetings with the claimant's team without the claimant being present. A third matter that she raised was that she had made requests for annual leave days in February and April 2022 which had not been authorised and had lapsed. She also revisited the request she had made in January 2022 for a review of her salary and hours as she had not heard anything substantive since then. She went on to say that she was disheartened to see an internal vacancy being offered for a Branch Manager at a salary of up to £23,000, which was more than hers. She mentioned the lack of any career development plan and said that she *was 'continually going round in circles'* and felt unfairly treated. She mentioned that her salary was some £2,500 less than when she began working for the respondent in 2008 and asked whether there was a pay scale for people in line manager positions.

56. Ms Ashelby replied the same day to say that the matters should be discussed when the claimant returned. At that time the claimant was expected to return to work on 28 February 2022 and Ms Ashelby proposed to meet on that day.

She copied in a member of the respondent's HR Specialist team named Ms Lola Adesina so that the claimant's various concerns were *'on her radar'.*

57. In the event the claimant's symptoms continued and she obtained the first of her series of fit notes from her GP. The proposed meeting on 28 February 2022 did not therefore take place. The fit note covered a period until Friday 4 March 2022 and Ms Ashelby believed that the claimant would return the following Monday. She did not, and Ms Ashelby then sent a further email to her HR colleague Ms Adesina asking for comments on the claimant's email of 21 February 2022.

Ms Ashelby's concerns about the claimant's absence

58. Ms Ashelby planned to meet the claimant on her revised return date of 31 March 2022. She emailed Ms Adesina on 10 March 2022 to say that the claimant had reported difficulty breathing as a result of Covid-19 during a telephone conversation three days before, but had posted an activity to the exercise app 'Strava' on 3 March 2022 showing that she had walked 4.7 kilometres in a time of one hour and 13 minutes [206-207]. The claimant had added a comment saying *'I'm back! Well not quite but ish. First bit of exercise in 3 weeks (Post Covid no 2 in 5 months)'.* Ms Ashelby wished to raise this with the claimant on her return to work. She did not say in what way for what purpose. Ms Adesina advised her not to do so as it may be perceived as Ms Ashelby undermining her account of her condition. She advised asking more open questions about how the claimant was dealing with any ongoing breathing difficulties. Ms Ashelby accepted that advice.

59. Around the same time Ms Ashelby was made aware of some posts the claimant had put on her facebook page. Those showed her attending her son's sporting event on 14 March 2022 and her father-in-law's 60th birthday party around the same time. Ms Ashelby noted that both posts showed the claimant indoors, in close proximity to others and not wearing a face mask. In her evidence Ms Ashelby was frank in saying that she saw the claimant's social media as being at least potentially inconsistent with how she reported

her symptoms to Ms Ashelby herself, and wanted to explore this further with the claimant.

Flexible working request

60. On 10 March 2022 the claimant emailed Ms Ashelby a request for flexible working which also incorporated what she referred to as a (second) 'salary grievance'. The changes she requested were:

    a. A four-day week, meaning she would no longer work on Mondays;

    b. Hours of 10am to 5.30pm on Tuesday to Thursday and 10am to 5pm on Friday;

    c. She would continue to work every third Saturday; and

    d. For the change to take effect on 22 March 2022.

61. Her salary grievance was in relation to her request for an increase from £22,500 to £25,000 per annum which she had made in January of that year, and which had not yet been resolved by Ms Ashelby.

62. 62. Ms Ashelby copied the email to Ms Adesina. She then emailed the claimant back on 11 March 2022 [212-213] to ask her to complete her flexible working request using the respondent's template application form which she attached. She said that once that was done she would arrange a meeting with the claimant within 28 days to discuss the request, its impact on the business and any other possible alternatives. The respondent's Flexible Working Policy states that:

    'Upon receipt of a valid flexible working application, the line manager will arrange to discuss this with the colleague, usually within 28 days. This will normally mean a face to face meeting, but can also take place over the phone, video call or by email depending on the circumstances.'

    She added that although the claimant had raised her request for a salary increase as a grievance, she hoped to be able to resolve the matter informally in a meeting on the claimant's return to work.

63. Ms Ashelby referred to the claimant's earlier complaint about holiday requests not being approved. She said that they should be emailed to her directly as well as requested on the respondent's internal system as a technical issue caused her not to see all requests made to her. She said that she was authorising the claimant's request now. She ended her email by saying that as the claimant's current fit note was due to end on 21 March 2022 she would contact the claimant on that date to organise a meeting at the respondent's head office in Clarkston to discuss the matters.

64. The claimant completed the form and emailed it to Ms Ashelby on 15 March 2022. She said she was keen to have the issues, including her salary grievance, resolved before she returned to work and asked if her requests could be agreed as soon as possible to aid her return. Ms Ashelby acknowledged the email and said she would contact the claimant in due course to arrange either a telephone or Teams meeting.

65. Ms Ashelby sought HR advice in response to that email. Her own view was that she wished to meet the claimant in person rather than virtually as it would be more conducive to a productive conversation. As well as the claimant's flexible working request she also wished to cover two further matters - the circumstances around the claimant continuing to start work after 9am for a longer period than she had understood, and to appreciate better the impact of the claimant's condition in light of the social media posts that she had seen. She did not divulge this to the claimant or issue an invitation to a telephone or Teams meeting.

66. By 21 March 2022 the claimant did not feel well enough to work and notified Ms Ashelby that she would not be returning the following day. On 22 March 2022 she emailed Ms Ashelby a further fit note which ran until 4 April 2022. The symptoms were stated as 'covid' but in her email she said that her doctor had confirmed that she was suffering from long covid and had been advised to rest [224]. This was the first reference made to long covid.

67. Three days later on 25 March 2022 Ms Ashelby emailed the claimant again, attaching a letter inviting the claimant to a meeting to discuss the flexible

working request [238-239]. It was to take place on 8 April 2022 at the Clarkston head office. There would be a note-taker present and the claimant was given the option to be accompanied. Ms Ashelby said that the claimant's issues in relation to salary would be covered at a further meeting to be arranged separately. In her evidence to the tribunal she explained that her rationale was that it was not feasible to agree on the claimant's pay until it was known what changes would be agreed to her hours and any other aspects of her role arising out of the flexible working request.

68. The claimant replied shortly after to say that she was on holiday on the proposed meeting date, and could the meeting be arranged by telephone or video call on that day rather than in person [228]. Around an hour later she emailed Ms Ashelby again to ask if her salary issues could be dealt with at the same meeting.

69. Ms Ashelby emailed the claimant back that afternoon to say that the meeting would be rescheduled until 21 April 2022 but otherwise the venue and format would be the same [240]. She attached a revised invite letter confirming the date change. She said that the claimant's salary would not be discussed at the meeting as it was a separate matter.

70. On 15 March 2022 the claimant had telephoned one of the respondent's HR Advisors named Ollie McCann about her return to work and flexible working request. The claimant conveyed that she felt that a return to working five days per week immediately would be too intensive, as she would have to manage if her flexible working request would only be discussed after she was back at work. Mr McCann suggested that the claimant might be able to return initially for four days per week by using up a day of accrued annual leave each week until she was established back in a pattern. He emailed Ms Ashelby to make this suggestion and copied in Ms Adesina. Ms Ashelby did not notice the email until 29 March 2022 when she emailed Ms Adesina to say that she *was 'not of a mind to agree to this course of action'* [243]. She gave no reasons why. She did not respond to Mr McCann who had suggested the measure.

71. By 6 April 2022 Ms Ashelby had not heard back from the claimant in response to the rescheduled meeting invite. She asked Ms Adesina if it was appropriate for her to contact the claimant again for confirmation that she would attend. Any advice given was not confirmed to the tribunal. Ms Ashelby did not go back to the claimant at this point.

72. On the same day she emailed HR to explain the situation with the claimant's extended late start time and make the point that the claimant's pay had not reduced at the same time. She asked for help in calculating the value in terms of pay of the hour between 9am and 10am each day that she understood the claimant was not working. She wished to use this as a negotiating point with the claimant in relation to her request for a salary increase.

73. The claimant emailed her final fit note to Ms Ashelby in the afternoon of 18 April 2022. This was the only fit note to state the medical condition as 'long covid'.

74. As stated, the respondent has a Sickness Absence Policy [138-146]. Among other provisions, there is the option for a manager to carry out a first welfare meeting with a colleague who is on long-term sickness absence, defined to mean one of four or more weeks' duration. Managers are given discretion in relation to whether or when to propose such a meeting. The meeting will normally take place in the workplace unless that is not appropriate, and the manager will ask about the illness and its expected duration. A phased return or referral to occupational health may be considered. Any agreed next steps will be followed up in writing.

75. The claimant asserted that Ms Ashelby ought to have scheduled a welfare meeting for her, and thereafter organised an occupational health examination. Ms Ashelby did not think it was appropriate to do so as the claimant was not initially expected to be absent for four weeks or more. Ms Ashelby understood that the claimant would be fit to return to work within around two weeks of testing positive, as she had done the first time she contracted Covid-19. Even as the absence continued, the claimant's fit notes suggested a relatively proximate return date.

The claimant's resignation

76. The claimant resigned from her employment by email to Ms Ashelby at 8.37am on 19 April 2022. She gave four weeks' notice, ending on 17 May 2022. She gave the reasons for her resignation as follows:

> ***'Reason for my resignation***
>
> *You should be aware that I am resigning in response to a repudiatory breach of contract and I therefore consider myself to be constructively dismissed.*
>
> *I can no longer carry on working in my position due to the businesses behaviours towards me. There has been a continuous and long series of events in my employment that have now resulted in me having to take this action as they result in breaches of my contract of employment.*
>
> *The final chain of events have been of this year with my salary grievance, pay deal, working hours change request and lastly despite my attempts on long term sick leave to formally agree reasonable adjustments to help me return to work including reduced working hours, you have advised me that you are unable to discuss these until I return to work in full. Whereby thereafter a formal meeting would take place before my request could be resolved by you. I feel discriminated against and that you are prohibiting me from be able to return to work and creating an environment I can no longer work in.*
>
> *In summary, the continuous long series of events which include bullying, harassment and discrimination are untenable. Furthermore my career progression has been unlawfully prohibited due to a previous grievance in my employment with you.*
>
> *You have therefore failed to uphold your duty of trust and confidence to me as my employer of which our relationship has been destroyed in your actions towards me. I now consider my working conditions intolerable which leaves me no option but to resign in response to your breaches and consider myself constructively dismissed.*

Yours sincerely,

Sharon Savage'

77. Ms Ashelby did not respond directly to the claimant's resignation, mainly as she appreciated that it alleged the respondent was legally liable and she wanted to get advice from HR. She forwarded the email along with the claimant's final fit note to Ms Adesina.

Post-resignation grievance

78. An Employee Relations Specialist within the respondent named Rebecca Whitney emailed the claimant on 21 April 2022 to acknowledge her resignation email. She said she was concerned at the comments and allegations made, and believed it was important to look into them. She attached the respondent's grievance policy and suggested the claimant consider putting forward her complaints under the process that it afforded. She offered to appoint an independent manager to investigate the complaints if the claimant did not want to actively be part of such a complaint. She did not receive a response by 25 April 2022 and sent a short follow-up email.

79. The claimant replied on 26 April 2022 [267] to express disappointment at the lack of contact by Ms Ashelby, and to confirm that she wished to raise a grievance. She referred to her request for flexible working and listed 13 matters which she believed were breaches of her contract. Those were, in summary:

(i) Failure to consider a phased return to work (this was a reference to her not being allowed to return to work in March 2022 for four days per week by using a day per week of accrued annual leave);

(ii) Failure to consider her flexible working hours application made on 15 March 2022;

(iii) Failure to support her long-term absence through illness, beginning on 14 February 2022;

(iv) Failure to take steps to prevent ongoing bullying and harassment by Ms Filshie;

(v) Failure to consider her 'salary grievance' first raised in January 2022;

(vi) Failure to provide equal pay due to a lack of transparency of the pay and grading system, discretionary commission and car allowances, and discrimination between male and female employees and between the Sales, Lettings and Financial Services divisions;

(vii) The unfair and discriminatory consequences of Ms Donaldson's handing of her grievance appeal in 2016;

(viii) Failure to advertise job vacancies internally and externally, and giving roles or promotions to family and friends of the leadership team of Ms Donaldson and Ms Ashelby;

(ix) Breaching the claimant's confidence by divulging details of her personal life to Mr McDonald in connection with the Financial Services vacancy the claimant applied for;

(x) Failure to reasonably consider holiday requests;

(xi) Failure to protect the claimant during the Covid-19 pandemic, with severe health and safety breaches resulting in the office outbreak in September 2021;

(xii) Failure to consider requests to work from home on a part time of or full time basis during the Covid-19 pandemic; and

(xiii) Unfair treatment during her sickness absence, in the form of Ms Ashelby (i) attempting in February 2022 to make arrangements for the claimant to work from home without verifying whether she was fit to do so, (ii) visiting the claimant's branch, holding a meeting with her team and suggesting that that the claimant was remiss in not holding daily 9am meetings, and (iii) emailing the claimant to order the reinstatement of those meetings despite having previously given the

claimant permission to start work at 10am, causing unnecessary stress.

80. The grievance contained a number of matters additional to those explicitly referred to in the claimant's resignation email.

81. Ms Adesina approached a series of managers to hear the claimant's grievance but owing to their other work commitments none of them was available. One manager who was available was ruled out by the claimant as being perceived as too close to Ms Donaldson. Eventually on 5 May 2022 Mr Paul Ashton was identified, who was a Divisional Managing Director for the Anglia and Central area of England.

82. The earliest date suitable to both the claimant and Mr Ashton was 9 June 2022. A letter dated 24 May 2022 was sent to the claimant inviting her to meet virtually with Mr Ashton on that day [368]. She was given the right to be accompanied by an employee of the respondent or a certified trade union representative.

83. The virtual grievance meeting began on 9 June 2022. A note-taker was present and the claimant was accompanied by a friend who was not an employee of the respondent or a certified trade union representative. Mr Ashton would not proceed to hear the grievance with the claimant's friend present. He offered to go ahead should she leave the meeting, or reschedule the meeting at short notice to allow the claimant to bring a permitted representative. The claimant would not agree to either. She mentioned that she had named her friend to HR over two weeks before and no issue was raised at that time, and that she was only there to take notes and not to play an active part. She was not a member of a trade union and did not trust any of her former colleagues. She accused Mr Ashton of behaving unprofessionally. She ultimately asked Ms Ashton to decide her grievance without a meeting taking place. Notes were typed up at a later point and were not disputed by the claimant before the tribunal [394]. They are taken to be a suitably complete and accurate summary of the meeting, such as it occurred.

84. The claimant commenced early conciliation with ACAS on 9 June 2022, the day of her grievance meeting.

85. Mr Ashton gave the claimant the opportunity to attend a rescheduled grievance meeting, again to be virtual, to take place on 17 June 2022. A letter to that effect was sent on 10 June 2022 [404]. The claimant replied on 14 June 2022 to say that it had been made 'impossible' for her to attend the meeting as she had no trusted colleagues, was not a member of a trade union and was not allowed to bring in a solicitor or personal friend. Ms Adesina replied to the claimant on 14 June 2022 to say that the respondent's stance would not change, but the claimant could provide a written submission instead of attending a meeting or her original grievance letter of 26 April 2022 could be treated as a written submission and Mr Ashton's investigation would be based on that. The claimant agreed to the latter approach.

86. Mr Ashton investigated the matters raised in the claimant's grievance. He interviewed Ms Donaldson and Ms Ashelby on 22 June 2022 and notes were taken of each [431-434]. He interviewed Mr McDonald on 27 June 2022 and again notes were taken [458].

87. Mr Ashton went back to the claimant at various points, either to explain how the investigation was progressing or to clarify some of her complaints.

88. Ms Donaldson explained by email of 19 July 2022 some of the steps she had taken in relation to the claimant's concerns about the Slater Hogg Shawlands office being Covid-safe in late 2021 [605]. She stated that she had asked for the air conditioning until to be serviced, and spoke to a senior Health and Safety consultant about the unit, who told her it was not linked to the outbreak which had occurred. She had called the claimant to reassure her that it was safe to return to the office.

89. Mr Ashton's outcome letter was issued on 21 July 2022 [615-622]. The claimant's grievance was not upheld save in relation to one aspect, namely the breakdown in communication which led to her holiday requests not being approved. Mr Ashton accepted that this was not satisfactory, but had been informed that the system issue which caused the problem had now been fixed.

The letter itemised each of her initial complaints in turn and provided a response to indicate the investigatory steps taken and conclusions reached.

90. The claimant was given a right of appeal which she exercised by email on 28 July 2022 [633-645]. She also emailed around 30 supporting documents at the same time.

91. A Mr Stewart Lobb, Divisional Managing Director, was appointed to hear the appeal. The claimant was invited by letter to a virtual hearing on 12 August 2022 [822]. The hearing proceeded and notes were taken [833-844]. The meeting lasted for two and a half hours. The claimant was not accompanied. Mr Lobb sent a copy of the minutes to the claimant for review. She declined to make any changes and did not say they were inaccurate. She expressed disappointment at Mr Lobb having said that he would not conduct a complete rehearing of the original grievance, and that he was not authorised to negotiate a settlement with her.

92. In investigating the claimant's appeal Mr Lobb interviewed Mr Crocket on 23 August 2022, Ms Ashelby on 25 August 2022, and both Mr McDonald and Ms Donaldson on 5 September 2022. Notes were taken of the discussions [845-852, 856-857, 863-865].

93. Mr Lobb issued his appeal outcome by letter dated 14 September 2022 [884-893]. He summarised the claimant's appeal points before explaining what investigation he had undertaken and his conclusions in relation to each. The appeal was not upheld. He found no evidence of discrimination or a breach of the claimant's contract on the part of the respondent. Under the respondent's policy there was no further right of appeal from his decision.

Post-resignation working, mitigation of loss and health

94. The claimant secured a temporary role as a sales coordinator with the Purple Bricks estate agency, beginning on 1 June and lasting for six weeks. She worked from home for 22.5 hours per week and was paid at the equivalent rate of £11,000 per annum or £211.54 gross per week. She estimated she earned between £700 and £800 net in total.

95. The claimant's position was that she was unable to drive more than short occasional trips due to her ongoing medical symptoms. This excluded her from a number of roles she could have applied for, including in the letting sector. Commuting by public transport created childcare issues owing to the additional time it took. She lived in a relatively rural area which did not have direct bus or train routes to Glasgow.

96. The claimant began a permanent role with Scottish Leather Group on 17 August 2022 and remains in that role. She is a Sales Support Administrator and her workplace is close to her home, meaning that she does not need to drive for more than ten minutes. It is a hybrid role combining some home working. Her base salary is £24,500 which is higher than her salary at the time of resigning from the respondent. She is a member of a contributory occupational pension scheme. She provided payslips to evidence her monthly earnings in detail.

97. At the time of the hearing the claimant was still experiencing some of the symptoms which prevailed between February and April 2022. She still had 'bad days' although on better days was able to achieve more of what she was capable of before her second Covid-19 diagnosis. On some days she still experiences heart rate issues, fatigue, impaired cognitive function and tinnitus. She has undertaken tests but nothing conclusive has been diagnosed. She is able to run for up to six miles twice per week, whereas in 2021 she trained for and completed a marathon.

Recruitment of Ms Ashelby's family members

98. Ms Ashelby's daughter and son are both employees of the respondent. Her daughter had worked in a bank and applied for a role in the respondent's Financial Services arm. Ms Ashelby made her aware of the vacancy but was not involved in her recruitment. She secured the position. Ms Ashelby's son joined the respondent as a junior letting negotiator and then moved to the Sales division, before also moving into Financial Services. Again there was no evidence of Ms Ashelby influencing the process to her son's advantage.

The parties' submissions

99. The claimant summed up her case by saying that she continued to insist on the complaints in the list of issues.

100. In relation to her request to have a phased return to work from her illness in February and March 2022, she said the respondent failed to consider this. That involved discrimination based on sex, age (with the comparator being younger employees likely to have fewer childcare commitments) and disability.

101. By failing to consider her flexible working request, the respondent discriminated against her in the same ways.

102. Likewise the failure to hold a welfare meeting under the Sickness Absence Policy was discriminatory.

103. She said that by the respondent's failure to recognise long covid as a disability, the respondent discriminated against her by reason of disability.

104. Ms Ashelby's failure to approve her holidays was an example of sex discrimination.

105. The claimant said that the catalogue of events which led to the last straw, followed by her resignation, began in 2016 with the treatment of her grievance. She was asked to accept less favourable terms. She was then by 2019 being paid unequally as compared with others and also herself in previous roles, and required to raise a further grievance about that. During the process of applying for a role in the Financial Services division there was a breach of her confidence, and data protection rules, by way of a disclosure about her previous financial circumstances. She was not protected against the unacceptable conduct of Ms Filshie when the two shared a branch and she was unfairly moved out of the branch in order to make that stop. A lack of adequate Covid-19 safety procedures also contributed.

106. The claimant relied on the employment tribunal judgment in ***Burke v Turning Point Scotland*** which was issued on 10 June 2022 to illustrate that long covid

can meet the requirements of a disability under the EQA. She was still suffering from some of the effects of the condition and had had to seek a new role which her physical limitations allowed her to perform. This was a hybrid role, with a workplace close to her home and no staff management responsibilities.

107. Ms Redman summarised the respondent's case as follows.

108. The claimant had not provided enough evidence to displace the initial burden of proof on her in each of her complaints. All of her historic complaints were addressed, reasonably and usually with the result of putting her in a better position. This was therefore more favourable treatment and not less. This would most likely have continued had the intended flexible work meeting been able to take place in 2022. The overarching message was that the claimant was treated the same way as anyone else would have been.

109. The claimant had not identified relevant comparators in her age and sex related complaints of direct discrimination. Looking at the events in 2022 complained about, there was no evidence of unfavourable treatment, let alone less favourable treatment than a suitable comparator. There was no 'failure' on the respondent's part. It initiated the right procedures and tried to follow them to conclusion.

110. There was no hard and fast rule under the Flexible Working Policy that a meeting had to be held to discuss the request within 28 days of it being made. The first meeting would have been within 28 days but the claimant asked for it to be put off. The second meeting was scheduled for a short time after. That was all the respondent could do.

111. Ms Ashelby did not refuse the phased return request, but wanted to discuss it along with everything else at the flexible working meeting.

112. There was no provision, criterion or practice to the effect that all of the respondent's employees had to work full time. The claimant herself acknowledged this and was aware of staff who had reduced their hours, including herself. Ms Ashelby had said everything was 'on the table' for the

flexible working meeting. She gave an example of a colleague being allowed to return to work from maternity leave on reduced hours. The claimant herself was allowed to start work later to accommodate her children's school day.

113. The question of whether the claimant was disabled needed to be applied at the relevant time, namely around the date the flexible working request was made and the events which followed. It was not denied that the claimant suffered a range of symptoms but there was no judicial decision above employment tribunal level that long covid could amount to a disability. In ***Burke*** the point was made that the question was very fact-based and the claimant in that case had been absent with the condition for nine months, longer than the claimant. The symptoms of the claimant in that case appeared to be more extreme than those the claimant described in the present claim. In another employment tribunal decision, ***Quinn v Sense Scotland*** which was issued on 29 August 2022, a finding was made that long covid did not meet the threshold of a statutory disability, despite a formal diagnosis being made at a later date. The current claim was closer to ***Quinn*** than ***Burke***.

114. Assessing whether the claimant suffered a substantial impact on normal day to day activities, Ms Redman said that the symptoms she disclosed to Ms Ashelby, via WhatsApp messages, were typical Covid-19 effects such as tiredness, coughing and fever. Later she said she had had trouble breathing. She did not divulge any of the more serious and persistent symptoms she described in her evidence. There was a lack of evidence at the time to qualify as substantial.

115. She said there was also no evidence that the symptoms would endure for at least 12 months. The fit notes only referred to Covid-19 itself until the day before the claimant resigned. There was no other medical information. The claimant had been unable to see her GP in person and they had only spoken by phone.

116. As a separate point, if the claimant was disabled at the relevant time then the respondent did not have knowledge of it, and could not reasonably have deduced that this was the position. This again was because the claimant had

only described some of her symptoms and those were typical of a 'normal' Covid-19 infection and not something more debilitating.

117. In relation to the discrimination claims, it was said that the respondent was not on notice to identify the need to make any adjustments, both because it did not know the claimant was disabled and since there was nothing apparent they could do that they were not already doing in any event. By March 2022 the claimant reported feeling better and her return date was never far off.

118. Holding a welfare meeting was an option as the absence continued but not mandatory. The claimant was on leave, then anticipated to be returning shortly after her illness, and she and Ms Ashelby were generally in touch using WhatsApp. There was no need for a meeting and no disadvantage by not having one. This was also true of the other decisions taken by Ms Ashelby, such as not allowing a phased return to work and not holding the flexible working meeting remotely.

119. Dealing with the constructive unfair dismissal claim, Ms Redman made the point that after many of the events now being relied upon the claimant had said at the time that she was content with the outcome. This included the resolution of her 2016 grievance appeal and the office move in February 2021. In neither case was the claimant coerced into the changes – they were offered to her and she agreed to them.

120. The claimant was not underpaid at the time of her 2019 salary grievance. The respondent does not operate a system of pay scales, and earnings are set with reference to the division and role in question, the size and performance of the relevant branch and other additional skills such as management. On several occasions the claimant's pay or commission levels had been increased and there is an annual process to review that.

121. In relation to Ms Filshie, there was evidence that each had difficulties working with the other. The respondent did not take sides but sought a pragmatic solution at local level, which it believed it had found.

122. In relation to Covid-19 practices, there had been 'ups and downs' for all employers and workers, and all offices were assessed for risk before staff could return after the initial lockdown period in March and April 2020. Ms Ashelby made sure a review was undertaken of the claimant's new office before her move in February 2021 as she knew how much of a concern it was for her. Proper advice was taken and remedial steps were made after the outbreak in September 2021. There was no conduct to damage trust.

123. The claimant's pay request in January 2022 was given serious consideration. She was already to receive a commission increase and a profit share. Ms Ashelby could do little until closer to April, and then the claimant made her flexible working request in March which it was felt had to be resolved first. The claimant referred to a colleague Graeme McInnes earning more but he was in the Sales division with a different reward structure and so not a fair comparator. This was addressed in the claimant's post-termination grievance, so she did receive an explanation.

124. There was no conscious refusal of the claimant's holiday requests. The problem was a technical one and not the fault of Ms Ashelby. She approved them as soon as she became aware.

125. It was reasonable for Ms Ashelby to remove the concession made to the claimant to allow her to start work late. It was initially expected to be temporary and believed to be no longer necessary. It was reasonable also for Ms Ashelby to want to discuss this face to face.

126. There was no lapse in more general management of the claimant. There were regular meetings, the claimant received feedback when necessary and had a good, open relationship with Ms Ashelby. In short, there was no repudiatory breach of contract.

127. In relation to remedy, it was said that the respondent agrees parts of the claimant's schedule of loss, but that she chose to leave the property sector where all of her experience had been acquired. There are still many openings there, some which offer flexibility. She could have done more to mitigate her losses.

128. No medical evidence of injury to feelings was produced. Although that was not strictly necessary as a rule, she was looking for a high amount and the tribunal should be satisfied what is appropriate with reference to objective expert evidence as well as the claimant's own evidence. If an award were required, it should be at the low to middle part of the lowest band established by Vento v Chief Commissioner of West Yorkshire Police [2002] EWCA Civ 1871 and subsequently revised to account for inflation.

Discussion and decision

Direct sex discrimination – s13 EQA

129. For the claimant to succeed in a claim of direct sex discrimination she must identify an appropriate comparator who was, or would have been, more favourably treated than she was. The comparator may be a real person or a hypothetical individual, in either case in materially the same circumstances as herself but for the characteristic of sex. The claimant relies on a hypothetical male comparator. The reason for the claimant's less favourable treatment must be sex and not another reason.

130. The onus of proving any form of direct discrimination falls initially on a claimant. They must prove 'primary facts' which are at least capable of amounting to direct discrimination. There is a body of case law authorities to this effect, e.g. ***Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332*** and ***Royal Mail Group Ltd v Efobi [2021] UKSC 33***. This means that they must bring evidence of being less favourably treated than their chosen comparator, and 'something more' to at least provisionally suggest that the reason for that treatment is the protected characteristic such as sex. If they cannot do that their claim will be unsuccessful. If they can, the onus then falls on the employer either to show that the events did not happen (or at least not in the way suggested) or that they happened for a reason other than sex. The employer is unlikely to be able to defend the complaint unless it can do so.

131. The claimant alleges less favourable treatment because of sex in the following ways:

a. Failure to help her return from her absence which began on 15 February 2022;

b. Failure to make reasonable adjustments to allow her to return to work;

c. Failure to consider her flexible working request of 15 March 2022;

d. Breach of the Flexible Working Policy by not arranging a meeting within 28 days of the request being submitted;

e. Failure to follow the ACAS code of practice relating to flexible working;

f. Failure to consider her holiday requests for 2022; and

g. Failure to hold a welfare meeting under the Sickness Absence Policy.

Items (a) to (e) were set out in the list of issues, and (f) and (g) were raised in the claimant's closing submissions. It became apparent that there was a degree of overlap between matters (a) to (e). Those are therefore dealt with together below.

132. Considering her evidence – to the tribunal and in the documents generated at the relevant times such as her resignation email and subsequent grievance - the claimant alleged that she had not been helped to return to work in or around March 2022 by the respondent:

(i) Insisting on holding the meeting to deal with her flexible working request in person, and not offering to conduct it remotely by telephone or Teams, thus requiring her to be back at work before it could take place;

(ii) Refusing to allow her to return to work initially for four days per week by using accrued annual leave days to cover one working weekday, therefore requiring her to come back to work full time; and

(iii) Declining to deal with the claimant's request for a review of her pay and conditions, made in January 2022, as part of the flexible working request (or, for completeness, before it) and deciding instead that it

would be dealt with after the outcome of the flexible working request was known.

133. Looking at those matters in turn, the tribunal concluded on the evidence presented that Ms Ashelby wanted to meet with the claimant face to face because she believed it would allow for a more productive discussion of the flexible working request, and also because she wished to raise the separate matters of the claimant's ongoing late morning start and the apparent inconsistency (as she saw it) between the claimant's reported symptoms and her activities evident from her social media accounts. The claimant offered no evidence as to why the decision was because of her sex, and the available evidence pointed to these other reasons.

134. Considering the claimant's request to use a day of leave per week as a means of effecting a phased return, Ms Ashelby was 'not of a mind' to agree to the arrangement. She understood at the time that this was raised with her that the claimant was only absent in the short term and would be able to make a full recovery. She saw the suggestion on 29 March 2022 and at that time the claimant's fit note suggested she would be able to return a week later on 4 April. Admittedly however, the claimant had been absent from work through illness for some six weeks by this point, clearly longer than the average isolation or recovery period from a positive Covid-19 test.

135. The claimant could not suggest why the decision was taken because of her sex. The legal onus was on her to do so. Ultimately the tribunal found that Ms Ashelby declined the request to use annual leave in this way for a reason other than the claimant's sex. The most probable reason was that she thought a phased return was not going to be necessary because she took from the claimant's fit note that she would be fully able to resume her duties within a short period. She would have taken the same view had a male employee reporting to her made the same request in the same circumstances. In other words, it was not because the claimant was a woman that Mrs Ashelby said no.

136. Finally, in relation to Ms Ashelby's decision not to consider the claimant's request for enhanced pay before resolving the flexible working application, the claimant again was unable to show any primary facts which suggested the decision being taken because of her sex. The tribunal was satisfied on the evidence that Ms Ashelby applied the logic that the claimant's pay could not be agreed until such details as how many hours per week she would be working were resolved. It was not uncommon for a flexible working discussion to lead in other directions from the terms of the original request and result in a change of duties or title, or a new place of work. This had happened before for the claimant in response to her grievance in 2016. It was understandable for Ms Ashelby to wait until it was known what changes, if any, were going to be made in that way before discussing pay.

137. The above conclusions effectively deal with (a) and (b) of the claimant's list of direct discrimination complaints.

138. The tribunal considered (c) and (d) together. They found that the respondent did not fail to deal with the claimant's flexible working request. Ms Ashelby made two attempts to meet with the claimant to progress it. She was entitled to insist on the meeting being in person for the reasons stated in paragraph [105] above. Even by the time the claimant resigned, she was still trying to hold the meeting. And even if she were perceived as failing to hold the meeting, there was no evidence that this was because of the claimant's sex, and that she would have acted differently had the claimant been a man.

139. Nor did Ms Ashelby act in breach of the Flexible Working Policy. It is not clear within the policy itself whether its terms are treated as being contractual or discretionary from the respondent's point of view. Even if it is the former, the policy explicitly states that a meeting will 'usually' take place within 28 days of a request being submitted in the correct format. As such the policy recognises that there will be situations where it is not possible to meet within 28 days. The claimant's situation was one of those. By contrast the policy states that each request 'will be concluded' within three months. The respondent had not exceeded that time limit by the date when claimant resigned.

140. The claimant did not make direct reference to the ACAS Code of Practice on handling flexible working requests. Considering the section of the Code dealing with 'Responding to a flexible working request', the tribunal found no provision which the respondent failed to follow. It noted that, in relation to discussion of a flexible working request, the Code states:

'It's a good idea to hold the meeting somewhere private, where you can talk confidentially. If you cannot meet face to face, you could also discuss it over the phone.'

The respondent proposed the first of those. She expected it would be achievable within a reasonable timescale. The second option is phrased as an alternative and not suggested to be mandatory.

141. In relation to the complaint that Ms Ashelby failed to consider or approve holiday requests, the tribunal's findings were that she did not receive those as she normally would have done because of a technical problem with the relevant system. When it first became clear to her that the claimant had requested holidays she approved those which were still to come. There was not a failure on Ms Ashelby's part to approve the holidays. The same issue would have arisen had a male employee reporting to her requested the same holidays via the online system. Ms Ashelby would not have seen, or been able to approve, that request either. There was no discrimination by reason of sex.

142. The final matter complained of was an alleged failure to arrange a first welfare meeting for the claimant under the respondent's Sickness Absence Policy. A first welfare meeting is something a manager could arrange with an absent employee under the policy. The purpose of the meeting is to allow the manager to understand better the nature of the illness, how long it is expected to continue, whether a phased return is possible and whether occupational health should be asked to assess the individual. According to the policy it will normally become an option if the employee has been absent for 28 days, is anticipated to be absent for at least 28 days, or the date of return is not known. In that regard the policy says:

'The trigger points below are for guidance only and management discretion will apply.'

The claimant's absence began on 15 February 2022. She initially self-certified and her first fit note covered the period of 24 February to 4 March 2023. By the expiry of that note she would not have been absent for 28 days. The next fit note covered her until 21 March 2023. Only upon receipt of that could Ms Ashelby appreciate that the claimant's absence would last for more than 28 days overall, but only just. Even so, she had discretion under the policy over whether to arrange a welfare meeting. The tribunal accepted that she exercised her discretion not to hold a welfare meeting until the claimant returned to work, and did so for reasons unconnected to the claimant's sex. It was for the claimant to prove that link, but again there was no evidence to do so. The evidence available suggested that Ms Ashelby thought a meeting would not be justified as the claimant's return to work was never expected to be more than a few weeks away.

143. In summary therefore, the claimant could not establish any primary facts which provisionally linked any negative treatment she experienced with the fact that she was a woman. In addition, there was evidence to suggest that, where such treatment occurred at all, it was for other reasons.

144. The tribunal therefore was unable to uphold any of the complaints of direct sex discrimination.

Indirect sex discrimination – s19 EQA

145. In making this complaint the claimant relied on a provision, criterion or practice ('PCP') being the respondent's requirement that all of its employees work full-time. She argued that as a woman she was within a group more likely to be placed at a disadvantage by the PCP, she was herself disadvantaged by the PCP, and that it was not a proportionate means of achieving a legitimate aim.

146. The respondent's witnesses' evidence was that the respondent applied no such PCP. Some of its employees worked part time as that was the scope of their role and others worked reduced hours following agreement with the

respondent, often as a result of making a flexible working request. The claimant herself had come to an arrangement with the respondent as part of the resolution of her 2016 grievance that she would reduce her hours. When she was ready to return to full time working in January 2019. The claimant was able to start work up to an hour later each day from August 2020 in order to manage childcare responsibilities.

147. It was not even clear that the claimant would be required to work full time herself, and so would be placed at the personal disadvantage she alleged. This was on the basis that, again, when she had requested to reduce her hours to less than full time she had been accommodated, and because Ms Ashelby was still receptive to that again as an outcome to the flexible working request made on 15 March 2022. It had not pre-emptively been refused.

148. The tribunal concluded on the evidence that the respondent did not operate a provision, criterion or practice of requiring all employees to work full time. Nor, for completeness, did it require all branch managers or team managers within its Letting business work full time. Nor did it require the claimant herself to work full time. No complaint of indirect sex discrimination could be well founded.

Direct age discrimination – s13 EQA

149. The claimant alleged that the respondent had directly discriminated against her on the basis of age. The meant that she considered she was less favourably treated than a comparator because of her age. She had identified a real comparator who was a colleague and who was younger than her. That individual had children and had had a flexible working request granted. The claimant did not directly refer to her in her evidence before the tribunal. The tribunal also considered, in the interests of fairness and for completeness, whether there was a suitable hypothetical comparator. That would have been a younger colleague performing work materially the same as the claimant who made a flexible working request in terms similar to hers.

150. The claimant alleges the less favourable treatment to have occurred by the respondent:

a. not considering a phased return to work for her (this again is a reference to her using up one annual leave day per week upon her return to work from her Covid-19 illness);

b. Failing to consider her flexible hours request;

c. Breaching its own Flexible Working Policy by not conducting a meeting with her within 28 days of the application, and

d. Failing to follow the ACAS Code of Practice on handling flexible working requests.

151. Ms Ashelby did not agree to allow the claimant to utilise a day of leave each week upon her return to work from illness, although she did not communicate that to the claimant. In the event the point was never reached where a decision had to be intimated as the claimant was medically deemed unfit for any work up until the date when her resignation took effect. In any event the claimant could not prove that Ms Ashelby adopted that position with reference to the claimant's age. As found above, the available evidence did not support that and pointed to other reasons, namely Ms Ashelby thinking it would not be necessary.

152. As has been discussed above, the respondent did not fail to consider her flexible working request. That suggests a deliberate intention not to consider it, or a lack of sufficient will to see the process through. Ms Ashelby arranged a meeting to progress the request twice, the first falling within 28 days of the request and the second, rescheduled because the claimant was on leave, just after that point. She was still planning to attend that meeting and under the impression that it would be going ahead – to the extent that she sought HR advice on whether she could send a further email to gain the claimant's confirmation of attendance – when the claimant resigned.

153. Similarly the respondent did not breach its own Flexible Working Policy, if indeed its terms were contractual, because the 28-day rule was not mandatory in all cases, but one to be observed in usual circumstances. The claimant would have attended a meeting within 28 days under usual

circumstances, i.e. had she not been off ill and then taking annual leave on the first proposed meeting date.

154. For reasons similar to those given in relation to the direct sex discrimination complaint, the tribunal could find no breach of the ACAS Code and the claimant did not specifically raise any.

155. Had any of (a) (b), (c) and (d) above occurred in a way which qualified as unfavourable treatment, the tribunal saw no evidence that the treatment of the claimant's named comparator or a hypothetical younger comparator was or would have been any more favourable.

156. The tribunal found that the requirements of a complaint of direct age discrimination had not been established.

Disability discrimination

Disability status

157. For a claimant to meet the statutory definition of disability under section 6 EQA they must suffer from a physical or mental impairment which has a substantial long-term effect on their ability to carry out normal day to day activities.

158. 'Substantial' in the context of section 6 means more than minor or trivial. Long-term means that the impairment in question has already lasted for 12 months or more, or is expected to last for 12 months or more, or is likely to recur.

159. The claimant relies on the condition 'Long Covid' as a disability. It does not matter whether 'Long Covid' is a clinically recognised condition in itself – it is the effect on the individual which matters, i.e. the claimant's own symptoms. The claimant experienced, at various times, a range of symptoms which, individually or in combination, had a substantial effect on her ability to cook, clean, get dressed, undertake moderate exercise, take part in other simple domestic and family activities and drive her car. Those are all normal day to day activities of the type envisaged in section 6. She was affected in that way between 15 February 2022 and the date of her resignation, 17 April 2022.

160. Whist in the above respects the claimant potentially met the definition of disability, she lacked one essential requirement. Her condition was not long-term. That is to say, at the time of the events complained of her condition could not reasonably have been expected to have the same effect on her for at least 12 months.

161. The claimant's complaints under both section 13 and sections 20 and 21 EQA are all about acts or omissions between 15 February and 17 April 2022. It is at that time that the question of whether the condition was long-term should be judged. It does not matter what course the illness took after the latter date. It is what is known and what can reasonably be predicted at the time of the alleged discriminatory act which matters – see for example ***Tesco Stores Ltd v Tennant UKEAT/01617/19.***

162. The claimant had contracted Covid-19 in September 2021. On that first occasion she had recovered within two weeks, which would be a normal recovery period objectively speaking. Her symptoms in 2022 were more severe than those she experienced five months before. However, it was not reasonable to expect them to continue at the same level of severity for at least 12 months. Most likely, at the very beginning of her infection period she would have been expected to recover within two weeks. As time passed and it became clear that it would take longer, but her fit notes never indicated that she would be fit to return to work more than a few weeks after they were issued. Save for the last note, which was only tendered to the respondent the day before she resigned, the fit notes covered ten, twenty eight and fourteen days respectively.

163. Only the claimant's final fit note stated 'long covid' as opposed merely to a reference to Covid-19. That was provided to the respondent the after before the morning in which she resigned. No alleged discriminatory acts took place between the respondent's receipt of the fit note and its receipt of the resignation email itself. The alleged discriminatory acts occurred earlier and in the absence of any medical assessment of Long Covid. Whilst the claimant's evidence was that her GP described her symptoms as long covid at an earlier date than that, this still did not imply that the effects the claimant

was experiencing in February in March 2022 would be as severe a year later. The tribunal noted that the condition Long Covid is not one which in 2022 had a predetermined course or prognosis, or set of symptoms, and so it could not be predicted with any accuracy whether the claimant's symptoms would ease and when. Further, the claimant had not been medically assessed and her GP was relying on her own description of the symptoms.

164. The tribunal noted that the test of whether an impairment is likely to last for at least 12 months equates to an assessment of whether that 'could well happen'. Therefore it need not be the most likely outcome at the point when the assessment is made. The tribunal considered that it was not impossible that the claimant could have been significantly affected by her symptoms in her normal day to day activities for up to a year, but that given the information available in the period February to April 2022 this was unlikely and below the probability level of something that 'could well happen'.

165. Taking this approach the tribunal found that the claimant did not have a disability at the time of the treatment she alleged that the respondent had carried out. Although her condition had a substantial effect on her normal day to day activities, it was not long-term when assessed as the law requires.

166. From this it follows that none of the claimant's complaints under section 13 or sections 20 and 21 EQA based on the protected characteristic of disability can succeed.

Complaint of failure to make reasonable adjustments – ss 20 and 21 EQA

167. For completeness, the tribunal considered whether any of the complaints based on disability would have succeeded had the claimant been able to establish that status at the relevant time.

168. The tribunal found that the respondent would not have reasonably been expected to know that the claimant's condition was a disability between 15 February and 17 April 2022 even if it had qualified as such. This is because the claimant did not describe her full range of symptoms to Ms Ashelby (or anyone else within the respondent). Ms Ashelby was entitled to think that the

second occasion of Covid-19 was similar to the first, albeit that the symptoms lasted a few weeks longer.

169. An employer's lack of actual or constructive knowledge is a complete defence to a complaint of failure to make reasonable adjustments. An employer is not subject to the duty if it did not know, and could not reasonably have been expected to know, that the individual had a disability and was placed at a substantial disadvantage at the time when an adjustment allegedly should have been made – see Schedule 8, paragraph 20 EQA. The claimant would have been unable to overcome that hurdle had she satisfied the tribunal that her condition amounted to a disability.

Complaint of direct disability discrimination – s 13 EQA

170. Whilst knowledge of a disability is not required for a section 13 complaint to succeed, on the evidence provided the claimant was not less favourably treated than a suitable comparator because of her illness. A comparator in this instance would be a fellow employee who was absent from work for a similar duration through an illness which did not amount to a disability. The tribunal saw no evidence that Ms Ashelby would treat that employee any differently than the claimant. Thus, again, had the claimant met the test of disability, she would not have succeeded in her complaints of direct discrimination.

Constructive unfair dismissal under section 95(1)(c) of ERA

Did the respondent materially breach the claimant's contract of employment?

171. The claimant alleges that she was constructively unfairly dismissed. This entails first that she establishes that her contract of employment was materially breached by the respondent. The breach can be of a specific term, or of the underlying relationship of mutual trust and confidence.

172. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***. It is an underlying and permanent feature of every employer-employee relationship. Implicit in that is that at all times the parties will not act in a way calculated to destroy the

relationship. It is possible for a breach of this type to occur even if no express term is broken. So, for example, an employer exercising a contractual power in a particularly malicious or capricious way may breach the implied duty. Whether the duty has been breached is to be objectively tested. The perceptions of the parties may assist but they will not determine the question.

173. The breach must be material in the sense that it has to be sufficiently fundamental or serious. It must go 'to the root' of the contract. A minor infringement will not be enough.

174. A material breach may be committed by the employer, or it may be threatened, amounting to an anticipatory breach.

175. It should also be recognised that in constructive unfair dismissal cases, a material breach may be established by a series of events which cause sufficient damage to the relationship when considered together. By extension, the 'last straw' in such a sequence may not be a material breach, or even a breach of contract at all, or and yet when viewed along with related previous conduct it may count towards establishing a breach overall.

176. In her resignation email the claimant alleged the following amounted to material breach of her contract, all occurring in 2022:

a. Her second salary grievance;

b. Her pay deal;

c. Her working hours change request; and

d. The refusal to discuss or make any adjustments until she returned to work from illness.

Additionally she referred in that email to *'a continuous and long series of events in my employment that have now resulted in me having to take this action'.* In her evidence and closing submissions those were said to be the earlier events below:

e. The treatment of her grievance in 2016 resulting in her having to accept less favourable terms;

f. The treatment of her first salary grievance of 2019;

g. The breach of confidence which was made by her manager, resulting in Mr McDonald being aware of details of her personal life in 2019;

h. Her treatment by Ms Filshie whilst at Countrywide Shawlands;

i. Being required to move to Slater Hogg & Howison Shawlands; and

j. Failure to provide a safe workplace in the context of the Covid-19 pandemic between approximately December 2020 and December 2021.

177. It is understood that the claimant's case is that the relevant breach or breaches were of the obligation of mutual trust and confidence rather than any express terms of her contract. She did not refer explicitly to any contractual terms, and her resignation email alleged that the respondent had failed to uphold the former.

178. Dealing with each matter in chronological order, the treatment of the claimant's June 2016 grievance was not a breach of contract, whether material or in a lesser way. The claimant's only criticism of the treatment of the grievance at its initial stage was that it did not resolve the question of how she would be able to return to work. She raised that via the appeal process. Ms Donaldson at the appeal stage heard the claimant's concerns, proposed an objectively sensible compromise in line with the claimant's changing circumstances and acted promptly. The claimant was given the opportunity to review the new terms proposed, and accepted them. She was pleased at the time with the outcome of the process.

179. The next event relied on was the first salary grievance of 29 August 2019. The claimant was unhappy because, having returned to full time working, her salary was lower than that when she first went on maternity leave. She believed that she was the victim of an indirectly discriminatory system which

worked against her because she had taken time off to have children, and still had commitments in relation to their care.

180. On the evidence, and as discussed above, the claimant's pay and conditions were not skewed by either direct or indirect sex discrimination. What was relevant in terms of a comparison with her salary before having children was that she was not now a branch manager as she had been before, she had fewer responsibilities and was working in a smaller branch. Those were the factors which best accounted for her earning less.

181. The claimant's salary when returning to work full time was on a par with another person in similar circumstances, who was paid slightly less as she was not as experienced as the claimant.

182. Further, and in any event, Ms Ashelby looked on the claimant's concern sympathetically and proposed an increase in pay and commission to Ms Donaldson, which was approved.

183. The tribunal therefore found that there was no breach of her contract in the way which her salary grievance was dealt with.

184. The claimant cited the breach of confidence she believed occurred on the part of her previous manager, which resulted in Mr McDonald knowing about her personal circumstances. As established in the findings of fact, on the evidence heard by the tribunal there was not a breach of confidence and Mr McDonald came to know the information through legitimate means. Mr McDonald was entitled to ask the question which he did in the context. There was again no breach of contract at this time.

185. The claimant referred to how she was treated by Ms Filshie while both worked at the Countrywide Shawlands office. This period began on 3 October 2016 and ended on 1 February 2021 with the claimant moving to the Slater Hogg office across the road.

186. The only conduct on the part of Ms Filshie which was described in any detail was her reaction to the claimant raising concerns about the level of safety in the office with respect to the risks posed by Covid-19. Her evidence was that

generally she got on well with Ms Filshie professionally even if the two did not see eye to eye on every matter. It was the respective managers of the two – Ms Ashelby and Mr Crockett – who considered that there was something closer to a personality clash but the claimant did not agree.

187. The claimant raised her Covid-19 concerns with a Health and Safety officer of the respondent, and by notifying Ms Ashelby in December 2020 or January 2021. Ms Filshie found out about the claimant's concerns via the Health and Safety team and not the claimant herself, which perturbed her, and this was magnified as she did not believe they were valid.

188. The single piece of evidence the tribunal had in order to evaluate Ms Filshie's reaction was her email of 13 January 2021 [175-176]. The email is measured explanation of why Ms Filshie believed that the office had adhered to the required protocols. It was not critical of the claimant, and referred to her only once in saying:

'Further to the email I was copied into last night, where it appears that Sharon Savage has raised some concerns over the branch being COVID safe, I thought it prudent to give you an over view of the current branch protocols.'

189. The tribunal therefore had no evidence before it of Ms Filshie mistreating the claimant.

190. The claimant complained that she was required to move from her office as a response to the issues caused by Ms Filshie and her working together. Whilst it would be possible in some circumstances to rely on one's employer forcing a change of working location as a breach or contributory factor to an overall breach, on the evidence of this case it was not a detrimental act. The claimant was given the opportunity to move rather than simply be told it would happen. The move was beneficial to her by taking her away from Ms Filshie and allowing her to work under the Slater Hogg brand as she had done for some years before. The evidence of her reaction at the time showed that she was very positive about the move. It made no realistic difference to her commute to work, being directly across the road. In all the circumstances the tribunal could not accept this event as a breach of contract in itself or a contributor to

a lengthier course of conduct by the respondent which could amount to a breach.

191. Next in chronological terms the claimant referred to the respondent's alleged failure to provide a safe working environment for her in the sense of implementing reasonable measures to minimise the spread of Covid-19. The respondent's actions must be evaluated objectively and not to any other standard. An initial assessment of the branch was undertaken in 2020 as it was for every branch and there was a prescribed way of doing that and documenting that it had been done, as well as reporting any concerns or modifications believed to be required. The respondent had plans in place to deal with any occasions of Covid-19 among staff, including gathering information about the duration of the absence of each individual and implementing a policy of temporarily closing any office where three or more staff tested positive at the same time. When the claimant and colleagues contracted the virus in September 2021 Ms Ashelby, despite being on bereavement leave, asked for the claimant's concerns about the office to be actioned. Those centred around the air conditioning unit and the external windows which could not be opened. She asked for those to be checked and remedied where required. Ms Donaldson picked the matter up and liaised with the respondent's central Health and Safety team to ensure this was done. A short time later she was told that the air conditioning unit was fixed, although it had no bearing on the risk of Covid-19 spreading in the office, and that the windows were now adjusted to open when required. This took until after the claimant was well enough to return to her office and, although the claimant did go back to work before these matters were fully rectified, she was allowed to delay her return out of sympathy with the concerns she had.

192. The tribunal also considered that the claimant had expressed concerns almost a year before about the measures in place in her office at that time. This was a different office, namely the Countrywide Shawlands branch which she shared with Ms Filshie and her team. The claimant did not give detailed evidence about what the issues were at that branch as she saw them. The tribunal had available to read Ms Filshie's email of 13 January 2021 which, at

least on the face of it, describes in some detail a reasonably comprehensive set of measures designed to prevent or minimise the transmission of the virus. Based on the evidence available to the tribunal it could not find that the respondent breached the duty to maintain mutual trust and confidence by requiring the claimant to work in an unsafe environment.

193. Turning to events in 2022, the claimant referred to her 'pay deal'. This was a reference to the terms which Ms Ashelby explained would apply for the year when the two met on 26 January 2022. Although the claimant's salary was not going to change, her commission rate was to be increased and she would be able to receive a share of the profit of her branch for the first time. Her earnings would increase by virtue of the commission uplift itself and, as it proved, would have increased further had she stayed by receipt of quarterly profit shares. The respondent was not obliged to increase her salary under any term of her contract and there was no evidence of other similar employees receiving salary rises at that time which could suggest the claimant was being hard done by in not receiving one herself. The claimant asked Ms Ashelby in the meeting about the possibility of a salary increase and Ms Ashelby said it would be considered nearer the beginning of April when more was known about the financial performance of the business. Ms Ashelby did not decline the request outright. Again given these facts the tribunal could not see that the claimant had identified any breach of contract on the respondent's part.

194. The final three issues which the claimant referred to as part of her rationale for resigning were her 'salary grievance', her flexible working request and the decision of Ms Ashelby to only deal with those two matters upon the claimant's physical return to work from her Covid-19 related illness. These matters appeared to be intertwined in terms of timing and process. By 'salary grievance' the claimant is taken to mean the respondent's response (or lack of one) to her request on 26 January 2022 for a review of her salary (since the 'salary grievance' itself was a step she took and not her employer). Similarly, the issue in relation to her flexible working request was how the respondent reacted to it.

195. The tribunal again considered the evidence before it. Taking the salary grievance first, the claimant's complaint in essence was that Ms Ashelby had not agreed to her request for an increase from £22,500 to £25,000 by the end of March 2022. As determined above, Ms Ashelby was not against seeking approval for a pay rise, but initially considered that she needed to get more financial information specific to the claimant's branch and its targets for the new financial year. She expected to have that in late March 2022. Then, in mid-March, the claimant submitted her flexible working request and Ms Ashelby thought it more logical to see what changes, if any, would be made to the claimant's role before looking again at her salary. That was a reasonable approach to take and there was no identifiable breach of mutual trust and confidence.

196. The tribunal turned finally to the way in which the flexible working request was dealt with, including Ms Ashelby's decision to discuss that with the claimant in a meeting in person. As was found in relation to the claimant's discrimination claims, the respondent did not breach its own Flexible Working Policy by way of Ms Ashelby wishing to have the meeting in person. That was the default method, and although provision was made for the meeting to happen remotely or even by email, she considered that those methods were not appropriate in the claimant's case for the reasons stated elsewhere in this judgment, namely that she believed that the conversation would be more productive in person, she wished to raise two other sensitive matters (the claimant's ongoing later start time and the apparent inconsistency between the claimant's reported symptoms and her activities posted to social media) and that, relying on the claimant's fit notes, she expected the claimant to be back at work on each of the two dates proposed.

197. By Ms Ashelby deciding to postpone the discussion meeting from 8 April 2022 until 22 April 2022 in order to hold it in person, a consequence was that it would not take place within 28 days of the original request which was submitted on 15 March 2022. As discussed above, the 28-day limit was a guide to follow in usual circumstances, not an absolute rule. By the claimant being both on leave and also ill and unable to attend work the situation was

not a normal one. The claimant asked for the meeting to be rescheduled because she was on holiday and did not say it was because of any issue with attending a meeting in person. She was expected by her GP to be well enough to return by the rescheduled date, which was only 37 days after the request was submitted.

198. Considering the thoughts and actions of Ms Ashelby objectively the tribunal did not consider them to be in breach of mutual trust and confidence in themselves, or to contribute to an ongoing act. The claimant by her evidence to the tribunal would clearly have preferred to attend a virtual meeting but by then she had the benefit of hindsight and knew how long her symptoms had gone on. Back on 25 March 2022, when the meeting was rescheduled, she had been off for less than six weeks and was expected to have returned by the meeting date itself. Had she not resigned then Ms Ashelby may well have eventually decided to hold the meeting by video, but this would involve speculation. The tribunal has to assess what was known at the time of the decision complained about. As stated above, the question of whether there has been a breach must be tested objectively.

199. The tribunal also considered the timing of the events complained of by the claimant. All of the allegations in (e) to (j) in paragraph 176 above occurred months if not years before the claimant resigned. This raised the question of whether to any extent her decision to resign was caused or influenced by them. In the claimant's mind they were connected. However, the tribunal viewed them as separate and not part of a continuous act. In reaching that view it noted that they were some time apart from each other, different in their nature, and involved a variety of different people who were being complained about. There is no rule that each event complained about has to have the same features, but the degree of difference between them and the time which passed from one to the next suggested to the tribunal that they should not be seen as a continuing act. Had any of them involved a breach of mutual trust and confidence they would still have been historic and isolated occurrences.

200. The result of the tribunal's findings in relation to the above is that the claimant was unable to prove that there was a breach of mutual trust and confidence

by the respondent, whether by any single act or omission, or by a combination of such acts or omissions over time forming a continuous act.

201. It was therefore not necessary to go on to consider whether there was a 'last straw', whether the claimant affirmed the breach by resigning promptly in response to it, and whether any constructive dismissal was fair or otherwise taking into account the reason for it and whether the respondent acted within the bounds of section 98(4) ERA.

Conclusion

202. None of the claimant's complaints were successful when applying the particular legal tests to the facts of this case as found by the tribunal on the evidence before it.

203. There was accordingly no need for the tribunal to undertake a detailed comparison of the claimant's earnings in her current role and those in her last position with the respondent, although it was noted that her salary now is higher than it was with the respondent, and the level of employer's pension contributions is similar. She did, however, sustain some short-term loss in between resigning and commencing her current role, and in it she does not earn commission or a profit share.

204. Ultimately therefore, whilst her financial losses may be modest or even be overtaken entirely given time, the point is academic for this tribunal as her complaints were unsuccessful and require to be dismissed.

Employment Judge: **B Campbell**
Date of Judgment: **03 July 2023**
Entered in register: **04 July 2023**
and copied to parties