Case No. 1804063/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs D Pinterova

Respondent: Clean and Tidy Domestic and Commercial Cleaning Ltd

Heard at: Leeds **On:** 3 to 5 January 2024
8 January 2024 (reserved decision in chambers)

Before: Employment Judge Cox
Members: Mr D Crowe
Mr M Brewer

Representation:
Claimant: In person
Respondent: Mrs Peckham, solicitor

RESERVED JUDGMENT

1. The following claims are dismissed, having been withdrawn by the Claimant:
   1.1 discrimination on ground of pregnancy or maternity
   1.2 discrimination on ground of gender reassignment
   1.3 holiday pay
   1.4 redundancy payment

2. The claim of failure to deal reasonably with a request for flexible working is dismissed, having been presented out of time.

3. The claim of unfair constructive dismissal succeeds.

4. The Respondent must pay the Claimant compensation of £15,048.18 in respect of that unfair dismissal.

5. The claim for notice pay fails and is dismissed.

6. The claim of detriments because of adoption leave fails and is dismissed.

7. The claim of direct disability discrimination fails and is dismissed.

REASONS

1. The Claimant worked for the Respondent from March 2008 until her resignation on 31 May 2023. She took a year's adoption leave from 1 June 2022. This claim is concerned with the Respondent's refusal to allow her to reduce her hours on her return to work.

2. The Claimant presented her claim on 22 June 2023, after a period of early conciliation through ACAS from 13 to 15 June 2023. She withdrew various parts of her claim over the course of two Preliminary Hearings and the main Hearing and these were dismissed. At a Preliminary Hearing on 5 September 2023 the Claimant was given leave to amend her claim to include an allegation that the Respondent had failed to deal reasonably with her flexible working request. That leave was given "subject to any time point". The Claimant was not given leave to amend her claim to allege that the decision to refuse her flexible working request was based on incorrect facts.

3. The upshot was that the claims for the Tribunal to decide were:
   3.1 unfair constructive dismissal;
   3.2 notice pay;
   3.3 detriments on the ground of taking adoption leave;
   3.5 direct disability discrimination; and
   3.5 failure to deal reasonably with a flexible working request.

4. The Claimant says that she is, and was at the relevant time, a disabled person as a result of each of these conditions:

   4.1 diabetes

   4.2 lipodystrophy, a condition involving abnormal distribution of fat tissue. In the Claimant's case, this involves her arms looking abnormally muscular after exercise.

   4.3 conditions that affect the use of her hands, namely arthritis and kienbock's disease in her left hand and carpal tunnel syndrome in both hands. Kienbock's disease involves the blood flow to one of the bones near the wrist being cut off, eventually causing the bone to die and leading to difficulty turning the hand. Carpal tunnel syndrome involves pressure on a nerve in the wrist, causing tingling, numbness and pain in the hand and fingers.

5. The Respondent accepted that the Claimant was a disabled person at the relevant time as a result of each of these conditions, although it denied that it had knowledge that she was.

Findings of fact

6. The Claimant began working for the Respondent, a cleaning company, on 8 March 2008. At that time the company provided its services primarily at racecourses and four or five holiday lets on sites across Yorkshire.

7. Initially the Claimant was a cleaner but in 2011 she was promoted to supervisor, which involved training new recruits as well as doing cleaning herself. At this point, her health began to deteriorate and in 2013 she was diagnosed with carpal tunnel syndrome on her right wrist and kienbock disease on her left wrist. In January 2014 she had surgery on her right hand. Her orthopaedic specialist told her to reduce her workload. She spoke to Mrs Tomlie, the General Manager and owner of the business, with whom she was on very friendly terms. Mrs Tomlie allocated her a role of managing holiday lets and training cleaning operatives. By 2014 she had substantially reduced the cleaning work she did. She occasionally wore a splint on her left wrist at work.

8. In 2015 the Claimant had further surgery, this time on her left hand. She began working more in the office, learning how to allocate staff and work out weekly rotas, and she started doing risk assessments. That involved assessing new sites and reviewing existing assessments annually. By the summer of 2015 her role had become managing holiday lets (ordering stock, organising the laundry, checking pool chemicals, overseeing the changeovers on Monday and Friday including checking the cleaning, organising yearly chimney sweeps and fire extinguisher checks), drafting and reviewing risks assessments, communicating with customers, drawing up weekly rotas, interpreting for cleaners (the Claimant speaks several languages) and checking the cleaning being done at racecourses. She also drew up quotes for new business. In 2018 she took over the work of her colleague Amy, who left the company. That involved typing of documents, keeping records, taking care of vans, and giving out contracts.

9. By the time of the events relevant to her claim, the Claimant was working between 37 and 45 hours a week on Mondays, Tuesdays, Thursdays, Fridays and the occasional Saturday. She was flexible and would sometimes change her day off from Wednesday to another day of the week to meet the needs of the business, such as when there was a race meeting on a Wednesday at one of the racecourses the company worked for.

10. The Respondent at this time was a relatively small business, employing around 50 cleaners and only three other people: the Claimant, Gail Cooper, who worked 2 days a week dealing with accounts, invoices and wages; and Mrs Tomlie, who

worked four days a week and, as General Manager, had oversight of all the business's activities.

11. The Claimant and her husband planned to adopt. On the assumption that the adoption would be happening in the summer of 2021, the business recruited Mr Wharmby in March 2021. The aim was for him to be trained by the Claimant to take over her duties when she went on adoption leave. He was recruited on a permanent contract because Mrs Tomlie planned to start reducing her hours and either retire or sell the business and Mr Wharmby would then be able to take up some of her duties.

12. In the event, the Claimant did not adopt her two sons until the following year, and so did not begin her adoption leave until 1 June 2022. The Claimant and Mr Wharmby therefore ended up working together for over a year. As the Claimant trained up Mr Wharmby and handed over her duties to him, the Claimant ended up being underemployed on some days. They travelled to sites together and talked about personal as well as business matters. They had a warm and friendly working relationship. They talked about the Claimant's diabetes because Mr Wharmby also had diabetes. The Tribunal accepts that the Claimant mentioned her wrist conditions to Mr Wharmby and that she showed Mr Wharmby her arm muscles when they were swollen after activity, but it also accepts that Mr Wharmby did not register that these amounted to physical impairments that had a substantial adverse effect on her day-to-day activities. He was not her manager and had no reason to focus on the possible import of what she was saying. His experience was that she was able to do the cleaning they were both involved in.

13. The Claimant and Mr Wharmby gave very different accounts of how much hands-on cleaning they did. Mr Wharmby's initial evidence, which he said was supported by the Claimant's timesheets in the hearing file from days before she started her adoption leave, was that they both spent around 60-70% of their time cleaning. In cross-examination, he reduced that to around 50% of their time. The Tribunal finds that Mr Wharmby was overstating the amount of cleaning that the Claimant did. His evidence was not consistent with the Claimant's unchallenged evidence about the limiting effect of the conditions affecting her hands on her ability to clean for any extended period. When questioned about the Claimant's timesheets, Mr Wharmby accepted that during some of the recorded hours the Claimant could in fact have been involved in chargeable activities other than cleaning. The Claimant's evidence was that she had done very little hands-on cleaning since 2014 and that any cleaning she did was correcting shortfalls in the cleaning done by the operatives. The Tribunal finds that that amounted to an understatement and that the Claimant did do more cleaning than that, although nowhere near to the extent Mr Wharmby claimed. She corrected any shortcomings in the cleaning done by the cleaning operatives, did around one hour's cleaning at racecourses on race days, occasionally covered for the sickness absences of cleaning staff and helped the cleaning operatives as and when necessary to meet deadlines.

14. Before the Claimant went on adoption leave, she discussed her return to work with Mrs Tomlie and they talked about the possibility of her returning on reduced hours. The Tribunal does not accept that any firm agreement was reached between them about this, given that neither woman knew what her circumstances would be when the Claimant's adoption leave ended in a year's time. On the other hand, Mr Wharmby's evidence, which the Tribunal accepts, was that he understood from his own discussions with Mrs Tomlie that she thought it very unlikely that the Claimant would return to work because she would have her hands full with her new children. Based on this, Mr Wharmby proceeded on the assumption that the Claimant would not be returning to work.

15. During the Claimant's absence, in November 2022, Mrs Tomlie sold the company to Lightowler, another, larger cleaning company and left the business. Mr Wharmby took over her responsibilities and became General Manager. Miss Westerdale was the Human Resources Manager for Lightowler and took over that role for the Respondent also. She had no experience of dealing with employees returning to work after a period of family leave and had never dealt with a request for flexible working before. Lightowler provided the Respondent with its computerised service for the payment of wages and invoices and as a result Ms Cooper was made redundant, although not until mid-April 2023.

16. In the written information provided when the company was sold, neither the Claimant nor her disabilities was mentioned.

17. The company had been growing for some time and now employed somewhere in the region of 70 to 80 cleaners. Because Mr Wharmby was assuming that the Claimant would not be returning to work, in December 2022 he asked the company to recruit another member of staff to help him with covering his work, which now effectively included the work Mrs Tomlie had done, the Claimant's role and the work he himself had done before the Claimant went on adoption leave. He did not mention to Miss Westerdale that the company had another employee, the Claimant, whose job he had been recruited to cover whilst she was on adoption leave. Nor did he tell Miss Westerdale about the Claimant's disabilities.

18. In February 2023, Gail Carpenter was recruited as a Business Support Manager, to work full-time assisting Mr Wharmby with his workload. She did hands-on cleaning, covered handovers of the holiday lets and also covered the racecourses when Mr Wharmby was on holiday. In addition, she provided administrative support to Mr Wharmby, who is dyslexic.

19. On 22 February 2023 the Claimant emailed the office to say that her leave was about to finish and she would like to come in and discuss her return to work and her options regarding working hours. She told Mr Wharmby on the 'phone that she wanted to come back in May. Mr Wharmby was very excited to discover that the Claimant intended to return to work, having assumed she would not be. He had enjoyed working with her and appreciated the experience she brought and the help

she had given him in learning the job. Because the company had grown substantially over recent months, he was still having to work very hard, even though Ms Carpenter had been recruited to assist him, and he welcomed the thought that he would now have the Claimant's help again. He arranged with the Claimant to meet with himself and Miss Westerdale on 21 March 2023 to discuss her return.

20. At that meeting on 21 March, the Claimant said that she would not be able to work the hours she had before because she now had two sons to care for and she wanted to work two fixed days a week. She was flexible about which days of the week those should be, but, once they were fixed, she could not change them. The childcare arrangements she had made could not be changed at short notice and her elder son had experienced trauma and needed stability.

21. Mr Wharmby is a very busy man and often out on site and Miss Westerdale works from Lightowler's Head Office and visits the company's offices only around once a week. It was difficult for them to arrange to meet. They met three or four times for 20 or 30 minutes during the period when the Claimant's request to reduce her working hours was being discussed, but other things were also discussed during those meetings. The two of them had not discussed the Claimant's situation before the meeting on 21 March. Miss Westerdale thought the Claimant was a cleaning operative and the Claimant had to explain during the meeting that she was in fact a manager. In cross-examination, the Claimant said that she showed Miss Westerdale the scars on her wrists from her surgery to explain why she had had to stop being a cleaner, but in her witness statement she makes no mention of having done that. She states that the meeting was brief and that she "added quickly" that she had stopped cleaning years ago. The Tribunal preferred Miss Westerdale's evidence that the Claimant mentioned none of her disabilities at this meeting. At the end of the meeting, Miss Westerdale asked the Claimant to put something in writing about what she wanted, so that it could be considered.

22. On 29 March 2023 the Claimant sent Mr Wharmby an email (she did not have Miss Westerdale's email address) saying that ideally she would like to return to work on 1 May 2023 on two days a week. Those would ideally be Tuesday and Thursday but she was willing to change those days for the "right motivation", that is, if the money on offer was right. (She needed an increase in her pay rate if she was to work on Mondays, because she would need to find extra money to cover the cost of school club on Bank Holiday Mondays.) She said she could work from 8.15am to 4.45pm as her boys would be either in nursery or school club.

23. As Miss Westerdale had never dealt with a flexible working request before, she got advice. She was told that the Claimant needed to fill in a form and so on 19 April she sent the Claimant a form to complete. This form required the Claimant to provide the details necessary for a statutory flexible working request (detailed further below). The Claimant was concerned that there should be no further delay, she having first asked to discuss the arrangements for her return to work over two months previously. She completed the form and returned it the same day. She said that the

working pattern she would like to work in future was: “Tuesdays and Thursdays but could be flexible if needed. 8.15am – 16.45pm. Increasing to 3-4 days in 2024”. In the section of the form headed “accommodating the new working pattern” where she was asked how she thought the effect on her employer and colleagues could be dealt with, she stated: “I am willing to increase my working hours in future and willing to help on phone anytime”. The Claimant confirmed in her evidence to the Tribunal that her younger son would be starting nursery in September 2024 and she would then be able to increase her hours to three days a week.

24. On 27 April 2023 Miss Westerdale ‘phoned the Claimant. The call was interrupted by the connection failing but Miss Westerdale ‘phoned back. The conversation lasted a total of around 3 minutes. The Claimant’s evidence was that Miss Westerdale called to discuss a query about her holiday pay but the Tribunal finds this unlikely, since the administration of wages was not part of Miss Westerdale’s role. The Tribunal does accept, however, the Claimant’s evidence that Miss Westerdale told her during this call that her request to change her hours had been declined.

25. Miss Westerdale’s evidence was that she had ‘phoned the Claimant to reassure her that her request to change her hours was still under review. But the Tribunal prefers the Claimant’s evidence, for several reasons. Miss Westerdale initially said in evidence that the notes in the Hearing file, which purported to confirm that the call was to explain to the Claimant that the company was still in the process of reviewing her request, were a typed-up version of her contemporaneous notes of the call. When questioned about that, she accepted that the notes went further than recording a summary of what was said during the call; they set out the company’s position on the Claimant’s request. More importantly, the Claimant’s evidence that Miss Westerdale in fact told her that her request had been refused was consistent with an email she sent Miss Westerdale within half an hour of the call asking her to provide reasons for the decision to refuse her request and what the Claimant’s options were. At this point also, the Claimant contacted ACAS and a solicitor for advice, indicating that she had been told that a decision had been made. The Claimant spoke to her solicitor over the ‘phone and then sent an email to him confirming the facts as she understood them. She did not expressly say in that email that the company had refused her request, but she did say that the company had told her on 27 April that it needed her four days, which implies that her request for a two-day week had been refused. Further, on 2 May 2023 Miss Westerdale sent the Claimant an email giving her the email address to which she should send any appeal in relation to “the decision that has been made”.

26. Miss Westerdale said in evidence that she had sent this email at the end of the day and had made a “typo”. She had meant to refer to the decision “that has yet to be made”. The Tribunal does not accept that this was a typographical error. The meaning of the email is clear and it is unlikely that Miss Westerdale would have made such a fundamental error as to refer to a decision that had already been made if it had not in fact been made, however tired she was. If she had not in fact told the

Claimant her request was refused, she would have challenged the Claimant's statement in her email that it had been.

27. On 5 May 2023 the Claimant's solicitor wrote to the Respondent. He pointed out shortcomings in its handling of the Claimant's flexible working request, outlined the legal claims she had in respect of that and sought a financial settlement in return for an agreed termination of the Claimant's employment at the end of her adoption leave. (This letter was marked "without prejudice" but the Claimant waived her right to object to it being referred to by the Tribunal.)

28. Miss Westerdale did not reply to that letter. She did, however, write to the Claimant on 9 May 2023 saying that no decision had yet been made but that, if the Claimant was not happy with the decision when she received it, she would be able to appeal to the email address provided in the email of 2 May. The Tribunal considers it more likely than not that the email was drafted in this way because, having received the solicitor's letter, Miss Westerdale realised that she had made her decision without following the proper process and she was trying to "cover her tracks". (The email of 9 May also states that the 'phone call on 27 April was to "gain more information regarding your request for flexible working", but in cross-examination Miss Westerdale accepted that that was incorrect; she had not asked the Claimant for any further information during the call.)

29. Even on Miss Westerdale's own evidence, by 17 May, when she invited the Claimant to the first meeting they had had since the Claimant's formal request had been made, Miss Westerdale had already decided that the Claimant's request for a two-day week could not be accommodated and would be refused. She had discussed the business's requirements with Mr Wharmby and he was of the view that there was no business need for an employee to work two days full-time in the office. Tuesdays and Thursdays were not busy days of the week, unlike Monday and Friday, which were changeover days for the holiday lets. Mr Wharmby and Ms Carpenter were already working full-time and did not have the capacity to take up the other three days of the Claimant's work. Further, Miss Westerdale identified that it would involve extra expense for the company to set up a jobshare, because of the need for a handover period. It was also difficult to recruit part-time staff to do a managerial role and there would therefore be difficulties in finding someone on a part-time basis to fulfil the other part of the Claimant's current contractual duties.

30. At the meeting on 19 May 2023 Miss Westerdale gave the Claimant her decision that the company could not agree to a two-day week. It needed her to return on four days. The Claimant said she would be able to increase to a three-day week when her younger son started nursery in September 2023, and could increase her hours again to four days a week from September 2024, when her sons were more settled. Miss Westerdale offered the Claimant the option of returning to work as a cleaner working two days a week on days of her choice to fit in with her childcare arrangements, or to return to work on Monday and Friday cleaning and checking the holiday lets, although that work would be seasonal only. At this point, the Claimant

said it was not possible for her to return as a cleaner because of the conditions affecting her wrists. Miss Westerdale said she would put something in writing for the Claimant to review, and she did so in a letter on 23 May 2023.

31. In that letter, Miss Westerdale confirmed that the company could not accommodate the Claimant working two days a week and set out the reasons for that decision. In summary, she said that the company could not afford the extra cost of recruiting another member of staff to cover the handover from the Claimant at the end of her work period. She said the Claimant's proposed hours would mean they could not meet customers' demands, which, she said, changed frequently on a daily basis. The Claimant would need to work on four days to meet the customers' request that a manager attend the racecourses on race days. The two existing full-time staff (Mr Wharmby and Ms Carpenter) were already working to full capacity and could not cover the other hours in the Claimant's role. She restated that the company was offering her a cleaning operative role as an alternative. She asked the Claimant to let her know "if this is something that would be suitable for you". She explained how the Claimant could appeal the decision.

32. After emailing her solicitor for advice, the Claimant resigned on 31 May 2023. In her resignation letter, the Claimant said that the actions of the company had destroyed the relationship of mutual trust and confidence. She believed the company had failed in its obligations towards her in dealing with her flexible working request and that there were no valid reasons for refusing it. She saw no point in appealing as, given the way in which the company had treated her, this would be futile. She also said that the offer of a cleaning role was not suitable for her because of her health conditions and the company had not made any reasonable adjustments for her in that regard. She said that the company had committed unlawful discrimination.

33. On 1 June her solicitor wrote to Miss Westerdale asking again that the company consider agreeing terms to settle the Claimant's dispute. Miss Westerdale did not respond to that letter but instead wrote to the Claimant on 2 June asking her to reconsider her decision to resign. She also said that the company viewed the Claimant's resignation letter as raising a number of grievances that it would like to discuss with her at a formal grievance hearing.

34. On 5 June 2023 the Claimant confirmed that she would not be retracting her resignation and saw no point in a grievance meeting because all the trust and confidence had irretrievably broken down.

35. On 12 June 2023 Miss Westerdale replied, saying that she regretted the Claimant's decision but accepted her resignation. The following day, the Claimant contacted ACAS under the early conciliation procedure and on 22 June 2023 she presented her claim to the Tribunal.

36. In August 2023 the company recruited another full-time employee, Janine, to do cleaning work but also staff training and management of the cleaning work at the racecourses and holiday lets.

The relevant law and issues

37. The Claimant alleged that various aspects of the way in which Miss Westerdale dealt with her flexible working request amounted to treating her less favourably because of her disability and/or detriments on the ground that she had taken adoption leave and/or, individually or cumulatively, a breach of the implied term of mutual trust and confidence which entitled her to resign and claim unfair constructive dismissal. She also alleged that the Respondent had acted unreasonably in dealing with her flexible working request.

38. It is unlawful for an employer to treat a disabled employee less favourably than it treats, or would treat, a non-disabled employee in the same relevant circumstances, if it does so because of their disability. That includes treating the disabled employee less favourably by subjecting them to a detriment (Section 39(2)(d) read with Sections 13 and 23 of the Equality Act 2010 – the EqA). An employer's action amounts to a detriment if the employee would or might reasonably view that action as disadvantaging them in their employment (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285). The Tribunal therefore had to decide whether any of the actions of Miss Westerdale amounted to a detriment and, if they did, whether Miss Westerdale was treating the Claimant less favourably than she would have treated a non-disabled employee, because of one or more of her disabilities. In this context, it needed to bear in mind that, if the Tribunal found facts from which it could decide, in the absence of any other explanation, that the Respondent had treated the Claimant less favourably because of her disability, it had to uphold the claim, unless the Respondent showed that it had not in fact discriminated (Section 136 EqA).

39. It is also unlawful for an employer to subject an employee to a detriment because the employee has taken adoption leave (Section 47C(1) and (2)(ba) of the Employment Rights Act 1996 – the ERA – read with Regulation 28 of the Paternity and Adoption Leave Regulations 2002). The Tribunal therefore had to decide whether any of Miss Westerdale's actions that amounted to a detriment were done because the Claimant had taken adoption leave. In this context, it needed to bear in mind that was for the Respondent to show the ground on which any act was done (Section 48(2) ERA).

40. It is an implied term in any contract of employment that an employer will not, without reasonable and proper cause, act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and its employee. If that term is breached, that amounts to a fundamental breach of the employee's contract, entitling them to resign and claim that they have been constructively dismissal.

41. For the purposes of a claim of unfair dismissal, it is for the employee to show that she has been dismissed. The definition of dismissal includes a constructive dismissal (Section 95(1)(c) ERA). A constructive dismissal amounts to an unfair dismissal in certain circumstances. This includes where the employer dismisses an employee for the reason that the employee has taken adoption leave (Section 99(1) read with Regulation 29 of the Paternity and Adoption Leave Regulations 2002). For these purposes, the reason for the conduct that led the employee to resign is treated as the reason for the dismissal. It is also an unfair dismissal if the employer cannot show a reason for its conduct falling within Section 98(1)(b) or (2) ERA).

42. The Respondent did not dispute that the Claimant had resigned in response to Miss Westerdale's handling of her flexible working request. It did not argue that the Claimant had affirmed her contract. It also accepted that, if the Tribunal were to find that the Claimant had been dismissed, that dismissal would be unfair because there was no potentially fair reason for Miss Westerdale's conduct.

43. In relation to the claim of unfair dismissal, therefore, the Tribunal had to decide only whether Miss Westerdale's actions amounted to a breach of the implied term and whether the reason for her conduct was the fact that the Claimant had taken adoption leave.

44. An employee has a right to apply for a change in her hours and times of work (Section 80F ERA). The application must be in writing, state that it is an application under the legislation, specify the change being applied for and the date on which it is proposed it should happen, and explain what effect the change would have on the employer and how, in the applicant's opinion any effect might be dealt with (Section 80F(2) ERA and Regulation 4 of the Flexible Working Regulations 2014).

45. The employer must deal with the application in a reasonable manner (Section 80G(1)(a) ERA). ACAS has issued a Code of Practice on handling in a reasonable manner requests to work flexibly. If a Tribunal considers that any provision of the Code is relevant to any question it has to decide (including, but not limited to, whether an employer has dealt reasonably with a flexible working request) it must take that provision into account when deciding that question (Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992).

46. A Tribunal cannot consider a complaint unless it is presented before the end of the period of three months beginning with the date on which it is alleged the employer failed to act reasonably or, if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented by then, within a further period that the Tribunal considers reasonable (Section 80H(5) ERA).

47. The Claimant's allegation that the Respondent had failed to deal with her flexible working request reasonably was not raised until 6 September 2023. The Tribunal therefore had to decide whether it had power to deal with this aspect of the claim, in

the light of the time limit. If it did, then it needed to decide whether the Respondent had in fact not dealt with the request reasonably.

Findings on Miss Westerdale's actions

Allegation 1: In the telephone call on 27 April 2023 Miss Westerdale notified the Claimant that the Respondent was turning down her flexible working request

48. Although the Claimant first asked for a change in her working hours at the meeting on 21 March, she did not put her request in the correct statutory form until she completed the form on 19 April 2023. As explained above, the Tribunal accepts that Miss Westerdale did tell the Claimant that her request had been turned down during their telephone call on 27 April 2023.

49. The Code of Practice requires the employer to talk to the employee about the request, at a meeting at which they have been told they can be accompanied. The request should be discussed with the employee to get a better idea of what changes they are looking for and how they might benefit the employee and the business. The employer should look at the benefit of the changes for the employee and the business as well as weighing the adverse business impact. The Respondent complied with none of those recommendations. Miss Westerdale made her decision without having discussed with the Claimant what her job involved before she went on adoption leave and what duties she felt she could do in the two days she was now offering. She had effectively failed to get any input from the Claimant on how her need to reduce her working days might be accommodated by the business and what benefits it might bring to them both. She based her decision solely on her brief discussions with Mr Wharmby, who was himself a relatively inexperienced manager and too busy with the demands of his work to give her much information. The result was a lack of any real detailed thought or discussion.

50. The Tribunal does not have sufficient grounds to conclude that, had Miss Westerdale dealt with the request reasonably, a decision to refuse the request would have amounted to a breach of trust and confidence. She and Mr Wharmby clearly had concerns about whether they would be able to recruit a part-time employee to cover the rest of the Claimant's duties and Mr Wharmby considered that the company needed a full-time manager who was able to do a significant amount of cleaning on any working day, as he and Ms Carpenter currently did. It was the company's failure to obtain sufficient input from the Claimant before it made its decision that was likely to destroy or seriously damage her trust and confidence in her employer. That clearly also amounted to a detriment.

Allegation 2: The Respondent ignored communications from the Claimant via her solicitor on 5 and 15 May 2023 regarding flaws in the flexible working request process

51. The Tribunal does not accept that the company's failure to respond to the Claimant's solicitor's letter of 5 May amounted to or contributed towards a breach of trust and confidence, given that the company was under no obligation to engage with her lawyer. Nor did the failure to respond amount to a detriment: objectively assessed, the Claimant could not reasonably view herself as being put under a disadvantage in her employment. The company had no obligation to involve itself in settlement discussions and it was not ignoring the Claimant herself: on 9 May Miss Westerdale sent her an email.

52. The Tribunal does not accept that the Claimant's solicitor sent the company a letter on 15 May. The Claimant based this allegation on an email to her from her solicitor in which he said that he intended to chase the company for a response to his letter of 5 May. Miss Westerdale's evidence, which the Tribunal accepts, was that no letter was ever received.

Allegation 3: In an email to the Claimant of 9 May 2023 Miss Westerdale pretended that the Respondent had not reached a decision on her flexible working request.

53. The Tribunal accepts that in her email of 9 May Miss Westerdale was trying to cover her tracks by pretending that she had not yet told the Claimant that her request had been refused. The Tribunal is satisfied that this lack of honesty on Miss Westerdale's part amounted to both a breach of trust and confidence and a detriment.

Allegation 4: At the meeting on 19 May 2023, Miss Westerdale offered the Claimant a part-time cleaning job which the Respondent knew she could not do due to her health

54. The Tribunal accepts that at the meeting on 19 May Miss Westerdale gave the Claimant the option of a job as a cleaning operative. That happened, however, before she was aware of the physical difficulties the Claimant had in doing cleaning work. That emerged only at a point after the offer was made, when the Claimant explained to Miss Westerdale that she could not do a cleaning job because of her health issues affecting her hands. Mr Wharmby's experience was that the Claimant was able to carry out cleaning, because she had done cleaning work during the time when they worked together. The Tribunal does not accept that it was a breach of trust and confidence or a detriment to offer the Claimant the option of a cleaning job for two days a week at a point when it was not clear that such a job would be wholly impracticable for her.

Allegation 5:On 23 May 2023, Miss Westerdale sent the Claimant an email turning down her flexible working request and offering her either her original role and hours or the part-time cleaning job

55. By the time Miss Westerdale wrote to the Claimant on 23 May, she knew that the Claimant considered herself physically unable to do cleaning work because of her disability affecting her hands. In those circumstances, the Tribunal accepts that it was a detriment to the Claimant for Miss Westerdale to re-confirm the offer of a job that she knew the Claimant felt she could not do. Viewed in isolation, this might not have been sufficient to breach trust and confidence, given that Miss Westerdale was giving the Claimant an option that she clearly did not have to accept. It did, however, add to some degree to the damage to the relationship of trust and confidence caused by Miss Westerdale's earlier conduct.

Allegation 6: Miss Westerdale made this offer knowing or hoping that it would lead to the Claimant's resignation, given her personal circumstances

56. The Tribunal does not accept that Miss Westerdale knew or hoped that offering the Claimant her original role and hours or a part-time cleaning job would cause the Claimant to resign. Miss Westerdale's actions were largely based on what Mr Wharmby told her about the job and the business and what he felt was workable. She knew that Mr Wharmby considered that the Claimant had been a valuable employee. She did not intend or hope that the Claimant would resign.

Allegation 7: The Respondent failed to make the Claimant redundant and pay her a redundancy payment

57. An employee is entitled to a redundancy payment only where they are dismissed because the employer's business has closed down or is expected to do so, or where its requirement for employees to do work of a particular kind, either generally or where the employee worked, has ceased or diminished or is expected to do so (Section 139 ERA). On the basis of the evidence that the Tribunal heard, there was no basis for it to conclude that Miss Westerdale acted as she did because the business no longer needed so many employees to do the work that the Claimant did. As there was no redundancy situation within the statutory definition, there was no obligation on the company to make her redundant or make her a redundancy payment. The Claimant accepted during the course of the Hearing that her job was not redundant and withdrew her claim for a redundancy payment for that reason. In these circumstances, the Tribunal does not accept that failing to make the Claimant redundant or pay her a redundancy payment amounted to, or contributed in any way towards, a breach of trust and confidence or amounted to a detriment.

Applying these findings to the claims

58. The Tribunal finds that a significant part of the Claimant's reason for resigning was the conduct identified above as amounting to, or contributing towards, a breach of trust and confidence. That was, in summary, Miss Westerdale's failure properly to consult with the Claimant before reaching her decision and pretending that a decision had not been made when it had. The Claimant was therefore unfairly constructively dismissed. The Claimant also felt that the company had no good reason for refusing her request, but the Tribunal has found insufficient evidence to conclude that the decision itself was a breach of trust and confidence.

59. The Tribunal heard no evidence to indicate that Miss Westerdale acted as she did because the Claimant had taken adoption leave. Bearing in mind that the onus is on the company to show what the reason for Miss Westerdale's actions were, the Tribunal finds that they were effectively because of Miss Westerdale's inexperience in dealing with flexible working requests, her failure to understand the need to obtain full information and discuss the request with the Claimant before reaching a decision and her desire to cover her tracks when she realised she should not have reached a decision when she did. The claim of detriments because of adoption leave therefore fails.

60. Likewise, there was no evidence that Miss Westerdale acted as she did because of any of the Claimant's disabilities. Indeed, Miss Westerdale knew about only the Claimant's disability that affected her hands, and then only after she had already told the Claimant she had refused her flexible working request. The only allegations relating to her conduct after that point were allegations 5, 6 and 7. There was no evidence before the Tribunal from which it might conclude that these decisions were in any way affected by Miss Westerdale's knowledge of the impairment affecting the Claimant's hands, or that Miss Westerdale would have treated an employee who was not disabled any differently. It follows that the Claimant's claim of direct disability discrimination fails.

Notice pay

61. The parties agreed that the Claimant was entitled to 12 weeks' notice of termination of her employment. The Tribunal has not found, however, that the decision to insist on the Claimant returning on her original terms was a breach of contract by the company. On the other hand, it was clear from the evidence the Tribunal heard that the Claimant could not return on those terms because of her childcare responsibilities.

62. Acting within the terms of the Claimant's contract, the company could either have given her 12 weeks' notice but not paid her for that period because she was not ready and willing to do the job she was employed under her existing contract to

do. Or it would have been entitled lawfully to dismiss her without notice because she had failed to comply with her own contractual obligations.

63. In either eventuality, the Claimant has not suffered any loss as a result of the company's failure to give her notice. The claim for damages for failure to give notice must therefore fail. (In any event, in calculating the Claimant's compensatory award the Tribunal has awarded her some compensation for what would have been her notice period. The Claimant would not have been entitled to also recover that sum as damages for failure to give notice.)

Failure to deal reasonably with the flexible working request

.

64. From the Tribunal's findings, the last date on which it might be said that the Respondent failed to deal with the Claimant's request reasonably was 23 May 2023. That was the date of the letter confirming that her request was refused and notifying her of her right to appeal. She did not take up that right. Taking into account the three days of early conciliation through ACAS, the complaint about that failure to deal with the request reasonably should have been presented to the Tribunal by 25 August 2023. It was not in fact raised until the Preliminary Hearing on 6 September, nearly two weeks later.

65. The Claimant's evidence was that she did not raise this aspect of her claim until the Preliminary Hearing because she did not realise until her discussion about her claim with the Judge at that Hearing that she could complain to the Tribunal about the company's failure to deal with her request reasonably. She said she thought it was just a bargaining chip raised by her solicitor to get the company to engage in a proper discussion with her about her request. The Tribunal does not find that evidence credible. The solicitor's letter of 5 May, which the Claimant saw before it was sent, clearly sets out the various actions of the company that were alleged to be unlawful and also threatens a Tribunal claim if an acceptable offer of settlement is not made. The actions identified include failing to deal with the Claimant's flexible working request reasonably.

66. Further, the Claimant accepts that she contacted ACAS and a solicitor immediately after the 27 April 'phone conversation with Miss Westerdale when she was told her request had been refused. That indicates that she knew then that her employment rights might not have been respected.

67. Given the advice the Claimant had received from her solicitor, the Tribunal is satisfied that it was reasonably practicable for her to include this allegation in her original claim, presented on 22 June 2023.

Compensation for unfair dismissal

68. The Claimant sought compensation for unfair dismissal, not an order for re-employment.

69. She had worked for the Respondent for 15 complete years by the date of her dismissal on 31 May 2023 and was aged 38 at that date. She was therefore entitled to a basic award of 15 weeks' pay (Section 162 ERA). The parties agreed that her week's pay was £513.30. The Tribunal awards her a basic award of 15 x £513.30 = £7,699.50.

70. Turning to the compensatory award, the Tribunal needed to consider what sum it would be just and equitable to award the Claimant in all the circumstances having regard to the loss she sustained in consequence of the dismissal, insofar as that loss was attributable to the company's actions (Section 123(1) ERA).

71. As already recorded above, the Tribunal does not accept that it would have been a breach of trust and confidence for the company to refuse the Claimant's request to reduce her working hours, had it been handled correctly. On the other hand, the Tribunal considers that there was only a 30% chance that it would have refused the request, had it properly considered the benefits to the business of retaining the Claimant in employment and what work she could usefully do in two days. She was very experienced, hard-working and competent and had valuable language skills. In other words, had the company dealt properly with the Claimant's flexible working request, rather than constructively dismissing her, the Tribunal considers that there was a 70% chance that her request would have been granted and she would have remained in employment.

72. If the Claimant's request had been granted, she would have worked two days a week for the 14 weeks from 1 June to 5 September 2023, and three days a week from 6 September, when her younger child started nursery. She claimed a further 52 weeks loss from that point, taking her to 5 September 2024. The Respondent did not query that period of future loss and the Tribunal accepts that it is realistic to assume that the Claimant will not be able to completely replace her lost income from the Respondent by resuming full-time employment before then, given her childcare responsibilities.

73. The Claimant was paid £12.65 per hour and worked 8.5 hours per day. If she had returned on a two-day week she would have earned 2.x 8.5 x £12.65 = £215.05 a week. In September 2023 this would have increased to 3 x 8.5 x £12.65 = £322.57. The increase to three days would take her above the lower threshold for income tax and National Insurance contributions and result in a net weekly wage of around £297.

74. In addition, the Claimant lost the NEST pension contributions that the company was making, being 3% of her wages. For the period from 1 June to 5 September 2023 this amounts to 3% x £215.05 = £6.45 a week. For the period from 6 September 2023 to 5 September 2024 it amounts to 3% x £322.57 = £9.67 a week.

75. The Tribunal was presented with no evidence that the Claimant failed to meet her duty to take reasonable steps to minimise her loss of earnings once she had left the Respondent. She looked for other work, at the Jobcentre, online and at a local job fair, but she could find nothing that she could do, taking into account her childcare responsibilities and her disabilities. From 6 September 2023, after her younger son started nursery, she began working for herself doing ironing. She incurred expenses of £600 in looking for work and then setting herself up in business. From her ironing work she earns around £800 a month, which equates to £184.61 a week.

76. The Claimant claimed £450 to compensate her for loss of her statutory rights and the Respondent did not dispute that sum. Although the Claimant is currently self-employed, it is likely she will seek employment again once her children are a little older and more settled.

77. The Tribunal therefore calculates the compensatory award as follows:

1 June to 5 September 2023

Lost earnings:	£215.05 x 14 =	£3,010.70
Pension contributions	£6.45 x 14 =	£90.30

6 September 2023 to 5 September 2024

Lost earnings:	£(297 – 184.61) x 52 =	£5,844.28
Pensions contributions:	£9.67 x 52 =	£502.84

Expenses in securing new employment	£600
Loss of statutory rights	£450
TOTAL	**£10,498.12**
	x 70% = £7,348.68

78. In summary, the Tribunal awards the Claimant a total of £15,048.18 in compensation for her unfair dismissal.

Employment Judge Cox
Date: 15 January 2024