EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Ms I Korpysa	**v**	**1. Impact Recruitment Services Ltd** **2. Howden Joinery Ltd**

Heard at: Watford (by CVP) **On**: 24, 25, 26 & 27 January 2022

Before: Employment Judge Alliott
Ms A Carvell
Ms S Williams

Appearances

For the Claimant: In person (via an interpreter)
For 1st Respondent: Mr Alan Williams (Solicitor)
For 2nd Respondent: Mr Richard Ryan (Counsel)

JUDGMENT

The majority judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal against the first respondent is well founded.
2. The claimant's claim for breach of contract against the first respondent, (notice pay) is well founded.

The unanimous judgment of the Tribunal is that:

3. The claimant's claims for age discrimination are dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent from 8 January 2018 (the date given on both sets of pleadings although the claimant suggested that she may have actually been employed by the first respondent earlier – to be confirmed). There is a dispute as to her last day of employment and whether she was dismissed or resigned. The claimant worked at the second respondent having been supplied by the first respondent on an agency basis. By a claim form presented on 11 June 2020 the claimant brings complaints of unfair dismissal, wrongful dismissal (notice pay) against the first respondent and age discrimination against the first and second respondents.

The issues

2. The issues were set out in a case management summary by Employment Judge King following a preliminary hearing heard on 8 March 2021. They are as follows:-

"Time limits/limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in s.123(1)(a) & (b) of the Equality Act 2010 ("EqA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

(ii) Given the date the claim form was presented and the dates of early conciliation any complaint about something that has happened before 22 August 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

[The date appears to be incorrect and should be 12 February 2020 1R and 29 February 2020 2R]

Unfair dismissal (against the first respondent only)

(iii) Was the claimant dismissed or did she resign as the first respondent alleges? If she did resign, was this as a result of the respondent's conduct to entitle her to bring such a claim?

(iv) What is the effective date of termination?

(v) What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent does not accept that it dismissed but if the Tribunal finds otherwise, the first respondent asserts that it was by reason of redundancy and some other substantial reason, namely caused by the pandemic.

(vi) If so, was the dismissal fair or unfair in accordance with the ERA s.98(4), and, in particular, did the respondent in all respects act within the so called "band of reasonable responses"?

(vii) Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Remedy for unfair dismissal

(viii) If the claimant was unfairly dismissed and the remedy is compensation:

(a) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway?
See: Polkey v AE Dayton Services Ltd [1987] UK HL8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;

S.13 Equality Act 2010: direct discrimination because of age;

(ix) Has the respondent(s) subjected the claimant to the following treatment:

(a) Mr Terry Hill not giving the claimant a permanent contract in July 2019 when Adrianna Smet was given such a contract?

(b) The claimant was asked to lift heavy items by Adrianna Smet instead of being given lighter duties on her return to work on 19 August 2019.

(c) Being told by Adrianna Smet at some point prior to 8 March 2020 that she "was too slow and too old to do her job and if she had got the power she would have sucked [sacked] her as soon as possible".

(d) She should not have been removed from shift after 26 March 2020, and if she was removed she should have been given furlough pay as she did not receive it.

(e) Dismissal

(x) Was that treatment "less favourable treatment", ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies upon the following comparators in respect of the allegations at (viii) above as follows:

(a) Adrianna Smet
(b) To be confirmed in further information
(c) Hypothetical comparator
(d)/(e) To be confirmed in further information

(xi) If so, was this because of the claimant's age and/or because of the protected characteristic of age more generally?

(xii) If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

(a) To be confirmed by the respondents in the amended response.

Breach of contract (against the first respondent only)

(xiii) Was the claimant dismissed without notice or did she resign without notice?

(xiv) To how much notice was the claimant entitled?

Remedy

(xv) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded."

The law

3. As per the IDS Employment Law Handbook Discrimination at Work at 15.7

"An employer directly discriminates against a person if:

- It treats that person less favourably than it treats or would treat others, and
- The difference in treatment is because of a protected characteristic.

Tribunals often deal with these two stages in turn… However, as Lord Nicholls commented in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), in some cases the "less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

4. Regarding the burden of proof, as per the IDS Handbook at 33.11

"Two stage approach. As succinctly put by Her Honour Judge Eady QC in Fennell v Foot Anstey LLP EAT 0290/15, "Although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone."

5. Further, at paragraph 33.12:

"The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crossthwaite Securities Ltd [2003] ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination. The guidelines can be summarised as follows:

- it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- in deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'
- the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal (see further Chapter34, 'Proving discrimination', under 'Inferring discrimination')

- the tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn

- in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

- these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information (see Chapter 34, 'Proving discrimination', under 'Ask and respond process')

- inference may also be drawn from any failure to comply with a relevant Code of Practice (see Chapter 34, 'Proving discrimination', under 'Inferring discrimination – breach of EHRC Codes of Practice

- when the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

- it is then for the respondent to prove that it did not commit or, as the case may be, it is not to be treated as having committed that act

- to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

- not only must the respondent provide an explanation for the facts proved by the claimant, from which the inference could be drawn, but that the explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

- since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normal expect cogent evidence to discharge that burden – in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice"

6. Dealing with less favourable treatment, as per the IDS Handbook at 15.17

"The test posed by the legislation is an objective one – the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.
…

That said, the claimant's perception of the effect of treatment upon him or her is likely to significantly influence the Tribunal's conclusion as to whether, objectively, that treatment was less favourable."

Comparator

7. S.23 requires the comparator to be in not materially different circumstances.

8. Dealing with whether the less favourable treatment was because of the claimant's race:

> "As to whether the less favourable treatment was because of the claimant's race, this is not a "but for" test but instead requires the court to ascertain "what, consciously or unconsciously was [the] reason" for the less favourable treatment (Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065 at [29]). The Tribunal is not required to consider the motive of the person, but their reason for the less favourable treatment, which can be subconscious (Amnesty International v Ahmed [2009] ICR 1450 [33-39])."

9. We have also taken account of the case of Nagarajan v London Regional Transport 1999 ICR 877, HL as follows: -

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

Although these cases are race cases, the principles apply equally as regards age

10. Lastly: -

> "Finally, it is the reasons of the decision maker(s) in respect of the act complained of that is relevant for the Tribunal. It will not be sufficient to show that the decision maker was acting on the basis of tainted information on the part of someone else, and that would need to be pleaded as a separate act (CLFIS (UK) Ltd v Reynolds [2015] ICR 1010 at [45-6])"

The evidence

11. We have been provided with a bundle running to 372 pages including five supplementary pages.

12. We have a one-page document from the claimant entitled "Evidence List". We had written statements and heard evidence from the following:

    12.1 The claimant. Due to the fact that her witness statement was less than comprehensive, the claimant also adopted under oath as true her first further and better particulars contained in pages 52-54 of the bundle.

    12.2 Mr Kyle Woodford, an agency colleague of the claimant's employed by the first respondent and working at the second respondent's premises.

12.3 Mr Sebastian Filipski, an on-site account manager for the first respondent, based at the second respondent's premises.

12.4 Mr Gary Brown, an onsite contracts manager for the first respondent, based at the second respondent's premises.

12.5 Mr Paul Hooper, owner and director of the first respondent.

12.6 Ms Adrianna Smet, a warehouse operative employed directly by the second respondent at the second respondent's premises.

12.7 Ms Claire Wiggins, HR Advisor at the second respondent.

13. In addition, we had a witness statement from Mr Terry Hiles, employed by the second respondent as a team leader. Although it was intended that Mr Hiles should give evidence, we were told that medical problems had prevented his attendance. He is no longer in the employment of the second respondent.

The facts

14. The first respondent is a company based in Northampton. It employs individuals and places them to work for clients on an agency basis.

15. The second respondent is a client of the first respondent. At the material time the second respondent had two main premises in Northampton, namely "Raunds" and "NDC (National Distribution Centre)". At the material time the second respondent was in the process of moving its operation from NDC to Raunds.

16. Both the claimant and the first respondent have asserted that the claimant was employed by the first respondent from 8 January 2018. Nevertheless, the claimant referred in her evidence to having worked for the first respondent prior to that and having been placed at other clients. The exact start date of the claimant's employment will need to be confirmed in due course.

17. As from 8 January 2018 the claimant was placed at the second respondent's NDC premises. She was employed as a warehouse operative.

18. The claimant was born on 29 June 1978 and consequently in the period from July 2019 until April 2020 was 41 years old.

19. The claimant is a Polish national with Polish as her first language. Although no doubt she has some English, she participated in this hearing via an interpreter.

20. Having heard and considered all the evidence, it is clear to us that there are some significant gaps in the evidence that has been placed before us. Emails, texts and phone calls have been referred to that are not included in the bundle. Some emails in the bundle do not have dates or times on them to corroborate when they were sent and in what sequence, for example page 139. In addition, a number of appendices to the grievance report have not been placed in the bundle and these would have included the submissions from Mr Paul Hooper, Mr Sebastian Filipski and Mr Gary Brown, all of which are potentially relevant. Nevertheless, we have endeavoured to deal with this case on the evidence placed before us.

21. On 23 March 2020 the Prime Minister announced the national lockdown.

22. It is clear that on 24 March 2020 at the end of the 06:00-14:00 shift the majority of the agency staff were told that Howdens would be shutting down. Mr Hooper gave evidence that Howdens announced that most staff would be stood down, that a named handful of people would remain at both sites to deal with incoming trailers and that all staff nevertheless would be paid for 40 hours that week whilst everyone worked out what was happening. In her interview for the grievance hearing the claimant put it rather more simply, namely, that the manager came to her shift and said that they were going to close the depot.

23. We accept that at this time there must have been considerable confusion as to what was going on. Nevertheless, we are unsure as to the extent to which the agency workforce was kept fully informed of where they stood. The claimant's concerns over the weekend of 27 and 28 March about her financial situation and her request for holiday pay may reflect the fact that she was unaware that she was to be paid 40 hours for that week.

24. It would appear that a number of the agency staff based at NDC were asked to come in on 25 March 2020 to continue to work unloading incoming goods. The claimant was not one of those requested to come in. A subsequent breakdown of those who Howdens wanted to continue working and those who were to be laid off from the NDC premises shows that 10 agency staff were requested to carry on working and 12 were laid off. The claimant was amongst those to be laid off. We have been provided with a breakdown of the ages of the NDC agency staff. The 10 retained to work range in age from 28 to 54. Of those to be laid off, the range in age is from 21 to 58. Of those to be laid off, it is noticeable that, if there is any bias, it is against the younger ones as seven of them were in their twenties.

25. Although we had no direct evidence on this, it is clear to us that the claimant was aware that other agency workers were still going in to the NDC from 25 March onwards and that she probably made enquiries. We make this finding based on comments she is recorded as making later. On 4 April 2020 she emailed Mr Brown referring to losing her job and someone lying to Terry that she had asthma [The inference being that a perception of vulnerability to covid may have been a reason to lay her off and not keep her working]. In another undated email that was probably sent on 30 March

2020 she states, “one person has contributed to the fact that I no longer work”.

26. It is clear to us and we find that Howdens selected the agency staff to remain working based on their requirements as to what they could do. Ms Wiggins gave evidence that the decision as to which agency staff to be retained was based on their skills and ability. Contrary to the claimant’s perception that she was the only agency worker not to be offered shifts after the 25 March 2020, we find that the overwhelming majority, namely about 76, did not return to work during that week and only 12 did. 10 at NDC and 2 at Raunds. The selection appears to have been made after 25 March 2020 as the breakdown spreadsheet attached to the email dated 2 April 2020 as it refers to the 12 still working. The author is Mr. Neil Munro of Howdens who was The Director of Inbound Supply and Warehousing). Mr. Hooper gave evidence that he was just sent this email with Howdens agency requirements. We were not told who actually made the selection of those to be retained.

27. We have looked at the evidence to see if there is any prima facie evidence that the claimant was not selected because of her age. In her further particulars the claimant puts it as follows:
“date: 29.03.2020 – fb messenger message from Adrianna to me that Dean (operation manager) and Tim (site general manager) have got something against me that’s why I haven’t got any more shifts at Howden.”
We have the translated texts from 29 March 2020 (also referred to in paragraph30 below). Whilst the claimant complains that Dean and Tim are against her, she does not suggest that this on account of her age. The exchange finishes with an odd reference by the claimant to not being cool and that being why “everyone has to kick me” In his untested witness statement Mr Tim Hiles denies any involvement in discussions about which agency staff were to be retained, although we place little weight on this evidence. As will be explained in due course, the claimant herself provides evidence as to why there may have been non-age related antipathy between her, Mr. Hiles and Ms Smet. In addition the claimant’s contemporaneous complaints about asthma / not being cool provide non-age related reasons even if there had been any adverse influence on Howdens not to select the claimant to be retained.

28. Taking all the evidence into account, we find that the claimant’s selection for lay-off as opposed to carrying on working during that week was nothing to do with her age and was based on Howdens’ requirements for certain selected individuals to continue unloading deliveries.

29. From the evidence we have seen we find that there was considerable confusion in the claimant’s mind as to her exact employment status. Of course, her legal position is that she was employed by Impact and placed with a client, Howdens. Nevertheless, some of the claimant’s emails suggest that she considers herself to have been an employee of Howdens. This may have been exacerbated by language problems. If the emails on page 139 were sent on 30 March, then she is referring to no longer working

at that time. In an email on 22 April 2020 she refers to being dismissed from work one day after her shift on 24 March 2020.

30. Mr Filipski's evidence was that on Saturday 28 March the claimant sent a screenshot to Gary Brown regarding the proposed Government furlough scheme. The claimant agreed she had probably done this. We have some translated texts sent by the claimant to Adrianna Smet on 28 and 29 March. At that time the claimant was stating:-

> "C … I am not mad at you that they fired me, and I know you got involved to fire me."
>
> And:
>
> Adrianna: "Did they fire you?"
>
> C: "I do not work from Wednesday"
>
> Adrianna: "But did you lost a job?"
>
> C: "Dean said on Tuesday before knew of our shift that they are closing Howdens
> …
> I did not receive any information that I lost my job."

31. Mr Filipski's evidence is that there was an exchange of emails between the claimant and Mr Gary Brown on 30 March 2020. (Curiously not referred to in Mr Gary Brown's witness statement). If sent on 30 March, Mr Brown was telling the claimant that they were still waiting for information regarding the job retention scheme, that it would not be available until the end of April and that the choice of whether to use the scheme for agency workers would lie with Howdens.

32. Included in this undated email stream there appears to be a 'copy and pasted' email from Gary Brown. Doing the best we can we have worked on the basis that this was sent to the claimant on or around 29/30 March 2020. This states as follows:-

> "Howdens are obviously following Government guidelines on social distancing at work, so have closed all depots and warehouses til further notice. They will update me on a daily basis if this changes, they have stated they want to retain all agency staff for when it re-opens.
>
> Any hours you worked will be paid at your normal rates or SSP for those in self-isolation.
>
> Going forward the Government have still not announced any payment plans for agency workers or self-employed workers.
>
> The rumours of 80% pay is a grant for full-time employees only! NOT agency on contracts.

> …
>
> This leaves you with little choice but apply for Universal Credits (£120/wk) or accept offers of other work from Impact **or elsewhere until Howdens re-opens**." [our emphasis]

33. Clause 5.1 of the claimant's contract of employment prohibits the claimant from working for any Third Party during her normal hours of work without prior written consent of Impact. The claimant told us that she was unaware of this provision which we accept.

34. In his witness statement Mr Filipski states as follows:-

> "I spoke with her (the claimant) on that same day 30.03.20 in person and told her that we will not have any more confirmed information regarding the furlough scheme and will keep her updated if anything comes available, as we have a number of people sitting at home just like she was."

35. At 12.22 on 1 April 2020 the claimant sent Mr Filipski a text asking him to call her when he had time and send her a copy of her contract.

36. The key communication between the claimant and Mr Filipski as to whether or not she had resigned her employment took place on 1 April 2020. At 12.23 the claimant sent a text message to Mr Filipski saying "Hey, if you have a moment, call me". We have Mr Filipski's phone log which shows that Mr Filipski called the claimant at 15:59 hours on 1 April and the call lasted 6 minutes 50 seconds. There is then a second call at 16:08 from the claimant to Mr Filipski and that call lasted 1 minute 40 seconds.

37. Mr Filipski has Polish as his first language and both parties stated that they spoke in Polish. This suggests that any misunderstanding due to language problems was not in play.

38. Mr Filipski's evidence of this call is as follows:-

> "On Wednesday 1 April 2020 the claimant called me and asked for all her holiday pay to be paid and requested a P45 from us. I confirmed with her that she has currently seven days accumulated in the system, and she will receive her P45 when the final holiday payment will be processed and payroll finalised in the middle of next week. The claimant said she has been offered new job and was starting as of Thursday 2 April and she wanted to take the opportunity she had been offered."

39. In his evidence for the grievance report he added that she did not want to tell him where her new job was.

40. In actual fact, the initial phone call was from Mr Filipski to the claimant.

41. Mr Filipski states that in the second call at 16.08 the claimant was asking when she would receive her P45. He told her when her last payment was processed, so Wednesday/Thursday the following week.

42. In his evidence for the grievance report Mr Filipski made the following point:

> "When Ilona called me on 1st April 2020, she requested for WHOLE her holidays to be paid and P45 as she is starting new job as of Thursday 2nd April. At that point she had 6.99 days of holiday accumulated and normally we are only processing 5 each week, but when she requested P45 we automatically processed whole of her entitlement. Ilona was told that her P45 will be issued when the last payment HOLIDAY be proceeds (sic) the following week. We have never requested anyone's P45 without request, even if people are no longer working for us."

43. We accept that requesting payment for accrued holiday entitlement is not an unequivocal indication of an intention to resign as many companies will allow employees to take an advance against holiday entitlement. It appears that the first respondent did this. However, Mr Filipski's evidence was to the effect that this was only done for up to 5 days per week and not more.

44. Conversely, the claimant has consistently denied that she requested her P45. In the transcript of her evidence to the grievance hearing she was asked several times if she had requested her P45 and she states that she had not. Her account is that she asked for her holidays to be paid and for a copy of her contract of employment. She told us that the reason she wanted to see her contract was to check what her notice period was.

45. In addition, there is a substantial dispute as to whether the claimant had secured another job on 1 April 2020. It is common ground that another agency, ACS, sent her to work at a warehouse on 2 April 2020. It is the claimant's case that she had only applied for another job via the new agency and had not got it on 1 April. The relevance of this is that it potentially undermines Mr Filipski's evidence to the effect that he was told by the claimant that she had been offered a job, knew what it was but declined to tell Mr Filipski and was starting on 2 April.

46. The claimant's evidence was that she had applied for a job on 1 April. In evidence she stated that she told Mr Filipski that she was looking for a job as she had bills to pay. She told us that it was on the morning of 2 April that she received a phone call from ACS and was told where to go to work for an induction session.

47. Approximately 10 minutes after the second call between the claimant and Mr Filipski on 1 April 2020 Mr Filipski sent the following email at 16.19 to a number of individuals at Impact:-

> "Hi all
>
> Just had call from Elona Korpysa confirming she want all her holiday pay this week and to be [sic] P45 as she found another job elsewhere but did not wanted to specify where.
>
> Thanks

Kind regards
Seb"

48. At 16.10 on 2 April 2020 the claimant called Mr Filipski. His phone log shows the call lasted 18 minutes and 53 seconds. Clearly, this was a long call. Mr Filipski states that it was made during a break at her work. He says she was questioning why she had been laid off from Howdens and others were not. He says she referred to rumours that she had asthma and that she only had a smoker's cough. He says he told her they were waiting for information from Howdens regarding the furlough scheme. He reminded her that she had requested her P45 the day before.

49. On 4 April 2202 in an email that we have timed at 11.05, Mr Gary Brown sent an email to all staff. It is said by the respondent that this was sent in error to the claimant given that the respondent maintains that the claimant had resigned on 1 April 2020. This email states:-

> "Unfortunately we are the messengers of some bad news.
>
> …
>
> So one of the sacrifices is to reduce the amount of agency staff, as a result they have advised Impact they have no alternative but to terminate your contract with immediate effect, as they do not have sufficient cash flow to furlough/retain all the agency.
>
> In order for them to terminate your contact they have to pay you 32 hours of severance pay in this week's payslip.
>
> Howdens' management apologise for this tough decision and thank you for your hard work whilst at Howdens.
>
> Howdens have stated if thing s ever pick up when the recovery starts, they would consider taking you back as you have skills and experience of their business.
>
> You are still registered with Impact and we will tray and find you alternative work as soon as possible, or if you wish to apply for Universal Credit we can arrange P45."

50. On 4 April 2020 in an email timed at 11.03, the claimant emailed Mr Brown as follows:-

> "I have a question when I get back to work.
>
> No reason was given to me why I lost my job and someone lied to Terry that I have asthma.
>
> I am entitled to 80% pay if I do not return to work."

51. Although seemingly timed two minutes before Mr Brown's email, Mr Brown's witness statement refers to this email being in response to his email. Whatever the position, the claimant did reply to Mr Brown's email at 12.17 on 4 April 20202 as follows:-

> "I am not satisfied with your position as my supervisor, you have not come and said that I lost my job, I do not deal with people who work for you for over two years.
>
> If you have a good job offer for me write or call me."

52. At 12.58 on 7 April 2020 the claimant emailed Mr Brown as follows:-

> "…In regards to my immediate dismissal without any specific reason, I would like to know the written reason why I am no longer working for Howdens especially while I was working for them from 08.01.2018 which gave more than two years?
>
> During that time, I haven't been late or have had any warning in regards to my work. I was very good employee who worked with passion on every shift and who helped others. Whole situation is very upsetting as I know that it only me who has been dismissed from work and other agency workers are still there, even they have been offered more money to be paid for their work."

53. Later on 7 Aril 2020, the claimant sent an email at 13.18 to Mr Dean Williams at Howdens. This states:-

> "Few days ago, I have received email from Gary the Agency Manager in which I was dismissed from my work without any written reason. That's why I am writing to you to kindly ask for a help as because of that situation I have met with the unexpected hardship and I am not able to afford the most basic necessities. My finances aren't as good as before as I don't work because I have been dismissed from my work position without any reason. As per government law in regards to equal rights I would like to know why it is only me who has been dismissed from work and other agency employees are still working at your company."

54. Mr Williams appears to have referred the matter back to Impact.

55. Although we do not have the phone log to confirm it, Mr Filipski states that he called the claimant at 15.23 on 7 April 2020. The precise timing given suggest that this is accurate. He states that he told the claimant that all her holiday pay had been paid and that she would be paid four weeks' notice pay despite her leaving and terminating her contract on 1 April 2020. He says the call ended amicably.

56. Also on 7 April 20202 the claimant received her payslip for the week ending 5 April 2020. It included seven days holiday.

57. The response pleads that the claimant received her P45 on 8 April 2020.

58. On 22 April 2020 at 9.21 hours the claimant sent a further email to Howdens. This states:-

> "My name is Ilona Korpysa and I really need help from Human Resources Department as I was dismissed from work at one day after my shift on 24 March 2020, without any information about such a decision, which in England is not accepted….

> Few weeks ago, I have received email from Gary the agency manager in which I was dismissed form my work without any written reason. That's why I am writing to you to kindly ask for a help as because of that situation I have met with the unexpected hardship and I am not able to afford the most basic necessities.
>
> …
>
> As per government law in regards to equal rights I have asked managers, why is only me who has been dismissed from work and other agency employees are still working at your company. …"

59. The claimant resent the 22 April 2020 email to Howdens on 8 May 2020. Howdens referred it to Impact for investigation and Mr Paul Hooper became involved. At 12.04 on 9 May 2020 Mr Hooper replied to Howdens stating:-

> "As yet I have been unable to make contact with either Seb or Gary but I will detail what I know…
>
> …
>
> - March 25th Ilona made contact with Seb and asked for her P45 as she had found a new job and wanted all her outstanding holiday pay.
>
> - Friday 27th March we had list of people from Howdens as to who they wished to be furloughed.
>
> - Ilona wasn't on this list but as she had asked for her P45 due to new employment we didn't address anything with – had she not requested her P45, given how long she had worked for us, we probably would have furloughed her.
>
> - At some point thereafter, and this is where I need dates from Seb and Gary, she started making noises on a few fronts….
>
> One being why she hadn't been furloughed
>
> Second why she had not been retained at Brackmills when others had been.
>
> Third why had she been dismissed without a reason.
>
> - We responded to one before any decision had been made on the furlough scheme she had requested her P45 and therefore made the decision herself to terminate her contract. That was her decision not Impact's or Howdens'"

60. Later he attempted to make contact with the claimant by text and calling. At 16.05 on 9 May 2020 he texted:

> "If it is a money issue I may be able to pay furlough money and backdate it but we didn't because I got told you had a new job and had left our company."

61. Mr Hooper and the claimant did talk on 9 May 2020 but the matter did not progress.

62. Mr Hooper sent a follow-up email on 11 May 2020.

63. The claimant replied on 11 May 2020 as follows:-

> "In regards to your email and help you want to offer to me, we are now in May and I was dismissed from Howden on 25 March 2020. As I am aware it has been already around two months when no one has contact my in regards to my dismissal. I have sent email to Gary asking for help and question on 7th April and again I haven't heard anything back. After that I have begged for help HR and again none reply. All my emails were asking for help as I was dismissed from Howden without any written reason while coronavirus situation and my employment for that company over two years.
>
> The whole situation with my dismissal put me in very bad health condition as I haven't been gotten any help and according to UK law to dismissed person you need to give a notice, reason and writing decision, none of them were followed. I was unemployed from 25 March 2020 because of Howden and still have to pay my rent, my bills, my living and help my son with his studies.
>
> Because of the whole situation and my health condition as I started to be very worried how can I cope without a work I was pushed to find new employer and earn the money and live normally."

64. On 11 May Mr Hooper decided to involve Peninsula, Impact's HR partners.

65. On 13 May Mr Hooper emailed the claimant stating that her 22 April 2020 email would be dealt with as a grievance. Amongst other issues, the summary of the issues/concerns to be dealt with under the grievance were her complaints about being dismissed on 24 March 20202 without any information or written reasons. On 19 May 2020 the grievance meeting was held. It is noted that during the course of that investigation Mr Hooper, referring to the telephone call on 9 May 2020 to the claimant, states:-

> "Ilona had asked for her P45 on 25 March and that Howdens and Impact had discussed the furlough scheme on Friday 27th March. At that point Ilona told me that she hadn't asked for her P45 on 25th but had asked for it on 1st April. I said that wasn't my understanding and she repeated it was the 1st (at that point I hadn't done any research into the events and was going on what I thought). It turns out I was a week out with her P45 request. Howdens discussion about the furlough scheme was on April 3rd."

That is, of course, at variance with the claimant's repeated denials that she had requested her P45 at any stage.

66. The grievances were not upheld. The claimant appealed the grievance outcome and the appeal was heard on 22 June 2020. The appeal was dismissed in its entirety.

The minority judgment on unfair dismissal (EJ Alliott)

67. I find that the claimant did not fully understand that her contract of employment was with Impact and that she was placed as agency staff with Howdens. The claimant regarded her job as being with Howdens and, when laid off on 24 March 2020, and not being offered any further shifts thereafter, she considered herself as dismissed. See extracts from 4/4/20

"Lost my job", 7/4/20 "Email from Gary the agency manager in which I was dismissed", 7/4/20 "My immediate dismissal without any specific reason", 22/4/21 "I was dismissed from work one day after my shift on 24 March 2020, "Grievance point 1 "You claim that you were dismissed on 24 March 2020" and her claim form giving her last day of employment as 24 March 2020.

68. The claimant said in evidence that after 4/5 days of not being offered shifts she thought she had lost her job with both respondents.

69. It is against that background that the claimant was looking for another job at the beginning of April 2020. As she stressed, she had bills to pay.

70. In actual fact, the claimant had not been dismissed from her employment with Impact. She had been laid off from Howdens but remained employed by Impact.

71. I find that on 1 April 2020 she did request her P45 and asked for all her outstanding holiday pay to be paid. I find that she made this request as in her mind she no longer had a job, wanted to be paid all due to her up to date and she needed a P45 for the next job she had been offered the next day.

72. The reason I find that she did request her P45 is that it is inherently improbable that Mr Filipski would invent such a detail within 10 minutes of a call with her. He clearly actioned the request as she did receive her P45 in due course and I accept the first respondent does not send out P45s unless they are requested. Further, I accept paying all her holiday entitlement would have been on the basis that her employment had ceased. Lastly, I find the detail of the claimant not saying where her new job was is an unlikely embellishment unless it was true. I reject the claimant's evidence she did not request her P45.

73. I find that in requesting a P45 and stating that she was starting a new job the next day the claimant clearly and unequivocally resigned her employment.

74. I find that the first respondent's conduct did not constitute a fundamental breach of her contract of employment such that she was entitled to terminate the contract and treat herself as dismissed. I find the effective date of termination to be 1 April 2020.

75. Accordingly, I find that the claimant was not unfairly dismissed.

The majority judgment on unfair dismissal (non-legal members)

76. We find that, whatever the claimant's thoughts on her employment status from 24 March 2020 onwards, the fact is that she remained employed by the first respondent up until 1 April 2020.

77. We find that the email sent to the claimant by the first respondent on or about 30 March 2020 expressly set out that the claimant's choices included

accepting offers of other work from Impact or elsewhere until Howdens reopened. We find that this was authority for the claimant to seek employment elsewhere whilst remaining employed by Impact.

78. We accept the claimant's evidence that she did not request her P45 in the 1 April 2020 call with Mr Filipski and that he is mistaken on this point. We find that the claimant merely requested a copy of her contract of employment. We find that Mr Filipski mistakenly thought the claimant had resigned.

79. We find that requesting her contract of employment and an advance against holiday pay is not a clear and unequivocal resignation. Further, that stating that she had or was looking for another job was not incompatible with remaining employed by Impact. We find that the claimant did not resign her employment with the first respondent. We find that the first respondent was wrong to think she had resigned.

80. Given that both the claimant and the first respondent were mistaken, we find that a reasonable point at which she was dismissed was when she was sent her P45 on 8 April 2020. Accordingly, we find that that was the effective date of termination.

81. We find that the reason for dismissal was a mistaken belief that she had resigned. We find that that is not a potentially fair reason and that the dismissal was both procedurally and substantively unfair.

82. Issues relating to contributory conduct, "Polkey" and compliance with the Acas Code of Conduct will be considered at the resumed hearing.

Age discrimination

83. The claimant complains about treatment she allegedly received from Mr Terry Hill (Hiles) and Adrianna Smet. The starting point for our assessment of what may have motivated Mr. Hiles and Ms Smet is the claimant's own evidence. In her further particulars she states:

> " First situation – date: November 2018 when I was asked by Terry Hills (sic) (Howden team Leader) to accompanied him as his parter (sic) for the Howden staff Xmas party, I had to refuse to this invitation as I am married and I would be against my commitments to my husband. As I have refused to go with him, his attitude has changed at work toward me.
>
> Second situation: date: 29.11.2018 – Terry Hills went to the staff Xmas party with Adrianna Smet (who was employed by Impact recruitment at the time), after that Adrianna Smet has got paermanent contract from Howden around July 2019 when she wasn't working as long as myself for Howden and she wasn't as experienced as me.

84. The claimant confirmed this in her oral evidence.

85. Ms Smet referred to unpleasantness after her appointment due to jealousy.

86. This strongly suggests to us that any antipathy between the claimant on the one hand and Mr. Hiles and Ms Smet on the other was nothing to do with her age and all to do with the Xmas party.

87. Treatment (ix)(a): “Mr Terry Hill not giving the claimant a permanent contract in July 2019 when Adrianna Smet was given such a contract.”

88. It is correct that in July 2019 Adrianna Smet was offered and accepted a permanent employment contract with Howdens and we so find.

89. In July 2019 Adrianna Smet was an agency employee of Impact working at Howdens at the same site as the claimant.

90. In July 2019 Howdens had a vacancy for a Warehouse Operative. Ms Wiggins told us it was common practice for Howdens to recruit from the Agency staff when a vacancy occurred and clearly a permanent position with Howdens was desirable to the Agency staff.

91. Ms Wiggins told us that the decision to offer the permanent position to Ms Smet was made by a Mr Grantham, a site manager who had left Howdens in July 202. Whilst her evidence as to what Mr Grantham told her was hearsay, she was involved at the time as she did the paperwork for Ms Smet’s recruitment and specifically discussed the matter. She told us and we accept that Ms Smet got the position due to her skill set. She had impressed with good communication skills (not least in English), had an excellent knowledge of the Howdens internal process and was capable of additional office based responsibilities in booking in stock. Ms Smet gave evidence that she was taken on as a good performer, although this was less persuasive as it is self-serving.

92. As such we find that Ms Smet is not an appropriate comparator in that she was not in materially the same position as the claimant. The claimant’s English was/is poor and she lacked the office based skill. As such we find that not offering the claimant a permanent role was not less favourable treatment.

93. Even if Ms Smet did receive more favourable treatment, we would have found that this was nothing to do with her age. If there was favouritism then this was probably due to the non-age related antipathy between them.

94. Treatment (ix) (b): “The claimant was asked to lift heavy items by Adrianna Smet instead of being given lighter duties on her return to work on 19th August 2019.”

95. In August 2019 the claimant had appendicitis surgery. She returned to work on 19 August 2019. Precisely what was known about the claimant needing to be restricted to light duties and when is uncertain. In her further particulars the claimant refers to a doctor’s not dated 16 August which must be wrong. We do have a doctor’s letter dated 16 September 2019 which advises her to avoid heavy lifting for three months. Ms Wiggins referred the claimant to OH on 25 September and an email of that date refers to the

doctor's letter and states "we are currently accommodating these restrictions and she is coping well". In her oral evidence the claimant told us that after her doctor's letter she wasn't asked to lift heavy items.

96. It is not clear to us what, if any, recommendation for light duties there was before the doctor's letter. The claimant, when asked how the agency should have been aware, said it was implied in a way as she had difficulty walking and that to her it was obvious. When asked what she had to lift she said a 5 litre pot of paint and said she didn't complain that she couldn't do it as Ms Smet had gone and what choice did she have. In her grievance interview she refers to a girl called Roxana who saw her 3 days after her return. The claimant says that she informed this Roxana she couldn't lift heavy items but was still required to provide a doctor's note.

97. Both Mr Hiles and Ms Smet deny requiring the claimant to lift heavy items and say that an instruction was given that she was only to undertake light duties. We have no doubt that that was true after the doctor's note. We find that on her return to work there was no formal direction or request that the claimant be restricted to light duties and that she was given normal 'picking' duties in the course of her work. We find picking duties would be randomly allocated, the claimant had access to a FLT if necessary and could ask for help if appropriate. Her duties may have involved heavy items but she did not complain at the time. It would appear that when she did raise the issue she was requested to provide a doctor's note which she did.

98. We find that the claimant may well have been directed by Ms Smet to undertake work which involved picking heavy items prior to 16 September 2019. We find that not being allocated light duties was due to an absence of a doctor's note recommending it.

99. We do not find that that treatment was less favourable. For this we have taken a hypothetical comparator, namely a younger colleague returning from surgery. The complaint here in our judgment is about poor procedure by Impact/Howdens and we find that a comparator would have been treated the same.

100. Even if Ms Smet did treat the claimant less favourably than a comparator, we would have found that this was nothing to do with her age. If there was such treatment then this was probably due to the non-age related antipathy between them.

101. Treatment (ix) (c): "Being told by Adrianna Smet at some point prior to 8th March 2020 that she " was too slow and too old to do her job and if she had got the power she would have sucked (sacked) her as soon as possible."

102. Ms Smet and Mr Hiles agreed that there had been a confrontation between Ms Smet and the claimant but said this was prior to Christmas 2019. In essence Ms Smet denies the comments and says that it was the claimant who referred to her own age. Ms Smet agrees she lost her temper and says she later apologised. She denies an incident on Sunday 8 March 2020, saying she specifically recalls the date as Monday 9 March was

International Women's Day in Poland and she had documentary proof she was in the Seychelles from 8-15 march, allegedly sent to her solicitors but not before us.

103. The claimant asserts that the comment was made and maintained it was in March 2020. She points to the evidence of Mr Woodford who did support her. However, we treated his evidence with some caution as his statement had clearly been typed by the claimant as it had the same misspelling of "sucked" for sacked as used by the claimant. Further, Mr. Hiles's statement says that Mr Woodford was not there on the occasion.

104. There are common threads to the accounts, for example the claimant either throwing down or placing down a clipboard, tempers being lost/ voices raised and Mr Hiles stepping in. Ms Smet says the context was about how fast Ms Smet was working. Ms Smet accepts that she said words to the effect that if it was her company she would fire the claimant due to her attitude.

105. We find that a confrontation did take place between the claimant and Ms Smet and that in simple terms this was a row at work between two people who didn't like each other. Whenever it took place and whatever was said, we find that a hypothetical comparator would have been treated the same with insult being made on both sides. In any event, even though the claimant's account includes a reference to her age, we find that any such comment was not because of her age but due to the antipathy between the two.

106. Treatment (ix) (d): "She should not have been removed from shift after 26th March 2020, and if she was removed she should have been given furlough pay as she did not receive it."

107. It is correct that the claimant was removed from shift after 26 March 2020 and not offered furlough pay. We find that a hypothetical comparator would have been treated exactly the same and so the treatment was not less favourable. In any event, we find that that treatment was not because of her age.

108. Treatment (ix) (e): "Dismissal."

109. The majority decision is that the dismissal was due to a mistaken belief that the claimant had resigned and therefore unfair. We find that a hypothetical comparator would have been treated exactly the same and so the treatment was not less favourable. In any event, we find that that treatment was not because of her age.

110. Accordingly the age discrimination claims are dismissed.

111. In the circumstances, we have not gone on to consider the time points.

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Employment Judge Alliott

Date: 22 April 2022

Sent to the parties on: 22 April 2022

For the Tribunal Office