THE EMPLOYMENT TRIBUNAL

SITTING AT: **ASHFORD**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mrs R Serpis
Ms C Edwards

BETWEEN:

Mrs J Sowden **Claimant**

AND

Grant Haze Ltd **Respondent**

ON: **9 and 11 August 2017 and 18 August and 1 September in Chambers**

Appearances:

For the Claimant: **Mr Whitfield, Solicitor**

For the Respondent: **Ms Y Montaz, Representative**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. By failing to allow the Claimant to return to the job that she did before she went on maternity leave when it was reasonably practicable for it to have done so the Respondent:
    a. Breached her right to return under Regulation 18(2) Maternity and Parental Leave Regulations 1999 (the "Regulations");
    b. Discriminated against her in breach of s 18 Equality Act 2010 ("Equality Act");
    c. Unfairly dismissed her within the meaning of s39 (2) and (7) (b) Equality Act.
2. The Respondent subjected the Claimant to a detriment by failing to consult her about the potential reorganisation of its accounts department in November 2015.

REASONS

1. By a claim from presented on 31 May 2016 the Claimant, Mrs Sowden, brought claims in relation to her return from work after maternity leave, a claim of pregnancy or maternity discrimination and a claim of unfair dismissal. All claims were resisted by the Respondent.

2. The claims was originally listed for hearing on 26 – 28 June 2017, but owing to the indisposition of the Respondent's representative, Ms Montaz the hearing was adjourned part way through the second day of the hearing and relisted before the same tribunal on 7 and 9 August. The Respondent did bring an alternative representative to the second day of the original hearing on 28 June, but the Tribunal accepted the Respondent's submission that it was not just to expect the Respondent to continue the hearing with an unprepared representative in a case that was factually and legally reasonably complex. Ms Montaz provided the Tribunal with a medical certificate.

3. The resumed hearing dealt with liability issues only. At the hearing the Claimant gave evidence on her own behalf and called her husband Benjamin Sowden as a witness. Evidence for the Respondent was given by Ann Debnam, account manager for the Respondent, Tracy Blackbourn, the Respondent's finance director and David Moore, the Respondent's managing director. All of the witnesses produced written statements which the Tribunal read before hearing the oral evidence. There was a bundle of documents of 172 pages. References to page numbers in this judgment are references to page numbers in the bundle.

The issues

4. It seemed to the Tribunal that the liability issues it needed to determine in this case were as follows:
    a. whether the Respondent failed to allow the Claimant to return to the same job after maternity leave;
    b. if not, whether that was because it was not reasonably practicable for it to do so;
    c. if it was not reasonably practicable for the Claimant to return to her role, whether the Respondent offered the Claimant another role that was both suitable for her and appropriate for her to do in the circumstances;
    d. Whether the Respondent's treatment of the Claimant on her return from maternity leave represented a breach of her right not to be discriminated against because of pregnancy or maternity under s18 Equality Act;
    e. Whether the Claimant resigned from her employment in circumstances in which she was entitled to do so by reason of the Respondent having:
        i. discriminated against her because of pregnancy or maternity; or
        ii. conducted itself towards her in a manner that represented some other repudiatory breach of the Claimant's contract of employment entitling her to resign from her employment.
    f. If the Claimant did resign in response to a breach by the Respondent whether she did so promptly and without waiving the breach;
    g. Whether there were any other acts or omissions of the Respondent that amounted to discrimination because of pregnancy or maternity.

h. Whether the Respondent complied with the terms of the ACAS Code in dealing with the Claimant's grievance in March 2016.

The law

5. Regulation 18(2) of the Regulations provides as follows:

(2) An employee who returns to work after—
(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or

(b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above,

is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

Section 18 Equality Act provides:

18 Pregnancy and maternity discrimination: work cases…

(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.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the 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….

Section 39 Equality Act provides:

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;
(d) by subjecting B to any other detriment….

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

The Tribunal was also referred to the case of *Blundell v Governing Body of St Andrew's Catholic Primary School UKEAT/0329/06* on the question of what is meant by "the same job".

Findings of fact

6. Based on the written statements, the documentary evidence and the oral evidence of the witnesses the Tribunal makes the following findings of fact.

7. The Respondent is a builders' merchants and architectural ironmongery firm that has been trading for over 25 years and supplies materials to the private and public sector. There are seven companies within the group of which the three relevant to these proceedings were Grant Haze Limited, Grant Haze Hampshire Limited and Grant Haze London Limited. The subsidiaries operate in the same way using centralised back office and finance systems and are different only in that they service different geographical customer bases. At the time the claim was presented there were 69 employees in Great Britain and 40 at the establishment at which the Claimant worked.

8. The Claimant started working for the Respondent on 1 August 2002. She was originally a sales assistant and then became an accounts assistant. Her job description for the role of accounts assistant was at page 43 of the bundle. This described her tasks as running the purchase ledger for Grant Haze Limited, tying up purchase invoices with delivery notes and purchase orders; entering invoices on the Sage accounting package; reconciling supplier statements to the purchase ledger; producing monthly cheques to pay suppliers; dealing with supplier credits and posting bank payments from cash book to computer. The document included a paragraph that made it clear that the job description was a guide only and was neither comprehensive nor exhaustive. The Claimant's contract of employment at page 39 also stated "Your job description may be amended from time to time and you may be required to undertake additional or other duties as necessary to meet the needs of the business." The Claimant accepted in cross examination that her original job description had evolved, but she said that she had only ever worked for Grant Haze Limited and not any of the subsidiaries. Ms Debnam also accepted that over the course of her employment the Claimant's work had evolved to encompass new elements.

9. The Claimant became pregnant during 2014 and planned to start her maternity leave on 8 June 2015 after taking a period of accrued annual leave. Her last day

in the office was 22 May 2015. The Claimant did not indicate a firm return date before she went on leave. The Respondent at no stage wrote to the Claimant setting out the date on which her maternity leave would end in accordance with Regulation 7(6) and 7(7) of the Regulations. As a result of that omission the Respondent was not entitled to receive notice from the Claimant of her intention to return from maternity leave (Regulation 11(5)).

10. Tragically the Claimant's baby, Rory Sowden, was stillborn on 30 May 2015. Her maternity leave therefore began on 1 June in accordance with Regulation 6(2) of the Regulations.

11. There was a dispute of fact as to what the Claimant subsequently told the Respondent about her intentions for her return to work. The Respondent had recruited Sarah Embleton on a six month contract (the offer letter was at page 47) to provide maternity cover for the Claimant and she started work on 1 April 2015 to allow for a seven week handover period. Ms Embleton's offer letter also allowed for the possibility of further employment with the group. It was the Respondent's initial case that the Claimant had said that she would be returning to work in October. There was no documentary evidence to support that except the email exchange at page 50A which indicates that that is what Ms Debnam and Ms Blackbourn had had in mind, but the source of their expectation is not clear. Ms Debnam's recall of events in cross examination was limited and did not assist the Tribunal on this point.

12. It was the Claimant's case that after Rory was stillborn she had a conversation with Ms Debnam at home on 8 June in which she had said that she would probably remain on leave until her statutory maternity pay had run out, but she did not want to commit herself at that stage. In light of the subsequent chronology of events the Tribunal finds on a balance of probabilities that the Claimant did say that to Ms Debnam on 8 June.

13. The Claimant's next meeting with Ms Debnam was on 27 July at Ms Debnam's home. Ms Debnam explained about keeping in touch ("KIT") days and the Claimant thought that these might help her in the process of eventually returning to work. Ms Debnam also informed the Claimant that she and Sarah Embleton would both be on leave at the same time in October 2015 and it would help the Respondent if she could do some KIT days then. The Claimant in fact started doing KIT days in August to cover Sarah Embleton's days of sickness absence and worked three KIT days in August and eight in September and October, carrying out the same duties as she had carried out before going on leave. Sarah Embleton herself became pregnant at some time during that period and we find as a fact based on Miss Debnam's evidence on cross examination that that Claimant became aware of that fact on 19 August 2015. We also find as a fact that the Claimant worked some of her KIT days alongside Sarah Embleton, despite being aware of Ms Embleton's pregnancy.

14. On 27 August Wendy Rich, another of the Respondent's employees, was offered a four day a week role as the accounts assistant for Grant Haze Limited (she had previously been allocated to Grant Haze Hampshire).

15. The Claimant visited Ann Debnam at home on 16 September and they discussed a possible return to work in November to assist the Respondent with a backlog of work. She did not confirm this in writing.

16. On 27 October Sarah Embleton signed a contract for permanent part time employment with the Respondent (page 49A).

17. On 28 October the Claimant and her husband went to Ms Debnam's house so that the Claimant could collect her wage slip. At that meeting the Claimant said that she now felt unready to return to work in November and did not feel that she would be able to cope with the Christmas period. The Tribunal finds that Ms Embleton's pregnancy formed no part of the Claimant's reasons for making that decision. The Claimant's case was that she said that instead she would be returning on 1 March 2016, but the Respondent disputes this on the basis that had the Claimant clearly said that Ms Debnam would have included it in the email she wrote to Tracy Blackbourn the following day (page 50A). The Respondent maintained that when the Claimant did return in March this was at very short notice. However there is at page 57D the transcript of a text message exchange between the Claimant to Ann Debnam (the messages themselves were at page 56) on 5 December 2015 in which the Claimant states "When I come back full time in March will I still be sitting in my corner?". The Tribunal finds as a fact that whether or not Ms Debnam communicated the Claimant's intentions to her colleagues, the Respondent knew or ought to have known by December 5 at the latest that the Claimant intended to return to full time work in March 2016.

18. During the period March 2015 to March 2016 the turnover of the Respondent's group of companies increased by over £1,000,000. This led to increased work levels and a need to recruit and to some extent reorganise the work of the accounts department, in which many employees were working part time. One particular problem was the difficulty the department was having in producing month end figures in a timely fashion. The changes were introduced to address this problem and also, towards the latter end of this period, to address the introduction of a new computer system across all the subsidiaries in the group.

19. The Respondent wrote to its employees (although not to the Claimant) on or around 3 November, an email of which there is a draft at page 50B. The original was not disclosed. This explained that as a result of the fact that the Claimant would not be returning to work in November as the Respondent had hoped and that Sarah Embleton had reduced her hours and was soon going on maternity leave, there was a need to reorganise the allocation of tasks. There was then a spontaneous meeting on 18 November (again the Claimant was not asked to attend) to inform employees of the initial plan. The Respondent conceded that in not inviting the Claimant to the consultation meeting on 18 November it subjected her to a detriment under s18 Equality Act. The Claimant was not aware of her exclusion from this meeting at the time and it appears that she did not become aware of it until the case was being prepared for hearing.

20. There is a letter dated November 2015 from Ms Debnam to the Claimant at page 53, which asks the Claimant about her likely return date and notifies her that the

Respondent wold be employing a temp to cover her role until her return. It also notified her that a new computer system would be introduced earlier than first thought, that “things are changing almost daily here” and that Wendy Rich had been brought in “to get Grant Haze up to speed and learn the new procedures that have been implemented during recent months”. The Claimant queried why she was being asked about her return date when she had already communicated to Ms Debnam her intention to return in March 2016.

21. On 18 November the Respondent also wrote the Claimant the letter at page 51 the fourth paragraph of which stated as follows:

> **"As you know Grant Haze has been busier and busier month on month and the trend is still continuing, we had made the decision on your return to share the work between you and Sarah but due to her impending maternity leave this will not be possible, so we need to make plans for her replacement. Several of the girls have asked for increased hours so we are hoping we will not have to employ anyone new, but that we will be able to shuffle round the existing staff. We sent round an email to this effect but wanted to keep you in the loop too. It will be good for the Company to be up to date and have enough staff to carry out the work without all the stress."**

The Tribunal finds that this letter did not clearly communicate to the Claimant that there might be changes that would have an impact on her job. It merely said that since Sarah Embleton would be going on maternity leave, someone else would have to share the Claimant’s work with her and that the Respondent hoped not to have to recruit.

22. On the evening of Friday 4 December the Claimant went to Ms Debnam’s house and Ms Debnam told her that her role would be covered by a temp until her return to work and that Wendy Rich would be sharing the work. She was also told that her old desk was to be replaced which caused the Claimant to enquire whether she would be working in a different location when she returned. She was assured in a text message from Ms Debnam the following day (page 56) that she would still be sitting in “her corner”. Ms Debnam added “Please try not to worry you will be doing the same things just not everything. So it won’t be so pressured. This is a positive and meant to take away worries.”

23. Ms Debnam confirmed on 19 December that the Respondent had taken on a temp. She added “we have broken the mould and taken on a man”.

24. On page 55A there was a Facebook message (19 January) from Ms Debnam to the Claimant letting her know that the new computer system was due to go live at the beginning of April and that there would be training from February for all staff. A further Facebook message on 28 January asked the Claimant if she could attend on 26 February and informed her that there would be a second day of training on 8 March (after her return to work). It is clear from that message that contrary to what Ms Debnam tried to maintain in her evidence, she clearly knew at that point that the Claimant had a clear return date and would be back in the office by 8 March at the latest. The message also informed her that the Respondent had decided to keep the temp (Alan) on during March “so he will be able to help out whoever needs it, as all the branches are now going to be using the new system”.

25. The Claimant visited the office on 4 February. She met Alan, who joked that he was keeping her seat warm. The Claimant became upset whilst talking to her colleagues about her loss. Mr Moore came briefly into the office to say hello to the Claimant and asked to see her before she left. The Claimant went to see Mr Moore in his office. There was a dispute as to what he said. The Claimant said in her evidence in chief that Mr Moore had pictures of his new born grandson on his wall and said to the Claimant that it must be hard for her looking at those pictures, which the Claimant found to be a strange thing to say. According to the Claimant he then said "Are you sure you want to come back"; "Are you doing it just for the money?"; "Are you sure you want to come back to the memories and the same people?" He suggested that she should think of herself and talk to him, Ms Debnam or Ms Blackbourn if things did not work out, although he could not give her preferential treatment. The Claimant said that she was left feeling unwanted and that there was no support for her returning to work. Mr Moore disputed this account of the meeting and denied questioning whether the Claimant wanted to come back although he agreed that he might have said that there was no pressure on her to come back. He denied making the remark about the photograph of his grandson or saying “are you doing it just for the money?” He was adamant that he did not make any of the specific remarks the Claimant alleges.

26. It is always difficult to make a finding of fact when two people have a different recollection of what was said during a conversation. We note that the Claimant was already upset at the start of this conversation due to her previous conversation with her colleagues and would have been likely to be very much sensitised to anything Mr Moore said. The Tribunal notes that the Claimant did not raise this conversation as part of her grievance and did not mention it during the grievance meeting. On a balance of probabilities had Mr Moore said everything that the Claimant recalled in her evidence, the Claimant is likely to have made some reference to it as part of her grievance. As she did not, we find therefore that Mr Moore only said those things to which he explicitly admitted in his evidence, namely that there was no pressure on the Claimant to return to work. We recognise that even an apparently neutral statement of that kind could have upset the Claimant, for whom the return to work was an emotionally charged issue.

27. On 13 February the Claimant received the letter at page 58 (the letter was dated 5 February) asking her to attend a return to work consultation on 23 February. The Tribunal finds that this was a reasonable letter and there was nothing in it that could reasonably have caused the Claimant anxiety. She in fact attended on 24 February. Ms Debnam and Ms Blackbourn were present and told the Claimant that her duties on her return would be different from those that she was carrying out before she went on maternity leave. Instead of working for Grant Haze Limited, she would be working for Grant Haze Hampshire. (In practice that never happened as the employee who was already doing the Grant Haze Hampshire work did not pass any work to the Claimant). The Claimant would also be doing “FORS registrations” which was not a task she had performed previously as it was in fact a new task in the organisation. There was a job description at page 60 describing what she was to do although this was not made available to her at the

time. She was also asked to do BACS administration, which the Respondent maintained was given to her because of her trustworthiness. She was told that Alan would only be staying for one more month until the new computer system was up and running and that she would be back at her own desk carrying out her old role thereafter. She was asked to think about the position. The Claimant was concerned about the changes and wanted to return to her old job at her old desk straight away. She became upset in the meeting. Nevertheless she reported for work on 1 March.

28. Prior to her return, on 26 February she attended the office for computer training. She asked for a meeting with Ms Debnam and Ms Blackbourn the same day. She told them that the changes to her role and workstation were causing her anxiety and she wanted to return to what was familiar after all the upheaval she had had in her life. The Claimant's evidence on this point was not challenged by the Respondent and in her evidence in chief she described in some detail a brief meeting before the computer training commenced at which she had expressed appreciation for the support being offered by the Respondent, but also concern about having to manage disruption and change at a time when she needed stability and continuity. She queried why she had not been told about the changes any sooner and in particular at her meeting two weeks earlier and Ms Blackbourn responded that there never would have been a good time to tell her. The Claimant had been told by Ms Debnam in December that she would be back at her old desk doing the same work just "not everything" and did not understand what had changed. She said:

> **"Knowing that I would have to shift between desks, I knew that I was going to feel more lost, like a spare part and not have any space to call my own.**
>
> **Tracy Blackbourn and Ann Debnam said that there was so much work to be done before the computer system went live and thought the proposal was best for me as the roles was not as demanding. Also, the company had to come first, as I apparently left them in the lurch by not returning in November 2015. They didn't want myself to go back to my original role, then crumble and leave them in the lurch again".**

29. After the computer training the Claimant met again with Ms Debnam and Ms Blackbourn. Mr Moore was also present at this meeting. The parties were not in agreement as to who had requested the meeting but we do not consider that to be material to our conclusions. The Claimant's evidence was that she expressed her concern to Mr Moore about the proposed changes to her role and reiterated that she wanted to return to her old job in order to restore some normality in her life. Mr Moore accepted in evidence that he had concerns. He describes the Claimant as having been very emotional at that meeting, crying and rocking and saying "It should have been me" instead of her son Rory who died. This was confirmed by Tracy Blackbourn's evidence and we find as a fact that the Claimant was in a highly emotional state at that meeting.

30. The Claimant did not dispute that the Respondent offered to help her find a more effective counsellor. However we also find that Mr Moore went further and said to the Claimant that because of the emotional state that she was in at the meeting he did not believe that she would be able to cope with her old role. We find that Mr Moore was genuinely concerned about the Claimant's welfare but was also

concerned about potential disruption to the business at a time of upheaval and change if in fact the Claimant had been unable to carry out her old duties. Mr Moore said in cross examination in answer to a question about whether he was fearful about the Claimant possibly crumbling, "Well yes, bless her, maybe not crumbled but certainly not coped". When asked whether the Claimant was capable of doing the role he said he said that role had changed and that she would not be able to do all of it. As a "father" he was concerned that she would not be able to cope and as a "business director" he did not think his business would benefit. He accepted that when the Claimant said "Thanks for the vote of confidence" he might well have responded "Well at least I'm honest". He however denied describing the Claimant as ungrateful as the Claimant alleged and as the Claimant did not mention that comment in her grievance (page 71) or in her comments on the grievance minutes at page 82 onwards, we find that on a balance of probabilities he did not actually say it. He did say in his evidence to the Tribunal that he would re-employ the Claimant tomorrow and there was no vendetta involved. In his view all of the Respondent's actions were designed to help the Claimant. However Mr Moore was also clear that any further changes or disruption would have been detrimental to the business at that juncture.

31. On her return on Tuesday 1 March she was not given a permanent work station – in fact it appeared that no thought had been given to where the Claimant was to sit or how she was to be equipped to carry out her work. She was taken to spend part of the day in Rainham in preparation for doing the FORS work. On 2 March she worked at a colleague's desk and did predominately FORS work. She was also working on BACS administration. She felt uncomfortable and out of place particularly as Alan, who was being retained on a week by week basis as a temp, was continuing to sit at the Claimant's old desk and he and Wendy Rich were undertaking the tasks that the Claimant had performed before her maternity leave. Alan was also performing some additional tasks that were not familiar to the Claimant. Ms Debnam's evidence was that Alan was performing the tasks in the Claimant's original job description for about 60-65 per cent of the time and the remainder of his time was doing things that the Claimant had not done and had not been trained to do, namely, the whole of the VAT reconciliation process (Ms Blackbourn confirmed that the Claimant had done the less complex aspects of VAT before going on maternity leave but not the more complex task of "finding the differences"). Alan was also doing quarter end reporting, cash book, supplier side and customer side receipts and all the paying in.

32. Ms Blackbourn was questioned about why tasks had been allocated between Alan and Wendy in the particular way the Respondent had chosen. She explained that although in theory a full time role could have been created for the Claimant based largely around the tasks that she had performed before her maternity leave, there would still then have been an overspill of work from the Claimant to a part time member of staff, which would have recreated the difficulties with log jams in work that the Respondent had suffered from several months previously. There was no such problem with the division of work between Alan and Wendy because of the way they allocated the purchase and sales side between them. There had also been a marked increase in the workload and the Respondent wanted to factor in to the Claimant's timetable her need for counselling. Ms Blackbourn said that it would not have been practicable for the

Claimant to work supported by Alan because she was not trained to do all the elements of the work that he was doing. The Respondent asked the Claimant to "bear with them" whilst the new computer system was put in place. Mr Moore had made it clear to his colleagues that he did not want any further changes during this period. He was receiving figures on a regular basis for the first time in several months and it was an exceptionally busy time. Mr Moore did not want any disruption to the status quo whilst the new system went live in phases across the seven companies in the group. Six of the companies were due to go live between April and June.

33. On 3 March the Claimant had a panic attack at work which she attributed to the stress caused by the changes to her role. She went to the toilet and Ms Debnam followed her. She offered to speak on the Claimant's behalf to Mr Moore and Ms Blackbourn. The next day the Respondent asked the Claimant to attend a meeting and agreed that the Claimant could be accompanied by her husband. The meeting took place in the boardroom after Mr Sowden had finished work. Initially only Ms Debnam, the Claimant, and her husband were present. There was a discussion about the changes to the Claimant's role and Ms Debnam said that it had been a decision of Ms Blackbourn and Mr Moore. She expressed the view that the Claimant did not have the right to return to her old role if she had taken additional maternity leave and that she in effect had no rights. The Claimant said that she was considering her options and Ms Debnam asked her not to leave her employment. Mr Moore then joined the meeting and confirmed that he was unwilling to change the status quo in the accounts department as they had just caught up after a great deal of disruption. In cross examination Mr Moore said that members of staff going on maternity leave is disruptive to the business as it necessitates getting in temporary staff, but that the introduction of the new computer system had been the biggest disruption. At that point however they were in the best position they had been in all year. There was a dispute as to whether Mr Moore had left the meeting or whether, as he alleged, all participants shook hands and left together, which was Mr Moore's account. As the Claimant made no reference in her evidence to him having walked out of the meeting, on a balance of probabilities we prefer Mr Moore's evidence on that specific point.

34. The Claimant returned home and composed the grievance letter at page 61. Her principal complaints were that had she not gone on maternity leave her role would not have changed and that she had not been permitted to return to her original role after maternity leave and it had not been explained to her why it was not reasonably practicable for her to do so. She maintained that her role still existed on her return date and that a temporary member of staff was carrying it out.

35. After raising her grievance the Claimant continued to attend work even though she continued to be concerned about the work she was being given and the places she was asked to sit.

36. The Respondent replied to the grievance on 14 March with the letter at page 65. The Respondent summarised her concerns as not having been given the accounts assistant role on her return from additional maternity leave and not

being happy with her workstation. The letter asked the Claimant to correct this summary if it had not understood her concerns correctly or wished to add any further points. The Claimant replied on 16 March (page 68) and reframed her concerns as follows:

a. She had not been given her original Accounts Assistant role back following her additional maternity leave even though the role still existed as a temporary member of staff was carrying out the duties of the role;
b. She also felt she had not been provided with a suitable alternative role with a similar status to her original role;
c. She had not been provided with any permanent work station.

She asked the Respondent to explain why it was not reasonably practicable for her to have her original role back.

37. The Respondent replied the next day at page 69 but failed to address the Claimant's request for an explanation about reasonable practicability.

38. Prior to the grievance meeting the Claimant produced a "Key points" document at page 71-72. It is not clear whether she simply referred to this during the meeting or whether she gave a copy to the Respondent. The meeting took place on 22 March. The Claimant had declined to bring a companion and the meeting was conducted by Ms Debnam with Ms Blackbourn taking the minutes (pages 74 -77). The Claimant brought with her to the meeting print outs of the statutory provisions setting out her legal rights but the Respondent did not engage with them. The meeting lasted for an hour and five minutes. The Claimant complained in her evidence that she had felt not listened to and was interrupted numerous times during the meeting. The Claimant disputed the accuracy of the minutes of the meeting and later set out her concerns at page s 82-86 in a note enclosed with a letter at page 80.

39. The grievance outcome letter was at page 78 and the Claimant received it on 30 March. The Respondent did not uphold the Claimant's grievances about her role but it did uphold her grievance about her workstation and included an apology for misjudging that aspect of the Claimant's return to work. It did not address the question of why it had not been reasonably practicable for the Claimant to return to her original role, instead maintaining that the Claimant had returned to an accounts assistant role. Immediately after the meeting the Respondent took steps to provide the Claimant with a permanent desk in the second accounts office and she was given equipment such as a telephone, a bin, a computer and access to printers. She remained unhappy with these arrangements - for example on 29 March she received a copy of the telephone list (page 91) that excluded her name, which made her feel excluded from the team. The telephone she was given did not work properly.

40. The Claimant decided not to appeal against the decision not to uphold the remaining aspects of her grievance for the reasons set out in the second paragraph of the letter at page 80. In summary she did not consider that Mr Moore, who would hear the appeal, would give her a fair hearing because of his previous involvement in decisions about the distribution of work in the accounts

team and that an appeal would therefore be a waste of time. (No alternative to Mr Moore was suggested to the Claimant at the time). The Claimant goes on to quote extensively from the requirements of the ACAS Code in her letter.

41. She wrote a second letter of the same date addressed to Mr Moore (page 87) formally resigning from her employment, but giving four weeks' notice. Her reasons for resignation were as follows:

> **"Since returning from maternity leave I feel that I have no role within the company and do not feel part of the team. I feel that a temporary employee has been favoured over myself to carry out my role that I was undertaking before I took maternity leave and I no longer feel valued at Grant Haze Limited.**
>
> **On my return I have expressed my concern about the changes to my role on many occasions as and this matter has not been resolved. I therefore have been given no choice but to resign from my Accounts Assistant position and seek further legal advice."**

42. Mr Moore replied to the Claimant's letter as follows:

> **"Thank you for your letter dated 4th April 2016 which I formally and with regret, accept your resignation from Grant Haze Limited effective from 29th April 2016.**
>
> **I am genuinely sorry that you have felt the need to terminate your employment. I appreciate that there have been a number of changes within the company whilst you have been on leave, however we have tried to organise the staff to best suit the needs of the company at the time, and also in the immediate future. I do genuinely feel that we have acknowledged your concerns to the best of our ability but I would also like to remind you that we have stated on a number of occasions that we are still undergoing changes within the company and will continue to do so over the next nine months.**
> **Your letter mentions the role of a temporary member of staff, but to reiterate previous conversations, Alan is employed to cover Sarah Embleton's maternity leave so I do not agree he has been favoured over yourself or any other member of staff. Every member of staff is as important as the next person and so I am disappointed that you no longer feel part of the team."**

Submissions

43. The Tribunal was grateful for the helpful submissions of both representatives. Mr Whitfield referred the Tribunal to the case of *Blundell* on the question of whether the Claimant had returned to the same job and submitted that applying that authority she had not. The facts of the Claimant's case could, he said, be very clearly distinguished from those in *Blundell.* He quoted a number of passages from the judgment of Mr Justice Langstaff:

> **"..it seems plain to us that, where a precise position is variable, a tribunal is not required to freeze time at the precise moment its occupant takes maternity leave, but may have regard to the normal range within which variation has previously occurred…**
>
> **..the question is whether the job on return fell outside the boundary of what was permissible. Was it outside the normal range of variability which the Claimant could reasonably have expected?"**

In his submission, the way in which the Claimant's role had been altered on her

return from maternity leave was far outside the normal range of variability that she could reasonably have expected. The work she was given was not accounts work of the kind she had done before her leave. The role was described by Ms Debnam as a "floater" role which connotes a lack of definition, permanence and responsibility. This was, he said, neither the same role, nor, were we to accept the Respondent's submission that it had not been reasonably practicable for her to return to her old role, one that was a suitable and appropriate alternative. The role that she was offered was not suitable in terms of the nature of the tasks, the capacity in which she was employed and the place at which she was employed. The last point was particularly important because the Respondent knew, or ought to have known how important it was for the Claimant's wellbeing to return to work at her old desk in the main office among people she knew. The Claimant had made this very clear to the Respondent on more than one occasion.

44. He submitted that the Respondent had misunderstood the Claimant's rights at the time of the events in question and were trying, for the purposes of the hearing before us, to establish that it had not been reasonably practicable to allow her to return to the job that she did before her maternity leave. The Respondent, he said, was attempting to do this by claiming that there had been a reorganisation of the accounts department rendering it not reasonably practicable to allow the Claimant her old job back, a fact denied, by the Claimant. It was the Claimant's submission that her job had not disappeared – it was instead being carried out by other members of staff, including Wendy Rich and the temp, Alan. Mr Whitfield further submitted that the distribution of the Claimant's role between two members of staff had pre-dated any purported re-organisation by the Respondent. However the Respondent's witnesses, he submitted, had made it clear that even if there had been a reorganisation of work that represented only part of the Respondent's reason for not offering the Claimant her old job back. The Respondent had also been motivated by two further considerations: its assumption that the Claimant would not cope with the pressure and the determination of Mr Moore not to have the business subject to any further disruptions at the time of the Claimant's return. The approach taken by the Respondent was, Mr Whitfield submitted, a breach of s18 Equality Act.

45. Mr Whitfield also objected to the Respondent's suggestion that the Claimant had not been ready to return to work in November because of Ms Embleton's pregnancy, which he described as an unnecessary and hurtful allegation. We see the force of that submission.

46. He further submitted that the grievance process had been fundamentally flawed. The Respondent did not initially grasp what the Claimant's actual grievances were, but despite the Claimant having corrected them the grievance outcome letter failed to deal with the Claimant's actual grievances and in particular her request for an explanation as to why it had not been reasonable practicable for her to return to her old job. The Respondent therefore failed at any stage properly to engage with the Claimant's actual grievances.

47. Mr Whitfield asked the Tribunal to draw inferences from incorrect or misleading statements made by the Respondent's witnesses during the course of the hearing. In his submissions he set out a list of 17 matters which he described as

"Misrepresentations". He asked the Tribunal to infer from these that the Respondent did not let the Claimant return to her old role because she had taken maternity leave and had inconvenienced he Respondent by not returning to work in early November as the Respondent had wished.

48. Ms Montaz began her submissions by conceding that it was a breach of s 18 Equality Act to exclude the Claimant from the consultation meeting in November 2015. She then submitted that the Claimant had in fact returned to her old job as she was still employed as an accounts assistant. In the alternative she submitted that it had not been reasonably practicable for the Claimant to be given her previous role because changes to her role had to be made alongside changes in the way that the accounts function at the Respondent operated. It would not have been practicable for the Respondent to restore the accounts function to the way it had operated before the Claimant's leave. This was in part she submitted, a consequence of Mr Moore's need to receive month end figures in a more timely fashion. She submitted that Mr Moore had valid reasons for his concerns about the Claimant's ability to cope under pressure. This was a balancing act and his decisions were taken in the knowledge that further changes would be needed in the accounts function. The Claimant had been told to "bear with us" and had agreed to see how things went. Consequently it had not been reasonably practicable for the Claimant to return to the job she did before her maternity absence. The job that she was given was a reasonable comparable position and was a job that was both suitable and appropriate for her to do in the circumstances.

49. On the claim of "ordinary" constructive dismissal, Ms Montaz submitted that if there had been a breach of the Claimant's contract it was not so serious as to amount to a repudiatory breach. When she returned to work the Respondent was in a state of flux – it was not an ideal time for her to return but to assist her the Respondent allowed it. Because the Respondent was going through a period of upheaval at the time its employees were not able to spend a great deal of time with the Claimant to make sure she was happy with her work. She was offered the opportunity to "desk hop" as she had been unwilling to work in the second accounts office as the Respondent had intended. Ms Debnam had apologised to the Claimant both before and after the grievance hearing because she had not been aware of what the consequences of that would be for the Claimant. The Respondent took steps to rectify the situation by providing the Claimant with a phone and a means of sending emails. In Ms Montaz's submission the reason the Claimant resigned was that it was obvious to her that things could not go back to the way they had been before she went on maternity leave and there would be further changes down the line.

50. She also reminded us of Mr Moore's evidence that had the Claimant returned to her old job she would not have lasted very long and would probably not have continued in her employment for more than a few weeks.

Conclusions

51. Our first observation is that the Respondent conducted itself towards the

Claimant in seeming ignorance of her rights. That is no excuse for failing to observe those rights. Whether its ignorance was its own or that of its advisers makes no difference.

52. The Tribunal rejects the Respondent's primary submission that the Claimant returned to the same job. That submission is wholly undermined by the evidence of the Respondent's own witnesses, each of whom gave evidence explaining why the Claimant's role was not available to her. We prefer the Claimant's submissions that on her return to work the Claimant was offered a job which differed materially from that which she had done before she went on maternity leave. The content of the work was different, consisting of FORS work and BACS administration. She was not doing the purchase ledger work for Grant Haze Limited as that was being done by Alan and to some extent by Wendy. She was not sitting at her old desk as she had been promised. She had no permanent work station at all in fact. Although the description "Accounts Assistant" could have been applied to the Claimant, this is generic job title that could be applied to a multiplicity of functions in an accounts department. We were fully satisfied, applying the test in *Blundell*, that the nature, capacity and place of the Claimant's work on her return from maternity leave were different from those that had applied before she left.

53. We also reject the Respondent's alternative submission that it was not reasonably practicable for her to return to the same job. We accepted that some elements of the Claimant's job had changed and that the environment was evolving. The Respondent was modernising its computer system and needed to reorganise its accounts function to make the work more efficient and ensure that Mr Moore received his figures promptly each month. But the Respondent failed to convince us that these changes made it not reasonably practicable for the Claimant to return to her old job. What the Respondent described as a "reorganisation" was in fact a reallocation of functions amongst certain staff members. It was plainly not the case that there was a shortage of work – the Respondent's case was that the opposite was true. Nor was it the case that the Claimant's work had disappeared. 60-65% of the job had not changed according to Ms Debnam's evidence. There were new tasks to learn and a new computer system to get to grips with and some processes were evolving such as the move to a BACS payment system instead of cheques. But the Respondent still needed to run a purchase ledger for Grant Haze Limited and was doing so. The central task of the Claimant's job still needed to be done and was still being done by a combination of Alan and Wendy. The Respondent failed to put forward a persuasive explanation as to why the role being carried out by Alan and Wendy on the Claimant's return to work could not have been performed by the Claimant herself or a combination of the Claimant and another member of staff.

54. The Respondent argued that it would have been highly disruptive to its business at that juncture to reallocate roles because it was in the process of installing a new computer system. It also relied on the difficulties it had had in obtaining month end figures on time and Mr Moore's unwillingness to have the status quo disrupted once that problem had been addressed. It also relied on its concerns about the Claimant's ability to cope with pressure. We had a number of concerns about these arguments.

55. As to the matter of disruption and Mr Moore's unwillingness to see changes in the status quo, this is an argument that could be put forward by any employer that perceives itself to be inconvenienced by a Claimant's rights on return from maternity leave. The point of a statutory right however is that it will take precedence over an employer's perception that it is being inconvenienced. The employee's rights must be respected and observed unless it is not reasonably practicable for the employer to observe them, because of some major change in the status quo such as a loss of roles through redundancy. In such a case it is not possible for the employer to change the situation back to the way it was before – something irrevocable has happened (and the woman returner in any event has alternative protections under Regulation 10). In this case on the other hand, the fact of the Claimant's duties having been temporarily allocated to someone else was not a major change in the status quo. It was consequence of a decision the Respondent made to organise its business in a particular way. It was in the Respondent's power to reverse that decision. The entitlement of a woman returning to work after maternity leave to return to her old job compels an employer to reverse any decision it has made to allocate her duties to someone else, regardless of whether the employer has come to prefer the new arrangement. Any other interpretation of the law would make the woman's right to return nugatory.

56. The difficulties caused by reintegrating an employee into the workplace after maternity leave can be mitigated by forward planning. This seems to have been absent in this case, in which the Respondent seemed to be unprepared for the Claimant's return. The Respondent seemed to be persisting with an argument that the Claimant had not given it adequate notice of her intention to return to work in March, although the evidence clearly showed that she had told Ms Debnam of her intention. We note that Ms Debnam seems not to have communicated to her colleagues when the Claimant indicated her plans about her return from maternity leave, most notably after the text exchange on 5 December 2015. Whether or not that was the case it was plain to us that the Claimant had properly communicated her intentions and could not be held responsible for the Respondent not having registered them. A number of the Respondent's difficulties in this case arose from a very informal approach to important employee communications and a lack of adequate record keeping.

57. We did not accept Mr Whitfield's submission that we should infer that the Respondent was in effect retaliating against the Claimant for failing to return in November. It seemed to us on the basis of the Respondent's witness evidence and particularly that of Ms Debnam and Mr Moore, that the Respondent was genuinely concerned about the Claimant’s welfare. However we also find that these concerns, in conjunction with its concerns about its own business operations, led it to make assumptions about the Claimant's ability to cope without informing itself properly about the position by consulting with the Claimant, taking account of her own clearly stated preferences or obtaining occupational health advice. The Respondent was aware that the Claimant was having bereavement counselling and in our view should have taken steps to make a properly informed decision about what the Claimant would be able to do, rather than reaching its own uninformed conclusions. Instead the Respondent

misled the Claimant into believing that she was going back to her original role until less than a week before she actually returned to work. The Respondent fell very far short of persuading us that it was not reasonably practicable for the Claimant to return to her old job because of her inability to manage the pressures of her role. There was simply no objective evidence that that was the case. We also find that it was patronising towards the Claimant to make assumptions about how much pressure she could handle and this was detrimental to her, regardless of whether it was well intentioned. It was also clear to us that the Respondent's concern about the smooth operation of its business was as at least as much part of its reason for acting as it did as its apparent concerns about the Claimant's ability to cope under pressure.

58. Our overall conclusion is that had the Respondent addressed its mind to the Claimant’s entitlement under Reg 18 in a timely fashion it would have been reasonably practicable for her to return to her old job or one that was very similar to it in content. In our view it is not open to the Respondent to fail to plan for the Claimant's return and then argue that it is not reasonably practicable to allow her to return to her old job. The Respondent's failure to allow the Claimant to return to her old job when it was reasonably practicable for it to do so was a breach of her entitlement under Regulation 18 of the Regulations and unfavourable treatment under s 18 Equality Act.

59. The effect on the Claimant was exacerbated by the fact that the role to which she did return was detrimental to her wellbeing. She had made it clear on more than one occasion that she wanted to return to what was familiar and restore a sense of normality in her life after her bereavement. This was no more than she was entitled to under Regulation 18. Again quoting from *Blundell*, we accept Mr Whitfield's submission that the role to which the Claimant did return- without a fixed desk, telephone or computer terminal, undertaking wholly different tasks from those she had done for many years for the Respondent, was at far remove from "a work situation as near as possible to that she left" in which "continuity, avoiding dislocation is the aim". In reaching this conclusion we relied on s18 (5) Equality Act, which provides that a woman retains the special protection conferred by s18 if the unfavourable treatment to which she is subject consists of the implementation, after the end of the protected period, of a decision taken during the currency of that period. It was clear to us that the Respondent took the decision not to allow the Claimant to return to her old role while the Claimant was still on maternity leave.

60. The Respondent conceded that the failure in November 2015 to consult the Claimant about the potential reorganisation of responsibilities was itself a detriment. We heard no submissions as to when the Claimant became aware of the fact of her exclusion. However it if were the case that the Claimant became aware of the failure to consult her during preparation for the hearing we would be likely to find either that time ran from the time of her discovery or, if persuaded that time ran from the time of the decision, that it would be just and equitable to extend time beyond the primary three month time limit.

61. Mr Whitfield also drew our attention to the Respondent's handling of the Claimant's grievance. In our judgment those flaws, in particular the Respondent's

failure to properly engage with the content of the Claimant's grievances amounted to a failure to comply with the provisions of the ACAS Code. It also contributed to the Claimant's constructive dismissal, to which we now turn.

62. Mr Whitfield submitted that the implied term was breached by the Respondent telling the Claimant that she could return to her old role until a week before her return and then failing to honour that commitment, by failing to provide her with a suitable work station and by dealing with her grievance in the manner that it did. In our judgment there are a number of ways in which the Claimant could establish a repudiatory breach of contract in this case and we reject the Respondent's contention that there was no breach going to the root of the contract. We have concluded that the Respondent breached the Claimant's statutory right to return and discriminated against her in doing so because she had taken maternity leave. These acts on the Respondent's part were in our judgment sufficient to establish a breach of contract of a sufficiently fundamental nature to entitle the Claimant to resign and treat the contract as terminated by the Respondent's conduct towards her. She acted appropriately in first raising a grievance to see whether matters could be put right, but the handling of her grievance and in particular the Respondent's failure to identify properly the subject of her complaint, was a further breach of the implied term. Having received the outcome of the grievance, which still failed to deal with her question as to why it had not been reasonably practicable for her return to her original job, the Claimant was entitled to regard the Respondent as indicating that it no longer intended to be bound by the terms of the contract. She acted promptly at that point in proffering her resignation. Her decision not to appeal to Mr Moore was a reasonable one in the circumstances of this case.

63. The Claimant therefore succeeds in her claims of a breach of Regulation 18, discrimination under s18 Equality Act and constructive dismissal. The matter will now be listed for a remedy at which the Respondent's outstanding costs application also be dealt with, unless the parties indicate to the Tribunal that they are able to resolve the matters of remedy and costs without a hearing. Whilst we heard some submissions as to costs at the end of the liability hearing the Claimant must set out in more detail the basis on which the costs she has accrued have been incurred.

64. Case management orders in respect of the remedy and costs hearing will follow.

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Employment Judge Morton
Date: 25 September 2017