THE INDUSTRIAL TRIBUNALS

CASE REFS: 17630/19
293/20

CLAIMANT: **Isobella Lewis**

RESPONDENT: **Teleperformance Limited**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was constructively and unfairly dismissed and is awarded £835.00 as set out in this decision. All other claims are dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr I Atcheson**
Mr R McKnight

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Ms S Agnew, Barrister-at-Law, instructed by A&L Goodbody Solicitors as agent for Brodies Solicitors.

BACKGROUND

1. The claimant had worked full-time for the respondent company from 4 April 2018 to 14 October 2019, when she resigned. She had been a customer adviser in a call centre dealing with queries on behalf of the Passport Office. She had been absent from work on sick leave from 3 April 2019 to 14 October 2019, the date when her employment terminated. She commenced new employment with a different employer on 21 October 2019.

2. The claimant lodged two claims in the tribunal. The first claim was lodged on 6 August 2019, when the claimant was still employed by the respondent and when she had been on sick leave. That first claim form alleged that she had been unlawfully discriminated against on grounds of her gender and that the respondent organisation had acted unlawfully in relation to an application for flexible working.

3. The second claim form was lodged on 5 January 2020. In that claim form, the claimant alleged that she had been constructively and unfairly dismissed contrary to the Employment Rights (Northern Ireland) 1996.

RELEVANT LAW

4. Constructive Unfair Dismissal

5. In ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, the Court of Appeal (GB) set out the basic propositions of law relating to constructive dismissal. It stated that they were:-

> *"1. The test for constructive dismissal is whether the employers' actions or conduct amounted to a repudiatory breach of the contract of employment:* ***Western Excavating (ECC) Ltd v Sharp [1998] IRLR 27****.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see, for example,* ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462****,* ***464 (Lord Nicholls) and 468 (Lord Steyn).*** *I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract; see, for example, per Browne-Wilkinson J in* ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347****;* ***350.*** *The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship'.*
>
> *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in* ***Malik*** *at p464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".*
>
> *5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a serious of incidents. It is well put at para 480 in Harvey on Industrial Relations and Employment Law –*
>
> *'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify him taking that action, but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as a*

constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'."

6. The Court also stated:-

> *"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 (more elegantly expressed in the maxim "de minimis non curat lex") is of general application."*

7. The Court went on to state:-

> *"The question specifically raised by this appeal is: What is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ stated that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in Woods at page 351 where Browne-Wilkinson J referred to the employer who, stopping short of an actual breach of contract, squeezes out an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. 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. I do not use the phrase "an act in a series" in a precise or technical sense. 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."*

8. The Court went on to state:-

> *"Moreover an entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective … ."*

9. In ***Brown v Merchant Ferries Ltd*** ***[1998]*** ***IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract.

10. Apart from establishing a repudiatory breach of contract, the claimant must have left his employment because of that breach of contract and he must not have delayed too long in resigning.

11. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833,*** the Court of Appeal (GB) held that in a normal case where an employee claims to have

constructively dismissed, it is sufficient for a tribunal to ask itself the following questions:-

> *"(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his resignation?*
>
> *(ii) Has he or she affirmed the contract since that act?*
>
> *(iii) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(iv) If not, was it nevertheless part of a course of conduct comprising several acts or omissions which viewed culmatively amounted to a repudiatory breach of confidence (if it was, there is no need for any separate consideration of a possible previous affirmation).*
>
> *(v) Did the employee resign in response (or partly in response) to that breach?"*

12. In ***United First Partners Research v Carreras [2018] EWCA Civ 323,*** the Court of Appeal (GB) stated:-

> *"It was also common ground before us that where an employee has mixed reasons for resigning, his resignation will constitute a constructive dismissal provided that the repudiatory breach relied on, was at least a substantial part of those reasons: there is a good deal of authority to that effect -"*

<u>Unfair dismissal</u>

13. To ground a successful claim, a constructive dismissal must, of course, also be unfair.

Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal and*
>
> *(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) a reason falls within this paragraph if it –*
>
> *(b) relates to the conduct of the employee,*

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Sex Discrimination

Article 3(2) of the Sex Discrimination (Northern Ireland) Order 1976 provides that indirect sex discrimination occurs where an employer in relation to an employee:-

"Applies to her a provision, criterion or practice which he applies or would apply equally to a man, but:-

(i) which puts or would put women at a particular disadvantage when compared to men;

(ii) which puts her at a disadvantage; and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim."

14. The proper approach to assessing disparate impact has been examined many times in reported case law. One recent example is the decision of HHJ McMullen QC in ***Faulkner v Chief Constable of Hampshire Constabulary [UKEAT/0505/05]***. In that decision, the EAT stated:-

"20. The legal principles to be applied in this case appear to us to be as follows. The four elements of this form of statutory indirect discrimination can be extracted from the wording of SDA s.1(2)(b) namely:

a. The application of a "provision" which the discriminator "applies or would apply equally to a man";

b. Which is such that it "would be to the detriment of a considerably larger proportion of women than of men" [ss.1(2)(b)(i)] ("disparate impact");

c. Which the discriminator cannot show to be justifiable irrespective of the sex of the person to whom it is applied [ss.1(2)(b)(iii)];

d. Which is to her "detriment" [ss.1(2)(b)(iii)]."

15. **Flexible Working**

Article 112F of the Employment Rights (NI) Order 1996 provides:

"(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if:-

(a) the change relates to:-

(i) the hours he is required to work;

(ii) the times when he is required to work;

(iii) where, as between his home and a place of business of his employer, he is required to work.

(2) an application under this Article must:-

(a) state that it is such an application;

(b) specify the change applied for and the date on which it is proposed the change should become effective; and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

16. Article 112G of the Employment Rights (NI) Order 1996 provides:-

"(1) An employer to whom an application under Article 112F is made:-

(a) shall deal with the application in accordance with regulations made by the Department, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies:-

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Department may specify by regulations.

(2) Regulations under paragraph (l)(a) shall include :-

(a) provision for the holding of a meeting between the employer and the employee to discuss an application under Article 112F within twenty-eight days after the date the application is made;

(b) provision for the giving by the employer to the employee of notice of his decision on the application within fourteen days after the date of the meeting under sub-paragraph (a);

(c) provision for notice under sub-paragraph (b) of a decision to refuse the application to state the grounds for the decision;

(d) provision for the employee to have a right, if he is dissatisfied with the employer's decision, to appeal against it within fourteen days after the date on which notice under sub-paragraph (b) is given;

(e) provision about the procedure for exercising the right of appeal under sub-paragraph (d), including provision requiring the employee to set out the grounds of appeal;

(f) provision for notice under sub-paragraph (b) to include such information as the regulations may specify relating to the right of appeal under sub-paragraph (d);

(g) provision for the holding, within fourteen days after the date on which notice of appeal is given by the employee, of a meeting between the employer and the employee to discuss the appeal;

(h) provision for the employer to give the employee notice of his decision on any appeal within fourteen days after the date of the meeting under sub-paragraph (g);

(i) provision for notice under sub-paragraph (h) of a decision to dismiss an appeal to state the grounds for the decision;

(j) provision for a statement under sub-paragraph (c) or (i) to contain a sufficient explanation of the grounds for the decision;

(k) provision for the employee to have a right to be accompanied at meetings under sub-paragraph (a) or (g) by a person of such description as the regulations may specify;

(l) provision for postponement in relation to any meeting under sub-paragraph (a) or (g) which a companion under sub-paragraph (k) is not available to attend;

(m) provision in relation to companions under sub-paragraph (k) corresponding to Article 12(6) and (7) of the Employment Relations (Northern Ireland) Order 1999 (NI 9) (right to paid time off to act as companion, etc.);

(n) provision, in relation to the rights under sub-paragraphs (k) and (l), for the application (with or without modification) of Articles 13 to 15 of the Employment Relations (Northern Ireland) Order 1999 (provisions ancillary to right to be accompanied under Article 12 of that Order).

(3) Regulations under paragraph (1)(a) may include:-

(a) provision for any requirement of the regulations not to apply where an application is disposed of by agreement or withdrawn;

(b) provision for extension of a time limit where the employer and employee agree, or in such other circumstances as the regulations may specify;

(c) provision for applications to be treated as withdrawn in specified circumstances.

17. Article 112H of the Employment Rights (NI) Order 1996 provides:

"*(1) An employee who makes an application under Article 112F may present a complaint to an industrial tribunal:-*

(a) that his employer has failed in relation to the application to comply with Article 112G(1), or

(b) that a decision by his employer to reject the application was based on incorrect facts.

(2) No complaint under this Article may be made in respect of an application which has been disposed of by agreement or withdrawn.

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under this Article may be made until the employer:-

(a) notifies the employee of a decision to reject the application on appeal, or

(b) commits a breach of regulations under Article 112G(1)(a) of such description as the Department may specify by regulations.

(4) No complaint under this Article may be made in respect of failure to comply with provision included in regulations under paragraph (1)(a) of Article 112G because of paragraph (2)(k), (l) or (m) of that Article.

(5) An industrial tribunal shall not consider a complaint under this Article unless it is presented:-

(a) before the end of the period of three months beginning with the relevant date, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(6) In paragraph (5)(a), the reference to the relevant date is:-

(a) in the case of a complaint permitted by paragraph (3)(a), the date on which the employee is notified of the decision on the appeal, and

(b) in the case of a complaint permitted by paragraph (3)(b), the date on which the breach concerned was committed.

(7) Article 249B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (5)(a).

18. The Flexible Working Regulations (Northern Ireland) 2015 provide

"*2.— (1) These Regulations apply to a flexible working application made on or after 5th April 2015.*

*(2) The Flexible Working (Eligibility, Complaints and Remedies) Regulations (Northern Ireland) 2003(**3**) are revoked but continue to apply to a flexible working application made before 5th April 2015.*

Entitlement to make an application

3. An employee who has been continuously employed(4) for a period of at least 26 weeks is entitled to make a flexible working application.

Form of application

4. A flexible working application must:-

(a) be in writing;

(b) state whether the employee has previously made any such application to the employer and, if so, when; and

(c) be dated.

Date when application is taken as made

5.— (1) A flexible working application is taken as made on the day it is received.

Breaches of the Procedure Regulations by the employer entitling an employee to make a complaint to an industrial tribunal

6. The breaches of the Procedure Regulations which entitle an employee to make a complaint to an industrial tribunal under Article 112H of the 1996 Order, notwithstanding the fact that his application has not been disposed of by agreement or withdrawn, are:-

(a) failure to hold a meeting in accordance with regulation 3(1) or 8(1);

(b) failure to notify a decision in accordance with regulation 4 or 9.

Compensation

*7. For the purposes of Article 112I of the 1996 Order (remedies) the maximum amount of compensation is 8 weeks' pay(**5**) of the employee who presented the complaint under Article 112H of the 1996 Order (complaints to industrial tribunals).*

PROCEDURE

19. The claims of constructive unfair dismissal, sex discrimination and in respect of flexible working were case managed and the parties had been directed to exchange witness statements in advance of the full hearing.

20. The claimant gave evidence on her own behalf and called no other witnesses. She was unrepresented.

21. Ms Irene McCullough and Ms Heather Crowe gave evidence on behalf of the respondent. The respondent was represented by Ms Sarah Agnew, Barrister-at-Law, instructed by A&L Goodbody Solicitors.

22. Each witness swore or affirmed to tell the truth, adopted their witness statement as their evidence in chief, and moved immediately into cross-examination and brief re-examination.

23. The evidence was completed on the first day of the hearing, 28 June 2021, and the tribunal indicated to the parties that it would hear submissions on the following day, 29 June 2021.

24. At 1.42 am on 29 June 2021, the claimant emailed the tribunal. The Tribunal Office had closed for the day. She indicated particular health difficulties for the first time and stated:-

"*I only ask for a short postponement, perhaps a day or so, so that I may collect myself, as I am eager to complete this issue*".

25. When the hearing resumed on 29 June 2021 at 10.00 am, the claimant did not attend because she was unwell. Her emailed request for a postponement was granted and the matter was listed for submissions on Friday 2 July 2021 at 10.00 am.

26. At that hearing on 2 July 2021, the parties made their submissions orally. The respondent had provided a written statement of the law in advance to the claimant.

27. After the submissions, the tribunal met to determine its decision. This document is their decision.

RELEVANT FINDINGS OF FACT

28. The claims before the tribunal fell into three distinct parts:-

    (i) The claimant alleged that she had made a flexible working request under Part IXA of the 1996 Order and that the statutory procedure had not been properly followed by the respondent in respect of that application. The claimant further alleged that she had suffered an unlawful detriment for the purposes of Article 70E of the 1996 Order as a result of making, or having sought to make, that application.

    (ii) The claimant alleged that she had been indirectly and unlawfully discriminated against on grounds of her gender contrary to the Sex Discrimination (Northern Ireland) Order 1976 in the refusal of the respondent to grant flexible working and in the policy criterion or practice which required the claimant to work full-time.

    (iii) The claimant alleged that she had been constructively and unfairly dismissed from her employment when she resigned on 14 October 2019, contrary to the Employment Rights (Northern Ireland) Order 1996.

29. The claimant's immediate manager was her Team Leader Ms Kay Barrie, whose immediate line manager was Ms Irene McCullough.

30. On 17 March 2019 the claimant sent an email to the respondent which stated:-

    "Due to the change in family circumstances, I would like to make a <u>statutory request to reduce my working hours</u> (tribunal's emphasis). I no longer have the facilities I once had for my daughter to be looked after outside of school, or to facilitate her getting to and from school when the need arises. Due to this [deletion], I would like to request <u>working four days per week between 9.00 am and 3.15 pm</u> (tribunal's emphasis). Ideally, I would be happy to work the 24 hours that were available during those shifts. As a lone parent with a child too young [deletion] to be left at home alone and no-one else available to look after her, <u>I will not be able to work weekends</u> (tribunal's emphasis). I appreciate the time taken to consider this request. If accepted, I would like to change to take effect <u>as soon as possible</u> (tribunal's

emphasis). I do have temporary arrangements in place for the next three weeks but will have great difficulty thereafter."

31. That email was initially sent to the wrong email address and was sent correctly on 19 March 2019, again by email. The claimant accepts that the date for this request was 19 March 2019.

32. A request under the 1996 Order to vary the employment contract to allow flexible working instigates a timetabled procedure which must be followed by the employer. It therefore has to be distinguished from the ordinary informal requests that can be made by an employee to alter terms and conditions; particularly hours of work, from time to time to cope with temporary changes in circumstances. Article 112F(2) sets out three particular matters that must be specified in an application under Part IXA.

    Firstly, the application must *"state that it is such an application"* ie an application by a qualifying employee for a change in the hours that employee is required to work and/or the times he is required to work. The tribunal is satisfied that in this particular case the claimant did satisfy this requirement. Her email made it plain that it was a statutory request to reduce her working hours and not to work weekends. There is no requirement to use the term "*flexible working*" or to specifically invoke Article 112F, in any application under Article 112F.

33. Secondly, Article 112F(2) also requires that an application must specify the change applied for by the employee and the date in which the employee proposes that change become effective. Again, the tribunal is satisfied that the claimant did comply with this requirement. The email stated in clear terms that she had wanted to reduce her hours to four days per week between the hours of 9.00 am and 3.15 pm. She had also stated specifically that she would not be able to work weekends. While the claimant did not, in terms, give a specific calendar date for the start of any such change, it is clear from the email that she was asking for the change to take effect *"as soon as possible"* and in any event within three weeks. This was sufficient.

34. That said, it is clear that the email dated 17 March 2019, and delivered on 19 March 2019, did not comply with the third statutory requirement set out in Article 112F(2)(c), in that the claimant did not explain the effect that the change in hours would have on her employer or how she felt her employer might deal with that change. It might be felt that this requirement referred to a matter which had been a matter principally for the employer and not a matter which an employee could easily have been expected to deal with. Nevertheless, it is a clear statutory requirement and perhaps is included in the legislation to direct the employee to consider not just the employee's own interests and needs, but also the interests and needs of the employer.

    For the purposes of Article 112F(2), the application had been incomplete and therefore not a valid application.

35. The application had also been incomplete for the purposes of Regulation 4(b) of the 2015 Regulations (see above) in that the application did not state whether the claimant had previously made any such application. The claimant had not done so and this is a particularly technical requirement to be placed on an applicant who will

often have no access to detailed advice in this area. That said, the legislation is clear.

36. The legislation does not require the employer to notify an employee that an application is incomplete in any specific respect and it does not require the employer to invite an employee to remedy any such defect in the application. The guidance issued by the LRA in 2009 [ER36] does however state on page 14 that:-

> *"WHAT HAPPENS IF THE APPLICATION IS INCOMPLETE?*
>
> *If an employee fails to provide all the required information as set out in "Making an Application", the employer should inform the employee of what they have omitted and ask them to re-submit the application when complete. The employer should also inform the employee that they are not obliged to consider the application until it is complete and re-submitted."*

That however is non-statutory guidance and it is expressly stated not to be an authoritative statement of the law. It can be distinguished from provisions which appear in a Code of Practice issued under statutory authority by the Agency, such as the Code relating to Disciplinary and Grievance Procedures, which have more weight.

37. The tribunal is therefore satisfied that the email dated 17 March 2019 and issued on 19 March 2019 was not a valid request for flexible working within the meaning of the 1996 Order and that it therefore did not trigger the statutory responsibilities of the employer in terms of procedure. That finding in itself would be fatal for any claim by the claimant in respect of a failure on the respondent's part to follow the statutory procedure for flexible working applications.

38. Before the tribunal continues with this judgment, the tribunal wishes to record its unanimous view that an organisation of the size of the respondent in this case, with access to a HR Department and with a relatively young workforce, should have been alert to the possibility of employees claiming flexible working within the terms of the 1996 Order and that such an employer should have followed the LRA Guidance in this respect. It does not alter the issue of legal liability in this particular aspect of the claims, but the respondent should have had procedures in place to ensure that an employee such as the claimant would have been advised whether or not her application had been fully completed for the purposes of the 1996 Order and, if not, what matters needed to be remedied. The respondent could then have followed the statutory procedure of arranging a formal meeting within 28 days, issuing a decision within 14 days thereafter and enabling a specific appeal. It is regrettable that in the present case, while the claimant did not properly comply with the very technical requirements of the 1996 Order, there had been a serious miscommunication between the parties. The claimant had been under the specific impression that she had made a valid flexible working application under the 1996 Order and the respondent took the opposite view, without properly clarifying the defects in the application with the claimant. Ms Crowe, in the grievance appeal (which will be dealt with later), specifically referred to this miscommunication and regretted that it had taken place. The respondent organisation needs to take this on board and to ensure that in future cases, valid claims, or attempted claims, under the 1996 Order are identified and are dealt with properly and in accordance with the LRA Guidance.

39. Shortly after the submission of the request to reduce working hours, the claimant's Team Leader, Ms Barrie, spoke to her line manager Ms McCullough and they discussed the request. Ms McCullough advised Ms Barrie that there would be no problems with the claimant's request to reduce hours but that she would have to work during the weekends with possibly some reduction in hours at the weekends.

40. On 22 March 2019, the claimant and Ms McCullough had a discussion at work. Ms McCullough had to deal with some conference calls and the discussion was interrupted for a period and resumed later that day. The tribunal is satisfied that Ms McCullough had been sympathetic with the claimant's difficulties. In the course of that conversation, she had indicated that reduced hours would be permitted, provided that the claimant could do some weekend work, even if that were for alternative or shorter shifts during the weekend. Approximately 100 staff, managed by Ms McCullough, worked in relation to passport queries. Those staff, with two historical exceptions (where two female staff had been imported into the section with pre-existing conditions of employment) worked at weekends. The workforce comprised approximately 60% female staff and 40% male staff.

41. The tribunal accepts that the claimant had reacted badly to this response and had indicated to Ms McCullough that she had been *"backing her into a corner"* and that she was making the claimant choose between her job and her child. The conversation ended and there is a dispute about the precise circumstances in which it ended. The claimant alleges that there had been no opportunity offered to her to take this matter further. Ms McCullough had been clear in evidence that she had told the claimant to go home, discuss it with her family, think about it, and then come back to her. The claimant had failed to do so. Having observed the claimant and Ms McCullough give evidence, the tribunal prefers the clear and specific recollection of Ms McCullough in this respect and accepts that the claimant had been given the opportunity to consider the position further and to come back to Ms McCullough once she had done so.

42. Approximately one week later, on 30 March 2019, the claimant went on sick leave and did not return to work thereafter.

43. After the claimant had been on sick leave for over a month, she had been invited to attend a *"wellness meeting"* to provide the claimant *"with the opportunity to explain how you are and when you were planning to come back to work"*. In the course of that meeting, the claimant had been emotional and upset. She had stated she had difficulties accessing the Handbook and she had stated that male employees had had access to the Handbook. She queried the amount of time spent on her flexible working request. However the claimant had been unable to point to any particular male employee or other employee who had better access to the Handbook than she had had, or any other employee whose flexible working request had been more favourably treated.

44. On 20 May 2019, the claimant had submitted a GP note in respect of her sick leave. That document had been scanned by HR and the original had been returned to her. The claimant objected to the original document being returned to her and thought that it indicated some form of discrimination or detriment. As indicated above there is absolutely no evidence whatsoever, even on a prima facie level, of any such discrimination or detriment. It was simply the case that the respondent organisation

operated in a paperless manner. This was a routine practice which applied equally to employees of either gender and to employees whether or not they had sought to apply for flexible working.

45. On the same day as the claimant queried the return of the original sick note, 25 May 2019, the claimant lodged a formal complaint (or grievance). That stated:-

> *"I would like to make a formal complaint regarding the conduct of management staff both in HR and the HMPO campaign. [Deletion] I made a request to have my hours reduced on the HMPO campaign 19 March 2019. The request is attached, as is the document detailing the events which unfolded around the request. I have now been off work for a few weeks with depression and after leaving in my sick line on 20 May 2019, I had it returned this morning 25 May 2019. I believe there is something very underhand taking place in this company and would like the Bangor Teleperformance Manager and Teleperformance District Manager be made aware of and address my concerns in regard to this conduct. Please note that I have also attended a meeting without being given reasonable access to the Employee Handbook."*

46. On 3 June 2019 the claimant was invited by Mr Richard Keenan, the Contact Centre Manager, to a meeting on 7 June at 11.30 am to discuss her complaint/grievance.

47. On 6 June 2019, Mr Keenan advised the claimant that the Handbook, some 138 pages, had been printed for her and was ready for her to collect at reception.

48. The meeting proceeded on 7 June 2019. It was conducted by Mr Keenan accompanied by a Ms Lauren Martin. The claimant indicated at the start of the meeting that her grandfather was unwell and she would not be staying too long. Nevertheless, the meeting lasted for one hour and 15 minutes and dealt with her complaint in some detail.

49. The claimant queried the length of the Handbook, the availability of the Handbook, Ms Martin's professional status, the level of the Manager dealing with her complaint/grievance and whether there was a security reason why she had been denied a hard copy or digital copy of the Handbook on 22 March 2019. When asked to indicate who she was stating had received a printed hard copy of the Handbook, she was reluctant to do so and it took some considerable time before she put forward a name. That related to an individual for whom part only of the Handbook had been printed out in specific circumstances. It was made plain to the claimant that everybody had access digitally to the Handbook and that with the exception of the computer difficulty, which had been quickly resolved, for the HMPO team in the work area, there had always been access to the digital version of the Handbook in the chill out areas. The claimant argued that that had not been reasonable.

50. The claimant complained about the manner in which her application for reduction of hours had been treated and there was a lengthy discussion about whether that application had been a simple informal request for a shift preference. The claimant argued that it had been a statutory application to have her hours changed due to

family circumstances. The difference between an informal application and a statutory application was discussed in some detail.

51. Mr Keenan indicated that there might have been a misunderstanding in relation to what had been asked for by the claimant. He stressed there were two different types of application; one an informal preference request and one a formal statutory application.

52. There was a detailed discussion about whether or not anyone had ever been given permission not to work weekends. Mr Keenan indicated that no-one had ever been given that permission. That is not strictly correct since two individuals for historical reasons (both female) had been given that permission. However he was correct to state that with the exception of brief periods for temporary personal circumstances, that had not been allowed for anyone else. He stated that the objective was to provide a *"fair and consistent"* procedure.

53. It is clear from the detailed transcript of the grievance meeting that the respondent had fully discussed the complaint/grievance brought by the claimant. That complaint/grievance had centred on her application to reduce her hours, and her access to the Handbook. The claimant appeared unwilling to accept any explanation from the respondent and towards the end of the meeting indicated that she was going to refuse to sign the minutes of the meeting. At one point Mr Keenan indicated that *"I will just do the investigation on the back of that email" – "do you understand me? – you are dubious".*

    The claimant responded *"of course I am! Of course I am!"*

54. The claimant was provided with a copy of the minutes to take home and read to decide whether she wished to sign them.

55. It does not appear that the minutes were returned by the claimant either with or without amendments. In any event, the tribunal has not been directed to any signed copy of the minutes.

56. On 1 July 2019, Mr Keenan wrote to the claimant with the outcome of the hearing. He had considered the claimant's complaint of 25 May, the notes of the meeting on 7 June 2019, statements taken from other members of staff and the Employee Handbook. He referred to the complaints raised by the claimant, including access to a printed copy of the Handbook, her request for a reduction in hours, that she had not been allowed to appeal in relation to the decision about the reduction in hours, that no options had been provided for her, that other colleagues had been allowed not to work specific weekend days and that she had been asked to leave the call floor during non-working hours.

57. In relation to the Handbook, he concluded that the Handbook contained 138 pages and that it had not been standard practice to issue it on request. He stated it could have been accessed on-line and that this had been explained to her when she first joined the respondent organisation. No printed copies of the entire Handbook had been issued to any employee. In certain cases, a specific section of the Handbook had been provided on request.

58. In relation to her request for reduction in hours, he stated that the respondent had tried to accommodate her request. She had been offered alternate weekends or shorter shifts at weekends and a reduction in her contracted hours had also been offered. He accepted that, given the use of the word *"statutory"* in her letter, the Team Leader, Ms Barrie, should have ascertained whether the request had been an informal one or a statutory request for flexible working. He indicated that managers would be briefed on what they should do in these circumstances. He stated that in any event Ms McCullough had reviewed the matter *"in-depth"* and that appropriate steps had been taken.

59. In relation to the claimant's statement that she had wished to appeal about the respondent's decision, he stated that he accepted that she had wished to do so but there had been nothing in the Handbook regarding informal preference requests. He stated that if it had been made clear at the time that the request had been a formal request under the legislation for flexible working, the matter would have been dealt with differently. In future, all such requests would be dealt with more formally.

60. In relation to the claimant's complaint that no options had been provided by Ms McCullough, he stated that Ms McCullough had tried to accommodate her request within reason and had offered significant flexibility that would not normally have been offered by the respondent. He stated that Ms McCullough had been due to meet with her again but had not been able to do so because the claimant had been absent on sick leave.

61. In relation to the claimant's complaint that other members of staff did not work weekends, he stated that there were no employees on HMPO work who had every weekend off. Some employees might work only Saturday or Sunday and that is something which could have been reviewed in relation to the claimant.

62. In relation to the complaint that she had been asked to leave the working area during her break, Mr Keenan stated that this had been a normal action since the employee, to whom she had been speaking, had been working and that it was not practice to take breaks in the working area.

63. Importantly, Mr Keenan stated in clear terms:-

> *"My recommendation to you would be to formalise this process by applying for flexible working, however as we have already discussed this in-depth, it would be pertinent for me to highlight that some weekend work will be required. We can also discuss how and whether or not any short-term adjustments to your schedule might help, as it is clear from what you have said that this is more likely to be long term".*

Mr Keenan did not identify properly the deficiencies in the application, did not invite the claimant to complete her application there and then, and did not, on that basis, set up a specific appeal to deal with her flexible working request; without the extraneous complaints.

64. On 8 July 2019, the claimant submitted an appeal letter which was some six typed pages. The claimant queried each finding by Mr Keenan.

65. In relation to Mr Keenan's recommendation that the claimant should formalise her process by applying for flexible working, the claimant stated:-

> *"As I explained to Richard (Keenan) on 4 July 2019 meeting, I feel that this is a requirement I may no longer need, as [deletion] appear to be dissipating. I also highlighted to Richard Keenan that this personal issue may have been resolved a lot sooner had I not had to deal with depression, which I can only directly attribute a result of the conduct of the management team in the company as I was happy in my job, performing well and dealing with a personal situation at hand calmly methodically and professionally."*

66. The tribunal therefore concludes that the claimant on 8 July 2019 and indeed earlier on 4 July 2019, had indicated in clear terms that she no longer wished to apply for flexible working.

67. A grievance appeal meeting took on 25 July 2019. It was heard by Ms Heather Crowe with notes taken by a Mr Harrison. Ms Crowe was a Contact Centre Manager. She had been appointed by the Vice President of Client Operations. She had had no previous involvement with the claimant or with the earlier procedure. That grievance meeting was detailed and thorough. It lasted for one hour and 10 minutes.

68. The claimant had been offered the opportunity of representation but had decided to attend the meeting on her own.

69. The claimant queried the identity of both Ms Crowe and Ms Harrison, and their job titles. She queried in particular that no-one more senior than Ms Crowe was hearing the appeal.

70. The claimant queried the amount of time that had been spent in relation to her application for a reduction of hours. There was a lengthy discussion about the difference between a temporary preference request and a formal statutory flexible working application. She queried being asked to leave the working area on 22 March 2019. She queried the non-provision of a hard copy of the Handbook.

71. The claimant alleged that she had not been aware of on-line access to the Handbook in the chill out area. The tribunal determines that it is highly improbable that the claimant, as a member of a team, and with knowledge that a computer had been available in the access area, would not have been aware that she could have accessed the Handbook at any time in that chill out area.

72. The claimant confirmed that she did not need to reduce her hours to work part-time anymore. She confirmed that she was willing to come back full-time. Ms Crowe confirmed that the respondent's position was that weekend working was required and the claimant did not continue her application not to work weekends.

73. It is clear the claimant became extremely upset in the course of this grievance appeal meeting, insisting that she had been treated *"so unfairly"*. There were several instances in the transcript which were recorded as unintelligible because the claimant and Ms Crowe had been talking over each other. At one point *"uncontrollable sobbing"* was recorded. Ms Crowe asked her what the respondent could do to help her return to work. The claimant confirmed that the request for

flexible working was *"past"*. Ms Crowe offered to allow the claimant to come back and work on a different account or different campaign. The claimant stated she did not know what to do and that (I) *"just want to be better"*.

74. Ms Crowe stated at one point that:-

> *"There just seems to have been a complete miscommunication between all parties".*
>
> *"I honestly think that again was another miscommunication because the fine line between a preference request and a flexible working request is a very fine. You know and it's maybe just, that it's just not been looked on properly. Not because of you. I mean absolutely not."*

75. On 12 August 2019 Ms Crowe wrote to the claimant dismissing her appeal. In relation to the claimant's request for an apology she stated:-

> *"I appreciate and acknowledge how the sequence of events made you feel like you weren't being treated fairly, I am sorry you felt that way. I can assure you that the actions taken throughout are consistent with other business areas so I believe you were treated with fairness and consistency. We discussed your return to work and that we can offer a phased return in order to support you to get back to work as soon as you are ready to return. We also discussed the option of submitting an internal transfer request if you are not comfortable returning to the HMPO Campaign."*

76. In relation to the request for a reduction in working hours, Ms Crowe stated:-

> *"I do acknowledge that because as you mentioned "statutory" in your letter, that you team leader could have ascertained at that point whether your request was for preferences or flexible working."*
>
> *"Irene McCullough did try to accommodate your request and had explained to you that she could authorise the part-time hours during the week and that you would only need to work some weekends. Irene also offered you shorter shifts at the weekend so that this might help your situation further. However you declined this as you stated you were unable to work any hours on Saturdays or Sundays. It is therefore clear that Irene did try to accommodate your request within reason."*

In relation to the return of the original sick line, Ms Crowe stated:-

> *"It is company policy and standard practice to return the original sick line to the employee once it has been scanned and added to your personal file."*

77. Further in relation to the request for reduction in hours, Ms Crowe stated that there had been a misunderstanding about the difference between a preference request and a flexible working request but that substantial time had been taken to review her request and to make appropriate recommendations. Even though it had been dealt with as a preference request, it had been dealt with properly and significant and reasonable adjustments had been offered.

78. In relation to having been asked to leave the call floor, Ms Crowe confirmed that this was a standard management approach which is deployed daily when agents who are not "*logged in*" are impacting on colleagues' productivity.

79. In short, Ms Crowe concluded that the claimant had been treated fairly and reasonably even though there had been an element of miscommunication between the claimant and management in relation to her application for a reduction in hours.

80. The claimant resigned on 30 September 2019 with effect from 14 October 2019. The resignation had therefore occurred some seven weeks after the determination of the grievance appeal. Throughout that period, the claimant had continued to remain an employee of the respondent organisation and had continued to submit sick notes. She received Statutory Sick Pay during the period. She commenced employment with a new employer one week later.

81. The claimant confirmed in answer to a question in cross-examination that the reason she left her job with the respondent, when she did so, was because she had found alternative employment. However, the tribunal is content that the claimant had been looking for employment for some time and that one reason and, in fact, the primary reason for her resignation had been the way in which her application to reduce hours, and not to work weekends, had been treated by the respondent.

82. It does not appear from the GP notes and from the claimant's evidence that she had attended her GP in person during the period between the grievance appeal notification and her resignation. Sick notes were of course issued during that period and the claimant had been prescribed treatment during this period.

DECISION

Constructive Unfair Dismissal

83. No breach of a specific term of the employment contract has been alleged in this case, or is apparent. The claim in respect of constructive unfair dismissal is that the respondent conducted itself in a manner likely to destroy trust and confidence between an employer and an employee. The claimant has raised several matters; however the only point, which in the judgment of this tribunal, could meet this test is the manner in which the respondent dealt with the claimant's application both to reduce her working hours and not to work weekends, which had been received on 19 March 2019.

84. The claimant's application had clearly been carefully researched and prepared. It had been put in clear terms. It made it plain that the application was a statutory request. It carefully set out the reasons for the application and the extent of the changes sought by the claimant. It set out when the claimant wished the changes to take effect; *"as soon as possible".*

85. The claimant at that stage had not been represented either by a trade union, employee representative or by a lawyer. She had been acting in good faith and doing her best to negotiate an almost impenetrable thicket of primary and secondary legislation, which had evolved over time. She had been relying on her employer to act reasonably and to treat her application seriously.

86. As indicated above the application contained two technical defects. Firstly, the claimant did not deal with the potential effect of the changes on her employer and, secondly, the claimant did not state whether she had previously made any such application. Both were matters within the knowledge of the respondent in any event and, even though required by the legislation, were not primarily matters which would have concerned the claimant at that point.

87. Neither of these venial omissions were noticed by the respondent at the time of the application. Instead, it would appear that the application was not identified at all as either a potential or an actual flexible working request. That error on the part of the employer was to an extent recognised later in the procedure. Both Mr Keenan and Ms Crowe concluded that the use of the word *"statutory"* should have alerted the respondent at an early stage to the possibility of a flexible working application and that it had clearly not done so. Steps were taken to improve the respondent's response in this area in future cases. The application from the claimant on 19 March 2019 had been simply been approached, wrongly, as an informal request to change hours and a relatively quick decision had been made to allow the claimant to work part-time if she wished to do, but to continue to require her to work at weekends.

88. Mr Keenan, in response to the grievance, stated:

> *"Whilst your request was a preference request, I do acknowledge that because you mentioned "statutory" in your letter, that the Team Leader could have ascertained at that point whether your request was for preferences or flexible working. As a result of this, managers will be briefed to consider what employees might intend to ask for, and/or what they might think is best for them, although it is not possible nor reasonable to believe that team leaders will be able to do so in every case."*

89. Ms Crowe stated:

> *"As discussed during our meeting (it) is easy to confuse a preference request with a flexible working request. As I previously mentioned, your team leader could have ascertained whether you are submitting a preference request or flexible working request I believe there has been a misunderstanding which led to teleperformance making a reference to the term "preference"."*

90. To the extent that a flexible working application was discussed in the course of the grievance, the only potential defect in the application put to the claimant was that she had not mentioned *"flexible working"* in the body of that application. That was not a statutory requirement and not a defect. The actual, and technical, defects in the flexible working application were not noticed by the respondent, if they were noticed at all, until the current litigation was well underway. The second defect was not mentioned at all by the respondent. The first defect only appeared to be mentioned in the course of the tribunal hearing. Neither were mentioned in the formal response to either claim.

91. It is clear that the claimant became distressed and upset during the grievance procedure in particular. She tended to misinterpret incidents and to ascribe malign motives where they did not exist. She had been concerned that the respondent was acting in an *"underhand"* way. She felt that the Handbook was being

deliberately withheld and that her application had not been treated seriously. All of this stemmed from the fact that trust and confidence between the employer and the employee had been destroyed by the manner in which the respondent had approached the application from the claimant.

92. The respondent, a relatively large organisation which had the benefit of a HR Department and HR Specialists, did not consult the LRA Guidance and did not refer to that Guidance at any point in this litigation, apparently until it was mentioned by the tribunal in the course of the hearing. They did not refer to their own Handbook which had paragraph 3.19 provided:

> *"Teleperformance as an employer has a statutory duty to seriously consider all applications received as statutory requests as flexible working."*

93. Once the claimant made it absolutely plain that she considered that she was making a flexible working application, the respondent did not point out any real or actual defects in the application. Instead they adopted an obstinate approach. They stuck to the line that the claimant had simply made a preference request and referred only to her *"failure"* to mention flexible working. That had not been a statutory requirement at any point. The respondent did not assist the claimant to complete her request by identifying either of the two minor defects. They did not offer to treat the application as an application under the legislation. They did not set up a formal meeting to discuss such an application, issue a formal decision in relation to such an application or indeed offer a specific appeal in respect of any such application. They simply blanked the claimant.

94. The respondent did not act reasonably and, looking at the matter objectively, they acted in a manner likely to destroy trust and confidence, and trust and confidence was so destroyed.

95. The last step in a chain of events in which the respondent acted in this manner was the grievance appeal outcome. The resignation was delayed for some seven weeks thereafter. However, during that period, the claimant had been receiving treatment for ill health and the tribunal concludes that the claimant did not waive the repudiation of the contract. The delay is simply not long enough in the circumstances of this case and given the manner in which the respondent had acted.

96. While the claimant, unrepresented and unadvised, did respond to a specific question put to her in cross-examination to say that she had resigned because she had got another job, the tribunal is content that, in giving this answer, the claimant was considering the timing of her resignation. In any event, it is sufficient that the repudiation was a reason rather than the only reason for the resignation. The tribunal therefore concludes that the claimant was, for the purposes of constructive unfair dismissal, as a result of the respondent's repudiation of the contract.

Sex Discrimination

97. The claimant made it plain in cross-examination that her claim in this respect was a claim of indirect sex discrimination because of the requirement to work full-time. She did not state that her claim was a claim that a requirement to work weekends had been indirect sex discrimination. In any event, the claimant had been offered

both part-time working and reduced hours at the weekends and had failed to take up that offer. She had subsequently confirmed on 4 July 2019 that she wished to work full-time. There was no evidence that part-time working had been refused to females and allowed to males. There was no evidence that there had been any disproportionate impact on females in relation to part-time working.

98. Even if the tribunal were to look at the issue of the requirement to work weekends, that was a requirement which had applied equally to males and was objectively justifiable for sound business reasons. Those wishing to query delays in passport applications would often do so in urgent circumstances and outside normal working hours. That requirement for weekend working was a reasonable requirement of the particular business of the respondent organisation. The requirement for weekend working had corresponded to a real need of the respondent. It had been appropriate and necessary to achieve that objective. The only two individuals who, for historical reasons, did not have to work weekends, were both females.

99. The onus is on the claimant to provide at least prima facie evidence of some act of indirect sex discrimination. No such prima facie evidence has been provided. The claimant has not discharged the initial onus of proof and the onus of proof has not therefore passed to the respondent. The claim of sex discrimination is therefore dismissed.

Flexible Working Application

100. The only complaint of this type made by the claimant in relation to the actions of the respondent were breaches of Regulation 6 of the 2015 Regulations.

101. As indicated above, the statutory provisions in relation to applications for flexible working are clear. Certain information has to be provided. If it is not provided, the application does not qualify as an application for the purposes of 1996 Order. There had been defects in the claimant's application. The tribunal therefore concludes that this claim must fail in any event.

102. The application had also been withdrawn by the claimant in the course of the initial grievance meeting and subsequently in the course of the grievance appeal meeting. The claim had therefore been withdrawn before any claim had been made to the tribunal on 6 August 2019.

103. The claim in respect of the procedural response is therefore dismissed. Nevertheless, this claim could have avoided if the respondent had acted as a reasonable employer in identifying and facilitating a potential application for flexible working in accordance with the LRA Guidance.

Flexible Working Detriment

104. There is no evidence whatsoever before the tribunal which could justify a finding that any action had been taken by the respondent on the basis that the claimant had applied, or had sought to apply, for flexible working.

105. In the first place, no such statutory claim had been completed by the claimant. However, it seems clear that the claimant had intended to lodge such a claim and

on that basis the legislation does provide for the potential of an unlawful detriment. Even on that basis, the claim must fail.

106. The non-provision of a hard copy of the Handbook had been perfectly reasonable and had applied to all employees. It had had nothing to do with the claimant's application to reduce her hours and not to work weekends.

107. The on-line provision of the Handbook either on the work floor or in the chill out areas had been reasonable. The tribunal concludes that the claimant must have known that she could have accessed the Handbook on the computer in the chill out room. There would have been no rational reason for the claimant to have come to the conclusion that the computer in the chill out room was in some way blocked from accessing the Handbook. In any event as soon as the computer difficulties in the work area had been brought to management attention, they had been rectified. Access to the Handbook had been the same for all employees, whether or not they had wanted to apply for flexible working.

108. The request for the claimant to leave the call floor on or about 22 March 2019 had been made calmly and reasonably by the Team Leader. The claimant had been engaging in the conversation with a colleague who had been working. The claimant had been on a break. The Team Leader's intervention had been standard practice and had been entirely unrelated to any application by the claimant for a reduction in hours and not to work weekends.

109. The claimant's allegation that Ms McCullough had been happy when leaving work on that date was similarly misconceived. There was nothing about that incident which could have been classed as a detriment and no evidence that it had been linked to any application to reduce hours and not to work weekends. Mr McCullough had simply been chatting to colleagues at the end of a shift.

110. The complaint in relation to the return of the hard copy sick note once it had been scanned, is similarly misconceived. It had been standard practice and unrelated to any flexible working application.

111. The other complaints from the claimant about helplines etc were similarly misconceived. No detriment had been established and no link to any application for reduced hours and not to work weekends.

112. The claim of unlawful detriment is therefore also dismissed.

Remedy

113. The basic award in respect of the constructive unfair dismissal is one week's gross pay ie £308.00. There is also an award for loss of statutory rights which, given the relatively short amount of service, will be £250.00.

114. On the basis of the evidence put before this tribunal, the claimant appeared to move after one week to another post. No evidence was provided in relation to the pay received in the new employment.

115. A compensatory award is therefore made for one week's net pay: £277.00.

116. Therefore the total reward in respect of the constructive unfair dismissal claim is

Basic Award:	£308.00
Compensatory Award:	£277.00
Loss of Statutory Rights:	£250.00
TOTAL:	**£835.00**

117. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President:

Date and place of hearing: 28 and 29 June 2021 and 2 July 2021, Belfast.

This judgment was entered in the register and issued to the parties on: