EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102908/2022

5

Held in Glasgow on 28-30 November 2022

Employment Judge L Murphy
Tribunal Member J Lindsay
10 **Tribunal Member S Singh**

Ms A Nicholl	**Claimant** **In Person**
Wm Morrison Supermarkets Ltd	**Respondent** **Represented by:** **Mr J Davies -** **Counsel**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous judgment of the Tribunal is that:

(i) It is just and equitable to extend the time limit in which to lodge the claim of victimisation contrary to section 27 of the Equality Act 2010 (EA).

(ii) The claimant's victimisation is not well founded and is dismissed.

(iii) The claimant's complaint of constructive unfair dismissal contrary to
25 section 94 of the Employment Rights Act 1996 is not well founded and is dismissed.

(iv) Having no entitlement to damages for any breach of contract by the respondent, the claimant's complaint of breach of contract (wrongful constructive dismissal) is dismissed.

30

REASONS

Introduction

1. The claimant lodged an ET1 on 26 May 2022 in which she identified complaints of breach of contract in terms (notice pay) and constructive unfair dismissal. When she lodged the ET1, she was unrepresented. In her original ET1 she complained about requests to change her hours of work given personal caring commitments she had including for her brother, who, she said, she took to disability clubs.

2. On 28 July 2022, the claimant sent further particulars of her claim ("FBP1). She was still representing herself at that time. FBP1 identified complaints of "unfair constructive dismissal and victimisation". The respondent sent amended Grounds of Resistance on 9 August 2022 (the Amended GOR1").

3. On 16 August 2022, the respondent's representative emailed the Tribunal and raised the fact that the ET1 did not include a claim of victimisation under section 27 of EA. On 21 August 2022, the claimant sent a document headed "leave to amend ET1 claims request", dated 19 August '21. On 29 August 2022 a preliminary hearing ("PH") on case management took place. The claimant was represented by Ms Smith, a CAB advisor. Further to the discussion at the hearing, EJ Hoey ordered the claimant by 13 September 2022 to provide specification of the claims of harassment and victimisation which her representative had, at the PH, advised she wished to progress. The respondent was ordered to provide any objection by 27 September 2022 and to lodge its formal response to the further specification.

4. On 13 September, Ms Smith, by now on record as representing the claimant, submitted a document called "Summary of Issues and Claims" ("FBP2"). FBP2 identified a complaint of victimisation contrary to section 27 EA and specified the protected acts relied upon and detriments asserted. Three of the detriments were alleged to have taken place in February 2022 and were *prima facie* out of time, even based upon the date of lodging of the original ET1. FBP2 confirmed that the claimant did not seek to progress a complaint of harassment. In response, the respondent lodged a further amendment to its

GOR ("Amended GOR 2") on 27 September 2022. No objection to the claimant's application to amend was intimated as directed by EJ Hoey.

5. The claimant's amendment application was extant when the final hearing began on 28 November 2022. During the preliminaries, in the absence of any objection from the respondent, we granted the claimant leave to amend in terms of FBP2 and accepted the respondent's Amended GOR2. It was explained that amendment was permitted subject to the issue of time bar which had not been determined and would be reserved for determination after hearing all evidence and submissions.

6. EJ Hoey sought, in his CMO, to list the issues for determination at the final hearing, insofar as he was able, in circumstances where the final iteration of the claimant's complaints and the respondent's grounds of resistance were not yet available. That list required to be updated in light of the clarifications provided in FBP1 and FBP2 and the consequential amendments in Amended GOR2.

7. The updated issues for the Tribunal to determine so far as liability is concerned are as follows:

Victimisation

(i) The claimant accepts that the victimisation complaint about detriments alleged to take place on 11, 18 and 21 February 2022 complaint was not lodged within the normal time limit in s.123 of EA which, allowing for the EC extension, respectively expired on 12 May, 19 May and 22 May 2022. If the clock stops not on the date the ET1 was lodged but on the date of the initial or subsequent amendment application, then all victimisation acts complained of are *prima facie* out of time. The Tribunal will require to decide:

1. Was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

i. why the complaint was not made to the Tribunal on time; and

ii. in any event, is it just and equitable in all the circumstances to extend time?

5 iii. If not, was there, in any event, conduct extending over a period?

iv. And, if so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that

10 period?

(ii) Subject to the time bar issue, if the victimisation complaint proceeds, the Tribunal will require to decide whether the claimant did the following things as alleged:

(a) On or around 29 September 2021, the claimant alleges she

15 complained to a manager, Deborah Wilson, regarding being harassed into changing her working hours despite care duties she had towards her disabled brother.

(b) On 18 February 2022, in a meeting with HR Manager, Lesley Murray (LM), and Assistant Store Manager, Kenny Coultar

20 (KC), the claimant alleges she complained to LM about feeling harassed by the respondent and previous acts of victimisation including being sent home by her line manager on 11 February 2022 and not receiving pay for her shift.

(c) On 21 February 2022, the clamant alleges she called HR and

25 and informed of her intention to raise a formal handwritten grievance regarding the way she was being treated due to resisting a change to her hours of work on the grounds of care duties to her disabled brother.

(iii) Were these or any of them protected acts?

(iv) Alternatively, did the respondent believe the claimant might do a protected act?

(v) If the Tribunal finds the claimant did a protected act or that the respondent believed she might do a protected act, did the respondent do the following things:

1. On 11 February 2022, send the claimant home from a shift she was scheduled to work and thereafter withhold the claimant's wages for that shift?

2. On 18 February 2022, following a meeting with LM and KC, withhold minutes of that meeting?

3. On 21 February 2022, refuse to deal with the claimant's handwritten grievance?

4. On 11 March 2022, suspend the claimant for what the claimant alleges was a common practice on the shop floor, and subject her to a disciplinary for the same?

(vi) By doing so, did the respondent subject the claimant to detriment?

(vii) If so, in each case, was it because the claimant did a protected act or because the respondent believed the claimant might do a protected act?

Constructive unfair dismissal

(viii) Was the claimant dismissed?

(i). Did the respondent do the following things:

1. On 21 September 2021, did LM suggest the claimant accept a change to her shift hours now she no longer had to care for her father (following his passing 2 years before), when the claimant reminded her she was still the main carer for her disabled brother and elderly mother?

2. On or around 29 September 2021, did the claimant complaint to Deborah Wilson that she was being harassed into changing her working hours despite care duties she had towards her disabled brother?

5

3. In November and December 2021 was there ongoing verbal questioning and demands by KC and Kat Tait (KT) that the claimant accept the proposed changes to her working hours?.

4. On 11 February 2022, was the claimant sent home by

10

KT one hour into her shift for being "unproductive". Were her wages thereafter withheld?

5. Did the respondent's HR manager, LM, fail to give the claimant proper support following this incident when the claimant reached to her for help?

15

6. On 10 March 2022, was the claimant suspended pending disciplinary action for taking logs from the shop after her line manager denied authorising the same?

7. Did the respondent act maliciously in singling the claimant out by submitting her to disciplinary action for

20

conduct the claimant alleges was a matter of ongoing custom and practice?

(ii). Did those acts or any of them breach the implied term of trust and confidence? The Tribunal will need to decide:

1. Whether the respondent behaved in a way that was

25

calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

2. Whether it had reasonable and proper cause for doing so.

(iii). Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

(iv). Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

(v). If the claimant was constructively dismissed, what was the reason for the breach of contract? The respondent says the reason was the claimant's conduct.

(vi). If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to (constructively) dismiss the claimant? The Tribunal will usually decide, in particular whether:

1. There were reasonable grounds for the respondent's belief;
2. At the time the belief was formed the respondent had carried out a reasonable investigation;
3. The respondent otherwise acted in a procedurally fair manner;
4. The (constructive) dismissal fell within the range of reasonable responses.

Breach of Contract (Wrongful Constructive Dismissal)

(vii). Did a breach of contract by the respondent arise or was it outstanding when the claimant's employment terminated?

(viii). Did the respondent do the things alleged to be breaches of contract set out in paragraphs **viii(i) 1. to 7.** above under the heading *Constructive Unfair dismissal*?

(ix). Did those acts or any of them breach the claimant's contract of employment?

(x). If so, did the claimant suffer any losses arising from the breach?

(xi). If so, how much should she be awarded in damages? The claimant claims twelve weeks' pay equating to her notice entitlement.

8. The final hearing took place 'in-person' at the Glasgow Tribunal on 28 – 30 November 2022. The claimant represented herself at the hearing, Ms Smith of the CAB having previously withdrawn from acting. She gave evidence on her own behalf. The respondent was represented by Mr Davies of counsel. The respondent led evidence from Duncan MacMillan, Kat Tait, and John Duncan. Evidence was taken orally.

9. Although EJ Hoey had previously ordered that a joint bundle be prepared by the respondent, this was not done. Neither Mr Davies nor the claimant were able to give any explanation as to why not. The respondent and the claimant produced separate bundles of productions. The respondent's unindexed bundle ran to 145 pages. The claimant's indexed bundle ran to 64 pages. There was relatively little overlap so no attempt was made to amalgamate the two.

10. Neither bundle contained EJ Hoey's CMO nor the most recent iterations of the claim and response. The respondent's instructing agents had provided Mr Davies with a different version of the bundle to that which they had sent the Tribunal. There was no index and different page numbering, so Mr Davies could not readily identify which documents he had that the Tribunal and the claimant lacked. Some documents in the respondent's bundle were illegible. An adjournment was needed for the following documents to be printed by Tribunal staff and added to the productions:

(i) EJ Hoey's CMO dated 9 August 2022;

(ii) FBP2 dated 13 September 2022;

(iii) Amended GOR 2 dated 27 September 2022;

(iv) Respondent's "Colleague Flexibility Form" dated 1 Mar 2022;

(v) Respondent's record of meeting between K Tait and Diane Wilson dated 10 March 2022;

(vi) Respondent's record of meeting between K Tait and Katie McHugh dated 11 Mar 2022.

5

11. Witness names and those of other individuals referred to in the judgment are abbreviated as follows.

Name	Abbreviation
Cherie Stachura, manager at the Falside Road store who searched the claimant's car with DM in March 2022.	CS
Deborah Wilson, former duty manager at the respondent's Falside Road Store (left c.November 2021)	Deb W
Diane Wilson, manager at the Falside Road store questioned by the respondent in March 2022 during disciplinary investigation	Di W
Duncan MacMillan, manager at the Falside Road store who searched the claimant's car and suspended her in March 2022. DM was a witness at the Tribunal.	DM
John Duncan, Manager of the respondent who conducted C's grievance hearing on 24 April 2022. JD was a witness at the Tribunal.	JD
Katy McHugh, till operator at the Falside Road store suspended and questioned by the respondent in March 2022 during disciplinary investigation	KM
Kat Tait, store manager of the Falside Road store from summer 2021 and investigating officer in disciplinary proceedings. KT was a witness at the Tribunal.	KT

Kenny Coultar stores operations manager at the Falside Road store who attended meetings with C and LM re C's hours of work	KC
Lesley Murray, HR Manager at the Falside Road store	LM
Martin Kinsler, colleague of C at the Falside Road store who accompanied her at meetings in February / March 2022	MK
Martin Smith, manager of the respondent's Johnstone store, who was appointed to chair the claimant's disciplinary hearing scheduled for 17 Mar 2022	MS
R McCormick, employee at the Falside Road store whose car was searched by CS and DM on 10 Mar 2022	RM

Findings in fact

12. Having heard the evidence, the Tribunal makes the following findings in fact, on the balance of probabilities:

Background

5 13. The claimant was employed by the respondent (and predecessor employer, Safeway) from 5 October 1990 until she resigned on 16 March 2022. She was employed as a shop assistant and worked at all material times at the respondent's Falside Road store in Paisley.

14. When her employment ended, the claimant's hourly rate was £10 per hour. 10 She was paid every four weeks. Latterly in her employment, she was not provided with hard copy pay slips. She was instructed to access payslips instead via an online portal the respondent operates for its employees called MyMorri. The claimant is not computer literate. She was unable to access the portal.

15 15. In March 2012, the claimant's brother suffered a brain aneurysm which left him in a coma for 6 weeks. After he was discharged from hospital he lived with the claimant for a period. He later moved into accommodation on his own

but continues to require significant care with many aspects of his day-to-day activities. He is registered blind and requires assistance with dressing and attending various disability support clubs. The claimant has supported him by providing care and by taking him to clubs. At the time of his illness, the claimant informed the respondent's then manager, Karen Gannon, of the situation and the caring commitments she had for her brother. The claimant was able to manage these around her part time working hours.

16. The claimant's caring responsibilities were discussed with management on subsequent occasions. At some stage before the Covid pandemic, the claimant spent 11 months working night shift for the respondent, and she discussed the impact of her caring responsibilities of the shift change with manager, Maria Faulds, at that time.

17. The claimant's father became ill and, on 20 September 2019, passed away. Prior to that date, the claimant had caring responsibilities for her father as well as her brother. The claimant informed the respondent about the situation with her father and, subsequently, about his passing, at the material times.

18. From 2016, the claimant's contractual hours were 8 am to 2.30 pm four days per week (Tuesday to Friday). Due to the Covid 19 pandemic, she agreed in or around December 2019 to start her shifts earlier and she worked from 7.30 am to 1.30 pm on the same four working days. This arrangement was not formally documented.

19. By 2021, respondent's contractual arrangements with most of its staff in the claimant's store regarding working hours were not fixed. By September 2021, there were only four employees working in the Falside road store who had fixed hours on a similar basis to the claimant.

20. Historically, the respondent and Safeway before it, used to restock their deliveries overnight. In the last 3 - 5 years, the respondent has altered its working practices to a twilight operation. Most stores in Glasgow, and the claimant's store, now start replenishing stock from 3pm. This has had an impact on the respondent's staffing requirements and, in particular, has

caused a greater demand for its employees to work backshifts into the evening.

21. In September 2021, the claimant continued to have caring responsibilities for her brother. In addition, her mother was awaiting a hip operation and the claimant required to provide some support to her mother. She was working in the respondent's Home and Leisure department in the store at his time.

22. The respondent published colleague shopping procedures. Employees were permitted only to make purchases in the store before or after their shifts or during a break. Colleagues who worked on the respondent's tills were not permitted to have a bank card about their person while working. When making purchases, employees were required to retain their receipt as proof of purchase. If they were shopping on a break, they were required to get the receipt for the purchase signed by a manager. Colleagues were required to store their purchases at the staff locker area or to place them in their car. They were not permitted to leave purchases on the staff floor or in the warehouse. They were not permitted to set goods aside in the warehouse or elsewhere to purchase later.

23. Sometimes, items of the respondent's stock were categorised by a manager as 'wasted', meaning they could not be sold to the public. In those circumstances, managers might offer employees the opportunity to take the wasted goods or employees might ask if they may take them. In either case, if employees were allowed to take the wasted goods, they required to get the manager to write on the label that the goods were wasted and to sign the label before taking them from the store.

24. The respondent also operated a published Disciplinary Policy.

Events from September 2021 to January 2022

25. On 21 September 2021, LM asked the claimant to attend a meeting with her. At the meeting, she told the claimant she wished to discuss the claimant's availability and hours of work. She referred to the claimant's father's death and suggested the claimant no longer had the same commitments out of work.

26. The claimant reminded LM that she still had caring commitments with respect to her brother and that her mother also needed her support as she awaited an operation. LM asked the claimant what clubs she required to take her brother to. The claimant explained she took him to the gardening club for the blind and to Disability Scotland. She said there were others but that this was not relevant because she worked the hours she did and could manage her caring around these.

27. LM informed her the needs of the business had changed and that the claimant's hours were no longer suiting. She told the claimant that weekend and back shift working were what the respondent was looking for. The claimant resisted the changes to her working hours and left the meeting feeling upset.

28. Within a week and a half of her meeting with LM, the claimant went to see Deb W, the duty manager, to discuss her previous meeting with LM. She told her she was upset and that she felt victimised by LM. She told Deb W that there were four employees (including herself) who worked in the store and who were on set shifts but that she was the only one of them who had been called to a meeting with LM to be questioned about hours.

29. Within four weeks of her meeting with LM, the other three colleagues of the claimant who were on fixed hours were also called up to meetings with LM to discuss their hours and to seek changes to their hours of work.

30. In October 2021, KC, Store Operations Manager, approached the claimant and asked her to return to her pre-pandemic hours of 8 am to 2.30pm, Tuesday to Friday. The claimant agreed to do so.

31. In November 2021, Deb W left the Falside Store. KT became the store manager from summer 2021.

32. In December 2021, KT raised the matter of the claimant's hours again with her in a conversation on the shopfloor shortly before Christmas. Only KT and the claimant were present. KT moved the claimant from the Home and Leisure department to work in the produce and milk and bread departments to take in

deliveries. She told the claimant, "*the working directive has changed*". She said the claimant's hours didn't suit anymore. She told her that deliveries were coming in later.

33. A further similar conversation took place between the claimant and KT on the shop floor in January 2022. Again, KT referred to the 'working directive' having changed. The claimant queried this 'working directive' change and asked to see a copy of it. The claimant had not heard of any 'working directive' before KT's references to it.

34. KT also discussed with the claimant how the claimant was working with stock. She instructed the claimant that the claimant should work with a cage and a pallet beside her on the shop floor. In years gone by, the staff did not stack deliveries on to shelves in that way. Previously, they had loaded stock on to carts in the back and had then worked from the carts on the shop floor. Previously there had been a bailer for cardboard onsite but now staff were required to load cardboard into the cage beside them when unpacking deliveries on to the shop floor. The cardboard would then be transported from the cages to an offsite bailer.

35. On a separate occasion in December '21 or January '22, KC also had a conversation with the claimant on the shop floor about her working practices. He told her that she wasn't working to the way the business wanted now.

Events February to 9 March 2022

36. On Friday 11 February 2022, the claimant attended her shift at 8 am. She was working in an aisle, unloading a delivery. From around 8.15 am, KT observed her working from the end of the aisle. The claimant moved the pallet and cage she was working with away from her person. KT approached and moved them back to where they were. She told the claimant again that the working directive had changed and that she was not working as she should be. She told her she was not opening the boxes fast enough. She told her that the timescale the company expects for working a delivery was 2 hours. The claimant replied that she didn't work "piece time". KT asked her what piece

time was and the claimant replied that she'd never heard of a 2-hour time scale for working a delivery in all the years she had worked at the store.

37. KT watched the claimant working intermittently from around 8.15 am to around 8.50 am. At around 8.50 am, KT returned. She remained unsatisfied with the way the claimant was performing the task. She repeated that the claimant was being unproductive and told the claimant to leave the store. She said she didn't want the claimant in her shop. The claimant was upset. She asked if she would be paid for her shift and was told she would be. She left the store, as instructed, and went home.

38. When she got home, the claimant contacted ACAS for advice. They told her that they imagined someone from the respondent would contact regarding the matter, but that, if they didn't, she should return to work on her next scheduled shift which was Tuesday 15 February 2022. The claimant received no contact from the respondent. She returned to work on 15 February. When she arrived at work, she tried more than once to speak to LM regarding what had happened the previous Friday. She was told LM was on a conference call in her office and was too busy to speak to her. The claimant tried then to speak to KC regarding the matter. She was told he was on a separate conference call in the manager's office. The claimant carried on with performing her duties. The claimant continued working the rest of her shifts that week. She was still expecting that a manager would come back to her about the events of 11 February 2022, but none did.

39. On or about 18 February 2022, the claimant was asked to attend a meeting with LM. The claimant was unsure of the purpose of the meeting and anticipated it was to discuss the events of 11 February. She asked her colleague, MK, to accompany her to the meeting. LM and KC were present at the meeting. KC did not contribute to the meeting but took notes. These were not provided to the claimant or produced to the Tribunal. MK did not contribute to the meeting.

40. LM informed the claimant that she wished to have a discussion about the claimant's hours and her availability. She asked the claimant what hours she

could do, and the claimant told her once more that she still cared for her brother and for her mother. She told LM she did not want to and could not change her hours.

41. LM advised she was raising it because of business need and told the claimant she would like her to start later in the day and to work one in four Saturdays. The claimant repeated that she could not and repeated her care commitments. At the end of the meeting, LM told the claimant there would be a further discussion regarding her hours. The claimant said she thought she had been called to the meeting to discuss why she had been sent home on 11 February. However, LM said no, they weren't there to discuss that, and words to the effect that LM considered that matter at an end.

42. On or about 19 February 2020, in the absence of any discussion with management about her being sent home on 11 February, the claimant decided to prepare a written grievance to submit to the respondent. She worked on this between 19 and 21 February 2022. She drafted a handwritten grievance in the following terms:

To whom it may concern

I would like to inform you of a situation which I have been facing in my workplace recently which is causing me undue stress and anxiety within my working days.

Over the past few months I feel I have been unreasonably challenged numerous times throughout my working day. I have recently been informed of changes to the working directive and advised my pace of work was not satisfactory in order to meet the company needs. This was verbally on the shop floor in front of customers therefore I believe this was an unprofessional setting to discuss productivity. As a result of this discussion which took place on the morning of Friday 11th February 2022 I was instructed by the store manager to stop working and leave with the reason being I was not productive enough, therefore I ended my working day at approximately 9:10 am despite my rostered shift ending at 14:30.

I was expecting to be contacted by personnel before resuming my shift on Tuesday, however no contact was made and this situation has still not been addressed from any parties of the workplace. I resumed on 15/2/22 and continued to work as normal.

Following on from this incident approximately 2 week [sic] later I was asked to meet with personnel and the assistant store manager and believed this meeting was arranged to deal with the incident which happened in the weeks prior. This however was not the case and in fact was to address my current rostered hours no longer being suitable and did not meet the needs of the business. The conversation resulted in sharing my availability between the hours of 06:00 – 17:00 hours Tuesday through to Friday and available for 1 in 4 Saturdays. I was informed these hours would have to be looked at as they may not suit the needs of the business.

I would like to raise a grievance regarding the above incidents and the manner in which I feel I am being dealt with at present. I feel like I am being personally singled out.

I have seeked assistance from the union and will continue to do so until these matters have been addressed.

Yours sincerely"

43. In the event the claimant did not submit the grievance to the respondent until after her employment ended.

44. She telephoned the respondent's Head Office on Tuesday, 21 February 2022. She asked to speak to the relevant person to discuss a grievance. She was put through to a female employee of the respondent. The call was relatively short. The claimant told the woman she had been having issues at work and would like to submit a formal handwritten letter. The woman advised her that this had to be done through My Morri and the claimant explained she did not have access. The woman told her she could get access through managers at her store but the claimant advised she didn't wish to do that as the complaint concerned management at the store.

45. The claimant asked her to record that she had made the call, seeking to submit a handwritten letter. The woman told her they could not note anything and that the claimant had to go through My Morri. The claimant said she was unhappy about that but that she would seek to do it electronically. The claimant did not provide the woman with any details of the contents of the grievance other than to mention it was about management and how she was being treated in the workplace and that she felt she was being targeted. She did not say anything else. She did not mention the Equality Act. She did not mention the words ‘discrimination’, ‘victimisation’ or ‘harassment’. She did not mention her brother or that he had a disability. She did not mention that she had caring responsibilities.

46. After that, the claimant continued to work for the respondent as usual. She sought the help of her son and daughter in relation to raising the grievance via My Morri but did not progress to submitting it or discussing it further with the respondent.

47. On 1 March 2022, the claimant was asked to attend a further meeting with LM and KC. She brought her colleague, MK, again. KC was responsible for taking minutes again. LM raised again the question of the claimant’s hours of work. She asked the claimant again about her availability to work additional hours. She completed a form headed “Colleague Flexibility Form”. The form recorded the claimant was currently contracted to work 5 days per week but in fact she was contracted to work on four days per week. The claimant resisted any change to her hours. She repeated her care commitments for her brother and mother. She ultimately, conceded, however, that she would be willing to work altered shifts as long as the hours allocated were between 6 am and 5 pm on Tuesdays to Fridays. She also conceded that she would be willing to work one in four Saturdays. This was recorded in the ‘Colleague Flexibility Form’. The claimant signed the form during the meeting.

48. KC asked the claimant if she would be willing to be moved to a different store. The claimant said she would not. She explained that the Falside Road store was walking distance for her which meant she could attend shifts even if driving conditions were poor due to the weather or if her car was not available.

The claimant was angry about the changes discussed in the meeting. LM repeated that they were due to the fact her hours no longer suited business needs. The claimant told them that she felt singled out and picked upon. She pointed out that other colleagues who have commitments outside work were not having their job roles changed. At the end of the meeting the claimant was told that they would get back to her with a copy of the minutes of the meeting which they would arrange to type up.

49. The respondent did not provide the claimant with the minutes, typed or handwritten. They did not provide her with a copy of the form she'd signed. They did not follow up with her regarding her hours of work in the time she remained employed.

50. The claimant continued to work her normal hours for the remainder of that week and the week that followed. She did not submit the grievance she had prepared, electronically or otherwise. She did not raise her concerns verbally with any member of the respondent's management.

Events from 10 March 2022

51. On Thursday 10 March 2022, the claimant was working in the store. At approximately 12:30pm, KT was not in attendance but was away, visiting another store. DM, Market Street Manager, was the duty manager for the store at the material time. DM was working with a delivery in the produce department when he noticed the claimant walk through that department, carrying a bag which appeared to contain logs. He saw the claimant leaving the store with the bag without going through any checkout. DM was suspicious. He looked to see if there were any logs on display for sale in the vicinity. He went to the office to review CCTV footage and saw footage of the claimant walking out to the car park with a large bag.

52. DM waited for a female manager to attend as he understood he would require to have a female present for any search to be carried out. CS, a female level 3 manager arrived at the store. DM and CS discussed with LM whether it was ok to conduct a search of an employee's car. LM confirmed that it was. They discussed the approach with LM and resolved to search the claimant's car

because of DM's suspicions, but also to first search the car of another colleague, RM. Their purpose in searching RM's car was not because of any suspicion but because they felt it would appear less targeted at the claimant if at least one other colleague was subjected to a car search. This was a common practice of the respondent's when conducting bag and body searches of colleagues. They would conduct multiple searches to avoid any appearance of targeting.

53. DM and CS searched RM's car and found nothing untoward. DM and CS then asked the claimant if they could search her car and she agreed. They searched the car with the claimant present and found a bag of Home Fire Heat logs that had been recorded as waste. The claimant told them that manager, Di W, had told her that she could take them.

54. They also found six bags of Fairy pods in two of the respondent's carrier bags. CS asked the claimant if she had a receipt for these. The claimant did not. DM asked the claimant to return to the store with the items so they could try to find the receipt. The claimant provided them with the final digits of her card so they could search on the computer to find a record of the transaction. The claimant told them she had paid at KM's checkout. DM found a record of the transaction. Only one of the bags of Fairy pods had been paid for. The Fairy pod packs had been discounted by the respondent and were selling for around £3.85 each. The total value of the goods was therefore around £23 but the claimant had paid only £3.85. There was no record of the claimant having paid for the respondent's carrier bags which contained the pods.

55. DM and CS discussed the matter with the claimant in the manager's office. The claimant advised she'd gone through the checkout and paid for items but didn't realise she'd only paid for one pack of pods. DM was concerned by the claimant's explanation and also concerned that she had already had her break earlier that day and appeared to have been shopping on company time. The claimant asked if she would be sacked. DM told her she would be invited to an investigation meeting. LM prepared a typewritten letter confirming the claimant was suspended and inviting her to attend a disciplinary investigation

meeting the following morning (11 March). DM signed this and handed it to the claimant. The claimant left the store.

56. The respondent also suspended KM, whose till the claimant went through. KM was not one of the four colleagues in the store with whom the respondent had been holding discussions regarding her hours of work.

57. KT, the store manager, arrived at the store later that day. She was asked to take on the role of investigating officer. There were no other managers available in the store at that time to carry out the role who were not already involved as witnesses. Later that afternoon, KT conducted interviews with CS. Di W and DM.

58. KT asked Di W if she had given the claimant permission to take the wasted logs, as the claimant alleged. Di W replied that she had not. She told KT that the claimant had approached her at the checkouts that day and asked her if she remembered a conversation that morning about logs. Di W said she had replied that she didn't know what the claimant was talking about, and that the claimant then said, "*remember, we were getting the delivery in?*". Di W said she told the claimant she didn't get the delivery in that morning but had gone for breakfast while the boys were unloading. She said the claimant continued, "*remember, you were standing beside me in the warehouse, and I said to you. It's the same as I said to you about the Guinness.*" Di W told KT that she'd repeated that she didn't know what the claimant was talking about and said that the claimant then said, "*maybe you didn't hear me…I'm no asking you to cover for me or anything*".

59. In the interviews with DM and CS, they told KT about their knowledge of events and the car search they'd conducted. Notes were taken of each of these interviews.

60. On Friday 11 March 2022, the claimant attended an investigation meeting with KT. KT asked the claimant about taking the logs. The claimant alleged she asked Di W whether she could take the logs. She told KT that she "*heard a yes, whether directed at me.*" She said she assumed Di W had been talking to her. KT told the claimant that Di W said she did not give her permission.

The claimant suggested it was a total misunderstanding and that she assumed Di W had heard her. KT asked her if she said to Di W *“I’m not asking for you to cover for me*”. She did not deny saying this but said she couldn’t recall. The claimant acknowledged that she should have got the logs signed before taking them from the store. KT also put it to the claimant that she was not on a break but was on work time. The claimant replied that she was going to the toilet anyway.

61. KT asked the claimant about the Fairy pods. The claimant told her that she took four packs to KM’s till. She said KM had two packs under the till which KM had put aside but that KM was no longer taking them. She said she decided to purchase those two packs in addition to the four she had carried to the till. The claimant indicated she was on another break at this time. She told KT she did not look at the screen to check the value and did not take the receipt. She acknowledged that failing to check the receipt was not following the staff shopping procedure. KT pointed out there were other checkouts opened and that self-scan was open. She asked the claimant why she chose to go to KM’s till when there was a lady waiting to be served at that till. The claimant said she never gave it a thought.

62. The claimant agreed that she had known KM a long time. KM lived around the corner from the claimant.

63. KT put it to the claimant that she had not swiped out for the breaks she said she was on. The claimant did not dispute this. At the conclusion of the meeting, KT told the claimant she remained suspended; that the investigation would continue; and they would be in touch regarding next steps.

64. Later that day, KT held an investigation meeting with KM. KM acknowledged that keeping two packs of the Fairy pods under her till was against company policy. She maintained that it was a genuine error to put through just one instead of six packs. She acknowledged her failure to sign the claimant’s receipt was a breach of the respondent’s staff shopping procedure. KM resigned later that day.

65. Following her investigation, on reviewing the evidence, KT decided the matter should progress to a disciplinary hearing. MS, store manager of the respondent's Johnstone store, was asked to conduct this.

66. On Monday 14 March 2022, the claimant called the store to ask whether her pension would be affected if she were to be sacked. The respondent was unable to answer the question. On Tuesday 15 March, the claimant called again to see if the respondent had the answer to her question about her pension. They did not. She asked what would happen regarding a disciplinary hearing and was told an invitation letter would be sent to her. The claimant explained she could not access My Morri and the respondent advised the letter would be available for collection from close of business that evening.

67. The claimant collected the letter at 9.30 pm. It invited her to attend a disciplinary hearing on 17 March 2022 at 11.15 am. The letter enclosed the notes of the investigation meetings with the claimant, KM, DM, Di W and CS. Also enclosed was a copy of the receipt from the Fairy pods transaction showing the payment of £3.27 and the CCTV images showing the claimant removing the bag of Homefire Heat Logs. The respondent also enclosed a copy of its Disciplinary Policy. The letter explained the claimant's right to bring a representative and warned her that a possible outcome of the disciplinary hearing was dismissal for gross misconduct. The letter explained that at the hearing, the claimant would be asked to respond to allegations of gross misconduct, as follows:

> 1. *A breach of the Disciplinary Policy when you committed theft of Morrisons property / stock involving damaged or waste stock*
>
> 2. *A breach of the Disciplinary Policy where you committed actual or attempted theft/ collusion involving company property or stock*
>
> 3. *Breach of the Disciplinary Policy where you failed to follow colleague shopping procedures*

Theft of Morrisons property / stock involving damaged or waste stock

The above allegations are made against you, following an incident on 10 March 2022, where you removed from the warehouse and placed in your car, one bag of Homefire Heat Logs at £4.00 that had been recorded as waste.

5 ***Actual or attempted theft/ collusion involving company property or stock***

On 10 March 2022, you paid for one bag of fairy Non Bio Pods, valued at £3.85 (not including discount) when during a search of your car, you were found to be in possession of 6 bags, where 5 bags had not been paid for. In
10 *addition, you had not paid for the shopping bags used to take the items to your car.*

Failure to follow colleague shopping procedures

On 10 March 2022, during your shift, you failed to retain and / or get a receipt signed, for the 1 bag of Fairy Non Bio Pod [sic]. In addition you placed goods
15 *in the warehouse to purchase later.*

68. After receipt of the disciplinary invite and enclosures, the claimant called LM at 8.30 am the next morning (Wednesday, 16 March 2022). She asked LM to adjourn the disciplinary to Friday 18 March 2022. LM refused. The claimant asked again whether she would lose her pension if sacked. She also asked
20 LM whether other disciplinaries would be taken into account at the hearing. LM told her she didn't have the knowledge to answer her queries at that time.

69. The claimant called LM back later that day at around 1.30pm. She asked her if there was any update regarding her pension query. LM said no, she really didn't know the answer. When LM was unable to answer either of those
25 questions, the claimant decided to resign verbally during the call. LM told her she was taking the call as the claimant's verbal resignation with immediate effect, to which the claimant agreed.

70. The claimant decided to resign because she feared she would be dismissed the following day at the disciplinary hearing and was eager to ensure her

pension was preserved. It was not discussed in her call with LM, but the claimant imagined that, on resigning, she would receive a payment in lieu of notice of twelve weeks' pay.

Events following the claimant's resignation on 15 March 2022

71. On 24 March 2022, the claimant submitted a typewritten grievance to the respondent and also attached a copy of her handwritten letter dated 21 February 2022. She managed to submit it electronically with assistance from her son.

72. Around the same time, the claimant attempted to initiate the Early Conciliation process with ACAS online. She did not manage to do so successfully due to technical difficulties arising from her lack of expertise with computers. In the third week of March 2022, the claimant contacted the CAB for assistance regarding her complaints about the respondent. The advisor told her that they didn't have anyone who could speak to her available as they were too busy.

73. The claimant successfully initiated the ACAS Early Conciliation process on 6 April 2022 and an Early Conciliation certificate was issued on 8 April 2022.

74. The respondent acknowledged the claimant's grievance by letter of 16 April 2022 and invited her to a grievance meeting on 26 April 2022.

75. The hearing was conducted by JD, store manager of another store. After the hearing, he conducted a follow up interview with KT on 28 April and with KC and LM on 29 April 2022. He met with the claimant on 9 May 2022 to advise her of the outcome of the grievance and handed her a letter setting out the outcome. The respondent did not uphold the claimant's grievance. The letter advised that the claimant had the right to appeal.

76. The claimant sent an appeal by email to the respondent on 16 May 2022. This was neither acknowledged nor progressed by the respondent.

77. On or about 23 May 2022, the claimant attempted unsuccessfully to submit her ET1 online. The problem she experienced arose from her lack of proficiency with computers.

78. The claimant contacted the CAB again shortly after. She was told that if she could come in immediately someone would see her. She took her papers to the CAB and obtained some advice on her situation. With their assistance, she managed to submit her ET1 online successfully on 26 May 2022.

79. After her resignation, the claimant was paid her final pay in March or April 2022. She was paid timeously and in full for the shift on 11 February 2022. She did not receive a payment in lieu of 12 weeks' notice in her final pay.

80. Following the termination of her employment, the claimant claimed no state benefits.

81. She sought alternative employment, and she secured a post with the Red Cross from 21 June 2022, earning £9.60 per hour, working 21 hours per week. Before securing that role, the claimant attended a job fair to seek other roles and sought assistance from her children to improve her computer literacy to improve her prospects in the job market. She applied for and attended an interview for a role in a hardware store as well as pursuing a role with the local authority through MBX Recruitment.

Relevant law

Time limits

82. Section 123 of the EA deals with time limits for bringing victimisation claims and provides:

"s.123 ***Time limits***

(1) subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…

(3) for the purposes of this section -

> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it."*

5 83. S.207B of the Employment Rights Act 1996 ("ERA") provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision
10 only has effect if the early conciliation process is commenced before the expiry of the statutory time limit.

84. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434). Parliament has
15 chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (**Adeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.)

Victimisation - liability

20 85. Section 27 EA is concerned with victimisation and provides, so far as material, as follows:

> ***"27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> 25 *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> (a) bringing proceedings under this Act;

> (b) *giving evidence or information in connection with proceedings under this Act;*
>
> (c) *doing any other thing for the purposes of or in connection with this Act;*
>
> (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
>
> (4) *This section applies only where the person subjected to a detriment is an individual."*

86. For a disadvantage to qualify as a detriment, it must be found that a reasonable worker would or might take the view that he had thereby been disadvantaged. The test must be applied by considering the issue from the point of view of the victim. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a justified and reasonable sense of grievance may well do so (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL11).

87. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

"**136 Burden of proof**

> (1) *This section applies to any proceedings relating to a contravention of this Act.*
>
> (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) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

…

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

88. The effect of section 136 is that, if the claimant makes out a *prima facie* case of victimisation, it will be for the respondent to show a non-discriminatory explanation.

89. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was victimisation. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination or victimisation (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts. The respondent's explanation is to be left out of account in applying Stage 1.

90. If the claimant shows facts from which the Tribunal could decide a discriminatory act has occurred, then, under Stage 2, the respondent must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected act (**Igen v Wong** [2005] IRLR 258).

91. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove victimisation but they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage v Grampian Health Board** [2012] UKSC 37).

Constructive Unfair dismissal – liability

92. Section 95 of ERA defines a dismissal, including what is commonly referred to constructive dismissal in subsection (1)(c):

"**95 Circumstances in which an employee is dismissed**

(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) –*

…..

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

93. The onus of proving a constructive unfair dismissal lies with the claimant. The
10 case of **Western Excavating Ltd v Sharp** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim:

1) There must be a breach of contract by the employer, actual or anticipatory;

2) That breach must be significant, going to the root of the contract, such
15 that it is repudiatory;

3) The employee must leave in response to the breach and not for some other, unconnected reason; and

4) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may have
20 acquiesced in the breach.

94. In every contract of employment there is an implied term, articulated in the case of **Malik v BCCI SA (in liquidation)** [1998] AC 20 as follows:

"*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the*
25 *relationship of confidence and trust between employer and employee*."

95. In **Baldwin v Brighton and Hove City Council** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from **Malik** was an erroneous transcription of previous authorities, and

the formulation should be "calculated *or* likely" (emphasis added). The EAT reaffirmed this modification in **Leeds Dental Team Ltd v Rose** [2014] IRLR.

96. In **Firth Accountants Ltd v Law** [2014] IRLR 510, the EAT noted that in a case concerning a breach of the implied term of trust and confidence, there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the conduct, there is no breach of the **Malik** term and no dismissal.

97. In **Meikle v Nottinghamshire County Council** [2004] IRLR 703 the Court of Appeal considered the issue as to whether the employees had to show that their resignation was as a result of the breach. It was held the repudiatory breach need not be the sole cause of the resignation; there may be concurrent causes. The proper approach once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.

98. Where an employee is seeking compensation for unfair constructive or wrongful constructive dismissal, the employee must establish his loss was caused by the conduct he relies upon as constituting the breach of the term. If the employee has left for some other reason, he cannot establish the necessary causation (**Tullet Prebon Plc & Ors v BGC Brokers LP & Ors** [2010] IRLR 648, QBD at 676).

99. The unreasonable bringing of disciplinary proceedings, irrespective of eventual findings, is capable of constituting a breach of the **Malik** term (**Gogay v Herfordshire County Council** [2000] IRLR] 703 and **Working Men's Club and Institute Ltd v Balls** UKEAT/0119/11/LA). An employer should not initiate disciplinary proceedings involving what are presented as allegations of "gross misconduct" without some basis for believing the allegations are well founded and that they might constitute gross misconduct;

and that may, depending on the circumstances, require some prior degree of "investigation". The initiation of disciplinary procedures alleging dishonest behaviour without any adequate basis for doing so and the unreasonable conduct of those proceedings are capable of amounting to a fundamental breach of contract in response to which an employee is entitled to resign (**Balls** at para 6.2.2.4).

100. The act of suspension is not a neutral one. It is itself a stigma (**East Berkshire Health Authority** v **Matadeen** [1992] IRLR 336; **Gogay**). A precipitate unjustified act of suspension can amount to a breach of the implied term of trust and confidence (**Gogay**). It must be justified on the facts of the case; it should not be a knee jerk reaction; and is not to be viewed as a routine response to a need for investigation.

101. In **Omilaju v Waltham Forest London Borough Council** [2005] 1 All ER 75, the Court of Appeal held that a final straw which is not itself a breach of contract could result in a breach of the implied term of trust and confidence. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant.

102. Further guidance in so-called 'last straw' cases where resignation is the culmination of a course of conduct comprising several acts or omissions across a period of time was provided by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978:

"16. *Although the final straw may be relatively insignificant, it must not be utterly trivial; the principle that the law is not concerned with very small things … is of general application.*

…

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term … The act does not have to be of the same character as

the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

…

21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does have that effect...*"

103. However, in cases where the Tribunal holds that the alleged final straw relied upon by the claimant was not part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term, then the tribunal *may* need to go on to consider whether the earlier conduct itself entailed a breach of the **Malik** term, has not since been affirmed, and contributed to the decision to resign (**Williams v Alderman Davies Church in Wales Primary School** UKEAT/0108/19 para 31 and 32).

104. An employee will lose the right to rely on the breach if by his words or actings he affirms the contract / acquiesces in the breach. Delay will not of itself amount to acquiescence, but it will be an important factor (**Chindove v William Morrison Supermarkets Ltd** UKEAT/0201/13).

Wrongful Constructive dismissal (Breach of Contract)

105. The Employment Tribunal has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994, SI 1994/1624. There are limits on the Tribunal's jurisdiction and certain types of claim are excluded, including claims for personal injury. The claim must arise or be outstanding on termination of the employment and the damages available are capped at £25,000.

106. In **Johnson v Unisys** [2001] IRLR 279, the House of Lords held that the implied term of mutual trust and confidence is not applicable to the manner of dismissal. The basis for the decision was that to apply the term in those circumstances would trespass on the statutory jurisdiction of unfair dismissal. However, if there have been pre-dismissal breaches that are outstanding on the termination of the employment, these may be actionable in damages (**Eastwood v Magnox Electric Plc, McCabe v Cornwall County Council** [2004] UKHL 35). In that case, Lord Nicholls, who gave the leading judgment, acknowledged that deciding whether action fell inside or outside the so-called '**Johnson** exclusion zone' would be difficult. Ordinarily a pre-dismissal breach does not of itself cause the employee financial loss though exceptionally there may be circumstances where it does so.

107. Where an employee claims wrongful constructive dismissal, the employee must establish his loss of the notice pay was caused by the conduct he relies upon as constituting the breach which founded the constructive dismissal (**Tullet Prebon**). It is possible for an employee to found a breach of contract claim for damages based on a breach by the employer in response to which he did not resign if he did not subsequently affirm the contract or if he was unaware of the breach at the time he resigned (**Tullet Prebon**; **Rawlinson v Brightside Group Ltd** UKEAT/1042/17/DA). As the breach did not occasion the termination of the employment, there will often be no loss arising, but that will depend on the facts and circumstances of the particular case, and exceptionally a loss may flow (e.g. **Rawlinson**, para 42).

108. In an assessment of damages, the contract breaker is to be taken as having performed his obligations in the least onerous way possible. The calculation of damages in a wrongful dismissal is usually limited to the amount of money the employee would have earned during his or her notice period or until the expiry of a fixed term if the contract is not terminable on earlier notice.

Submissions

109. Mr Davies gave oral submissions. He cited the following cases:

- **Kaur v Leeds Teaching Hospitals NHS Trust** (*op cit*);

- **Bournmouth University Higher Education Corpn v Buckland** [2010] EWCA Civ 121, CA;
- **Aberdeen City Council v McNeill** [2015] ICR 27 (Ct of Sess); and
- **Wright v North Ayrshire Council** [2014] ICR 77, EAT.

5 110. Put broadly and briefly, Mr Davies argued that the claimant had not done a protected act so that her victimization claim must fail. With respect to constructive unfair dismissal, he said the respondent had not breached the Malik term as it had reasonable and proper cause to act as it did. Mr Davies resisted the constructive wrongful dismissal claim on the same grounds.

10 111. The claimant declined to give a submission.

112. Mr Davies' submissions are summarized in more detail below when discussing each issue for determination.

Discussion and decision

<u>Time bar – Victimisation Alleged Detriments in February 2022</u>

15 *Was the claim made within a further period (beyond the normal time limit) that the Tribunal thinks is just and equitable?*

113. The claimant initiated the Early Conciliation process on 6 April 2022. The EC Certificate was issued on 8 April 2022. The ET1 was lodged on 26 May 2022. The victimisation detriments are alleged to have taken place on 11, 18 and 21
20 February 2022 and from 10 -16 March 2022.

114. The claimant's original ET1 referred to victimisation but did not provide full specification of the alleged protected acts or detriments. It referred to the claimant's brother having a disability and to her being the sole carer for her brother and mother. On 28 July 2022, the claimant lodged FBP1 which stated
25 she believed she was victimised because of continuously resisting on care responsibility grounds and repeatedly complaining and / or expressing her intention to complain about bullying and harassment conduct by the respondent aiming to force her to accept a change to her working hours. On

19 August 2022, the claimant sought to amend to include her victimisation complaint and offered some further particulars. On 13 September 2022, full specification of the complaint was provided in response to EJ Hoey's Order, with the alleged protected acts and detriments fully identified.

5 115. If it is accepted the ET1 complaint contained a victimisation complaint, albeit poorly particularised, then only the alleged detriments on 11, 18 and 21 February 2022 are, on the face of it, lodged late and only by a period of between 6 days (in the case of the last February detriment) and two weeks (in the case of the first February detriment). The March detriments would not 10 be *prima facie* out of time. If the date when full specification was provided on 13 September 2022 is regarded as the first date when a proper application to amend was made to introduce a victimisation complaint, then all acts complained of are *prima facie* out of time by between around three months (in the case of the March detriments) and around four months (in the case of the 15 earliest February detriment).

116. Mr Davies said the respondent opposed an extension of time on the basis that such an extension was not just and equitable. He noted the Tribunal has a discretion but said there was no good excuse for the claim not having been brought earlier. He observed that the claimant's evidence was that technical 20 problems lay behind the delays in submitting the claim. He acknowledged there was no significant hardship to the respondent if the extension were to be permitted and the claim allowed to be determined.

117. We considered all relevant factors to determine whether it would be just and equitable to extend time to 13 September 2022 to allow the claims to proceed. 25 Factors which weighed against the granting of an extension included:-

(i) The claimant was aware of the relevant facts for the claims at the time of the events themselves.

(ii) The claimant could have sent the ET1 by post if she had technical problems with online submission.

(iii) Full specification of the victimisation complaint took some months to be provided after the original ET1 was lodged.

(iv) Time limits are designed to ensure compliance with the principle of legal certainty.

5 118. However, having carefully considered all relevant matters, the following factors weighed more heavily in our deliberations:

(i) The claimant referred to victimisation in her original ET1 dated 26 May 2022 albeit without proper specification. The length of delay was relatively short to that date. She had tried to lodge the ET1 slightly
10 earlier on 23 May 2022 but had experienced technical difficulties. She is not computer literate. She does not have expertise in employment law.

(ii) The claimant sought advice from the CAB shortly after her employment ended but was not successful in obtaining any advice until late May
15 2022. She was not formally represented by the CAB until after the PH in August 2022. She made attempts to particularise her victimisation complaint before that. As a litigant in person, she was not familiar with the applicable tests. When EJ Hoey gave directions of the specification required, this was complied with timeously by the claimant's
20 representative;

(iii) Therefore, although the victimisation complaint was not fully specified until 13 September 2022, the respondent and the Tribunal were on notice long before that of the claimant's wish to bring a complaint of victimisation under the Equality Act 2010. If the inclusion of this head
25 of claim was not clear from the original ET1, it was certainly clear that it was advanced from the claimant's correspondence of 28 July.

(iv) The claimant had attempted to raise an internal grievance on 21 February 2022 regarding some aspects of her complaint. She was thwarted in doing so by her inability to access and use the technology
30 insisted upon by the respondent. She raised a grievance on 24 March

2022 after her employment was terminated. She was, therefore, keen to seek an internal resolution to the concerns she had, if possible, and focused on doing so.

(v) The respondent had the opportunity to object to the claimant's amendment application including the victimisation complaint (and was directed to do so) by 27 September 2022. It did not. Nor did it take any jurisdictional issue with respect to time bar in its Amended GOR2 of that date.

(vi) We are not concerned that the cogency of the evidence has been significantly impacted by the period of delay, the case having proceeded to a final hearing on the evidence in November 2022.

(vii) The disadvantage to the claimant if the extension is refused is substantial in that she will be deprived of the opportunity to litigate the complaints under section 27 and to have these judicially determined.

(viii) A final hearing has proceeded in any event to determine the claimant's constructive unfair dismissal and breach of contract claims with significant overlap of the relevant evidence and the respondent has, in any event, incurred the expense of preparing for and attending the hearing. There is little or no prejudice to the respondent in these circumstances in allowing the extension of time.

119. We concluded that, on the facts and circumstances of this case, it would be just and equitable to extend the time to 13 September 2022 for the presentation of the victimisation complaint.

Victimisation – did the claimant do a protected act or acts?

120. According to FBP2, the first protected act took place on or around 29 September 2021, when the claimant alleges she complained to Deb W regarding being harassed into changing her working hours despite care duties she had towards her disabled brother.

121. Mr Davies submitted that the claimant made no allegation that the respondent had breached the Equality Act 2010. He noted that she agreed she had made no such allegation in any of her asserted protected acts.

122. We accept that the claimant told Deb W she was upset and that she felt victimised by LM following the meeting with LM. We accept that she told her there were four employees (including herself) who worked in the store and who remained on set shifts but that she was the only one to be questioned about her hours.

123. We recognise that an allegation of EA may be express or implied. We considered the whole factual context to assess the natural interpretation of the claimant's words to Deb W to determine whether such an allegation was expressly made or might be implied. Though the claimant used the word 'victimised', construed against the background context, we do not find that the natural meaning of the word was intended or understood to be the technical meaning assigned to that term by the EA. The claimant used that word in a broader layman's sense. We find, therefore, that there was no express allegation that the respondent or anyone else had contravened the EA.

124. We further concluded that the claimant's words could not be construed as implying such an allegation. The claimant identified no protected characteristic during the conversation either in relation to herself or in relation to her brother. She did not mention her brother to Deb W, or the fact that he was disabled. She suggested she had been singled out when some others were also on fixed shifts, but she made no suggestion of any link between that 'singling out' and a characteristic accorded protection under the EA. We, therefore, find the claimant's comments to Deb W in September 2021 did not amount to a protected act for the purposes of section 27(2) of the EA.

125. The second protected act is alleged by the claimant to have taken place on 18 February 2022 during the meeting with LM and KC. In FBP2, the claimant alleges she complained to LM about feeling harassed by the respondent and about previous acts of victimisation including being sent home on 11 February 2022.

126. We accepted the claimant's evidence about what she said in the meeting. That evidence was not, however, consistent with what was averred at paragraph 8.1.3 of the claimant's FBP2. The Employment Judge offered the claimant multiple attempts to add anything to her account of the meeting during her evidence in chief. The claimant's evidence to the Employment Tribunal was not that she complained about harassment or victimisation, or even that she complained in more general terms, about the events of 11 February during the meeting on 18th February 2022. Her evidence was, and we have found, that she was asked about changing her hours and resisted doing so because of her caring responsibilities. We accept she mentioned being sent home on 11 February at the end of the meeting, but it was only to say she thought the subject would be discussed.

127. The claimant accepts that she did not mention the Equality Act or allege any breach of any legal right during the meeting. We again considered, having regard to the whole factual context, whether an alleged breach of the EA could be implied from anything she said in the meeting. The claimant referred to her brother and her caring commitments in resisting changes to her hours which the respondent proposed. The respondent did not impose a change of hours, and, in any event, the claimant did not complain that doing so would breach any right protected by discrimination legislation, or any other right. She gave no evidence that she complained to LM and KC about previous interactions with the respondent or said she was feeling harassed or victimised whether within the technical meaning under the EA or at all. We conclude the claimant did not imply that the respondent had contravened the EA at the meeting on 18 February 2022. Her comments during this meeting did not amount to a protected act for the purposes of section 27(2) of the EA.

128. The third protected act is alleged by the claimant to have taken place on 21 February 2022 during a phone call between the claimant and an unnamed female manager at the respondent's Head Office. IN FBP2, she alleges that she informed the lady of an intention to raise a grievance regarding her treatment due to resisting a change to her hours of work on the grounds of care duties to her disabled brother. Again, the claimant's evidence to the

Tribunal about the call, which was accepted on the balance of probabilities, did not accord with that averment.

129. She said she told the woman she felt she was being targeted. She said she told her that the grievance was about management and how she was being treated in the workplace. The claimant gave evidence that she did not provide the woman with any more detail of the contents of the grievance. She did not mention, or allude to, her brother, his disability, or any other protected characteristic. We find, therefore, that the claimant did not, during the call, make any allegation, express or implied, that the respondent had contravened the EA. Nor did she assert or imply that the written grievance she wished to submit concerned the infringement of any rights protected by the EA.

130. As we are in a position to make a positive finding that the claimant did not do a protected act for the purpose of section 27 of EA, it is unnecessary to be concerned with the burden of proof provisions (**Hewage**). In the absence of any protected act, the claimant's complaint of victimisation contrary to that section cannot succeed and is dismissed.

Constructive unfair dismissal

131. This is a case where the claimant relies upon a series of acts which cumulatively (or individually) are said to amount to a breach of the implied term of trust and confidence. The series of acts is said to have begun on 21st September 2021 when the claimant met with LM and subsequently complained to Deb W; thereafter to included conduct by her managers, KT and KC on the shopfloor, including KT sending the claimant home on 11 February 02; and, latterly, to culminate in the disciplinary suspension and investigation. The "disciplinary action" is described in FBP2 as having a 'last straw effect'.

132. In **Kaur**, the Court of Appeal observed that if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach, there is no need to examine the earlier history to see whether the alleged final straw does have that effect. An appropriate starting point is, therefore, to determine whether the 'final straw' in this case was capable of contributing to

the series of acts which are cumulatively claimed to amount to a breach of the **Malik** term.

Assessment of the alleged final straw: the March 2022 Disciplinary

133. Mr Davies submitted that the respondent had reasonable and proper cause to suspend the claimant on 10 March 2022, to conduct a disciplinary investigation and to invite the claimant to a disciplinary hearing. He referred to DM's evidence that he suspected the claimant had stolen the logs and, on searching her car and checking the transaction records, that she had stolen 5 packs of Fairy pods. He referred to the claimant's evidence during the investigatory meeting when she accepted that she had not followed staff shopping procedures. As the respondent had reasonable and proper cause to suspend, Mr Davies contended there could be no breach of the implied trust and confidence term.

134. Mr Davies went on to address the claimant's suggestion in FBP2 that she was singled out by being submitted to disciplinary action for what she described in that document as "*a matter of ongoing custom and practice that couldn't therefore amount to gross misconduct*". He said there was no evidence of any such custom and practice in the store and noted that the respondent's witnesses were not questioned on this by the claimant.

135. We considered first whether the claimant, as a matter of fact, resigned in response to the asserted "final straw". If she did not, it would be irrelevant to her constructive unfair dismissal claim whether that act was capable of comprising or contributing to a fundamental breach. The claimant was clear in her evidence that she resigned on 16 March in response to the disciplinary situation which hung over her and, in particular, because of her fear that she would be dismissed for gross misconduct and lose pension entitlements should that happen. We accept that the claimant resigned in response, in broad terms, to the disciplinary suspension and investigation

136. Was the purported 'final straw' capable of contributing to the series of acts cumulatively claimed to have breached the **Malik** term? There was no evidence that DM, whose suspicions prompted his car search, was motivated

by any other ulterior considerations. We accepted his evidence that he saw the claimant walk out the store, apparently on work time, carrying a bag of what appeared to be logs which she did not take through a checkout. We accepted it was this which prompted him to arrange to search her car. We likewise accept DM's account of his concerns over the discrepancy between the quantity of Fairy pods purchased and those found.

137. It was common ground that the claimant later admitted breaches of staff shopping procedures during her investigation meeting with KT the following day. There was no compelling evidence of a custom or practice in the store whereby employees were entitled to shop on their breaks or to ignore other staff shopping procedures including by taking wasted stock without a manager's signed label.

138. The claimant gave evidence that KM was equally suspended on 10 March 2022 and invited to a disciplinary investigation meeting. KM was not one of the four colleagues in the store with whom the respondent had held previous discussions regarding her hours of work. There was no evidence before the Tribunal that the claimant was targeted because of any unrelated dispute with the respondent or that the disciplinary allegations were engineered by the respondent in bad faith.

139. Given the incriminating nature of the evidence found, the respondent's conduct in suspending, investigating and arranging a disciplinary hearing was not calculated or likely to damage the trust and confidence between it and the claimant. We acknowledge suspension should not be a knee-jerk reaction where investigation is required. Nevertheless, in a case like this one, where grounds exist to suspect potential dishonesty and collusion, we consider the respondent had proper cause to suspend to allow an opportunity to investigate the incident while preserving the integrity of that investigation and protecting the respondent's property in the interim.

140. The respondent carries on business as a supermarket retailer and potential theft of stock by its staff or customers poses a particular risk to its business model. Objectively, it is difficult to envisage circumstances where the

respondent might turn a blind eye to evidence of the type it had become aware, or take lesser action. On discovering that evidence, we accept Mr Davies' submission that the respondent had reasonable and proper cause to take the matter forward as it did. We make no finding as to the claimant's guilt or innocence of the disciplinary allegations against her. It is unnecessary to do so. The question for the Tribunal is whether, objectively, the respondent had reasonable and proper cause to suspend the claimant and progress a disciplinary process in the manner it did. Based on the evidence before it, we are satisfied it had such cause.

141. We reminded ourselves that the last straw act need not be unreasonable or blameworthy and it need not, in and of itself, amount to a breach of the implied term of trust and confidence (**Omilaju**; **Kaur**). Nevertheless, it must contribute something, even if relatively insignificant, to the breach when taken in conjunction with the earlier acts.

142. We are not persuaded that the respondent's initiation or conduct of the disciplinary process contributed anything to an alleged cumulative breach of the implied term of trust and confidence. The respondent followed a process which included the usual safeguards for the claimant. It informed her of the allegations and set them out in writing in the disciplinary invite. It provided copies of the evidence which would be considered at the disciplinary hearing. The claimant was informed of her right to be accompanied and the letter told her the purpose of the meeting was for her to respond to the allegations. It was clear, therefore, that she would be given a chance to do so. We acknowledge the final straw need not be of the same character as the earlier acts relied on. In all of the circumstances, we are not persuaded, however, that the respondent's disciplinary response to the evidence of potential attempted theft and breaches of procedure contributes anything, however insignificant, to the claimant's alleged cumulative breach.

143. That is not necessarily the end of the matter. In **Williams**, it was pointed out that, even where it is held that the final straw relied upon did not form part of a course of conduct amounting to a repudiatory breach of the **Malik** term, the Tribunal may need to go on to consider whether the earlier conduct itself

entailed such a breach which has not since been affirmed, and which contributed to the decision to resign.

Antecedent acts of the respondent: Discussions about working hours

144. The claimant complains about LM's conduct on 21 September 2021, 18 February 2022 and 1 March 2022 during meetings about her hours of work. She also complains that KT and KC raised the matter. We have found that KT did so on two occasions in December '21 and January '22 when she referred to a new 'working directive' and told the claimant her hours didn't suit anymore because of deliveries coming in later.

145. In Mr Davies' submission, the claimant was not singled out by the respondent for these discussions. Other employees were likewise spoken to. He observed that a template form had been created to record such discussions with staff. He denied that the claimant was spoken to weekly on the subject or in a harassing manner. There was, he submitted, reasonable and proper cause for the discussions which took place. In any event, said Mr Davies, no substantive changes were ultimately imposed upon the claimant.

146. He further maintained that the claimant did not resign in response to the discussions regarding her hours of work but instead because of her fears over losing her pension if she should be dismissed.

147. We considered the whole context to assess whether, objectively, the respondent's conduct breached the implied term. The claimant was a very longstanding employee who was on what had become legacy terms and conditions with respect to working hours. She was one of only a few remaining employees who had set shift patterns. It is common ground that she had a contractual entitlement to work the specified hours.

148. The respondent's business operation had changed and so too had its requirements for the hours to be covered by its employees in the store. LM raised this with the claimant in September 2021 in circumstances where she believed the claimant's personal situation in terms of her previous caring responsibilities for her father had changed. Other employees working fixed

hours were also ultimately approached for similar discussions in the autumn of 2021.

149. Thereafter, LM met with the claimant on two further occasions in February and March 2022 to discuss the issue further and to scope out whether the claimant could offer any flexibility and, if so, within what parameters. This led to the claimant's cooperation in providing a more extended window of availability for working hours on her fixed working days and to her agreement to do one Saturday in four. The claimant was not spoken to weekly, or in a harassing manner. In all the circumstances, we do not consider that LM's conduct, objectively viewed, was calculated or likely to seriously damage the relationship of trust and confidence. The claimant had a right to work her contracted hours, but it was open to the respondent to seek to agree a consensual change to the working pattern.

150. We have greater reservations about the appropriateness of KT's attempts to initiate *ad hoc* conversations about the subject with the claimant on the shop floor while the claimant was working. This occurred on two occasions. The claimant resisted the discussions. To breach the **Malik** term, the behaviour must be sufficiently bad that it would destroy or seriously damage the relationship of trust and confidence, not merely irritate or cause a minor problem. KT did not issue any ultimatum or ty to impose unagreed hours on the claimant during these exchanges.

151. On the facts here, we do not consider that KT's comments to the claimant about working hours, viewed objectively, breached the **Malik** term. We acknowledge there may be circumstances where continued repetition of such comments may come to do so, but we do not assess that boundary had yet been crossed in the present case.

<u>Antecedent acts of the respondent: Discussions about ways of working and sending the claimant home</u>

152. The claimant also complains that on 11 February, she was sent home by KT for being unproductive with her wages withheld. She alleges this, and that the failure of HR to give her proper support in the aftermath of the incident, was – or contributed to - a breach of the **Malik** term.

153. Mr Davies accepted that sending an employee home without reason might be a breach but said that on this occasion the respondent had reasonable cause for the action KT took.

154. To make an objective assessment of the conduct, once again, we had regard to the overall context. The background to the incident was that the claimant had been advised by KT and by KC that working methods had changed. Specifically, when working on a delivery, she'd been told to keep the pallet beside her from which she should replenish the stock. She'd also been instructed to keep a cage close by into which she should place the discarded cardboard. We accept that this was the accepted way of working in the store at the material time, and that this represented a change from times gone by. We also accept that the claimant was reluctant to work in this manner.

155. On the day in question, she had to be reminded to keep the pallet and cage close by. We accept that she was not working as quickly in unloading the delivery as KT would have liked. KT told her she was unproductive. She said she didn't want her in her shop and told her to leave. We have not found that the claimant's wages were withheld or that she was unclear whether they might be. The respondent did not contact the claimant after sending her home or engage with her attempts to discuss the matter upon her return for her next shift which was the following week.

156. The sending home of an employee happens from time to time but the panel did not consider that these were typical circumstances. This is not a case of an employee being sent home due to illness or because of a business closure or a lack of available work. The claimant was contracted to work on the date in question for a further four and a half hours. The respondent had a

requirement for staff to work in the store. In effect, KT suspended her as a form of disciplinary sanction for what KT perceived to be a lack of productivity.

157. The respondent's Disciplinary Policy was not produced to the Tribunal. The respondent led no evidence that that it operated any published policy rendering employees liable to such action in cases of poor productivity or perceived poor productivity. The claimant's *de facto* suspension on 11 February was not for the purpose of progressing any disciplinary investigation. The respondent did not initiate any performance improvement process. KT's act in sending the claimant home was essentially penal in nature.

158. It is well established that suspension itself is a stigma (**Matadeen**; **Gogay**). A precipitate unjustified act of suspension can amount to a breach of the implied term of trust and confidence (**Gogay**). The claimant was not suspected of accused of gross misconduct. The accusation was one of poor performance and, specifically, not working quickly enough. We do not accept KT had reasonable and proper cause to respond in the way she did on 11 February. The claimant's conduct, while evidently frustrating to KT, did not warrant such a response. That act was then compounded by the respondent's omission to contact the claimant at home to clarify her situation, or to accommodate her later requests in store for a discussion about the incident. No reasonable or proper cause was put forward by the respondent for this omission. The claimant was left in limbo, unclear as to what, if any, further action the respondent intended to take regarding the matter.

159. The situation persisted until 18 February 2022, when it became clear at the end of the meeting with LM and KC that the respondent's management had no intention of pursuing any further discussion with the claimant or other action in relation to the incident.

160. Objectively viewed, the decision to send the claimant home and thereafter to decline to discuss the matter was calculated or likely to seriously damage the claimant's trust and confidence in the respondent. The respondent breached the **Malik** term by these actions.

161. Having so found, it falls to be considered whether the claimant resigned in response to this breach.

162. Mr Davies submitted that she did not.

163. We recognise there may be concurrent causes of resignation (**Meikle**). Nevertheless, on the facts we have found, we are not persuaded that the respondent's treatment in sending the claimant home and subsequently failing to communicate with her about it was a contributory cause of her resignation. Irrespective of how she, or her advisors, framed her case in the pleadings and further particulars, her evidence to the Tribunal regarding her reason for resigning was clear and straightforward; she did so because of fears her pension was at risk if she were dismissed.

164. In any event, we find that the claimant affirmed the contract following that breach before she resigned. She returned to work on Tuesday 15 February after the incident and continued to work and be paid for her shifts as normal. We acknowledge that she prepared a handwritten grievance on the subject which she proposed to lodge on or about 21 February 2022. However, when she was told by Head Office that she could not do so, she made no further attempt to pursue a grievance, formal or otherwise. She did not enlist the help of a colleague or family member to submit an electronic version through My Morri. She did not attempt to post her handwritten letter to Head Office, or even to hand it to a manager in her store.

165. When she raised the issue at the end of the meeting with LM and KC on 18 February, she allowed LM to close the subject down. She had an audience with LM and KC in the presence of her witness, MK, but she did not take the opportunity presented to record her complaint about her treatment. The claimant knew at that stage, based on LM's comments, that the respondent had no intention of discussing the incident further and she chose to continue working without protest. By her words and actions, we are satisfied that she chose to keep the contract alive after the breach.

166. We conclude that the claimant was not constructively unfairly dismissed contrary to section 94 of ERA. Although the respondent breached the implied

term of trust and confidence by KT's action on 11 February 2022 and by its failings in the aftermath of that incident, the claimant affirmed the contract after the breach before resigning. She did not resign in response to the breach. Neither was the breach 'revived' by the asserted 'last straw', namely a 'maliciously engineered disciplinary situation'. The disciplinary situation was not a breach of the implied trust and confidence term nor was it capable of contributing to such a breach.

Wrongful Dismissal (Breach of Contract)

167. The claimant's constructive wrongful dismissal claim cannot succeed because she did not resign in response to a breach of contract by the respondent (**Tullet Prebon**).

168. We considered whether there was an actionable antecedent breach. We have held that the respondent breached the implied term of trust and confidence by its act on 11 February 2022 and omission in the week that followed to engage with the claimant about the incident. As this breach arose prior to and has been found to be independent of the termination of the contract, the question of whether it falls within the **Johnson** exclusion zone does not arise.

169. We have, however, found that the claimant affirmed the contract after that breach and before the termination of the contract. It was not, therefore, 'outstanding' on the termination of the claimant's employment as required by Article 3 Of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

170. Further, and in any event, that statutory instrument restricts the Tribunal's jurisdiction to claims for the recovery of damages or other sums and extends to no other remedy such as a declaration. The claimant suffered no financial losses arising from the respondent's breach as it is common ground that she was paid for her shift on the 11th February in full.

171. For these reasons, the claimant's claim for constructive wrongful dismissal or breach of contract does not succeed and is dismissed.

Employment Judge: **L Murphy**
5 **Date of Judgment:** **12 December 2022**
Entered in register: **13 December 2022**
and copied to parties