THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs J Howie	**AND**	**Interactive Development Education Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 8-12 May 2017**

Before: **Employment Judge A M Buchanan** **Members:** **Mrs J Cairns**
Mr M Ratcliffe

Appearances

For the Claimant: **Ms C Millns of Counsel**
For the Respondent: **Mr D Southall, Solicitor**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1 The claim for automatic unfair dismissal pursuant to regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") is dismissed on withdrawal by the claimant.

2 The claim of automatic unfair dismissal by reason of pregnancy/maternity pursuant to section 99 of the Employment Rights Act 1996 ("the 1996 Act") is dismissed on withdrawal by the claimant.

3 The claim of unfair dismissal pursuant to sections 94/98 of the 1996 Act is well founded and the claimant is entitled to a remedy.

4 The claim of pregnancy discrimination by dismissal pursuant to sections 18 and 39(2)(c) of the Equality Act 2010 ("the 2010 Act") is dismissed on withdrawal by the claimant.

5 The claim of pregnancy discrimination by detriment pursuant to sections 18 and 39(2)(d) of the 2010 Act is well-founded and the claimant is entitled to a remedy.

6 The alternative claim of sex discrimination is dismissed.

7 The alternative claim for a redundancy payment is not well-founded and is dismissed.

8 The claimant is entitled to compensation for unfair dismissal in the sum of £21772.90 and subject to the provisions of the next paragraph, the respondent is ordered to pay such sum to the claimant forthwith.

9 The Employment Protection (Recoupment of Benefits) Regulations 1996 ("the 1996 Regulations") apply to this award and the particulars required by Regulation 4(3) are:-

9.1 The monetary award is £21,722.90.

9.2 The amount of the prescribed element is £11,557.46.

9.3 The dates of the period to which the prescribed element is attributable are 16/09/16 – 31/07/17.

9.4 The amount by which the monetary award exceeds the prescribed element is £10.165.44.

10 The respondent is ordered to pay to the claimant compensation for unlawful discrimination pursuant to section 124 of the 2010 Act (including interest to the date of calculation as specified in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996) in the sum of £4,419.94. For the avoidance of any doubt, the 1996 Regulations do not apply to this award.

11 There will be no award for Tribunal fees pursuant to Rule 76(4) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules").

12 Subject to paragraph 9 above, the total sum payable by the respondent to the claimant is £26,192.84 and is payable forthwith.

REASONS

Preliminary matters

1.1 By a claim form filed on 24 October 2016 the claimant brought proceedings against

four respondents. The claimant relied on four separate early conciliation certificates and on each of which Day A was shown as 26 August 2016 and Day B as 26 September 2016.

1.2 On 21 November 2016 a response was filed on behalf of Interactive Development Support Limited and the now remaining sole respondent Interactive Development Education Limited in which all liability to the claimant was denied. On the same day a separate form of response was filed on behalf of the Council of the City of Newcastle upon Tyne ("NCC") and Newcastle City Learning again including a denial of liability.

1.3 A private preliminary hearing ("PH") took place on 2 December 2016 before Employment Judge Garnon at which it was noted that Newcastle City Learning was not a legal entity but a department of NCC and therefore Newcastle City Learning was removed from the proceedings. It was noted that there was an issue as to whether or not the claimant's contract of employment had transferred to NCC and accordingly a public PH to determine that matter was arranged for 13 February 2017. In addition the claimant was ordered to file further particulars of the detriments to which she claimed to have been subjected by the various respondents and those particulars were filed on 15 December 2016.

1.4 On 9 February 2017 the Tribunal was advised that the claimant wished to withdraw her claim against NCC and by a judgment signed on 10 February 2017 the claim against NCC was dismissed. The claimant by then had accepted that the correct name of her employer company was Interactive Development Education Limited and therefore at the hearing on 2 December 2016 Interactive Development Support Limited had been removed from the proceedings. Accordingly from 10 February 2017 onwards the only respondent in this matter has been Interactive Development Education Limited which we now refer to as "the respondent".

1.5 A further private PH took place by telephone on 13 February 2017 before Employment Judge Hargrove when issues in the claims were identified and various orders made for the final hearing which came before us as detailed above.

1.6 At the hearing on 13 February 2017 it was noted that the claims before the Tribunal were:-

1.6.1 A claim of automatic unfair dismissal pursuant to regulation 7 of TUPE and section 99 of the 1996 Act.

1.6.2. A claim of ordinary unfair dismissal pursuant to sections 94-98 of the 1996 Act.

1.6.3 A claim of discrimination because of pregnancy relying on the provisions of sections 18 and 39(2)(c) and (d) of the Equality Act 2010 ("the 2010 Act").

1.6.4 An alternative claim of sex discrimination relying on the provisions of sections 9 and 39 of the 2010 Act in case any of the alleged detriments occurred outside the protected period in respect of the claimant's pregnancy as defined in section 18(6) of the 2010 Act.

1.6.5 A claim for a redundancy payment.

1.7 The matter was listed to begin on 8 May 2017. On that day a non legal member who had arranged to sit on this case found that she was unable to attend by reason of urgent domestic circumstances and therefore the Tribunal arranged for Mrs J Cairns to attend and sit on the panel effective from Tuesday 9 May 2017. Accordingly the Tribunal hearing began on that day and continued through until the evening of Thursday 11 May 2017 when submissions were received. The Tribunal decided to release the parties and to deliberate in Chambers on Friday 12 May 2017 and therefore this judgment is issued with full reasons in order to comply with rule 62(2) of the 2013 Rules.

Witnesses

2 During the course of the hearing the Tribunal heard from the following witnesses:-

2.1 Gordon Quince – a Director of the respondent and the dismissing officer.

2.2 Valerie Ross – a former employee of the respondent whose employment transferred to NCC on 1 June 2016.

2.3 Alwyn Thow – Quality Manager with Interactive Development Support Limited (an associated company of the respondent) who acted as the appeal officer in respect of the claimant's dismissal.

2.4 Pauline Bell – who acted as a note taker at various meetings attended by the claimant relevant to this matter and in particular at the hearing on 17 June 2016 and at her appeal against dismissal hearing on 4 August 2016.

2.5 The claimant. On behalf of the claimant two further additional statements were filed which were accepted and therefore read and accepted by the Tribunal namely the statements from:-

2.6 Ian Grayson – who was the claimant's trade union representative at the meetings relevant to this matter.

2.7 Amy Hunt who is a Regional Officer of the National Union of Teachers and who represented the claimant at the appeal against dismissal hearing which took place on 4 August 2016.

Documents

3 The Tribunal had before it a bundle of documents comprising 423 pages. As the matter progressed additional documents were added bringing the documents to 447 pages. Any reference in this judgment to a page number is a reference to the corresponding page within the agreed bundle.

Comment on witnesses

4 The Tribunal makes the following brief comments in respect of the principal witnesses who appeared before it:-

4.1 Gordon Quince ("GQ") – The Tribunal found the evidence from this witness to be given in a hesitant and vague fashion. The witness clearly was not familiar with the contents of the agreed bundle and was not on top of the details of the case which, given its importance to the respondent, was surprising.

4.2 Alwyn Thow ("AT") – The evidence from this witness was not compelling. It is clear that she had approached her role as appeals officer in a muddled way and in particular had not read any of the papers in relation to the matter prior to start of the appeal hearing – in particular she had not familiarised herself with the letter of dismissal or the claimant's letter of appeal. As a result the appeal hearing was thoroughly confused. The witness accepted in cross examination that she had rubber stamped the original decision. When that matter was questioned in re-examination, the witness claimed not to have understood what rubber stamp meant. The Tribunal found the evidence of this witness particularly unreliable. The witness accepted that her method of dealing with this appeal was not consistent with the approach she adopted in dealing with appeals in the associated company in which she worked.

4.3 The claimant – The evidence from the claimant was consistent and credible. It was clear throughout her evidence that the events in question had had a clear and demonstrable effect upon her. The claimant was familiar with all aspects of the case and was able to express her view of matters in a clear and compelling way.

Factual issues

5 There were not many factual issues for the Tribunal to determine but such as there were are resolved in the findings of fact which follow. In the main where conflict arises between the parties the Tribunal prefers the evidence of the claimant to that of the witnesses for the respondent for the reasons set out above.

Legal issues

6 The legal issues in the matter were simplified as the case progressed and as various heads of claim fell away. At the outset of the hearing it was confirmed that the claimant would only pursue one allegation of detriment namely that set out at paragraph 1 of the further particulars on page 18A. The allegation related to the alleged failure of the respondent to advise the claimant in respect of a safeguarding investigation being undertaken by NCC and being denied the opportunity to state her case in relation to that investigation which resulted in a requirement from NCC to the respondent to remove the claimant from the relevant contract. In addition at the end of the evidence, the claimant withdrew allegations that her dismissal was an act of pregnancy discrimination and that her dismissal was automatically unfair by reason of a transfer pursuant to Regulation 7 of TUPE and/or that her dismissal was automatically unfair by reason of pregnancy pursuant to section 99 of the 1996 Act. Accordingly the Tribunal was left to determine two substantive claims namely:-

6.1 A claim of detriment because of pregnancy and

6.2 A claim of ordinary unfair dismissal.

7 The legal issues in those matters were as follows:-

Pregnancy Detriment Claim

7.1 Was the claimant on maternity leave from 10 July 2015 until 8 July 2016?

7.2 Did the respondent fail to advise the claimant of allegations made against her as part of a safeguarding investigation undertaken by NCC from January until March 2016? Was the claimant thereby not given the opportunity to state her case before the investigation concluded and was the claimant thereby denied the opportunity to respond to the conclusions of the investigation?

7.3 If so, does this amount to a detriment within section 39(2)(d) of the 2010 Act?

7.4 If so, was the detriment in the protected period as defined in section 18(6) of the 2010 Act?

7.5 If so, did the respondent impose any detriment because of the claimant's pregnancy or because of illness suffered by her as a result of it or because the claimant was exercising or seeking to exercise or had sought to exercise the right to ordinary or additional maternity leave?

7.6 It is noted and recorded that there were no time issues in relation to that particular allegation.

Ordinary unfair dismissal

7.7 Has the respondent proved the reason for dismissal as third party pressure placed on the respondent by NCC in relation to a contract held by the respondent from NCC? If so, did this amount to some other substantial reason within section 98(1)(a) of the 1996 Act?

7.8 If so, did the respondent act reasonably in treating that reason as sufficient to dismiss?

7.9 If not, and the dismissal is unfair could and would the claimant have been fairly dismissed by the respondent and if so when – the **Polkey** question?

In relation to remedy:-

7.10 The claimant sought the remedy of compensation. How should compensation be assessed?

7.11 As the claimant had been ill at all times since the date of her dismissal, was the claimant entitled to compensation for loss of earnings?

7.12 Do the1996 Regulations apply to any award?

7.13 Should there be an award for injury to feelings and/or injury to health in respect of the discrimination claim?

Findings of fact

8 The Tribunal, having considered the oral evidence received from the witnesses, the way in which those witnesses answered questions in cross-examination and the documents to which it was referred during the course of the hearing, makes the following findings of fact on the balance of probabilities:-

8.1 The claimant was born on 11 February 1985. She began work for the respondent company on 14 June 2006 and was dismissed effective from 16 September 2016. At the time of her dismissal the claimant was employed as LLDD (learners with learning difficulties or disabilities) Manager.

8.2 The respondent company is one of a group of companies effectively controlled by the GQ who is a director. The group of companies had at one time employed some 180 employees but at the material time had employees numbering approximately 160. A fellow director of GQ was Paul Bagnall ("PB") who is the father of the claimant. GQ and PB had worked together for many years until PB retired from the respondent in July 2015. An agreement had been reached between PB and GQ for GQ to acquire the shares of PB in the respondent subsequent to his retirement. The events central to this case have resulted in that offer being withdrawn and, as a result, relations between GQ and PB have substantially deteriorated.

8.3 The respondent company provides education and training services and part of that provision is to people with learning difficulties and/or disabilities. It is a closely regulated sector and the respondent is subject to inspections from, amongst others, OFSTED.

8.4 One of the places of business of the respondent was Westgate College which is owned by NCC and it operated in a small annex ("Westgate") there. In that building the respondent delivered training pursuant to a contract between itself and NCC. The most recent contract ("the Contract") between the respondent and NCC at the material time was that at page 75 onwards which was a contract for the provision of learning for a period of 12 months from 1 September 2015 with an option to have an extension for a further period to 31 July 2017. The Contract was detailed and included at section B7 (pages 89-90) provisions that NCC reserved the right to refuse to admit or to withdraw permission for any of the employees of the respondent to enter Westgate College and also a provision at clause B7.4 which read – *"The decision of the Council as to whether any person is to be refused access to any premises occupied by or on behalf of the Council shall be final and conclusive".* In addition clause B7.5 read, "*The Contractor shall replace any of the Contractor's Employees who the Council reasonably decides have failed to carry out their duties with reasonable skill and care. Following the removal of any of the Contractor's Employees for any reason, the Contractor shall make sure such person is replaced promptly by another person with the necessary training and skills to meet the requirements of the Services".*

8.5 The Contract provided for the respondent to deliver to learners with severe learning difficulties training in English and Maths and Employability and Functional Skills. The training was delivered by tutors supported by learning assistants and often the service users would be accompanied by their own carers. The service users were relatively few in number given the high degree of need evinced by them and of the necessity for one to one, if not more than one to one, personal tuition. The claimant's husband had been

a tutor on the Contract and indeed remained so until his employment came to an end through an agreed settlement in November 2015.

8.6 The claimant had worked for the respondent and effectively worked her way up through the ranks and had fulfilled the role of tutor in Maths for which she was qualified but at the material time had effectively become the manager in the sense that she was the person at Westgate to whom all staff (numbering some 20/30) were to refer in the event of problems. We find that if a matter which was raised with the claimant was beyond her skill or experience, she would refer them to her father PB who made frequent visits to Westgate - at least several times a week. We conclude that the claimant was the "go to" person at Westgate for the staff but she did not have formal line management responsibilities for them. She did not carry out appraisals or supervision of staff and if there were serious staff issues they would be referred to and dealt with by PB and if necessary by GQ. We reject the evidence of GQ that the claimant was in full control of staff at Westgate.

8.7 The claimant became pregnant and it was agreed that she would begin maternity leave on 8 July 2015. The claimant did so and gave birth to her son on 24 July 2015. The claimant intended to take 12 months away and it was intended that she would return to work on 10 July 2016.

8.8 The claimant's maternity leave coincided with the retirement of her father and the claimant attended a retirement party in July 2015 shortly before she gave birth. Before the claimant left for maternity leave she was in charge at Westgate of delivery of the provision required to be delivered by the Contract which in turn was fulfilling a contract between NCC and the Skills Funding Agency ("SFA"). In addition the claimant was providing the service in relation to a contract held by the respondent with the Education Funding Agency ("EFA") which was a direct contract between the respondent and EFA. Some of the provision required by the EFA contract was delivered at Benton House which was the main office of the respondent but such provision as required by the EFA contract as was delivered at Westgate was delivered under the control of the claimant as set out above. We find that at the time the claimant began her maternity leave she was spending approximately equal amounts of time on the EFA contract and the Contract. We find that the amount of time spent by the claimant between those two contracts varied over the weeks and months depending upon the requirements of the contracts themselves.

8.9 During the second half of 2015 the claimant raised a grievance in relation to matters which had occurred at her father's retirement party on 23 July 2015. She set out her grievance in a letter of 21 August 2015 (page 134). The grievance was investigated and the claimant's maternity leave replacement, Sam Riley, wrote to her on 21 September 2015 (page 143) with the outcome of the grievance which was partially upheld. The claimant was not happy with the outcome and wrote to GQ on 24 September 2015 (page 146) which was not in fact an appeal but which was raising issues in respect of the way the grievance had been conducted. That matter is not of much significance or relevance to this Tribunal.

8.10 In early January 2016, GQ was contacted by NCC and made aware that an anonymous complaint had been received about the provision provided by the respondent at Westgate under the Contract. The matters raised were serious and GQ

was summoned to a meeting at NCC with Caroline Miller ("CM") - an official of NCC. There were several meetings between GQ and CM and at one of those meetings PB was in attendance having agreed to offer assistance to GQ on the matter. It was made plain that safeguarding issues had been raised and that a confidential investigation was to be undertaken by NCC. PB made it plain to CM and to GQ that the claimant was not to be contacted about the matter because she was away on maternity leave and she was ill. Furthermore, at that time it appeared that the matters which had been complained about had arisen after the claimant had left for her maternity leave and were not therefore of relevance to her. The claimant was made aware of the necessity for the NCC investigation by PB but the information was conveyed in an informal way.

8.10 On 2 February 2016 the claimant accessed her e-mail account held in the respondent's IT system and noted the 27 e-mails dating from 25 October 2012 until 15 June 2015 largely from her husband to herself had been accessed and forwarded to Sam Riley's work and personal e-mail accounts and the work e-mail accounts of GQ. Some of the e-mails had had critical comments added into them. This upset the claimant and she raised the matters with GQ in an e-mail of 2 February 2016 (page 308). As a result GQ invited the claimant to a grievance hearing. The claimant in fact did not wish to formally raise a grievance and her union representative Ian Grayson (IG) contacted GQ on 8 February 2016 to advise him of that and therefore the respondent decided to investigate the claimant's complaints informally and on 16 February 2016 (page 154) GQ wrote to the claimant in the following terms:-

"I can confirm that the local authority requested e-mails for the purposes of an investigation into a number of concerns raised by an anonymous individual and as we are accountable to the local authority we complied with their request. As you are on maternity leave we did not ask you to do this".

GQ reminded the claimant quite properly of the company policy which allowed them to access e-mails held on all their own systems. The claimant was not satisfied with that action and on 10 March 2016 (page 167) raised a formal grievance about the matter with GQ and attended a grievance meeting taken by Pauline Bell of the respondent on 12 April 2016 (page 186).

8.11 On 15 April 2016 the claimant and her husband were visited by the police who stated that they were investigating a complaint received from Sam Riley on 8 April 2016 in respect of an alleged threat made by the claimant's husband to Sam Riley. That visit resulted in no further action save that the claimant complained about it and added the issue to her grievance by writing to Pauline Bell on that same day (page 193). The claimant was not happy with the response that she received and therefore formally updated her grievance on 26 April 2016 (page 200).

8.12 On 27 April 2016 the claimant and her husband had a second visit from the police this time investigating an alleged unlicensed and illegal firearm. This information had been gleaned from the e-mails which had been accessed from the claimant's machine and as a result the claimant raised a further grievance on that matter by writing to Pauline Bell on 28 April 2016 (pages 201-202). Further correspondence on the point took place between GQ and the claimant on 28 April 2016 (page 204).

8.13 On 3 May 2016 (page 206) GQ wrote to the claimant a letter which reads:-

"I am writing to notify you that the NCL contract has been terminated from 31 May 2016 on the following grounds:
Council considers that the evidence uncovered as part of the safeguarding investigation constitutes a breach of contract terms and conditions and also a breach of SFA funding criteria covered within the contract terms;
Continuing to fund ID could bring the council into disrepute;
Loss of confidence in the management and college for ID;
Failure of ID to report the safeguarding issues.

I also attach a letter from Caroline Miller in respect of the transfer and of the contract and the team as of 31 May 2016. As you can see from the letter you are not included in the transfer and I ask you to come in to consult with me on this matter as soon as possible".

8.14 That correspondence failed to enclose two letters which the respondent had received from NCC. Those two letters were a letter dated 21 March 2016 (page 175) in which NCC had exercised their right to remove the claimant and her husband Gareth Howie from the Contract and a letter of 29 March 2016 (page 177) which had in fact terminated the Contract effective from 31 May 2015. The claimant pointed out that the letters referred to had not been sent to her and GQ then sent onto her the letter of 21 March 2016 (page 175). When the claimant received that letter she was shocked given that it removed her from the Contract and this was the first she knew of it.

8.15 The claimant responded to GQ and suggested meeting with him. On 6 May 2016 GQ suggested there should be a "fact finding exercise" (page 215) and that the meeting would take place on 13 May 2016 at Benton House. On 4 May 2016 Pauline Bell had given the claimant the outcome of her grievance in respect of e-mails which the claimant did not accept and appealed.

8.16 On 13 May 2016 the claimant met with GQ. This meeting took place at the claimant's request at Jesmond Library (pages 225-230). The claimant was made aware of the safeguarding allegations which were principally made against her husband and the claimant was able to advise GQ that one of the allegations in respect of not allowing a learner to visit the toilet had not been upheld when investigated by NCC. The claimant made clear her position that she was not the line manager of the staff at Westgate and in particular not the line manager of her husband. She made clear her position that no one had come to her regarding safeguarding issues related to her husband or any other member of staff. The claimant also asked why NCC had not contacted her in relation to their investigation. GQ explained that her father had stated that she would not be available for interview because she was unwell and GQ advised the claimant that she needed to take that matter up directly with NCC if appropriate. It was agreed that further investigation would continue and that GQ would keep in touch with the claimant. On 14 May 2016 the claimant made a complaint to NCC about the investigation. That complaint was ultimately rejected on 3 August 2016.

8.17 On 17 May 2016 the claimant wrote to Pauline Bell with details of her appeal against the grievance outcome and attended a grievance appeal meeting on 10 June 2016 with Ian Grayson.

8.18 In the meantime GQ had written to Caroline Miller on 24 May 2016 (page 239) saying:-

"You have stated that you cannot disclose confidential information from the safeguarding investigation but it would be helpful to provide us with substantial reasons for Jennie's removal from your contract".

This was the only contact between GQ and NCC in respect of the claimant's position.

8.19 A prompt reply (pages 240/241) was received on 26 May 2016 in which it was confirmed that the removal of the claimant had been asked for because of information in relation to complaints regarding her husband GH and examples were set out of the alleged behaviour which had led to that request. It was alleged that the claimant had had the matter reported to her which she had dismissed as her husband's "sense of humour", that several staff felt bullied and intimidated by GH and felt unable to report it to the claimant, that staff reported they had felt punished for raising concerns with the claimant about GH and that there were concerns raised by external care agencies about the management of Westgate generally. We find that the respondent through GQ did not at any time ask NCC to reconsider their decision to remove the claimant and/or to cancel the Contract. Furthermore the respondent did not at any time seek to suggest that the claimant should be interviewed and seen by NCC before it concluded its investigation.

8.20 By letter of 6 June 2016 (page 242) the claimant was invited to a "*disciplinary hearing*" with regard to "*Council's third party pressure notice removing you from site*". That letter included minutes of the meeting of 13 May 2016, the NCC letter of complaint, the claimant's job description and the disciplinary policy. The claimant was told she may face dismissal. That meeting ultimately took place on 17 June 2016 and was minuted (page 258). This meeting lasted 13 minutes and was taken by GQ accompanied by PB as note taker. The claimant attended with Ian Grayson. There was confusion as to whether it was a disciplinary meeting or a meeting to discuss the third party pressure notice as it had been called. GQ wished to discuss with the claimant alternative roles for her but had not provided any details to her in advance and so an adjournment was agreed for her to look through the details of the three roles which had been offered. Having considered those roles, the claimant indicated that she did not meet the essential criteria for the roles she had been informed of. The three roles in question were QTLS Tutor (Emotional and Behavioural Difficulties), Health and Social Care Tutor (Sessional) and Tutor/Assessor for Health and Social Care. It was agreed that the respondent would write to the claimant again.

8.21 On 30 June 2016 GQ wrote to the claimant (page 262) inviting her to a "third party pressure meeting" which was to take place on 5 July 2016. The letter includes the following paragraph:-

"I understood your concerns that our previous meeting was labelled as a disciplinary hearing. As a result any disciplinary concerns have been put on hold to allow us to move through and complete the Third Party Pressure process".

8.22 The meeting duly took place on 5 July 2016 (pages 265-266) and lasted eight minutes. The claimant attended with Mr Grayson and GQ chaired with Pauline Bell as

note taker. At this meeting for the first time the claimant was made aware that the other contract on which she worked, namely the EFA contract, had also been removed from the respondent in May 2016. The claimant made the point that there could no longer be any third party pressure being applied in respect of her position because the Contract had been removed from the respondent company at the end of May 2016. There was broad agreement reached that the respondent no longer needed the LLDD Manager role which the claimant had fulfilled prior to her maternity leave and it was apparently agreed that there was a redundancy situation, particularly in light of the fact that the EFA contract had also been removed. The claimant made her position clear in relation to the three alternative roles she had been offered namely that the location was different, the terms and conditions were different and the hours and rate of pay were different and they were not managerial roles: it was made clear by Ian Grayson on behalf of the claimant that they were not considered as suitable alternative roles or suitable roles for redeployment. GQ made it clear that there were no other vacancies suitable for the claimant and therefore that he would consider the matter further.

8.23 On 8 July 2016 (page 275) GQ wrote to the claimant in the following terms:-

"Following our meeting to discuss the request for your removal from the NCL contract. We confirm there is no opportunity for redeployment available so therefore there is no alternative but to terminate your employment with notice. Your last day on maternity leave is 8 July 2016 and you are entitled to 10 weeks statutory notice ……..your final day of employment will be midday on the 24 October 2016.....You have the right to appeal against this decision".

That letter had incorrectly calculated the last day of work and a subsequent letter was sent correcting the last day of employment to 16 September 2016.

8.24 Whilst these matters were ongoing three other vacancies had arisen within the respondent: a Deputy Manager post for a children's residential care home run by the respondent, secondly a Functional Skills Tutor role and thirdly a Teaching Assistant role in Functional Skills**.** It is common ground that the Deputy Manager role was not suitable for the claimant. The Functional Skills Tutor role (pages 442-443) carried a salary of between £20,586 and £23,799 per annum and that role had in fact been given to Helen Hayes. This employee was an employee of the respondent working at Westgate who was due to transfer to NCC under the TUPE process resulting from the termination of the Contract. Helen Hayes did not wish to transfer and therefore to prevent her being out of work, the respondent appointed her to that role without advertising the role and without competitive interview. That process occurred in late May 2016. The Tribunal has no evidence as to who was appointed and when to the Teaching Assistant role but that is a role which pays £7.10 per hour and produced an annual salary of something in the region of £13,000.

8.25 The claimant received an e-mail from GQ on 8 July 2016 (page 276) in which he confirmed to the claimant *"We are terminating on notice after third party pressure from the local authority*". The claimant herself obtained from NCC the report of the safeguarding enquiry. This was not provided to her by the respondent at any time.

8.26 On 13 July 2016 the claimant received the outcome of her grievance appeal from AT and on 14 July 2016 the claimant appealed against her dismissal. The appeal

hearing took place on 21 July 2016 (page 283). The claimant attended with Amy Hunt and AT chaired the hearing accompanied by Pauline Bell. Prior to that meeting AT did not read any papers in respect of the matter. She did not read the letter of dismissal and she did not read the letter of appeal – any knowledge of the circumstances about which she was to adjudicate had been gleaned by "skimming" correspondence which is the word used by the witness to the Tribunal. The approach adopted was very different to the approach which she usually adopts when undertaking these duties within the company of the respondent group in which AT ordinarily works. Her approach was to listen to the claimant and then to go away and investigate the matter. Her approach was then not to go back to the claimant with the results of her investigation but simply to write to the claimant with the outcome of her appeal. She did that by letter of 4 August 2016 (page 301) in which the appeal was dismissed in summary terms as follows:-

"Having considered the grounds for your appeal and the evidence in relation to the matter, it appears to me that you were not automatically unfairly dismissed because the dismissal was not because of a TUPE transfer but because of 3rd Party Pressure raised after lengthy investigations by Newcastle Council over serious safeguarding incidents that had taken place many months earlier. This happened well before the cancellation of the contract with Newcastle Council".

We find that the words of that paragraph were not the words of AT but were placed in the letter by the HR Advisors used by the respondent and that indeed was admitted by AT in cross examination. The only part of the letter which was original drafting by the appeal officer were the following words "*It is therefore my conclusion that the decision to terminate under the third party pressure is upheld".*

8.27 The claimant sought to raise a further grievance in respect of the contents of the report of the NCC investigation but the respondent refused to entertain further grievances as the claimant was no longer an employee.

8.28 We find that many of the matters mentioned in the NCC report were simply never put to the claimant and she did not at any time have the opportunity to put her case either to NCC or to the respondent about them. We find that the details given to the claimant of the investigation by GQ at the meeting on 13 May 2016 were not adequate for her to offer any meaningful response to any of the matters which were there detailed.

Findings of fact on Remedy

9 Having deliberated on the question of liability, the Tribunal determined that the claimant was entitled to a remedy. It therefore moved on to deal with remedy. For the sake of convenience our findings of fact are here set out in respect of remedy which we make on the same basis as our findings of fact on liability.

9.1 The claimant received pay until 16 September 2016 and therefore has no loss until that day. The claimant was paid £27,600 per annum gross at dismissal which equates to £530.76 per week. It is accepted that the claimant received £1,834.66 per month net which equates to £423.38 per week net.

9.2 The claimant paid 1% of her salary to a pension and the respondent made a similar contribution of salary. The payment was £276 per annum for both the claimant and the respondent.

9.3 The claimant has been ill and not fit for work since 16 September 2016 and that position continued up to the date of the hearing before this Tribunal. The medical evidence before the Tribunal was limited to a report from the claimant's GP dated 27 February 2017 (pages 421-422) which indicated that the claimant had been experiencing continuing anxiety and poor sleep from the beginning of her maternity leave in July 2015 "*due to an ongoing series of events in relation to her employment and the lack of support and detrimental treatment from her employer".*

9.4 The medical report indicated that from December 2016 the claimant had been prescribed the antidepressant Trazodone 100mg daily and that was continuing up to the date of the Tribunal hearing.

Submissions

Claimant

10.1 On behalf of the claimant Ms Millns filed written submissions which extended to 17 paragraphs (10 pages) which were supplemented by oral submissions.

10.2 In addition Ms Millns filed a bundle of authorities namely:-

Dobie –v- Burns International Security Services (UK) Limited [1985] 1WLR43;
Bancroft –v- Interserve (Facilities Management) Limited UKEAT/0329/12/KN;
Henderson –v- Connect (South Tyneside) Limited UKEAT/0209/09;
Grootcon (UK) Limited –v- Keld [1984] IRLR 302.
Greenwood –v- Whiteghyll Plastics Limited EAT 2007 (brief summary)
Reference was made to the decision in **Scott Packing & Warehousing Co Limited –v- Patterson [1978] IRLR 166**.

The submissions are briefly summarised as follows:

10.3 In looking at whether the reason advanced is a substantial reason falling within section 98(1)(a) of the 1996 Act, the Tribunal should consider whether the reason is substantial and not wholly frivolous or insignificant and the interpretation of what is substantial is a subjective one and will depend on the facts and the type of the case. It is for the respondent to prove the reason for dismissal. If it does so, then it is for the Tribunal to assess whether the respondent acted reasonably in treating that reason as sufficient to dismiss. It was submitted that in dealing with that question in respect of cases involving third party pressure, the Tribunal should have regard to the injustice caused to the employee and in particular, in this case, the steps taken by the respondent to seek to persuade NCC to change its mind in relation to the removal of the claimant from the Contract and the steps taken by the respondent to find alternative work for the claimant within the respondent organisation.

10.4 It was submitted that, as the respondent did not dismiss the claimant until 7 July 2016 some three and a half months after the claimant was removed from the Contract

by NCC, the Tribunal should not be satisfied that the respondent had in fact proved that that was the reason for the dismissal.

10.5 It was submitted that there were other matters referred to by the respondent namely redundancy and conduct issues such that the position was so confused that the Tribunal could not be satisfied what in fact he reason for dismissal.

10.6 It was submitted that if the Tribunal was satisfied that third party pressure did amount to some other substantial reason and was the reason for dismissal, then the respondent had not acted reasonably and 15 factors were set out in written submissions which would point to the fact that the respondent had failed to act reasonably. It was said the respondent had made no attempt to persuade NCC to change its mind, did not inform the claimant about her removal until six weeks after it had occurred, did not consider the injustice to the claimant, did not seek to persuade NCC to hear from the claimant when it became clear that she was crucial to the investigation, did not advise the claimant of the ending of another contract namely that with EFA until 5 July 2016 which was some six weeks after that contract ended, did not offer the claimant two roles which were available after the ending of the Contract for which she was suitable namely a Teaching Assistant (Learning and Support) role and a Functional Skills Tutor role.

10.7 It was submitted that the meetings carried out with the claimant were shambolic, brief and simply ticking boxes. The claimant was given insufficient time to prepare for important meetings and was ambushed with conduct allegations at those meetings, that the respondent accepted the claimant was redundant and yet did not dismiss for that reason and conducted an appeal process which was fundamentally flawed. It was submitted that the claimant's dismissal was unfair.

10.8 In respect of the pregnancy detriment claim, it was submitted that the failure by the respondent to advise the claimant of the allegations against her and to afford her an opportunity to be interviewed by NCC amounted to a detriment. It was said that this was unfavourable and that there was evidence that that was because of the claimant's pregnancy because the respondent did update its other members of staff who were not away on maternity leave as to the basic details and progress of the NCC investigation. It was submitted therefore that the burden had passed to the respondent to prove why it acted as it did and that the Tribunal should not accept that explanation and should not accept that the treatment of the claimant was in no sense whatsoever on the grounds of her pregnancy.

10.9 In respect of remedy it was said that it was not possible for the Tribunal to speculate as to whether or not the claimant would have been made redundant because such a dismissal would have required consideration of a pool of candidates and selection criteria and the Tribunal simply had no evidence in relation to such matters. It was said that the claimant was entitled to full compensation at her level of pay at the point of dismissal but that if there was to be any reduction it should only be to the level of the pay scale of the alternative position of Functional Skills Tutor. It was submitted that there should be no **Polkey** deduction at all as the evidence was insufficient to support an assessment by the Tribunal but, if there was to be a reduction, it should be at the lower level.

10.10 It was submitted that the claimant should be entitled to future loss, that she had remained ill since dismissal by reason of the respondent's dismissal of her and that in those circumstances she is entitled to recover compensation for loss of earnings. The Tribunal was referred to the evidence of the claimant in that regard. The ill health was causally connected directly to the dismissal and the claimant's evidence on that point was credible. It was credible for the claimant to say that she would have accepted a role at a lower salary given that her husband was out of work and that they had a young family to support whilst her husband was trying to set up a new business. That evidence was compelling. It was suggested that the claimant would be in a position to find work by autumn 2017, given that once the stress of these proceedings was behind her it was likely that her health would improve.

10.11 In respect of injury to feelings it was submitted that there should be an award in the bottom **Vento** band and that that could properly reflect also injury to health.

Respondent

11.1 For the respondent Mr Southall filed written submissions extending to 26 paragraphs (8 pages) and made oral submissions and these are briefly summarised.

11.2 The respondent was not responsible for any detrimental conduct towards the claimant. The investigation which the claimant seeks to assert as a detriment was conducted by NCL on behalf of NCC and not by the respondent and there is no detrimental conduct towards the claimant by the respondent.

11.3 If there is then it was not because the claimant was pregnant or on maternity leave but was because the claimant's father had told GQ that she was not to be contacted in relation to the investigation because she was ill.

11.4 It is clear that the reason for the dismissal of the claimant was third party pressure and that amounts to some other substantial reason. GQ genuinely tried to find his way through a very complex and difficult and unique situation at the same time as dealing with the process of transferring staff to NCC under the 2006 Regulations.

11.5 It could be said that the meeting on 13 May 2016 was somewhat disorganised but that was followed by two further meetings prior to dismissal which were not.

11.6 It was submitted that the appeal hearing was not a rubber stamp and that AT had simply misunderstood the question in respect of "rubber stamping" the original decision and that what she meant by that was that she had agreed with the original conclusion of GQ.

11.7 It was reasonable for the respondent not to offer the claimant the roles of Functional Skills Tutor and Learning Support Assistant because those roles became vacant and fell for appointment prior to the claimant's dismissal. The respondent acted reasonably and the dismissal was fair. The respondent does not seek to argue that the claimant would or could have been fairly dismissed for redundancy – that would involve too great a degree of speculation by the Tribunal.

11.8 In respect of remedy it was submitted that any award to the claimant for injury to feelings should be at the lowest **Vento** level and that there was no medical evidence to support an injury to health claim. In relation to loss of earnings it was submitted that there should not be full recovery and that a 50% reduction of the loss to reflect the fact that the claimant had been ill since dismissal was appropriate.

The Law

Unfair Dismissal Claim

12.1 The Tribunal reminded itself of the provisions of section 98(1) and (4) of the 1996 Act:
"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*
(a) the reason (or if more than one the principal reason) for the dismissal, and
(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case".

12.2 We have reminded ourselves that if the respondent proves the reason for dismissal on the balance of probabilities, then it is for the Tribunal to consider the questions posed by section 98(4) of the 1996 Act. In dealing with those questions, we remind ourselves that there is no burden of proof resting on either party but rather the burden lies neutrally between them. In dealing with the questions posed by section 98(4) of the 1996 Act, we must not substitute our views as to what should or should not have happened but instead we must consider those questions from the standpoint of the hypothetical reasonable employer and usually consider whether the decision to dismiss falls within the band of a reasonable response to the situation: only if the decision falls outside that band can the dismissal of the claimant be categorised as unfair.

12.3 In the context of a dismissal by reason of third party pressure, we reminded ourselves of the decision of the Court of Appeal in **Dobie –v- Burns International Security Services (UK) Limited [1985] 1WLR43** and the fact that it is essential in considering whether a respondent acted reasonably in dismissing because of third party pressure to have regard to any injustice suffered by the employee. The Tribunal has reminded itself of the guidance from Sir John Donaldson MR and in particular:-

"In deciding whether the employer acted reasonably or unreasonably a very important factor of which he has to take account, on the facts known to him at the time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example he will clearly have to take account of the length of time during which the

employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment and matters of that sort. None of these is decisive but they are all matters of which he has to take account and they are all matters which affect the justice or injustice on the employee of being dismissed".

12.4 The Tribunal has reminded itself of the guidance of Mrs Justice Slade in **Bancroft –v- Interserve (Facilities Management) Limited UKEAT/0329/12/KN** that it behoves an employer to consider the allegations made by a third party against its employee when considering how to deal with its employee and that in failing to do so, a respondent would not have done everything it could to mitigate injustice caused by the third party's request. In addition, it may be appropriate to consider whether an employer should have taken steps earlier in the employment history to seek to remedy a problem before it became an insuperable problem leading to dismissal.

12.5 The Tribunal has reminded itself of the decision in **Henderson –v- Connect (South Tyneside) Limited** and the guidance of Underhill J in which he made the following comment:-

"In the present case the appellant clearly suffered a procedural injustice: he had no chance to put his case to the Safeguarding Children Board. We were not informed about the procedures adopted by the Board: but if it is indeed the case that a man can lose his job and be labelled a child abuser because of a conclusion reached on evidence which he does not see, by people whom he does not know and has no chance to address applying criteria which he has no chance to challenge without any effective appeal, that is a deplorable state of affairs. It is of course a separate question whether he suffered a substantial injustice. As to that the Tribunal was not and nor are we in a position to make a fair judgment. The respondent understandably did not take up the burden of trying to prove that the conclusion reached by "the professionals" and adopted by the council that he posed a risk to children was correct or even reasonable: it was not its own decision and it probably would not have been in a position to call the supporting evidence if it had wished to. Accordingly the case proceeded before us on the basis that the Appellant had – or at least may well have – suffered a serious injustice for essentially the reasons identified under ground 1 ……. Cases of this kind are not very comfortable for an employment tribunal (but) it must follow the language of section 98(4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee but has failed any eventual dismissal will be fair: the outcome may remain unjust but that is not the result of any unreasonableness on the part of the employer".

12.6 We have reminded ourselves of the provisions of sections 119 and 123 of the 1996 Act and in particular section 123(1) which reads:
"....the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

12.7 In respect of an award of compensation for loss of earnings when a claimant has been ill and unable to work since the date of dismissal, the Tribunal has reminded itself that the task for Tribunals in assessing the contribution of ill health to the employee's losses is different in respect of immediate and future loss. In **Seafield Holdings Limited –v- Drewett [2006] ICR 1413** the EAT commented that it was satisfied that a "but for" approach was appropriate for determining the employee's loss between the date of dismissal and the Tribunal hearing – namely the immediate loss. But it concluded that such an approach was wholly unsuitable for the task of future loss. Instead Tribunals should make an estimate of the chance that had the employer not acted in the way it did, the employee's illness would still have prevented her from working.

12.8 The Tribunal has reminded itself of the decision in **Devine –v- Designer Flowers Wholesale Florist Sundries Limited [1993] IRLR 517** and the guidance of Lord Coulsfield. We note that the decision in that case was to the effect that an employee who had become unfit for work wholly or partly as a result of the unfair dismissal is entitled to compensation for loss of earnings at least for a reasonable period following the dismissal until she might reasonably have been expected to find other employment. The Tribunal must have regard to the loss sustained by the employee, consider how far it is attributable to action taken by the employer and arrive at a sum which it considers just and equitable. There is no reason why the personal circumstances of the employee including the effect of dismissal on her health should not be taken into account in ascertaining the appropriate amount of compensation. However, the employee will not necessarily be entitled to loss of earnings for the whole period. The fact that unfitness followed upon and was attributed of dismissal does not perforce imply that the whole period of unfitness must be attributable to the actions of the employer. There may be questions for example as to whether the unfitness might have manifested itself in any event.

12.9 The Tribunal has also reminded itself of the decision in **Dignity Funeral Limited –v- Bruce [2005] IRLR 189** where it was reiterated that the Tribunal's function is to award compensation which is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The Tribunal has to consider two questions: whether the applicant's dismissal was one of the causes of his wage loss and if it was, what compensatory award would be just and equitable. The former question is one of fact. The latter question is one of discretion and it was further stated that where, in a period after dismissal, a claimant suffers loss because she is prevented from working due to ill health, the Tribunal must decide whether the illness was caused to any material extent by the dismissal itself: whether, if so, it had continued to be so caused for all or part of the period up to the hearing: and if it was still so caused at the date of the hearing, for how long it would continue to be so caused. It is essential for the Tribunal to make clear cut findings on these questions before any question of a compensatory award can arise.

12.10 We have reminded ourselves of the decision in **Polkey –v – A E Dayton Service Limited 1988 ICR142** and the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT** where it was stated:-

"The following principles emerge from these cases:

(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
*(6)The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*
(7) Having considered the evidence, the Tribunal may determine
(a)That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
(b)That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
*(c)That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.*
(d) Employment would have continued indefinitely.
(8) However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored".
We recognise that this guidance is outdated so far as reference to section 98A(2) of the 1996 Act is concerned but otherwise holds good.

12.11 We have reminded ourselves of the guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** in respect of the so called Polkey assessment:

"A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".

Claim of Detriment because of pregnancy: section 18 and 39(2)(c) of the 2010 Act.

12.12 We have reminded ourselves of the provisions of section 18 of the 2010 Act which read:
"(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.....
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(6) The protected period, in relation to a woman's pregnancy begins and ends-
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy:
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy".

12.13 We have reminded ourselves of the provisions of section 39 of the 2010 Act which read:
"(2) An employer must not discriminate against an employee of A's (B) –.....
(d) by subjecting B to any other detriment.

12.14 We have reminded ourselves of the provisions of section 136 of the 2010 Act which read where relevant:
"(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".

12.15 We have reminded ourselves that a detriment for the purposes of section 39 of the 2010 Act exists if a reasonable worker would take the view that they had been disadvantaged in the circumstances in which the Claimant found herself: ***Shamoon v***

Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. However to be actionable, the claimant has to show that she suffered a detriment and that it was objectively reasonable in all the circumstances for her to consider that that was so.

12.16 We note that if the claimant establishes a prima facie case that she was treated unfavourably because of her pregnancy then the burden of proof passes to the respondent to show that the treatment of the claimant was in no sense whatsoever on the grounds of the claimant's pregnancy.

12.17 We have reminded ourselves of the relevant provisions of section 124 of the 2010 Act which read:

(2) The tribunal may....(b) order the respondent to pay compensation to the claimant.
(6) The amount of compensation which may be awarded under subsection (2) (b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

12.18 We have reminded ourselves of the guidance to tribunals in the well-known authority of **Vento –v- Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318** as updated by the decision in **Da'Bell –v- NSPCC 2010 IRLR 19.**

12.19 We have reminded ourselves of the decision in **Simmons –v- Castle 2012 EWCA Civ 1288** and the conflicting authorities of the EAT in respect of whether or not the 10% uplift to damages dealt with in **Simmons** applies to awards for Injury to Feelings in the Employment Tribunal. We noted in particular the decision of Langstaff J in **Beckford –v- London Borough of Southwark 2016 ICR D1**. We have now noted the decision of the Court of Appeal in **De Souza –v- Vinci Construction (UK) Limited 2017 EWCA Civ** 879 which has resolved the previous conflict and which directs us to apply the uplift of 10% to the award of injury to feelings. This decision was promulgated after our deliberations but before this Judgment was perfected and issued. We do not consider that this is something on which we need to seek further representations from the parties as the position is clear.

12.20 We have reminded ourselves of the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the 1996 Regulations") and in particular Regulation 4 in respect of the calculation of interest. We note that the relevant rate of interest pursuant to Regulation 3 of the 1996 Regulations for the purposes of this matter is 8% per annum.

12.21 We have reminded ourselves of the provisions of Rule 76(4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 in respect of a costs fee order. We have also reminded ourselves of the Judgment of the Supreme Court in **R (on the application of UNISON) –v- Lord Chancellor 2017 UKSC 51.** This Judgment was handed down after the hearing with the parties but before the promulgation of this judgment. In light of the contents of the Judgment of the Supreme Court we have decided to act as set out below. Again we do not think it necessary to seek the views of the parties before promulgating this Judgment in view of the very clear position and in view of the way we have decided to proceed as set out below.

Conclusions

Pregnancy discrimination – detriment claim

13.1 The Tribunal has considered first the claim of detriment because of pregnancy/maternity.

13.2 The claimant was away on maternity leave from 8 July 2015 until 8 July 2016. The claimant was entitled to both ordinary and additional maternity leave. The failure on the part of the respondent to advise the claimant of the NCC investigation occurred from January 2016 to May 2016 and so fell during the protected period in respect of the claimant's pregnancy as defined in section 18(6) of the 2010 Act.

13.3 We conclude that there was a failure by the respondent to make the claimant aware that NCC were undertaking a safeguarding investigation in which anonymous allegations against the claimant (and her husband) were to be investigated and which investigation could (and, in the event, did) lead to the claimant's removal from the Contract and so place her employment in jeopardy. We find that other members of staff of the respondent (against whom allegations had not been made and who therefore were not personally implicated) were made aware of the investigation and were interviewed (albeit on a confidential basis) by officials of NCC during the course of the investigation. The claimant was denied the opportunity to know the details of the allegations against her or to state her case. The claimant was denied the opportunity to respond to the conclusions of the investigation carried out by NCC which led NCC to require her removal from the Contract by letter to the respondent dated 21 March 2017.

13.4 We accept the evidence from GQ that he knew the claimant was involved in the matters being investigated by NCC and indeed that the claimant was (as he accepted in cross examination) "crucial from the outset" to that investigation. We accept that GQ had no control over the investigation carried out by NCC but the failure to make the claimant aware of the investigation and at least to ask the claimant if she wished to be involved - particularly once it became apparent that it was her actions which were being investigated - was the failure of the respondent. That failure on the part of the respondent to ensure that the claimant was made aware of the investigation and the potential effect of it on her and her employment status was perceived by the claimant as a detriment. We conclude that it was reasonable of the claimant to consider such action as a detriment. The claimant suffered a detriment within section 39(2)(d) of the 2010 Act.

13.5 Having reached that conclusion, the Tribunal has moved on to consider whether that detriment was because of the claimant's pregnancy or because of illness suffered by her as a result of it. The Tribunal notes that the claimant was away from the workplace because of pregnancy – she was on maternity leave. If she had been present in the workplace the claimant would have been made aware of the investigation by NCC and would have been interviewed by NCC as part of that investigation: the claimant would effectively have been able to defend herself. We conclude that the claimant has established a prima facie case that the detriment she suffered was because of her pregnancy and therefore we look to the respondent for the explanation advanced for the unfavourable treatment.

13.6 The explanation advanced by the respondent for its lack of contact with the claimant was the instruction issued by PB at the meeting on 18 January 2016 that the claimant was away on maternity leave and very unwell after her pregnancy and giving birth and that she was not to be contacted. GQ stated that PB had made that very clear and so he followed that instruction. During the course of the NCC investigation, the claimant did contact GQ about other matters which arose (notably the accessing of her email correspondence) but GQ did not raise the matter of the NCC investigation when she did so. The question must be posed - why not? The explanation advanced was that the claimant was away on maternity leave and GQ was "treading really carefully". It is clear that GQ would not have felt the need to tread really carefully if the claimant had not been absent from work by reason of maternity leave and by reason of an illness suffered by the claimant as a result of her pregnancy. Do we accept that the explanation for the detriment suffered by the claimant at the hands of the respondent was not materially influenced or, put another way, was in no sense whatsoever because of her pregnancy or an illness suffered by her because of it? We conclude that the reason the respondent acted as it did was materially influenced by the claimant's pregnancy. We can accept that the motivation of GQ, and for that matter PB, in keeping the claimant away from the investigation was benign but nonetheless it was materially influenced by the fact of the claimant's pregnancy and illness resulting from it. The respondent's failure to make the claimant aware was inherently discriminatory and was materially influenced by her pregnancy. The explanation of the respondent is not accepted.

13.7 Accordingly the claimant has been subjected to pregnancy discrimination and is entitled to a remedy.

Conclusions in respect of remedy – discrimination claim

14.1 It was not argued that the claimant's dismissal was an act of discrimination. It was argued that if there was a finding of pregnancy detriment then the loss arising from it was injury to feelings alone.

14.2 The Tribunal has considered the remedy to the claimant for the discriminatory acts. The Tribunal takes account of the fact that the respondent acted from benign motive in doing what it did. However, the claimant was subjected to unlawful detriment and that detriment lasted from January 2016 until the claimant's dismissal in July 2016 albeit that the time the claimant became aware of what had happened was not until May 2017. The Tribunal takes account of the effect of the discriminatory act on the claimant. The lack of opportunity to know the allegations and state her case has caused the claimant real distress and together with other factors has led to her present illness. The discrimination lasted for a relatively short time. The parties were agreed that these acts produce an award in the lower band of **Vento** compensation and we agree with that assessment.

14.3 We note the lower level of **Vento** compensation after **Da'Bell** is now £600 to £6000. We noted the decision in **Simmons –v- Castle 2012** and that there was previously disagreement as to whether the 10% uplift applied to awards for Injury to Feelings. When deliberating in this matter, we determined that following **Beckford** it was right to uplift the lower band of compensation by 10% to £660 to £6600. We note that the Court of Appeal in **De Souza** on 4 July 2017 agreed that it was appropriate to

uplift the award by 10% and we had effectively done so by uplifting the band as set out above.

14.4 Having assessed all relevant matters, we conclude that the appropriate level of compensation to reflect the claimant's injury to her feelings in this matter is £4,000. We take account of the fact that the claimant did not understand the motivation of the respondent as discriminatory until the position became clear in May 2016 notwithstanding that there had been an ongoing course of discriminatory conduct from January 2016. We take account also that we are not compensating the claimant for any injury to feelings caused by reason of her dismissal but only by reason of the detriment specified in our earlier findings. We take account of the fact that the claimant suffered considerable distress when she discovered the fact that she had been investigated and effectively found liable in that investigation without ever being made aware of the investigation or being allowed to contribute to it.

14.5 The Tribunal notes that that award will be subject to interest and the Tribunal has considered the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 and given that this is an award for injury to feelings notes that the interest should be paid from the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation. The Tribunal takes the commission of the act of discrimination from 18 January 2016. Accordingly the period of calculation is 18 January 2016 until the day of the calculation of this award by the Tribunal on 12 May 2017. This is a period of 479 days at 8% per annum and thus interest totals £419.94 (479 x 0.8767 per day).

14.6 Accordingly the total award of compensation for pregnancy discrimination is £4419.94p.

Conclusions in respect of unfair dismissal

15.1 The Tribunal has first considered whether the respondent has proved the reason for the dismissal of the claimant. The Tribunal reminds itself that the burden to prove the reason lies with the respondent. In this case the respondent says that it dismissed the claimant by reason of third party pressure from NCC in respect of the removal of the claimant from the Contract.

15.2 The Tribunal reminds itself that the claimant was removed from the Contract on 21 March 2016 and the Contract itself was terminated on 29 March 2016 and the claimant was not dismissed until 8 July 2016 - three and a half months later. The Tribunal reminds itself that in the course of the meetings which led to the claimant's dismissal there was reference to disciplinary matters which were "parked", there was reference to a redundancy situation which was not proceeded with and there was reference to third party pressure. The Tribunal notes that by the time of the dismissal given that the Contract had been terminated, it could legitimately be argued that the third party pressure had disappeared along with the Contract. This was not a case where an employee was removed from a contract which then continued between the employer and its contractor. The Tribunal has considered the evidence from GQ and it is his evidence which is relevant to the question of the reason for dismissal. At this stage in our enquiry we are looking to why GQ dismissed the claimant. The reason for a dismissal is the circumstances in the mind of the dismissing officer when he dismisses.

We are satisfied that the advice GQ received was that given that the claimant had been removed from the Contract that amounted to third party pressure and that was why he moved to dismiss the claimant on 8 July 2016. The respondent has proved to us on the balance of probabilities the reason for dismissal. The approach of the dismissing officer was muddled and at times contradictory. However, those factors are matters which go to the question of reasonableness posed by section 98 (4) of the 1996 Act. The fact that the third party pressure was no longer present after the removal of the Contract is also a matter which goes to the question of reasonableness posed by section 98(4) of the 1996 Act. We have assessed the evidence of GQ and we are satisfied on the balance of probabilities that, on advice, he moved to dismiss the claimant because of the pressure from NCC. We make no comment on the quality of that advice. We are however satisfied that GQ followed it. The label applied to that reason is some other substantial reason as referred to in section 98(1) of the 1996 Act. Therefore the respondent has established the reason for dismissal of the claimant and we turn to the questions posed by section 98(4) of the 1996 Act.

15.3 The Tribunal has considered whether in dismissing the claimant for that reason the respondent acted reasonably. The Tribunal reminds itself that in answering this question it is not for it to substitute its view as to what should or should not have happened. It is for the Tribunal to consider the actions of the respondent from the viewpoint of the hypothetical, reasonable employer and only if the Tribunal can conclude that no reasonable employer would have acted as the respondent did can it conclude that the dismissal was unfair.

15.4 We note that at the time the claimant was dismissed the so called third party pressure from the Council had effectively disappeared as by then the Contract had been terminated. NCC was no longer in a position to place any pressure on the respondent in such circumstances. We conclude that no reasonable employer would move to dismiss an employee for that reason in those circumstances. We conclude that what was facing the respondent in July 2016 when the claimant was dismissed was a redundancy situation given that both the Contract and the other contract on which the claimant worked had been terminated. The whole of the claimant's job content had disappeared by virtue of the cancellation of the two contracts. We conclude that any reasonable employer would have moved to deal the resulting redundancy situation but the respondent did not do so but rather it continued to deal with matters in respect of so called third party pressure which was no longer present. Those are not the actions of a reasonable employer.

15.5 In dealing with the situation with NCC, the respondent did not act as any reasonable employer would have acted. We conclude that GQ did not give any – let alone any reasonable – consideration to the injustice to the claimant in being removed from the Contract. The claimant had worked for the respondent for 10 years and she had an unblemished disciplinary record. Any reasonable employer would have sought to persuade NCC to change its mind and in so doing would have sought to persuade NCC to interview the claimant and to seek her input - crucial as it was - into their investigation. We are satisfied that the respondent did not take that step. Our findings show that the only contact between the respondent and NCC was a letter of 24 May 2016 whereby the respondent asked for reasons why the claimant had been removed from the Contract and it was not in anyway an attempt to seek to persuade NCC to change its mind. No reasonable employer would have acted in that way.

15.6 The delay in informing the claimant of her position and of the findings against her was not action which any reasonable employer would have taken. No matter what may or may not have been said to GQ by PB in January 2016, by February 2016 GQ knew that the claimant was well enough to deal with various grievances she was advancing to him in respect of other matters and yet no consideration was given at that stage, timely as it would have been, to have advised the claimant of the matters being investigated by NCC and to seek to have her input into those matters.

15.7 The meetings which were conducted with the claimant by the respondent were as the process unfolded rightly described by the claimant's representative as "shambolic". Disciplinary matters were confused with redundancy matters which were confused with third party pressure matters. The claimant did not know where she was. No reasonable employer would have acted in that way. The meetings were brief and were simply meetings which were "*going through the motions*" to follow advice given. The meetings were not a meaningful attempt to find an alternative role for the claimant within the respondent company. No reasonable employer would have acted in that way. Further, the delay in advising the claimant of the situation meant that various alternative roles which would have been clearly suitable for her were closed off from her – and another employee who was not at risk of losing her job was preferred over the claimant. No reasonable employer would have acted in that way.

15.8 The Tribunal finds that the appeal process which was followed was indeed "fundamentally flawed" as was described by the claimant's representative. The appeal officer did not bring any original thought or objective assessment to the exercise she was required to carry out whether it was a review or a rehearing. In adopting the process that she did, as described in our findings of fact, the respondent through its appeal officer acted as no reasonable employer would have acted.

15.9 For those reasons the Tribunal concludes unanimously and without difficulty that the dismissal of the claimant for the reason proved was unfair and the claimant is entitled to a remedy.

Conclusions in respect of remedy – unfair dismissal

16.1 The claimant indicated that she wished to receive the remedy of compensation if the claim for unfair dismissal succeeded.

16.2 The maximum amount of a week's pay at the time of the claimant's dismissal for the purposes of calculation of the basic award was £479.00 and the appropriate multiplier is 9.5 given the claimant's age. Accordingly the basic award is £4,550.50.

16.3 The Tribunal has considered whether the claimant should be compensated for her losses arising from the unfair dismissal at the level of her net monthly pay at date of dismissal (agreed at £1,834.66 per month) or at the lower level attributable to one or other of the two roles to which the claimant might have been appointed had a reasonable search for alternative employment been carried out. Having considered that matter, the Tribunal concludes that it is appropriate to compensate the claimant at the rate of her existing salary at the effective date of termination for it was from that position from which the claimant was dismissed. The Tribunal considers that it is not appropriate

that the claimant should be compensated at the lower level attributable to one or other of the two roles which were available during the course of the period when the claimant should have been subject to consultation in respect of alternative employment namely the Functional Skills Tutor role or the Learning Support role. The Tribunal concludes that the evidence it has is simply not sufficient to enable it to say what role and at what level of salary the claimant would have been employed had she not been dismissed. It may be that the respondent, acting reasonably, would have appointed the claimant to a different role but given her a period of salary protection. It would simply be speculation on the part of the Tribunal to make a finding as to the level of salary the claimant might have been earning had the respondent acted reasonably and retained her in employment. The claimant was dismissed from a role which carried a salary of £1,834.66 per month net and that is the salary level which the Tribunal will use for the purposes of calculation of the compensatory award.

16.4 The Tribunal has considered whether it should award the claimant any compensation for loss of earnings from 16 September 2016 onwards given that the claimant has been ill throughout the time from then until the date of this hearing. The Tribunal finds that the claimant gave birth on 24 July 2015 and then had physical difficulties arising from a difficult birth. Those difficulties had more or less resolved themselves by the end of 2015 but nonetheless necessitated the claimant undergoing surgery in July 2016. When the claimant was dismissed on 8 July 2016 she was about to return from maternity leave and was accordingly paid notice pay by the respondent until 16 September 2016. Accordingly the claimant did not suffer financial loss until 16 September 2016.

16.6 The Tribunal finds that from 2016 onwards the claimant has suffered from a mental impairment of anxiety, panic attacks and depression. We are satisfied that whilst there was a pre-existing condition from which the claimant suffered, her mental health was made considerably worse by reason of her dismissal. We note that the claimant was first prescribed anti-depressant medication in December 2016 only after the dismissal had been effective for some six months. The Tribunal has considered whether there is a causal connection between the dismissal of the claimant by the respondent in July 2016 and the illness suffered by the claimant. The Tribunal notes that the claimant became mentally ill and was so ill between January and July 2016. That illness was attributable to a variety of factors not least the actions of the respondent in dealing with the claimant as it did in respect of the matters relating to the access to e-mails, the visits by the police and then the process which began in May 2016 and led to the dismissal in July 2016. The Tribunal reminds itself that it is not for the Tribunal to compensate the claimant for the manner of her dismissal but can only compensate the claimant for losses arising because of the dismissal and in that context the Tribunal has considered the questions required of it by the decision **Dignity Funerals Limited**.

16.7 The Tribunal has considered whether the applicant's dismissal was one of the causes of her loss of earnings from July 2016 onwards and it is satisfied that it was. The Tribunal accepts the claimant's evidence that she did not visit a doctor in relation to a mental impairment until October 2016 after the dismissal was effective in September 2016. We accept her evidence that she was having anxiety attacks when considering job applications and when considering the question of a return to work. The Tribunal has to assess the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the respondent. The Tribunal must

assess whether the dismissal was the cause of any of the losses from September 2016 onwards and, if it was, what compensatory award would be just and equitable.

16.8 The Tribunal has considered whether it is satisfied that the illness from which the claimant suffered after September 2016 was caused by the dismissal. Having considered all relevant matters the Tribunal concludes that the loss arising from the dismissal is attributable to an illness caused by the respondent but the element of that loss arising from dismissal is 60% of the total loss and the Tribunal would attribute the other 40% of the loss to the existing illness prior to the dismissal for which the respondent is not responsible to compensate the claimant under the 1996 Act.

16.9 The Tribunal has next considered the period of time it will be before the claimant is able to return to work at the level of remuneration enjoyed by her at the time of her dismissal. We consider that with this litigation at an end the claimant should be able to be in a position to seek work and will be able to find work albeit at a reduced level of earnings by 8 September 2017. We conclude that with reasonable efforts the claimant should be able to find work at 50% of the rate she was paid by the respondent from that date. We further conclude that by 8 April 2017, the claimant should have been able to find work at the same level she was earning with the respondent and that consequently from that date onwards there will be no ongoing financial loss.

16.10 The Tribunal therefore awards compensation from 16 September 2016 until the date of promulgation of this Judgment on 31 July 2017. This is a period of 45.5 weeks. The claimant is in receipt with her husband of Universal Credit. The information provided to us on that point was sparse but it seems clear to us that the benefits being received by the claimant are subject to recoupment and accordingly we conclude that the Employment Tribunals (Recoupment of Benefits) Regulations 1994 will apply to this award. Accordingly we break down the period of loss for which compensation will be awarded to the prescribed amount and the non prescribed amount.

16.11 The Tribunal has considered the decision in **Polkey**. The respondent did not seek to argue that the claimant might have faced dismissal by reason of redundancy arising from the loss of the Contract and the EFA contract. The respondent accepted that the degree of speculation required to advance such an argument was too great to admit of any proper assessment by this Tribunal. We consider that the respondent was right to make that concession. The respondent chose to move to dismiss the claimant by reason of third party pressure and not redundancy. No redundancy process of any kind was embarked on and thus there is no evidence available to the Tribunal from which it could speculate as the outcome of any redundancy procedure – properly and reasonably conducted. Accordingly there will be no reduction of the compensatory award pursuant to the decision in **Polkey**.

16.12 The Tribunal has considered the limit on any compensatory award in this matter pursuant to the provisions of section 124(1ZA)(b) of the 1996 Act. We conclude that the effect of sections 221(1) and 221(2) and 226(3)(c) and 226(6) is that the maximum compensatory award in this matter is the claimant's gross annual salary at dismissal namely £27600. This was the figure adopted by the parties. As the compensatory award we consider appropriate does not exceed that sum, there will be no statutory maximum limit to apply to this award,

16.13 With those conclusions in place, we set out our award of compensation in tabular form.

Table of Compensation for unfair dismissal calculated pursuant to the provisions of the 1996 Act

Basic award

£479 x 9.5 is	£ 4,550.50 **A**

Compensatory award – prescribed element

Loss of earnings 16 September 2016- 31 July 2017	
45.5 weeks @ £423.35 per week -	£19,262.42
LESS 40%	£ 7.704.96
	£11,557.46 **B**

Compensatory award – non prescribed element

31 July 2017-8 September 2017	
5.5 weeks @ £423.35 per week -	£ 2,328.42
8 September 2017-8 April 2018	
30 weeks @ £203.35 per week -	£ 6,100.50
	£ 8,428.92
Less 40%	£ 3,371.56
	£ 5,057.36
Add	
Loss of statutory rights -	£ 350.00
Loss of pension rights (£5.30 per week x 81 =£429.30	
less 40% namely £171.72)	£ 257.58
	£ 5664.94 **C**

Compensation for unfair dismissal:

A	Basic award	£ 4,550. 50
B	Compensatory award – prescribed element	£ 11557.46
C	Compensatory award – non prescribed element	£ 5664.94
		£ 21,772.90

Table of total compensation awarded

Compensation for unfair dismissal	£21,772.90
Compensation for unlawful discrimination	£ 4,419.94
Total compensation awarded -	£26,192.84

Tribunal Fees

16.12 When the Tribunal deliberated in this matter, it decided that it was appropriate to make an award to the claimant of £1200 in respect of Tribunal fees paid by the claimant to bring these proceedings to hearing. Before this Judgment was perfected and promulgated, the Supreme Court handed down its Judgment in the **Unison** case and ruled that the Fees Order, pursuant to which the claimant had paid fees, was unlawful. As a result, fees paid by the claimant will be refunded to her. In those circumstances, we consider that it is inappropriate to make any award in respect of fees paid pursuant to a Fees Order which has now been declared unlawful. Accordingly on the basis that the claimant will be able to and will, in due course, receive repayment of all fees paid, we make no fees cost award in this matter pursuant to Rule 76(4) of the 2013 Rules.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 July 2017

JUDGMENT SENT TO THE PARTIES ON

2 August 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL