



EMPLOYMENT TRIBUNALS

Claimant:

Mrs Joanne Milton

v

Respondent:

Stephen MS Lai & Co Business
Consulting Limited

Heard at:

Reading

On: 24 and 25 February 2022
and in chambers on 1 March 2022

Before:

Employment Judge Hawksworth
Mrs C Anderson
Mrs F Tankard

Appearances

For the Claimant: Mr H Milton (the claimant's husband)

For the Respondent: Mr S Lai (director)

Interpreter (Cantonese): Mr S C Au (25 February 2022 only)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was constructively dismissed by the respondent and her complaint of unfair dismissal succeeds.
2. The complaint of direct sex discrimination in respect of sick pay succeeds.
3. The complaint of direct sex discrimination in respect of lack of support fails.
4. The respondent is ordered to pay the claimant the sum of £8,897.65 comprising:
 - a. a basic award of £1,422.69;
 - b. a compensatory award of £2,363.14;
 - c. £1,516.09 in respect of financial losses (of which £136.93 is interest);
 - d. £3,595.73 for injury to feelings (of which £595.73 is interest).

REASONS

Claim and response

1. The claimant was employed by the respondent from 1 October 2017 to 28 October 2019 as an administrator. The respondent is a small company which provides business consultancy services to companies overseas. At the relevant times, the respondent had two employees, the claimant and her male colleague who was also an administrator.
2. In a claim form presented on 30 November 2019 after Acas early conciliation from 3 to 29 October 2019, the claimant brought complaints of constructive unfair dismissal and sex discrimination. The response was presented on 3 January 2020. The respondent defended the claim.

Hearing and evidence

3. The hearing took place at Reading employment tribunal. Everyone attended in person on the first day. The second day was a hybrid hearing: the panel members and Mr Lai attended by video and everyone else was at the tribunal.
4. At the start of the hearing it became apparent that the parties had not fully complied with the preparation steps which had been ordered at a preliminary hearing on 15 July 2020. The tribunal had to take the first day to deal with the following case management issues:
 - 4.1. The claimant sent a schedule of loss and further information about her claim to the tribunal and the respondent after the preliminary hearing as ordered. She also provided both the tribunal and the respondent with the documents she relied on, in the form of a bundle, by the date ordered by the tribunal.
 - 4.2. Mr Lai sent an email to the tribunal before the preliminary hearing setting out his argument and attaching some documents. He sent some additional documents (17 jpeg image files) to the tribunal on 23 February 2022 (the day before the hearing before us). None of Mr Lai's documents had been copied to the claimant. Mr Lai did not have a copy of his argument document with him, and he could only access it from his home computer. It was not on the tribunal file.
 - 4.3. There was therefore no agreed bundle (that is, no joint pack of documents), and the claimant had not had the opportunity to read Mr Lai's documents. Mr Lai's argument document was missing.
 - 4.4. Neither party had prepared or served a witness statement.
5. We took into account the fact that neither party had legal representation, and we decided that we should take a pragmatic approach to the non-compliance with the orders. We decided that we would:

- 5.1. take an extended lunch break. This would allow Mr Lai to return home to email his argument document to the tribunal and the claimant, and it would allow the claimant and her husband time to read Mr Lai's documents;
 - 5.2. treat the claimant's claim form and further information as her witness statement, and treat the respondent's response form and arguments document as his witness statement;
 - 5.3. assist the parties with the documents so that we had a workable bundle ready for the start of the witness evidence part of the hearing.
6. On the first day of the hearing, Mr Lai attended on his own. He speaks good English, but there were some points which the tribunal asked him to repeat for clarity, and vice versa. At about 11.30am on the first day, the judge enquired whether Mr Lai had been told that he could request an interpreter. He said that he had emailed the tribunal to ask for a Cantonese interpreter. The judge made enquiries and found that his request had been noted on the tribunal's electronic file but not actioned for this hearing.
7. The tribunal administration took urgent steps to request an interpreter. An interpreter could not be found for that afternoon. We used the remainder of the day to ensure that the case management issues were resolved and the case was ready to start hearing the evidence. We decided that we would start to hear the evidence on the second day when an interpreter would (we hoped) be in attendance. There was a long discussion about whether the case could proceed on the second day if there was no interpreter. We considered this carefully, as both parties were keen to go ahead and Mr Lai's English is good. We decided that because Mr Lai had asked for an interpreter, and there had been points at which we were not sure about our understanding, it would be better to reschedule the hearing if there was no interpreter available on the second day.
8. After lunch Mr Lai sent his argument document and some other documents. We assisted the parties with the paperwork and talked through the process of numbering the pages of the various documents with the parties. By the end of the first day everyone had printed copies with agreed page numbers for the documents as follows:
- 8.1. The claim form, Acas certificate, response form, case management orders (put together by the tribunal, pages 1 to 32);
 - 8.2. the claimant's further information and documents (printed out by the tribunal, pages 33 to 80);
 - 8.3. the respondent's argument document, email of 13 July 2020 and documents (printed out by the tribunal, pages 81 to 106);
 - 8.4. copies of the claimant's contract of employment provided by the claimant and the respondent (not numbered).

9. The judge also discussed with the parties the issues to be decided by the tribunal and typed up a copy of the list of issues for the parties (see below).
10. On the second day of the hearing Mr S C Au, a Cantonese interpreter, attended. He interpreted that day's hearing in full. We are very grateful for his assistance.
11. We heard evidence from Mrs Milton and then from Mr Lai. In the absence of full witness statements, the judge asked each witness questions about the issues for decision. There was then questions of each witness by the other party followed by the opportunity for each witness to clarify any answers they had given earlier. Mr Lai and Mr Milton made closing comments.
12. We refused a request by Mr Lai to introduce three new documents after Mrs Milton had concluded her evidence. We did not allow this further evidence as it was produced so late in the day, we had already spent the previous day sorting out the documents and Mrs Milton had finished giving her evidence and would have to be recalled to give more evidence if the late documents were allowed.
13. There was insufficient time within the time allocated for us to deliberate and deliver judgment, and so we reserved judgment. We had a further hearing day in private without the parties on 1 March 2022, to consider and reach our decision.

Issues

14. At the preliminary hearing on 15 July 2020 Employment Judge Laidler identified the sex discrimination claim as follows:

"In the claim form the claimant set out how she believes she was treated less favourably on the grounds of her sex to [her male colleague] in respect of absence while off sick. She sets out how in September 2018 [her male colleague] had considerable time off work during his probationary period but was fully supported by Mr Lai and was paid his full salary for the two month period. On the contrary the claimant alleges when she went off sick with work related stress and subsequently put in a request for annual leave which was declined, she received little support or assistance. She was only paid statutory sick pay."

15. The judge at the preliminary hearing was unable to clarify other matters relied on in support of the claim of sex discrimination and constructive unfair dismissal because the claimant became upset and was unable to continue. The judge made an order for the claimant to provide further information setting out each and every matter relied on as sex discrimination, and each and every matter relied on as amounting to a fundamental breach of contract entitling her to resign and claim

constructive dismissal. The claimant complied with this order and provided a document which included her schedule of loss and a numbered list of matters relied on.

16. At the start of the final hearing before us, we clarified the issues. The claimant confirmed that she did not rely on any matters other than those identified by the judge in respect of her sex discrimination claim. We identified with the claimant the matters she relied on as amounting to breaches of contract in her constructive unfair dismissal claim, by reference to the numbered list in her further information document. Mr Lai confirmed that the respondent's position was that the claimant was not dismissed, and that there was no difference of treatment between the claimant and the claimant's comparator because he worked overtime to make up hours on sick leave.
17. The judge typed up a list summarising the alleged breaches of contract and the alleged acts of discrimination. The judge explained to the parties that these were the issues the tribunal would be deciding. She gave each of the parties a copy of the list. The list of issues is as follows:

1. Constructive unfair dismissal

Mrs Milton says that her employer breached her contract in the following ways, and that these led to her resignation:

- 1.1. Not being paid on time as per the contract
- 1.2. Being paid part of her salary in July 2019 followed by the balance several days later than stated in her contract
- 1.3. Mr Lai declining her request to take annual leave in October 2019
- 1.4. Mr Lai telling her on 30 August 2019 that 'Every leave without proper procedure...I will give legal warning...and follow employment procedure'
- 1.5. Neither Mr Lai nor the claimant's colleague replied or responded to her sending in her GP sick note on 12 September 2019
- 1.6. On 27 September 2019 she did not receive a pay slip
- 1.7. On 27 September 2019 she was only paid SSP and Mr Lai did not inform her that this would happen and she had no reason to believe she would be treated any differently to her colleague
- 1.8. On 1 October 2019 when she returned to work, Mr Lai asked Mrs Milton whether she wanted her return to work meeting privately or all together
- 1.9. On 1 October 2019 Mr Lai held a team meeting before her return to work meeting, and spoke exclusively to her colleague so that Mrs Milton felt excluded
- 1.10. On 1 October 2019 Mr Lai asked Mrs Milton what her grievance was when she had already sent her grievance letter on 27 September. He said he preferred everything to follow the law from now on as stated in his email of 28 September. When Mrs Milton asked why she had been treated differently in relation to sick leave, Mr Lai did not respond and stated he did not treat her unfairly. Mrs Milton felt her grievance had not been taken seriously at all and that she had no option but to resign.

2. Direct sex discrimination

Mrs Milton says that she was treated less favourably than her colleague who is male in that:

- 2.1. she was only paid SSP when on sick leave, but he received full pay for sick leave
- 2.2. she was not supported by Mr Lai when on sick leave, but [Mr Lai] was very supportive towards her male colleague.

Findings of fact

18. We make the following findings of fact about what happened. Where there is a dispute about what happened, we consider the evidence we have heard and the documents we have read, and we decide what we think is most likely to have happened.

Introduction

19. There was a contract of employment between the parties dated 1 October 2017. In relation to remuneration, this said that the employee would be paid in monthly instalments in arrears. The contract did not expressly set out a date for payment. The claimant spoke to the respondent's accountant about this, and she was told that she would be paid on 28th of each month.
20. Mr Lai is the owner and director of the respondent. The claimant was aware that Mr Lai had not set up a regular payment mechanism like a standing order or direct debit, and she was worried that he might forget to pay her. She reminded him each month when pay day was approaching.
21. In July 2019 the claimant was paid in two instalments, the first on 26 July and the second on 29 July. We had no evidence that the claimant was paid after the 28th in any other month, and we find that the payment on 29 July was the only occasion when the claimant was paid after 28th.

Annual leave issues

22. The contract said that the respondent's leave year was 1 April to 31 March. The claimant was entitled to 20 days leave a year plus bank holidays. In the 2019 leave year, the claimant took two days' annual leave in April 2019 and 10 days for a summer holiday in July 2019. She also had five paid bank holidays in the period April to August 2019.
23. At one stage the respondent had a system for recording annual leave, but Mr Lai decided not to continue with the subscription for this, and he asked his employees to keep their own record of annual leave.
24. Mr Lai agreed that the claimant could work from home from time to time. He had no problem with his employees working from home to deal with

family or personal issues, provided they took their laptops and had their office phones on divert to their mobiles. During March to August 2019 there were around 2 occasions each month when the claimant asked to work from home from various reasons, for example because of family issues.

25. The claimant and Mr Lai did not have any conversation about how time spent working from home to deal with family issues would be dealt with. The claimant understood that because she was able to complete her work tasks on the days when she was working from home, she would not need to record any time off as annual leave or to make the time up in any other way.
26. Mr Lai did not tell the claimant that she had to take time off as leave or make it up. He later told the claimant that he regarded her as taking a half day's annual leave on each of 10 occasions on which she worked from home, and he said this equated to 5 days' leave (page 105). The claimant agreed that she had taken a half days' leave on two of the occasions when she worked from home, that is 30 July and 27 August 2019, but not the other days.
27. On 29 August 2019 the claimant texted Mr Lai to ask if she could take a week's leave from 21 to 25 October 2019. Mr Lai replied to say, 'No, not possible'. When she asked for a reason, Mr Lai said 'Better everything follows UK employment law' (page 57). He asked whether the claimant still had any days leave left as she had had holidays already. She said she had 12 days remaining of her leave allowance, plus bank holidays (page 58). Mr Lai said that he would send her leave application forms for her to fill in so that he could check his records and then decide. This was a more formal process than he had suggested previously.
28. The claimant replied to say that Mr Lai had not continued with the HR tool which recorded leave, and had said he preferred word of mouth. She said Mr Lai had made her feel like she was trying to trick him when all she wanted to do was use 5 days annual leave. She agreed that a more formal process should be adopted going forward (page 59).
29. The claimant made a written request on the same day in which she set out leave she had taken and said that she had 8 days remaining (not 12 as she had initially thought) (page 73). We find that at this time the claimant had 7 days leave remaining, not 8 (she had not counted the two half days).
30. Mr Lai replied by email and copied the claimant's colleague into the email (page 61). He said that he had told the claimant that once business started (after some sickness and other absence by the claimant and her colleague) he would not be able to allow further holidays. He said she could apply for leave from 13 December 2019. He referred to the claimant's time off for family issues. He said the claimant's colleague would be on a business trip in October.

31. The claimant replied on the same day (page 75). She said she had not been told that time spent working from home for family issues would be taken as a half day's annual leave. She said she was not aware of her colleague's business trip.

The claimant's sick leave

32. On the morning of 30 August 2019 the claimant sent Mr Lai a WhatsApp message to say she had a GP appointment. He replied saying, 'Every leave without proper procedure...I will give legal warnings...and follow employment law procedure'. He suggested that she take the day as one day's leave, and fill in a leave form (page 63). The claimant said she did not need a day's leave for a doctor's appointment. Mr Lai replied, 'You send leave form...to confirm whole day or half day'.
33. The claimant's GP certified that she was unfit for work from 30 August 2019 to 20 September 2019 (page 64). The reason was reactive depression. She saw her GP again on 12 September 2019 and was signed off sick until 30 September 2019 (page 65). She sent her certificates to Mr Lai. She copied the second certificate to her colleague.
34. Neither Mr Lai nor the claimant's colleague replied or responded to her message with her GP sick note on 12 September 2019. On 17 September 2019 Mr Lai messaged the claimant to ask if he and her colleague could visit her at home. The claimant replied to say that she was not really up to visitors (page 66).

The claimant's pay while on sick leave

35. On 27 September 2019 the claimant did not receive a pay slip. She checked her bank account to find that she had only been paid statutory sick pay (SSP). She had not been told that she would not receive full pay. Her contract said that the employer 'operates the statutory sick pay scheme'. However, she believed that she would be paid full pay during sick leave because she knew that her colleague had been paid in full when he was on sick leave during his probationary period. He was paid full pay for two months' sick leave in September and October 2018, and then further time off on full pay for sickness during the following six months (page 91).
36. We pause here in the chronology to set out some matters concerning the claimant's colleague's sick leave. The claimant and her colleague exchanged WhatsApp messages while he was off sick in September 2018. During this time the claimant's colleague asked the claimant to tell Mr Lai that he was not working from home, as he had contacted him, and the claimant reassured her colleague that Mr Lai was just concerned for his health more than anything (page 49). In another message, the colleague said that Mr Lai was angry with him, and the claimant replied 'Don't worry, he will calm down' (page 52).

37. At the hearing before us, Mr Lai said that the reason the claimant's colleague was paid full pay while on sick leave was because Mr Lai had visited the claimant's colleague at home when he first went off sick and he had asked to stay on full pay because he was the only earner in the family. His wife did not work. Mr Lai said that he and the claimant's colleague agreed that he could stay on full pay during sick leave provided that later on, he made up the hours he had missed.
38. This agreement between Mr Lai and the claimant's colleague was not recorded in writing. Mr Lai relied on a spreadsheet with two tables (pages 91 and 92). The first table showed that the claimant's colleague had taken 479.5 hours working time as sick leave during the period September 2018 to April 2019. The second table showed that the claimant's colleague had worked 479.5 hours 'non official works' during the period May 2020 to November 2020. The table said he had worked 60 additional hours each month by writing 8 articles. In his evidence to us, Mr Lai said that some of these additional hours were performed by members of the claimant's colleague's family.
39. We find that the claimant was not aware of any agreement between Mr Lai and her colleague about working overtime to pay back hours on sick leave. Neither Mr Lai nor the claimant's colleague told her about it.

The claimant's return to work

40. Returning to the chronology, on 26 September 2019 the claimant messaged Mr Lai to say that she would be back at work on Monday 1 October 2019 (page 67). She asked if they could have a back to work meeting.
41. On 27 September 2019 the claimant made a formal grievance complaint (pages 77 to 80). She complained that her request to take annual leave in October had been declined and that she had been treated unfairly by not being paid full pay during sickness absence in September 2019 unlike her colleague who had been paid in full for two months' sick leave.
42. On 28 September 2019, after receiving the grievance, Mr Lai sent an email to the claimant (page 70). He said everything he did as an employer was following the law of the UK and if the claimant felt it was unfair or felt uncertain she should consult with relevant government departments. He ended by saying, 'All decision is for the protection of both sides employer and our employees, and have followed the laws of the UK'. We find that this was his response to the grievance. This was not compliant with the employer's grievance procedure (schedule 3 of the contract). The procedure provided that a meeting would be held before the decision was made.
43. When she arrived at work on 1 October 2019, Mr Lai asked Mrs Milton whether she wanted her return to work meeting privately or all together. She said she would like a private meeting.

44. Mr Lai then held a team meeting with the claimant and her colleague. We find that during that meeting the majority of Mr Lai's discussion was with the claimant's colleague, as the claimant had been out of the business for a month. However, we do not find that Mr Lai spoke exclusively to the claimant's colleague so that the claimant felt excluded.
45. After the team meeting, Mr Lai and the claimant met for her return to work meeting. They also discussed her grievance. Mr Lai asked the claimant what her grievance was about. He said he preferred everything to follow the law from now on as stated in his email of 28 September 2019. When Mrs Milton asked why she had been treated differently in relation to sick leave, Mr Lai said he had not treated her unfairly. He did not mention his agreement with the claimant's colleague to work additional hours to pay back full pay.
46. The claimant felt her grievance had not been taken seriously and that she had no option but to resign there and then. She typed up a resignation letter, printed it out and handed it to Mr Lai (page 106). He left the room. Shortly afterwards he returned and agreed with the claimant that she would be on garden leave for her 4 week notice period.
47. On 31 October 2019 Mr Lai messaged the claimant to ask if she would like to return to work for him. He said he understood that for 'you as a household, some financing is very tight'. The claimant decided that she did not want to return to work for Mr Lai (page 72).
48. At the hearing before us, Mr Lai said that he had paid the claimant's colleague full pay during sick leave because he was the main person supporting his family. He was the only financial source. He said that the claimant's husband was a professional and so she didn't need extra support. Also, he said the claimant had declined a home visit from him and had not requested full pay during sick leave.

The law

Constructive unfair dismissal

49. The definition of dismissal in section 95 of the Employment Rights Act includes constructive dismissal. Section 95(1)(c) provides that an employee is dismissed where:

"the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct."

50. *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* set out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

- 50.1. that there was a fundamental breach of contract on the part of the employer;
 - 50.2. that the employer's breach caused the employee to resign; and
 - 50.3. that the employee did not affirm the contract, for example by delaying too long before resigning.
51. All employment contracts contain an implied term to the effect that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Whether there has been a breach of the implied term is to be considered objectively, from the perspective of a reasonable person in the claimant's position (*Tullett Prebon plc v BGC Brokers LP 2011 IRLR 420*).
52. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* Underhill LJ set out guidance on the questions to be considered where an employee claims to have been constructively dismissed and where there are said to be a number of alleged contractual breaches. Those questions are:
- 52.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?
 - 52.2. Has the employee affirmed the contract since that act?
 - 52.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - 52.4. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence?
 - 52.5. If so, did the employee resign in response (or partly in response) to that breach?
53. If a constructive dismissal is established, the tribunal must also consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98(4) of the Employment Rights Act 1996.

Direct discrimination because of sex

54. Sex is a protected characteristic under section 4 of the Equality Act 2010.
55. Section 13(1) of the Equality Act provides:
- “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*
56. Sub-sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof in discrimination cases:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

57. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.
58. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

Conclusions

Constructive unfair dismissal

59. We have applied these legal principles to the facts as we have found them, using the approach set out in *Kaur v Leeds Teaching Hospitals NHS Trust*, to reach the following conclusions.

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

60. The claimant says the most recent act on the part of the employer that triggered her resignation happened on 1 October 2019. She complains about three things that occurred on that date:

60.1. Mr Lai asked Mrs Milton whether she wanted her return to work meeting privately or all together;

60.2. Mr Lai held a team meeting before her return to work meeting, and spoke exclusively to her colleague so that Mrs Milton felt excluded

60.3. Mr Lai asked Mrs Milton what her grievance was when she had already sent her grievance letter on 27 September. He said he preferred everything to follow the law from now on as stated in his email of 28 September. When Mrs Milton asked why she had been treated differently in relation to sick leave, Mr Lai did not respond and stated he did not treat her unfairly. Mrs Milton felt her grievance had not been taken seriously at all and that she had no option but to resign.

61. We have not found that Mr Lai spoke exclusively to the claimant's colleague so that she felt excluded. We have found that the other things happened as the claimant alleged.

Has the employee affirmed the contract since that act?

62. The claimant resigned her employment on 1 October 2019, the same day as the most recent incidents. She remained employed during her notice period, but did not go into work as it was agreed that she would be on garden leave.
63. The claimant did not affirm the contract after 1 October 2019. She resigned on the same day. The agreement that she would be on garden leave during her notice period was not an affirmation of the contract. The claimant did not, in agreeing arrangements for her employment to end without her being at work, show an intention to continue in employment rather than to resign.

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

64. Viewed objectively, neither Mr Lai asking the claimant whether she wanted her return to work meeting privately or all together nor Mr Lai holding a team meeting before the return to work meeting were repudiatory breaches of contract. That was not conduct which was calculated or likely to destroy the relationship of trust and confidence between employer and employee. It was a small team, and the claimant had copied her colleague into her second GP note. It was not unreasonable for Mr Lai to ask whether the claimant wanted her return to work meeting in private, and it was not unreasonable to hold a team meeting first.
65. However, the way in which Mr Lai dealt with the claimant's grievance was a breach of the implied term of trust and confidence. The claimant had a genuine grievance about her sick pay. She knew that her colleague had been paid full pay during two months' sickness absence. She had been paid statutory sick pay, and had not been given any warning or notification of this. She was not aware of any arrangement between Mr Lai and her colleague about additional work to pay back full sick pay. It appeared to her that she had been treated differently to her colleague and she had not been provided with any explanation for this treatment. On 1 October Mr Lai responded to her grievance about this by referring back to his short email of 28 September, and by failing to provide any further explanation. He failed to deal with the claimant's grievance as required by the respondent's grievance policy.
66. A reasonable person in the claimant's position would have seen this as a failure to take her genuine grievance seriously, and as conduct likely to destroy or seriously damage the relationship of trust and confidence between her and her employer.
67. The failure to take the claimant's grievance seriously was a breach of the implied term of trust and confidence entitling the claimant to resign and claim constructive dismissal.

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

68. It is clear from the chronology of events on 1 October 2019 as found by us that the claimant's resignation was prompted by Mr Lai's failure to take the claimant's grievance seriously. She resigned in response to the breach.

Unfair dismissal

69. Having found that the claimant was constructively dismissed, we consider whether the dismissal was unfair. This requires consideration of whether the respondent had a potentially fair reason for dismissal and whether the dismissal was fair in all the circumstances of the case.
70. The respondent did not advance any potentially fair reason for dismissal. The dismissal was not related to conduct, capability, redundancy or any other potentially fair reason. There was no potentially fair reason for the claimant's dismissal.
71. Further, the dismissal was not fair in all the circumstances. In failing to deal with the claimant's grievance the respondent did not follow its own procedure.
72. The claimant's complaint of unfair dismissal succeeds.

Direct sex discrimination

73. The claimant says that she was treated less favourably than her colleague who is male in that:
- 73.1. she was only paid SSP when on sick leave, but he received full pay for sick leave;
- 73.2. she was not supported by Mr Lai when on sick leave, but Mr Lai was very supportive towards her colleague.
74. We have first considered our findings of fact on these two points, and then whether the treatment as we have found it to have occurred amounted to less favourable treatment.
75. We have found (and there was no dispute about this) that the claimant's comparator was paid full pay during two months sick leave and for other periods after that. The claimant was paid SSP when she was on sick leave for one month. Mr Lai exercised his discretion to continue full pay for the claimant's comparator but not for the claimant. This decision amounted to less favourable treatment of the claimant compared to her comparator.
76. We have not found that Mr Lai was less supportive of the claimant than he was of her comparator. It is apparent from the Whatsapp message exchanges that the claimant's comparator had some concerns about his interactions with Mr Lai while he was on sick leave, and the claimant had

to reassure him at times. We do not find that Mr Lai's failure to contact the claimant for five days after she sent her second GP fit note to Mr Lai was unsupportive; people on sick leave may need a bit of space rather than contact from their employer.

77. Therefore, we have not found on the facts that Mr Lai was less supportive of the claimant than her comparator, and we have not found that there was less favourable treatment of the claimant in this regard.
78. In relation to Mr Lai's decision not to continue the claimant's full pay during sick leave, we have considered whether there are facts from which we could conclude that the difference in treatment between the claimant and her comparator was because of sex. Mr Lai saw the claimant's salary as less important than her comparator's salary because of their family circumstances. We could infer that the fact that the claimant was female played a part in his perception of her salary as less important than her comparator's. We have decided that the burden of proof shifts to the respondent to satisfy us that the difference in treatment was in no sense whatsoever based on the difference in sex.
79. Mr Lai's explanation for the difference in treatment was that the comparator was paid full pay during sick leave because he was the main person supporting his family, the only financial source. Mr Lai said that the claimant's husband was a professional and so she didn't need extra support. Also, he said the claimant had declined a home visit from him and had not requested full pay during sick leave, so he could not consider this.
80. When the burden shifts to the respondent, the respondent should produce "cogent evidence" of its explanation. The evidence in support of this explanation was not cogent. The agreement between Mr Lai and the comparator was not recorded in writing. The document which showed the hours worked back was in very general terms, and the additional work did not start until around 18 months after the comparator was first off sick. Some of the work was not done by the comparator himself, but this was not recorded on the document.
81. At the time the claimant was off sick and at the time of her return to work, her comparator had not made up the extra hours. The claimant was not told of any arrangement for her comparator to work back hours later. Mr Lai said the claimant did not make a case for continuation of full pay, but he did not give her the opportunity to do so. He did not tell her that he would be considering this at the home visit he suggested.
82. Finally, although Mr Lai said that he thought that, unlike her comparator, the claimant did not need extra support, he referred in his message of 31 October 2019 to 'some financing [being] very tight' for the claimant's household. This is not consistent with his explanation that the claimant did not need financial support.
83. The respondent has not satisfied the burden of proving that gender did not play any part in its perception of the claimant's financial position on which

the decision not to continue full pay was based. The complaint of direct sex discrimination in relation to sick pay therefore succeeds.

Remedy

Unfair dismissal compensation

84. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of:

- 84.1. a basic award; and
- 84.2. a compensatory award.

85. Section 123 of Employment Rights Act says that the compensatory award shall be:

“Such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”.

Compensation for discrimination

86. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010.

87. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

88. In complaints of discrimination, the aim is to put the claimant back in the position she would have been in if there had not been any discrimination. The award is to compensate for financial losses and for non-financial losses such as injury to feelings.

89. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The Presidential Guidance of 25 March 2019 on injury to feelings set out updated *Vento* bands. The guidance says that for claims presented on or after 6 April 2019, as the claimant’s was, the lower band is £900 to £8,800 (less serious cases); the middle band £8,800 to £26,300 (cases that do not merit an award in the upper band); and the upper band £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

Additional findings of fact and conclusions

Unfair dismissal compensation

90. Basic award: The claimant had two years' service and was over 41 at the time of her employment. She is entitled to a basic award of 3 weeks' pay. The claimant's gross weekly pay was £474.23 (£2,055 x 12/52). This is below the maximum amount of a week's pay for claims presented after April 2019 (£525 per week) and so is not subject to the cap. The claimant is entitled to a basic award of £474.23 x 3 = £1,422.69.
91. Compensatory award: Following her dismissal, the claimant had a period where she was not working, from 30 October 2019 to 17 November 2019. Her loss of salary during this period was £1,042.39.
92. The claimant found a new job which started on 18 November 2019. Her salary with her new employer is lower than with the respondent. She has a net monthly loss of salary of £214.15 per month. We have concluded that the claimant could have found alternative work which fully mitigated her losses within 5 months. We award loss of salary for the 5 month period from 18 November 2019 to 17 April 2020 in the sum of £214.15 x 5 = £1,070.75.
93. The claimant has lost her statutory rights as a result of the dismissal. We award £250 as compensation for loss of statutory rights.
94. The total compensatory award is £1,042.39 + £1,070.75 + £250 = £2,363.14.

Sex discrimination compensation

95. Loss of earnings: as a result of the discriminatory decision not to pay the claimant full sick pay, the claimant suffered loss of salary in September 2019. We award compensation for this loss in the sum of £1,379.16. Credit has been given for SSP received in the sum of £358.15.
96. The claimant is awarded interest on the compensation for financial losses. Interest runs from the mid-point of the period starting with the date of discrimination and ending with the date of the hearing.
97. The discrimination began on 1 September 2019. The number of days between 1 September 2019 and the hearing on 25 February 2022 is 906 days, and so from the mid-point of that period to the date of the hearing is 453 days. The rate of interest is 8%. The calculation is 8% x £1,379.16/365 x 453 days. That means interest on loss of earnings is £136.93.
98. The total award for financial losses in the discrimination complaint is £1,379.16 + £136.93 = £1,516.09.
99. The claimant is also entitled to an award for injury to feelings. In this case there was a one off act of discrimination (the decision not to pay the claimant full pay on sick leave). The claimant was extremely upset by

being treated differently to her colleague. We have decided that the appropriate band is the lower Vento band and that the appropriate award is in the lower half of the band. We make an injury to feelings award of £3,000.

100. We award interest on the injury to feelings award. Interest on injury to feelings applies for the whole period from 1 September 2019 to 25 February 2022, the date of the hearing, that is a period of 906 days. The rate of interest is 8%. The calculation is $8\% \times £3,000/365 \times 906$ days. That means interest on the injury to feelings award is £595.73.
101. The total award for injury to feelings is $£3,000 + £595.73 =$ £3,595.73.

Holiday pay

102. The claimant claimed 8 days pay for untaken holiday. We have found that the claimant had taken 13 days paid leave since 1 April 2019, and therefore had 7 days untaken holiday remaining from her 20 day entitlement for the full holiday year 1 April 2019 to 31 March 2020.
103. The claimant did not work the full holiday year and was therefore not entitled to her full annual leave entitlement for that year. She worked from 1 April 2019 to 28 October 2019, that is 210 days. Her entitlement to holiday was $20 \times 210/365 = 11.5$ days. She had taken more than this.
104. The claimant was also entitled to eight days bank holiday leave in a full year which pro-rated for the part year is 4.6 days. There were five bank holidays in the part year the claimant worked (two at Easter, two in May, August). The claimant was paid for these five days.
105. The claimant was therefore paid for 18 days leave (annual leave and bank holidays) from the full year's 28 days leave entitlement and the part year entitlement of 16.1 days. She does not have any accrued but untaken holiday leave. No award is made in respect of holiday pay.

Summary

106. The total award to the claimant is therefore £8,897.65 comprising:
- 106.1. a basic award of £1,422.69;
 - 106.2. a compensatory award of £2,363.14;
 - 106.3. £1,516.09 in respect of financial losses (of which £136.93 is interest);
 - 106.4. £3,595.73 for injury to feelings (of which £595.73 is interest).

Employment Judge Hawksworth

Date: 11 March 2022

Sent to the parties on: 15 March 2022

For the Tribunals Office

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