EMPLOYMENT TRIBUNALS

Claimant: Mrs N Davidson

Respondent: Restons Solicitors Ltd

HELD AT: Manchester **ON:** 8, 9 and 10 March 2017

BEFORE: Employment Judge Franey
Mr G Skilling
Mrs J Harper

REPRESENTATION:

Claimant: Mr J Cullen, Counsel
Respondent: Mr E Legard, Counsel

WRITTEN REASONS

1. These are the written reasons for the judgment given orally with reasons at the conclusion of the hearing and sent to the parties in writing on 16 March 2017.

Introduction

2. By a claim form presented on 8 July 2016 the claimant complained that when she resigned from her position as a Case Manager with the respondent in May 2016 she had been unfairly constructively dismissed. She said that the respondent had breached trust and confidence in a sequence of events going back to November 2013 which culminated in a meeting in March 2016 (following her return from maternity leave) at which she had been given an ultimatum that if she did not agree to move to a lower paid role she would be dismissed from her position on capability grounds.

3. Her claim form also included complaints in respect of discrimination because of pregnancy or maternity, sex discrimination and notice pay. A complaint in respect of holiday pay was never pursued and Mr Cullen withdrew it during submissions.

4. By its response form of 17 August 2016 the respondent resisted the complaints on their merits. It denied that there was any breach of contract, let alone a fundamental breach, and therefore denied that there had been any dismissal. It resisted any complaints of unlawful discrimination. There had been legitimate concerns about the claimant's performance following her return from maternity leave in February 2016 but no ultimatum had been imposed.

5. The complaints and issues were identified by Employment Judge Ryan at a preliminary hearing on 21 September 2016. The claimant withdrew any complaints under section 18 Equality Act 2010. The scope of the direct discrimination complaint was identified and recorded.

6. At a further preliminary hearing on 5 December 2016 Employment Judge Sherratt ordered that there should be excluded from the bundle of documents for this hearing a "without prejudice" letter sent by the claimant's solicitors.

Issues

7. We discussed the issues with the parties at the commencement of our hearing. For the respondent Mr Legard accepted that if the resignation should be construed as a dismissal, it was unfair.

8. For the claimant Mr Cullen accepted that those allegations of direct discrimination because of pregnancy or maternity which related to treatment during maternity leave could not be pursued under section 13 Equality Act 2010 because of the provisions of section 18(7) Equality Act 2010. The sole allegation of direct discrimination because of pregnancy or maternity therefore related to the alleged "demotion" upon return to work after maternity leave. The claimant relied on a hypothetical comparator in that complaint.

9. It followed that the issues for the Tribunal to determine in this hearing were as follows, taking account of the claim form and of EJ Ryan's summary:

Direct discrimination because of pregnancy/maternity

(1) Was the claimant subjected to a demotion in February 2016 upon her return to work from maternity leave resulting in her having to start basic training again?

(2) If so, did the respondent in that respect treat her less favourably because of pregnancy or maternity than it would have treated a hypothetical comparator, being a person who had not been pregnant or on maternity leave but who had been absent from work for a similar period?

(3) In so far as any less favourable treatment occurred more than three months prior to the presentation of the complaint, allowing for the effect of early conciliation, can the claimant show either that it formed part of conduct extending over a period ending within that period, or that it would be just and equitable for time to be extended?

Unfair Dismissal

(4) Did the respondent commit a breach of the implied term of trust and confidence in one or more of the following alleged respects set out in paragraph 13 of the claim form?

(a) The way the claimant was treated in November 2013 when she was shortly due to commence maternity leave, in that the respondent unilaterally changed her job role, brought unfounded disciplinary action against her and informed her colleagues of the disciplinary matters, which was embarrassing and humiliating;

(b) In November 2014 the claimant was treated differently because she informed the respondent she was pregnant. The respondent changed the claimant's role continuously which was unsettling and disturbing for the claimant whilst pregnant;

(c) Delaying her return to work without any proper cause in January/February 2016 following maternity leave and making improper comments relating to the claimant returning to work and her inability to afford childcare;

(d) Subjecting the claimant to training following her return from maternity leave in February 2016 and treating her differently because she had been away from the office due to maternity leave;

(e) Making improper comments relating to the claimant's performance following her return from maternity leave in February 2016 without any investigation or disciplinary hearing;

(f) Giving her an ultimatum to accept a demotion or be subjected to disciplinary proceedings and dismissed on 23 March 2016?

(5) If so, was any fundamental breach of contract a reason for the claimant's resignation?

(6) If so, had the claimant nevertheless lost the right to resign because of that breach by affirming the contract by delay or otherwise?

Wrongful Dismissal

(7) If the claimant's resignation is to be construed as a dismissal, was the respondent in breach of its obligation to give contractual notice of termination?

Remedy

(8) If any of the above complaints succeed, what is the appropriate remedy?

Evidence

10. The parties had agreed a bundle of documents which ran to approximately 170 pages. Any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated.

11. The claimant gave evidence herself and also called as a witness Mervin McDonald, a former colleague. She also relied on a written witness statement of Beverly Evans, but Ms Evans did not attend the hearing to give evidence. Her witness statement was unsigned. We declined to attach any weight to it.

12. The respondent called two witnesses. Gillian Beckett was the Human Resources ("HR") Manager involved throughout the period covered by the claim, and Malcolm Roberts was the Training and Development Manager who dealt with a grievance in 2013 and with the return to work in February 2016.

13. The Tribunal read the witness statements and treated them as evidence in chief before the witnesses were questioned by the other party.

Relevant Legal Framework – Unfair Dismissal

14. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

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

15. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

16. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

17. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, 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. That requires one to look at all the circumstances."**

18. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

19. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

20. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation

approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

21. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. A last straw can have the effect of resuscitating an earlier breach: **Lochuak v London Borough of Sutton UKEAT/0197/14/RN.**

Relevant Legal Framework - Notice pay

22. If the claimant's resignation was really a dismissal, she would be entitled to notice pay because it the employer in reality ended the contract without notice by committing a fundamental breach.

Relevant Legal Framework - Equality Act 2010

23. The complaint of pregnancy or maternity discrimination was brought under the Equality Act 2010. Section 39(2)(d) prohibits discrimination against an employee by subjecting her to a detriment.

24. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

Burden of Proof

25. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

26. Consequently it is for a claimant to establish facts from which the Tribunal can reasonable conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

27. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

28. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

Direct Discrimination

30. Direct discrimination is defined in section 13(1) as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

31. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

32. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person as long as the circumstances are not materially different. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to the protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Findings of Fact

33. This section of these reasons will set out the broad chronology of events. The point at which each of the allegations contained in paragraph 4(a) – (f) of the list of issues arises will be identified but our decisions (and the resolution of any key disputes of fact) will be addressed in the Discussion and Conclusions section.

The Respondent

34. The respondent is a solicitors' practice which provides a debt recovery service to financial institutions such as banks and debt purchasers. It is instructed by its clients to collect overdue debts from their customers, and where those customers fail to engage or default under an arrangement the respondent will institute and pursue legal proceedings and enforce County Court judgments. It employs approximately 128 staff. It has a full-time HR Manager in Mrs Beckett and access to expert advice from an Employment Law Consultancy. It has grown rapidly and substantially in recent years.

35. There are a number of relevant policies found in the employee handbook. The grievance procedure appeared at pages 38-40. It encouraged informal discussion of problems but said that formal grievances should be raised in writing. The disciplinary procedures appeared between pages 41 and 49. They included provision for action in cases of capability.

36. The handbook also made provision for a change of role in cases where there were capability issues (page 115). The policy said that if performance was still not adequate

> **"…you will be warned in writing that a failure to improve and to maintain the performance required could lead to your dismissal. We will also consider the possibility of a transfer to more suitable work if possible."**

The Claimant

37. The claimant was first employed by the respondent in June 2007. She was initially employed as an office assistant but over the years she worked her way up and was appointed a Litigation Executive (a role subsequently re-named Case Manager). Her first assignment in that role was in the Mortgage Possessions Department. She was working there in 2013.

38. The claimant had a son born in February 2008. In the spring of 2013 the claimant became pregnant again. Her baby was due in early February 2014. A pregnancy risk assessment was carried out at the end of September 2013 (pages 53-57).

October 2013 Discipline Issue

39. On 7 October 2013 (pages 63-72) the claimant was called to an investigatory meeting where a number of matters were discussed with her. On 8 October 2013 the claimant was invited to a disciplinary meeting. The invitation letter appeared at page 81. There were three issues raised. The first was a mistake in calculating disbursement fees which resulted in £645 of costs not being claimed. The second was not claiming VAT despite being given an email address by a District Judge so such a claim could be submitted. The third was passing for payment an invoice that had already been approved.

40. The claimant put her case in writing in a letter of 11 October at pages 94-97. She admitted an error in relation to the costs claim and that she had made a mistake in not scheduling a follow-up for the VAT issue. Both she and a colleague had made errors in relation to the third matter. She went on to say that she had been overloaded with work for which she had not been properly trained, and that she had a lot of issues outside of work and was five months pregnant. She suggested that in the last few months the support and training that had previously been there had gone. She said she was stressed and depressed and was seeing her doctor. She mentioned that she had had a miscarriage, which she had not previously disclosed to the respondent.

41. The matter was discussed at a hearing on 14 October (pages 98-106) following which the claimant went on sick leave. By a letter of 16 October at page 101 Mrs Beckett wrote to the claimant to say that she had decided not to proceed

with formal disciplinary action. She was predominantly influenced by learning of the miscarriage. However, the claimant was being given a reasonable management instruction that she should make every effort to address the shortcomings that had been identified. The letter was to be kept on file.

November – December 2013 Grievance

42. Whilst the claimant was off sick in mid October 2013, a team leader, Mr Woof, had cause to look in her desk drawer for some paperwork relating to an ongoing court matter. He discovered items of paperwork that he thought should have been actioned by the claimant. The respondent tasked a colleague, Ms Evans, with reviewing the claimant's case load to see what the position was on her files generally because it was not known when she would be back.

43. After the claimant returned to work on 17 November she was called to a meeting on 21 November. The notes appeared at pages 107-109. After a brief discussion about how the claimant was getting on, Mrs Beckett told her of what had been found in her desk by Mr Woof and that a full file review had been carried out. A number of problems had been identified. The claimant said she was going to take some advice.

44. This resulted in a letter from her solicitors of 1 December 2013 at pages 116-117. The letter was headed "formal grievance". It expressed her shock that disciplinary action was going to be initiated. Concerns about the volume of work and lack of adequate support and training were reiterated. The letter said that unless the matter was resolved amicably there would be legal proceedings for pregnancy discrimination, sex discrimination, harassment and personal injury.

45. Mrs Beckett acknowledged receipt of that letter in a letter to the claimant of 1 December and invited her to a grievance meeting on 11 December. The notes of that grievance meeting appeared at pages 119-127. The claimant was accompanied by Mr McDonald. The outcome of her grievance appeared in a letter of 19 December at pages 128-129. Mr Roberts decided that the grievance was unfounded. He said that the items found in the desk drawer could not be ignored. The allegations were not unwarranted or spurious and there was no different treatment because of pregnancy or because of sex. The claimant did not appeal this decision.

December 2013 – January 2014 Discipline Proceedings

46. A disciplinary invitation letter was issued on 18 December 2013. It appeared at pages 131-134. The disciplinary hearing was to be before Mr Roberts on 20 December 2013. Attached to the letter was a two page spreadsheet identifying 14 files on which there were concerns about how the claimant had handled them. This spreadsheet had originally been compiled by Ms Evans and saved in a public area of the shared drive with the name "Nicola's errors".[1] As attached to the disciplinary invitation it bore a different heading. It was accompanied by a witness statement from Mr Woof about the items he had found in the drawer in October 2013.

47. Before the disciplinary hearing the claimant and Mrs Beckett had a private discussion. The result was that the claimant was allowed paid leave until her

[1] Ms Evans was disciplined and dismissed for this and other matters.

maternity leave started in the New Year. She said this was a deal in return for her accepting a written warning and not pursuing legal proceedings. Mrs Beckett maintained that there was no "deal"; the legal proceedings were not discussed and she could not control what sanction Mr Roberts would apply. She said the paid leave was a compassionate measure because she could see how upset the claimant was. There were no notes of this discussion. We will return to it in our conclusions.

48. The notes of the disciplinary hearing before Mr Roberts on 20 December 2013 appeared at pages 135-138. The claimant accepted she had made mistakes but put forward her case about the lack of support and the stress she had been under. The outcome was a written warning which was live for nine months. That was confirmed by Mrs Beckett in writing by a letter of 6 January 2014 at page 139. The claimant was offered the right of appeal but did not pursue it.

49. The circumstances of this disciplinary action formed allegation 4(a) and we will return to it in our conclusions.

2014

50. In January 2014 the claimant was on paid leave and then maternity leave. Her daughter was born on 2 February 2014.

51. She returned to work on 3 November 2014. She underwent several weeks of retraining. Mr McDonald was the trainer.

52. The claimant signed her contract of employment in November 2014 (pages 32-37). It referred to the grievance and disciplinary procedures. It said at clause 2 on page 32 that:

> **"The Company may amend your duties either on a temporary or permanent basis. You will be notified of any permanent change in writing. In addition to your normal duties, you may be required to undertake additional or other duties as necessary to meet the needs of the business."**

2015

53. In early January 2015 the claimant informed Mrs Beckett that she was pregnant and maternity leave was due to begin in April 2015.

54. Allegation 4(b) was that upon her return to work her role was changed continuously. The claimant said in her oral evidence that she was moved between work for three different clients (Arrow, Marlin and HSBC) within the weeks that followed her retraining period. She had to learn the different client parameters and requirements for each role. There was no specific retraining given but Mr Dole, Mr Charnock and Ms Blagg were all available to help the claimant. Her case was that the respondent did not want to give her a fixed permanent role because she would be going off on maternity leave in the spring of 2015. We will return to that in our conclusions.

55. Although not a matter which was said to have contributed to a breach of trust and confidence, the claimant alleged that Mrs Beckett made comments on two occasions in February or March 2015 to the effect that the claimant would not be

able to return to work because she was unable to afford childcare. A brief account of this appeared in paragraph 27 of the claimant's witness statement, but she provided more details when cross examined by Mr Legard. Mrs Beckett denied having made any such comments and we will return to that in our conclusions so. We will also return to the contention made in the claimant's witness statement that Mrs Beckett told her around this time that she would have to take annual leave in order to attend an antenatal appointment.

56. The claimant started a further period of maternity leave in April 2015. Her second daughter was born on 6 May 2015.

December 2015 Return to Work Discussions

57. In November and December 2015 there were discussions about the date for her return to work from maternity leave. The claimant wanted to return in mid January 2016. Mrs Beckett said that the company wanted to delay her return until 1 February so that she could go through training with some new entrants rather than be trained on her own. The claimant was concerned about the loss of pay but Mrs Beckett arranged for the claimant to take accrued annual leave for the second half of January so that she did not lose out financially.

58. The arrangements were confirmed in an email from Mrs Beckett of 4 December 2015 at page 142. The email was discussed later that day (page 144). Mrs Beckett explained the position in relation to holidays. She suggested it worked out well for the claimant and in response the claimant said, "That's perfect really". The claimant had not been able to take any "keeping in touch" days. In cross examination she accepted that she had been a little bit upset at not having been back in the office to familiarise herself but that overall it did work out. The allegation of delay to her return to work date formed part of allegation 4(c) and we will return to it in our conclusions.

February 2016 Training

59. The claimant returned to work on 1 February 2016 and started a period of training in a group with the new recruits. A central part of the training concerned telephone calls to customers. The regulatory framework had changed and these calls were subjected to more rigorous scrutiny than before. In October 2015 a call quality escalation procedure had been produced (pages 51-52) which made provision for calls to be listened to and audited and to be rated as red, amber or green. A red rated call would lead to a discussion and could lead to an interim supervision plan or a personal development plan ("PDP"). If the objectives of a PDP were not met the position would be escalated to the HR department, implicitly with a view to capability proceedings.

60. Mr Roberts was keen to impress on the claimant that the role had changed. It was common ground that he said that she would be treated as a "new starter" and that he said:

> **"It's a new Restons now. It's a telephone based job and if you can't talk on the phone you can't do the job."**

61. The retraining formed the basis of the allegation of direct pregnancy and maternity discrimination (issues 1-3) and of allegations 4(d). We will return to it in our conclusions.

62. The claimant also said that there were some other inappropriate comments made by Mr Roberts in this period. The allegations appeared in paragraphs 35-37 of her witness statement. She said that in a group discussion he made a comment about how she kept having babies, and that in other group discussions he would tell her that she already knew something, doing so in a way which was embarrassing. We will address this allegation in our conclusions too.

4 – 21 March 2016 Performance Concerns

63. Mr Roberts and Mrs Beckett said that concerns developed about the claimant's performance. When questioned about her relatively poor performance on the telephone she made reference to having headaches. They formed the view that she was not fully engaged all the time.

64. This led to a meeting between the claimant and Mr Roberts on 4 March 2016. A new manager, Ms Delooze, was also present. Mr Roberts said deficiencies in the claimant's work before she went on maternity leave were still present. The note at pages 145 recorded the following:

> **"The concerns at the meeting were that ND was still not consistently speaking clearly and when she was unsure of the response her voice descended into a mumble. ND said that she thought that her confidence and attitude had improved since her previous term at Restons. ND openly admitted that in her previous term of employment she hadn't given the role 100% [**with**] an inference that she hadn't seen it as long-term employment. That view had now changed and she actually on this occasion wanted to come into work."**

65. On Monday 7 March the claimant told Ms Delooze that she had been upset by some of the comments from Mr Roberts in that meeting. Ms Delooze informed HR of that in an email the same day at page 147. Her email recorded that Mr Roberts had said that as the claimant was a returning member of staff he would have expected more from her and that when challenged she had a habit of stating that she had a headache, was feeling unwell or coughing. Mr Roberts accepted in cross examination that he had made that comment as it reflected his perception that the claimant had not been properly engaged in or committed to her training and had offered a range of excuses. The claimant also alleged that on 18 March Mr Roberts made a sarcastic comment about her headaches when he heard her ask for some paracetamol. These alleged comments formed part of allegation 4(e) and we will return to them in our conclusions.

66. On 18 March she was called to a further meeting with Mr Roberts. The notes appeared at pages 145-146. There had been role play training in that week and there were concerns that the claimant had problems maintaining a high level of voice control, and on occasions the customer would control the call. Mr Roberts emphasised that there was a different working environment from a year earlier, and Ms Delooze and another person had been brought in to ensure that all Case Managers got full training and support. He said he could not allow the claimant to go live on telephone calls unless the training team was confident in her ability to do it.

The note at page 146 recorded that Mr Roberts mentioned the disciplinary matter from 2013 during this discussion. Ms Delooze had not been aware of that matter before.

67. Mr Roberts later changed his mind and allowed the claimant to go live on telephones on Monday 21 March. Mikala Gardner, a Call Auditor, sat with her whilst she made the calls**.** She made a number of calls that day and the following day.

Meeting 23 March 2016

68. On Wednesday 23 March 2016 the claimant was called to a meeting with Mr Roberts and Mrs Beckett. Mrs Beckett's note of what she (i.e. Mrs Beckett) said in that meeting appeared at page 148. The claimant did not accept that the note was accurate but she not produce any notes of her own.

69. The note at page 148 recorded problems with three calls. During the first one the claimant had been very quiet and mumbling. It was felt she had come across as robotic and lacking personality. On the second call her lack of confidence was evident because there was a lack of clarity and her speech had been rushed. The third call was described as "a difficult call to listen to" because the customer had taken over.

70. The note ended with the following paragraphs:

> **"I discussed the above with Nicola and also mentioned that she had had a conversation with Mikala asking if she could go into the Correspondence Team. I mentioned this and said it was an option however it would not be at the same level she is at now. It would be an Administration Assistant on the Correspondence Team which would be dealing with correspondence and not taking or making calls. Unfortunately this would result in a reduction in salary as this position was £16k and not £22k that Nicola currently earns. Nicola was a little upset at this as she felt she could be a Case Manager in the team as she would not be required to take or make calls. This is incorrect. Case Managers in Correspondence will make and take calls and they are also available for calls if other teams are engaged.**
>
> **At this point I asked Nicola what she thought we could do to help, we have spent time and money on training. We provided the speech course[2] and I am a little unsure what else we could do for. Nicola could not provide an alternative other than what we had already discussed.**
>
> **I also mentioned to Nicola that if she remained as a Case Manager we would have to audit her calls and the way they are at the moment would result in red rating calls, this would lead to a personal development plan and if no improvement could lead to disciplinary. Nicola understands this.**
>
> **I confirmed I had spoken to the management team and they are quite happy for Nicola to move positions within the company to assist her and due to her length of service. Nicola has good knowledge and it would be a shame to lose her. Nicola is taking the weekend to think things over and will discuss with me on Tuesday."**

71. This exchange formed the nub of allegation 4(f). The claimant maintained that it was an ultimatum: if she did not agree to move to a lower paid role she would be dismissed for incapability. The respondent said it was not an ultimatum but simply a recognition of the fact that if her current performance levels continued she would

[2] A reference to an assertiveness course provided some years earlier.

face capability proceedings, and that the possibility of a move to a different role was something which the claimant had raised. We will return to this dispute in our conclusions.

72. In any event the claimant was not at all happy with this discussion. She maintained that she raised an "oral grievance" with Mrs Beckett during this meeting. Mrs Beckett did not recall any such oral grievance being raised.

After the 23 March Meeting

73. By agreement the claimant had the following day off and then it was the Easter weekend. She was due to return to work on Tuesday 29 March but remained off and was certified unfit for work by her General Practitioner. The fit note was extended on 14 April for a further three weeks by reason of "anxiety state; stress at work" (pages 149-150).

74. On 18 April the claimant's solicitor sent a letter on a "without prejudice" basis which we did not see. The reply of 20 April at page 151 indicated it would be addressed internally as a grievance.

75. On 25 April Mrs Beckett wrote two letters to the claimant, the first inviting her to a welfare meeting (page 153) and the second inviting her to a grievance meeting (page 154). Both meetings were to be on 5 May. Mrs Beckett was to deal with the welfare meeting, but then take notes at the grievance meeting which was to be handled by a Litigation Manager, Mr Charnock.

76. By email of 3 May the claimant said she was unable to attend. She was not well enough. Mrs Beckett moved the welfare meeting to 9 May (page 157).

8 May Resignation

77. On 8 May (page 160) the claimant emailed a letter of resignation which was dated 6 May. The letter appeared at pages 158-159. It gave a number of incidents that had breached trust and confidence. They were:

- The disciplinary matter from November 2013;
- Changes to the claimant's job role;
- The continual change of roles in early 2015 once the respondent was aware the claimant was pregnant;
- The delay in her return to work to 1 February 2016;
- Demeaning comments during the training on return to work.

78. The claimant ended her letter by saying:

> **"The last straw for me was on 23 March 2016 when I was given my ultimatum that my job was changed to a lower grade role or my employment would be terminated. All in all I strongly believe I have been discriminated against because of my gender and my maternity being subjected to less favourable treatment than other employees."**

79. That resignation letter was acknowledged by a letter of 9 May at page 161. Mrs Beckett asked the claimant to come to a grievance meeting on 16 May to discuss those matters. By email of 13 May at page 162 the claimant refused because she did not have any trust and confidence it would be handled fairly.

Submissions

80. At the conclusion of the evidence each advocate made an oral submission addressing the constructive dismissal and direct discrimination complaints. They were agreed that the wrongful dismissal complaint would stand or fall on whether there had been a constructive dismissal.

Respondent's Submission

81. Mr Legard began by outlining the legal framework applying to a complaint of direct discrimination and to constructive unfair dismissal. There was no dispute as to the applicable principles and they are summarised above. He then invited the Tribunal to prefer the evidence of the respondent's witnesses to that of the claimant. He suggested that the overwhelming feeling of this case was that the managers had bent over backwards to support the claimant over a long period. He reminded the Tribunal of the importance of sticking to the pleaded case.

82. In relation to the direct discrimination complaint he submitted that there was no actual demotion, but that in any event this case was hopeless because it was clear that the respondent would have treated anyone returning from a period of absence in the same way. There was no direct discrimination or any evidence that the treatment was because of pregnancy or maternity.

83. Turning to the unfair dismissal he addressed each of the six component parts in turn. He submitted that the respondent had dealt reasonably with the disciplinary issues in 2013, and that although it had been remiss of Ms Evans to save the spreadsheet of files with the title "Nicola's errors", that was a matter which was addressed appropriately with Ms Evans at the time. The change of the claimant's role in 2013 and then again in 2014 were understandable given the reductions in the type of work and the fact she was about to go on maternity leave at both periods. The delay in allowing he return to work in the second half of January 2016 was a classic example, he submitted, of the claimant reinterpreting in a negative way something which she had welcomed at the time. he reminded us that the claimant used the word "perfect" in the telephone call recorded at page 144.

84. In relation to the training period in February and March 2016 he suggested that the respondent's managers were competent to assess performance and were entitled to provide feedback to the claimant. The retraining was appropriate because the nature of the business had changed significantly since the claimant last worked in it. Mr Roberts had found the claimant to be disengaged and uncommitted and was entitled to raise his concerns about headaches and other matters with her. She was just not cut out for the telephone based case management role.

85. As to the comments which the claimant alleged had been made, Mr Legard invited us to accept the respondent's account of events. Mrs Beckett had found offensive the suggestion she had tried to "blackmail" the claimant in December 2013.

The serious allegation about the "babies" comment by Mr Roberts had not been made at any time prior to the service of the claimant's witness statement in February 2017.

86. In relation to allegation 6, he submitted that there had been no ultimatum. The claimant was not suited to fast paced telephone work. This realisation had dawned on her so she initiated a conversation with Ms Gardner about alternatives. There was no ultimatum given: page 148 was an accurate record.

87. Mr Legard also made brief submissions on remedy issues which it is not necessary to record.

Claimant's Submission

88. On behalf of the claimant Mr Cullen addressed the constructive dismissal complaint first of all. He made clear that the claimant relied on the cumulative effect of the pleaded matters, not upon any one of them save for the events of 23 March 2016. He suggested that paragraph 13 of the claim form did not encapsulate the earlier pleadings and the claimant should be allowed some latitude in interpretation of her case. On credibility he invited us to prefer the claimant's evidence. The Tribunal should bear in mind the reality of what happens at work.

89. Dealing with the allegation about events in late 2013 he invited us to take account of the October matter as background to the disciplinary issue in November. The claimant's work had not changed. She had been happy and valued before. The respondent failed to give enough credence to the factors which contributed to her errors in late 2013. The claimant did not accept that what she did could reasonably be construed as misconduct. The respondent therefore entered into the deal in December 2013 to avoid Tribunal proceedings. The claimant was forced into it at a time when she was heavily pregnant.

90. In relation to the events of early 2015 he suggested that Mrs Beckett had been led by Mr Roberts in relation to her attitude towards childcare costs. Mrs Beckett had to deny the comment even though she knew it had been made.

91. In relation to the events of February 2016 onwards, Mr Cullen submitted that the evidence of Mr Roberts mixed truth and falsity. The concessions he had made in his evidence were a tactically astute way to cover his tracks. He embarked on a course of conduct to force the claimant into resigning. It was not accepted by the claimant the return to training in February 2016 was not a demotion and was a reasonable step, but it was the way she was treated after it. Calling her a "new starter" undermined and belittled her. It was odd that there was a reference back to the December 2013 discipline. Although the delay before her return to work was no longer criticised, there was still a lack of confidence which was made worse by the way management treated her. To suggest that she was feigning headaches was entirely inappropriate. She had not said that she had not given 100% in the past.

92. The comment about "having babies" was the most significant comment. We were asked to conclude that the claimant would not have made that allegation were it not true.

93. The action over performance taken on 23 March was taken too swiftly. The claimant had only gone live a couple of days earlier. She needed more training and support. The options must have been discussed between Mr Roberts and Mrs Beckett before this meeting. The talk of moves came out of the blue and it was said that it was inevitable she would be dismissed. We were invited to find that there had been an ultimatum, and that trust and confidence had been breached then if not before.

94. In relation to direct discrimination Mr Cullen accepted that the claimant was no longer critical of the return to the training pod in February 2015 but he invited us to take the view that there had been direct discrimination in the subsequent comments and treatment of the claimant into March. On time limits he submitted the last discriminatory act was 23 March and that the illness of the claimant meant that it would be just and equitable to extend time.

95. Mr Cullen also briefly addressed some remedy issues which we need not record.

Discussion and Conclusions

1. Credibility

96. Before addressing the legal complaints it was necessary for some disputed factual issues to be resolved. They primarily related to comments alleged to have been made by the respondent's witnesses. Both advocates addressed credibility in their closing submissions and we formed a view about respective reliability first of all.

97. Each of the three main witnesses (the claimant, Mr Roberts and Mrs Beckett) gave evidence in an apparently credible manner, but there were some matters suggesting that the respondent's evidence was ultimately more reliable than that of the claimant.

98. Firstly, the claimant denied having said in the meeting on Friday 4 March 2016 that she had not given 100% in the past. However, that phrase appeared in the note kept by Mr Roberts at page 145 and there was something to the same effect in the email from Ms Delooze the following Monday (page 147). Mr Roberts explained very clearly in his oral evidence to our hearing how that admission by the claimant had struck him as surprising. Given the two separate references to such a comment the Tribunal found as a fact that the claimant did make that comment. Her denial of having done so counted against her reliability.

99. Secondly, the claimant's case on the facts seemed to develop as time went on. There was much in her witness statement that we were surprised did not appear in the claim form or the resignation letter, including some comments of obvious significance in the context of a pregnancy/maternity case which appeared only in paragraph 35 of her witness statement (the allegation that Mr Roberts commented that the claimant kept "having babies").

100. Thirdly, her account of some matters which did appear in the claim form developed. The claim form and witness statement gave the impression that Mrs Beckett had made one comment about affording childcare, but in oral evidence the

claimant elaborated, saying such comments had been said twice and giving more detail about the circumstances.

101. Fourthly, we were satisfied that there was an element of retrospective reinterpretation of events by the claimant, as Mr Legard submitted. The best example was probably the delay in the return to work until 1 February 2016. At the time (page 144) the claimant described the arrangement as "perfect", but by the time of her resignation letter at page 158 that had been reinterpreted as unfair and a matter on which she had been given no choice.

102. Fifthly, we were impressed in particular by Mr Roberts' evidence. He made some candid admissions not limited to the headache comment recorded by Ms Delooze at page 147. He also conceded that he had said things for which there was no contemporaneous record, including comments about the claimant being a new starter. He could easily have denied making such comments. Mr Roberts also readily accepted that with hindsight the mention of the discipline matter in the meeting on 18 March was inappropriate because Ms Delooze had not been aware of it at the time. We were satisfied these were the hallmarks of a candid witness, not (as Mr Cullen submitted) a tactically astute way of covering his tracks.

103. Putting those matters together we found the evidence of the respondent's witnesses to be more reliable than that of the claimant in relation to any disputed matters where there was no contemporaneous record made.

2. Constructive Dismissal

104. The Tribunal then turned to the legal complaints pursued. The first matter we addressed was the constructive dismissal complaint. We reminded ourselves of the relevant legal framework. The test to be applied is the test formulated by the House of Lords in **Malik.**

105. Importantly, that is an objective test. The fact that an employee has lost trust and confidence does not mean that there was been a breach of the **Malik** test. It is also a high standard for an employee to overcome. Not every action by an employer which can properly give rise to a complaint by an employee breaches trust and confidence. That was emphasised by the Employment Appeal Tribunal in **Frenkel Topping v King**.

106. Against that background we turned to the six allegations which the claimant maintained together amounted to a fundamental breach of contract. Mr Cullen was careful to emphasise in submissions that the claimant did not suggest that any matters in isolation amounted to a breach of trust and confidence save for the events of 23 March. It was more a question of considering them one by one and then taking a look at the total picture revealed.

107. For convenience the allegation from paragraph 4 of the list of issues will be reproduced before we make findings of fact and explain our conclusions.

> **(a) The way the claimant was treated in November 2013 when she was shortly due to commence maternity leave, in that the respondent unilaterally changed her job role, brought unfounded disciplinary action against her and informed her colleagues of the disciplinary matters, which was embarrassing and humiliating;**

108. This allegation related to the events of November and December 2013 resulting in the written warning from early January 2014. The allegation as pleaded in paragraph 13 of the claim form had three elements.

Change to Role November 2013

109. The first element was a change to the claimant's job role. This was a matter which hardly featured in the oral evidence during our hearing. It was addressed briefly in paragraph 18 of the claimant's witness statement without an explanation of why it was considered detrimental. It was a move to the Arrow team until her maternity leave was due to begin in late January or early February 2014. In the meeting of 21 November as recorded at page 107 that move was described as a "clean slate" move. There had been a disciplinary issue in October in the course of which the claimant made clear that she felt that she was under undue pressure of work and not given enough support. Overall the Tribunal concluded that it was perfectly reasonable to put the claimant on some other work (for the relatively short period before maternity leave) given the concerns that she had raised.

Unfounded Disciplinary Action

110. The second element was that there was unfounded disciplinary action taken against the claimant. The Tribunal was satisfied that the respondent was entitled to pursue matters which were raised with the claimant in late 2013. There were reasonable grounds for concern that the claimant may have committed disciplinary misconduct, and indeed the claimant (to her credit) admitted that she had made errors and mistakes, although of course identifying some mitigating factors. The October disciplinary matter was dealt with in a compassionate way by Mrs Beckett, and due largely to the miscarriage earlier in the year she decided that no further action should be taken. Mr Cullen on behalf of the claimant very properly recognised that to have been a compassionate move at the time.

111. The December disciplinary issues resulting from the review of the claimant's files were taken forward and resulted in a written warning in January 2014. Of the four levels of punishment available in the respondent's disciplinary procedure, a written warning was the second most lenient. The respondent did not impose a final written warning or dismissal. Further, the written warning was administered at a time when the claimant was not going to be at work anyway. She was on paid leave prior to the commencement of her maternity leave and by the time she returned to work the period for which the warning remained live would have expired anyway. There was therefore no chance of transgression in that period.

112. We rejected the allegation the respondent acted in any way unreasonably in those disciplinary matters, and there was certainly no breach of the **Malik** test or anything which might contribute to one.

Colleagues' Awareness

113. That left the third element of the first allegation, which was that the claimant's colleagues were informed of the disciplinary matters, leading to embarrassment and humiliation for her. The respondent accepted that the person tasked with reviewing the claimant's files, Ms Evans, saved her record in a public folder with the title

"Nicola's errors". That was an inappropriate way to proceed and the respondent did deal with it as part of disciplinary matters against Ms Evans in due course. There was no suggestion by the claimant it was authorised by management. It appears to have been a decision taken by Ms Evans of her own volition and management addressed it appropriately once they became aware of it. Such an error by a colleague, if appropriately addressed, cannot reasonably contribute to a loss of trust and confidence in the employer as a whole.

114. More broadly, the claimant's witness statement at paragraph 13 referred to discussions between the management team with an unnamed colleague or two which led to her disciplinary issues becoming more widely known. It is entirely understandable that the claimant was concerned at this. However, at the time she did not treat it as destroying trust and confidence nor, in our judgment, could it reasonably have had any material effect by the time she came to resign over two years later.

115. Overall on this allegation we accepted that the claimant was upset and embarrassed by the disciplinary proceedings and surrounding circumstances; those were particularly unwelcome given that she was shortly to go on maternity leave. However, the respondent acted entirely reasonably in its pursuit of those matters and when viewed objectively there was no significant cause for complaint.

<u>December 2013 "Deal" ?</u>

116. It is convenient at this point to deal with the allegation the claimant made that in December 2013, shortly before the disciplinary hearing, she did a deal with Mrs Beckett that she would not pursue Employment Tribunal proceedings and would accept a written warning in return for paid leave prior to maternity leave.

117. We were satisfied that no such deal was reached. Mrs Beckett, we concluded, was not perturbed by the threat of legal action at the end of the grievance letter from the claimant's solicitors of 1 December 2013 at pages 116 and 117. Further, Mrs Beckett was not able to dictate the decision that Mr Roberts was going to make on the appropriate disciplinary sanction, if any. We were satisfied that the paid leave was genuinely a compassionate move by Mrs Beckett and not part of any deal. The claimant was heavily pregnant. Mrs Beckett had recently learned of an earlier miscarriage, and it was not in dispute that she had acted compassionately in dropping the October disciplinary matter. The claimant's performance had been affected by the stress resulting from the way she was being treated, and in those circumstances Mrs Beckett could only be credited for offering to allow the claimant to take paid leave before her formal maternity leave began. We rejected the contention that was any kind of deal involving the claimant not pursuing Tribunal proceedings.

> **(b) In November 2014 the claimant was treated differently because she informed the respondent she was pregnant. The respondent changed the claimant's role continuously which was unsettling and disturbing for the claimant whilst pregnant;**

118. This allegation, according to paragraph 13 of the claim form, related to the return to work in November 2014 but we were satisfied that was an error in the date. On the claimant's own case in her witness statement Mrs Beckett was not aware of the pregnancy until January 2015. That was consistent with Mr McDonald's

evidence that the claimant was in a training period from November 2014 into the New Year. It was really about January 2015 onwards.

119. The claimant asserted that her role was continuously changed because she had told Mrs Beckett she was pregnant with her maternity leave due to begin in April 2015. It was not in dispute the claimant was moved to work for three different clients in a relatively short period. However, we were satisfied that was all Case Manager work within the scope of the contract she had signed in the previous November (see clause 2). The claimant explained in evidence that it was difficult to adapt her work to the differing client requirements but she was offered support from colleagues. Viewed objectively we were satisfied that this was a relatively minor matter, bearing in mind in particular that the claimant made no grievance or complaint about this matter at the time. There was no unreasonable treatment meeting the **Malik** test or contributing to such a breach.

> **(c) Delaying her return to work without any proper cause in January/February 2016 following maternity leave and making improper comments relating to the claimant returning to work and her inability to afford childcare;**

120. We considered the alleged comments before addressing delay.

Childcare Comments

121. Comments about the claimant not being able to afford childcare were alleged to have been made in February or March 2015 rather than on return to work in the following year. The allegation was that Mrs Beckett said words to the effect of "you won't be able to come back as you couldn't afford childcare". That was mentioned in the resignation letter at page 158 and in the claim form. Mrs Beckett denied having made any such comment. Her case was that there had been a discussion about childcare and childcare vouchers but no such comments made

122. We noted that the claimant did not make any complaint about these comments in 2015. They were not raised until her resignation letter in early May 2016. As we have already observed, the claimant gave significantly more detail in her oral evidence than appeared in her witness statement. Bearing in mind our findings about respective credibility, we found overall these comments were not made by Mrs Beckett in the way the claimant alleged. We accepted there was a discussion about childcare vouchers, or childcare generally, in passing between the two of them, but we were satisfied that this was an example of the claimant retrospectively construing these matters in a negative light when they were not seen as negative matters at the time.

Antenatal Appointment

123. The same was true, we concluded, of the antenatal incident which appeared in the claimant's witness statement at paragraph 28. Mrs Beckett denied that a member of staff who was pregnant would be required to take holiday in order to attend an antenatal appointment. There was no record of any complaint about this at the time and nor did it appear in the claimant's resignation letter. Mrs Beckett had acted with compassion towards the claimant in 2013, having been aware of the miscarriage, and we were satisfied that Mrs Beckett would not have taken such a

hard line with the claimant over an issue of this kind. We found as a fact that this did not happen as the claimant alleged.

Delay in Return to Work

124. The final element of this allegation was about delay to the return to work. In submissions Mr Cullen said on behalf of the claimant that she was no longer critical of the delay; a sensible concession in our view because it was apparent that the financial issue, not the delay in itself, was her main concern at the time. The financial issue was resolved by holiday pay in a way she described as "perfect" in the telephone discussion recorded at page 144.

125. Overall we were satisfied that there was nothing this allegation which amounted to or could contribute to a breach of trust and confidence.

(d) Subjecting the claimant to training following her return from maternity leave in February 2016 and treating her differently because she had been away from the office due to maternity leave;

126. The practice of retraining someone returning from an extended period of leave (such as maternity leave) was something which the claimant had already experienced in November 2014, and in her resignation letter in May 2016 at page 158 she said that she accepted retraining in 2014 because it was normal procedure.

127. It was sensible therefore, we concluded, for Mr Cullen to accept in submissions that this was no longer an issue; the suggestion that this retraining amounted to some form of a demotion was withdrawn. Accordingly this allegation added nothing to any possible breach of trust and confidence.

(e) Making improper comments relating to the claimant's performance following her return from maternity leave in February 2016 without any investigation or disciplinary hearing;

128. We considered the comments as alleged by the claimant one by one. Some featured in the claim form; others did not. We addressed the pleaded case first.

"New Starter"

129. Paragraph 4 of the claim form identified that Mr Roberts had said that the claimant would be treated as a new starter. He accepted that, but explained that it reflected a positive view that the claimant would have a fresh start and be retrained, not least because the role had changed significantly since she last performed it.

130. We were satisfied that the comment was made in this sense and it was not a matter which, viewed objectively, was an unreasonable or inappropriate comment.

"A new Restons…"

131. Mr Roberts accepted that he said to the training group that it was "a new Restons", and that "it's a telephone based job and if you can't talk on the phone you can't do the job".

132. That was part of a message to all the members of the training pod, most of whom were new recruits, of the importance of telephone work. The job had changed and that message, if bluntly expressed, was nevertheless clear and appropriate. It was important that it was understood by everyone. We rejected the contention that viewed objectively there was anything unreasonable or inappropriate in making that clear to the claimant and to others.

"Headaches"

133. The third pleaded comment was that Mr Roberts said that the claimant had been hiding behind headaches and making excuses. Again Mr Roberts accepted that he did make a comment along these lines at the meeting on 4 March 2016. It was recorded in any event in the email from Ms Delooze at page 147.

134. That blunt comment reflected a genuine view on the part of Mr Roberts that the claimant had not been properly engaged in the retraining, and when challenged would offer this and other excuses for poor performance during role playing calls or in group training sessions. It was genuinely a source of frustration for Mr Roberts. The claimant was not a new starter unfamiliar with the company's work; she was an employee with long service who had done telephone work in the past. Mr Roberts and his colleagues were entitled to expect more of the claimant than from a new recruit, and to find it frustrating that she appeared not to be fully committed and engaged to her new role.

135. We rejected the contention that the comments on which the pleaded case was based amounted to or could have contributed to a breach of the implied term of trust and confidence.

Unpleaded Comments

136. In addition to the pleaded case there were a number of comments raised by the claimant in other places which it is appropriate to deal with.

137. The resignation letter said that Mr Roberts said to the claimant she "should know better", and in paragraph 36 of her witness statement this was put as him saying that she "should know this".

138. Mr Roberts accepted in his evidence that he had said this kind of thing to the claimant acknowledging that her previous experience meant that she should know things which the new recruits did not. He explained that in a group discussion where the training pod was being tested on their knowledge he would from time to time seek to deter the claimant from answering the question based on her prior knowledge of the respondent in order to give the new recruits chance to speak up and contribute as well. That seemed to us perfectly reasonable and we rejected the contention that those kind of comments, when viewed objectively, could be regarded as likely to breach trust and confidence, even if the claimant or others saw them as critical of her.

139. There was also the allegation in the witness statement (paragraph 33) that Mr Roberts described the claimant's previous work circumstances as "wishy washy" at the time she left to go on leave. This did not appear in her resignation letter and nor did it feature in the claim form. According to the witness statement it was said in a

one-to-one meeting in early February 2016. There was no contemporaneous record of this or any complaint about it. Mr Roberts said it was not a phrase that he would use. The phrase was attributed to the claimant by Ms Delooze in her email of 7 March 2016 about events that morning (page 147). However, a reference to the previous disciplinary issue, which is how the claimant construed that reference, was not in our judgment unreasonable. It was part of the positive aspects of the claimant being treated as a new starter and having a fresh start. We were satisfied, based on the evidence we heard, that although Mr Roberts did make a reference to the earlier problems he did not use precisely that phrase.

140. That left finally the comment that potentially was the most significant, which was the allegation (at paragraph 35 of her witness statement) that Mr Roberts said to the claimant, "You just keep having babies". If that comment was made it was very surprising indeed that it did not appear in the resignation letter or in the claim form. It only appeared in the claimant's witness statement served in February 2017. The allegation was strongly denied by Mr Roberts, and bearing in mind our conclusions about respective credibility, and the late stage at which the allegation was made, we rejected the claimant's allegation on the facts. In our view such a comment would have been entirely inconsistent with how Mr Roberts had managed the claimant over time, and although he had expressed himself in fairly blunt terms on occasion about performance issues, there was no trace of a discriminatory attitude which might give rise to such a comment. We found as a fact that this alleged comment was not made.

(f) Giving her an ultimatum to accept a demotion or be subjected to disciplinary proceedings and dismissed on 23 March 2016.

141. We found that page 148 was a reasonably accurate record of what Mrs Beckett said during the meeting, and of the gist of the claimant's responses. We did not have any other notes to assist us.

142. We accepted Mrs Beckett's evidence that she raised the options for redeployment because she had been told by Mikala Gardner that the claimant had raised that possibility herself earlier in the week.

143. Those options in any event reflected the basic reality of the situation. The claimant was not performing to the required standard, despite her previous experience and despite seven weeks of training and role play exercises. She had gone live earlier that week but there were still substantial concerns about how she was handling those live calls. It was clear that such a situation could not continue indefinitely. If the claimant did not improve her performance then she would find herself in a PDP, and if there was no improvement at that stage she would find herself in disciplinary proceedings with her employment at risk.

144. Upsetting as it may have been to have that spelled out, we rejected the claimant's case it amounted to an ultimatum. It was an accurate summary of the position. The claimant failed to appreciate the nuance that it all depended on her performance going forward. That might have been because she was upset, or because she felt that in truth she was not capable of the required performance and therefore she thought dismissal was inevitable. Nevertheless this was not what Mr Roberts or Mrs Beckett said. Their comments were accurately recorded, we

concluded, in the note at page 148. Dismissal was on the cards if performance did not improve, not inevitable come what may.

145. Accordingly we concluded that no ultimatum was imposed. It followed that there was no breach of the **Malik** test on 23 March. There was reasonable cause for managers to make the claimant's precarious position clear to her and to discuss an alternative which they believed she had already raised herself.

Cumulative Effect

146. Nor, we concluded, was there any breach of trust and confidence when all these matters were looked at cumulatively. The events of 23 March 2016 could not amount to a final straw turning the earlier matters into a fundamental breach of contract. The whole sequence represented reasonable management of the situation.

147. That does not mean that the claimant was wrong to resign. That was a matter for her and we did not doubt that the claimant genuinely felt that she was under pressure. It was upsetting and distressing for her to have these problems at work, particularly after she had been there for such a long period.

148. However, the legal test is an objective test, and on that test we were satisfied that there was no fundamental breach of contract by the respondent. The claimant's resignation was not a dismissal under section 95(1)(c), and therefore the unfair dismissal complaint failed and was dismissed.

3. Breach of Contract – Notice Period

149. The same fate befell the wrongful dismissal claim. In the absence of any constructive dismissal there was no entitlement to notice where it is the claimant who chose to resign. That claim failed as well.

4. Direct Pregnancy and Maternity Discrimination

150. The pleaded case at paragraphs 10 and 11 of the claim form was that the discriminatory treatment was in the *de facto* "demotion" on return to work in February 2016 when the claimant had to undergo what was described as "basic training" again.

151. As we have indicated, during his submission on the constructive dismissal claim, Mr Cullen withdrew any suggestion there had been a *de facto* demotion or any objection to the retraining period, and therefore read literally that alone was fatal to the discrimination complaint. There was no detriment under section 39(2)(d).

152. Mr Cullen sought to argue, however, that the claim form should be read more broadly and that the allegation of less favourable treatment should encompass matters outside paragraphs 10 and 11, including the comments and subsequent treatment in March. We rejected that contention. The claim form was professionally drafted, the issues were clearly delineated at a case management hearing and in so far as Mr Cullen's submissions incorporated any application to amend, it would not be appropriate to allow that after the conclusion of the evidence.

153. Accordingly we found that the direct discrimination complaint failed. We were satisfied that there was no detriment to the claimant within section 39(2) in the arrangements made for retraining on her return to work.

154. In any event, even had the retraining been a detriment, the claimant would have been in exactly the same position had she been returning to work after a period of absence that was unrelated to pregnancy or maternity, meaning that less favourable treatment could not be established.

155. The time limit issue became academic given that we rejected the complaint on its merits, but it is appropriate to record what we would have decided had that claim been well-founded. The decision that the claimant should return on 1 February as part of the training pod was actually made in December 2015, but even if we treated it as made on 1 February 2016, and ignoring the ACAS conciliation period of 17 days, the three month time limit would still have expired in the middle of May 2016. It followed that the claim form was presented some six weeks or so out of time.

156. There was no basis on which we could find there was any continuing act of pregnancy discrimination which would bring the claim within time. This was the last allegedly discriminatory act.

157. Further, had it succeeded on its merits we would not have found that it would have been just and equitable to extend time. We did not dispute that the claimant was made ill by what was happening (that was evidenced by the fit notes, despite the lack of detailed medical evidence) but the claimant was well enough to instruct solicitors in the middle of April 2016 to send the "without prejudice" letter. That was well inside the primary limitation period, so on the information before us we would not have found it just and equitable to extend time.

158. For these reasons all the complaints were dismissed.

Employment Judge Franey

27 March 2017

REASONS SENT TO THE PARTIES ON

31 March 2017

FOR THE TRIBUNAL OFFICE