EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Ms M Walworth	Scrivens Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 15 & 16 January 2018
7 March 2018 (in chambers)

EMPLOYMENT JUDGE Anstis **MEMBERS** Mr R W White
Ms S B Din

Representation:
Claimant: Mr P Keith (counsel)
Respondent: Ms P Whelan (consultant)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant was subject to unlawful pregnancy and maternity discrimination by the Respondent.

3. The Claimant is entitled to holiday pay.

REASONS

INTRODUCTION

1. By a claim lodged on 11 July 2017 the Claimant claims to have been unfairly (constructively) dismissed, to have been discriminated against on the grounds of pregnancy or maternity and also to be owed holiday pay.

2. In their response to the claim, the Respondent denies being liable to the Claimant as alleged, and also brings an employer's contract claim for (i) payment of £11,000, alternatively £5,500, being partial re-imbursement of training costs incurred by it, and (ii) arguing that the Claimant was in breach of contract in failing to give proper notice of resignation.

3. It is agreed between the parties that the Claimant's employment ended on 13 March 2017. It is not suggested by either party that any of the Claimant's claims, or the employer contract claim, were brought outside the relevant time limit for such claims.

4. The Respondent operates a large chain of retail opticians. At the time her employment ended the Claimant was employed by them as a branch manager and was also a qualified dispensing optician.

5. At the start of this hearing, owing to an administrative oversight for which the tribunal apologises, only the employment judge and Ms Din were at tribunal. The parties were offered the opportunity under section 4(1)(b) of the Employment Tribunals Act 1996 to proceed with a two-member panel, and were informed that Ms Din was appointed from the panel of persons appointed after consultation with organisations or associations representative of employees. The consent of both parties is required to proceed in such circumstances, and was not forthcoming. Fortunately, Mr White was able to attend the panel at short notice, so the hearing was able to proceed with a fully-constituted panel.

THE ISSUES

6. Mr Keith had prepared a list of issues for the tribunal. In discussions with the parties this list of issues was agreed subject to the deletion of one point. After consultation with the Claimant Mr Keith indicated that the Claimant was not pursuing an aspect of her claim in relation to her job title or designation as a dispensing optician. It was also agreed with the parties that at this stage the hearing (and hence this judgment) would be limited to matters of liability only. At the conclusion of the hearing a date was set and directions given for a remedy hearing, on a provisional basis.

7. The issues for the tribunal at this hearing were agreed to be as follows:

Constructive dismissal

1. Did the Respondent commit an actual or anticipatory breach of contract by 'pausing' the period for compliance with her training fee agreement while she was on maternity leave?

2. If so, was that breach fundamental to the employment contract and/or the implied term of trust and confidence?

3. If so, did the Claimant resign in response to the breach?

4. Did the Claimant delay too long before resigning?

Pregnancy or maternity discrimination

5. By 'pausing' the period for compliance with the training fee agreement while the Claimant was on maternity leave, did the Respondent treat the Claimant unfavourably because she exercise or sought to exercise the right to ordinary or additional maternity leave.

Employer's contract claim

6. Was the Respondent entitled to 'pause' the period for compliance with the training fee agreement while the Claimant was on maternity leave?

7. Did the employer commit an actual or anticipatory fundamental breach of contract in doing so?

8. Did the Claimant accept the breach and terminate the contract?

9. If so, did any clauses in that contract survive the termination?

Holiday pay

10. Is the Claimant owed money for accrued but untaken holiday pay at the date of termination?

8. It was apparent that a number of difficulties had arisen between the Claimant and the Respondent towards the end of her employment, with capability proceedings and other issues being raised by the Respondent and the Claimant raising a grievance about her treatment. Much of the evidence from the Respondent's witnesses was concerned with putting forward their explanation of these events. However, the Claimant has always limited the basis of her complaints in this case to one particular matter, rather than relying on previous incidents. While noting this as general background or contextual information, we consider it only relevant to the issues we have to determine on one particular point, as set out below, and will not otherwise express a view on it.

THE FACTS

9. The tribunal heard evidence from the Claimant herself, and from Theresa Richards (regional manager), Katie Hibberd (HR manager) and Kashif Mohammed (finance director).

10. Many of the relevant facts were not in dispute between the parties. On other points it is not the events themselves which are in dispute, but the dispute is about the reasons for those events and/or their legal significance.

11. We will deal first with those points which are not in dispute.

12. The Claimant started work with the Respondent as an optical advisor on 26 January 2009. It was later agreed between the parties that she would become a Trainee Dispensing Optician with effect from 13 September 2010, and in connection with this on 16 August 2010 the parties agreed a "Training/Service Agreement" in order for the Claimant to be trained as a Dispensing Optician to the standards required by the Association of British Dispensing Opticians.

13. That agreement records that the Respondent has agreed to pay for the Claimant's training as follows:

> "*in consideration … for the Trainee agreeing to remain in the employ of the Company for the Period as hereinafter defined and to repay a variable amount of the amount of the Liquidated Damages Total as hereinafter defined directly and proportionately depending upon how much of the Period the Trainee has failed to fulfil*"
>
> and that:
>
> "*the Company has explained to the Trainee that it requires the Trainee to remain in the employment of the Company for the Period so that it may recover the expenditure it has incurred in Training the Trainee.*"

14. The relevant provisions of that agreement are as follows:

> *"'The Registration Date' means the date on which the General Optical Council registers the Trainee as a Dispensing Optician …*
>
> *'The Period' means the period from the date the Employee commenced as a Trainee Dispensing Optician to a date which is three years from the Registration Date.*

3.1 … the Trainee agrees to remain in the employment of the Company for the Period …

4.1 In the event that the Trainee braches clause 3.1 … the Trainee shall pay to the Company upon demand the amount of Liquidated Damages as referred to in the Schedule depending upon when the Trainee terminates his/her employment …

Schedule 1:

If there was a breach of Clause 3.1 … the amount of Liquidated Damages which shall be demanded by the Company shall depend upon when the Trainee terminates his/her employment as follows:

(a) Prior to the successful completion of the Association of British Dispensing Opticians Examinations and six months thereafter - £22,500.

(b) At any point after the period defined by clause (a) above is expired but prior to 2 years from the Registration Date … £11,000.

(c) At any point after the period defined by clause (b) above is expired but prior to 3 years from the Registration date … £5,500."

15. The "Registration Date" in the Claimant's case was 15 December 2014.

16. The Claimant did not suggest that there was anything in the terms of this agreement that was unlawful or improper, nor that the figures given were anything other than a genuine estimate of the costs (direct and indirect) incurred by the Respondent in her training.

17. Under the terms of the agreement it appears, therefore, that if the Claimant left employment after 15 December 2014 but before 14 December 2016 she would be due to pay £11,000 to the Respondent, and if she left after 15 December 2016 but before 14 December 2017 she would be due to pay £5,500 to the Respondent.

18. At the end of August 2015, the Claimant notified the Respondent that she was pregnant, with the "estimated date of delivery" being April 2016.

19. On 11 September 2015 Katie Hibberd, a HR Manager employed by the Respondent, wrote to the Claimant acknowledging this notification and setting out the necessary formal next steps in notification. She also said in that letter:

"As discussed, your current Contract of Employment is subject to a Training/Service Agreement which will need to be reviewed closer to your due date to take into account the period of time that you will be on maternity leave."

20. The Claimant later notified the Respondent formally of her intention to commence maternity leave on 18 April 2016. In response, Katie Hibberd wrote to the Claimant on 11 January 2016 setting out some of the formal arrangements for her maternity leave, and stating as follows:

"As detailed in my letter dated 11 September 2015, your employment is subject to a Training/Service Agreement dated 16 August 2010 and signed by you. In this Agreement you agreed to work for the Company for a period of three years from the date that you registered as a Dispensing Optician with the General Optical Council. I understand that you registered as a Dispensing Optician on 15 December 2014 and, as you intend to commence your maternity leave from Monday 18 April 2016, you will have completed 16

months' of the 36 month 'Period' detailed in your Training/Service Agreement. The outstanding 20 months of 'the Period' will recommence upon your return to work following your maternity leave. Should your maternity leave start before 18th April 2016, the appropriate outstanding amount of 'the Period' will recommence upon your return."

21. The Claimant accepted that she had been told much the same thing verbally by Katie Hibberd in September 2015. She said that she had, at that point, simply taken Katie Hibberd's word for it that this was what the agreement said, and had not actually herself looked back over the agreement until much later. For her part, Katie Hibberd accepted that this was not what the original agreement had said, but described this term as set out in the letter of January 2016 as being an attempt by the Respondent to vary the agreement (and something she said was universally done when someone who was subject to the agreement went on maternity leave) which the Claimant had accepted by virtue of her failure to object.

22. This letter states that the "Period" of three years during which the Claimant is under an obligation to repay all or part of her training costs would be effectively suspended or paused for the duration of her maternity leave. The duration of her maternity leave would not count towards this Period. It is this that is at the heart of the dispute between the parties. In argument before us this became known as the "pause clause".

23. It is agreed between the parties that if the pause clause is effective then the Claimant would be due to repay £11,000 (for which the Respondent makes an employer contract claim). If the pause clause is not effective, the amount due (subject to argument about the effect of any repudiatory breach of contract on the part of the Respondent) would be £5,500.

24. Shortly after receiving this letter, the Claimant in a letter of 9 February 2016 raised a grievance about a number of aspects of her treatment by the Respondent, and saying that this mistreatment amounted to pregnancy or maternity discrimination. The "pause clause" was not mentioned by her in that grievance. The grievance was heard by Linda D'Arcy of the Respondent on 10 March 2016. On 22 March 2016 Linda D'Arcy wrote to the Claimant giving her conclusion on the grievance: "*… I can find no evidence to suggest that you have been discriminated against due to your pregnancy."* The Claimant did not appeal against this finding on the grievance but she was, of course, due to give birth shortly after receiving this decision. Her maternity leave began as planned on 18 April 2016, with her daughter being born shortly thereafter.

25. On 6 January 2017 the Claimant called Katie Hibberd to discuss her return to work. The conversation was the subject of a detailed note by Katie Hibberd. In answer to Mr Keith's questions, Ms Hibberd said that this note had been made on the Monday following the date of the conversation, which was a Friday. The note records as follows:

"MW called to ask for advice regarding her return to work. MW explained that her daughter… had some health issues as she had a variety of allergies that has caused quite a few issues since she was born. MW was very concerned about putting her daughter into childcare as any ill preparation of food could cause an allergic reaction. The medical advice given was that her daughter could grow out of it however there were no current signs of this happening.

… MW felt that she was going to struggle to leave her daughter at this time and she asked if she could:

(a) bring her daughter into work with her
(b) have extended time off work

KH confirmed that it would not be an option to bring her daughter into work is the branches do not have crèche facilities. MW response to this was quite jovial and came across as joking and said "are you sure, she is very cute and could bring in additional business to the branch". MW was quite accepting that this was not an issue.

KH confirms that MW could request holiday in accordance with the Company Holiday Request Procedure however this would need to be done through her Regional Manager, Teresa Richards. MW explained that she would be looking for a couple of extra months off. KH advise that holiday requests are generally up to 2 weeks and MW annual entitlement would not cover two months so this may not be a suitable option.

Upon discussing the extended time off work or "sabbatical", as referred to by MW, KH explained that this is not something the company generally supports and raised concerns that as a branch manager it would be unlikely that the company could support this. MW added that she did not know if two months would be enough. MW was hoping that her daughter would still grow out of the allergies however she did not know when or if this would happen. MW was happy to use child care but not at this time as she did not want to leave her daughter with such health issues.

KH sympathised with MW situation but advised that she was unable to suggest an option that would support MW requirements. MW confirmed that she had not discuss the matter with Theresa Richards as she wanted advice from HR first. KH advised that the HR department would update the regional offices on any contact with staff however recommended that MW discuss the matter with TR ASAP."

26. The Claimant's account of this conversation in her oral evidence was somewhat different. She accepts that she had a conversation with Katie Hibberd about a return to work at this time. She said that she had made her own brief note of the conversation after it occurred, but this was not disclosed prior to the hearing nor was it disclosed by her after its existence was established on the first day of the hearing. She accepted that she had mentioned that her daughter had had health issues, but she also said that she was contacting childcare providers and any discussions with Katie Hibberd were on the basis of what might happen if her daughter's health worsened while with a childcare provider. She said that the question of taking holiday had been raised by Katie Hibberd, but that it was her (the Claimant) who had mentioned the possibility of a sabbatical.

27. On 10 February 2017 Katie Hibberd wrote to the Claimant saying:

> *"I write further to our recent communication when we discussed your potential return to work. You indicated during this conversation that you were still considering your options however, you may not return to work following your maternity leave."*

The letter went on to point out that the Claimant was due to return to work at the end of her maternity leave on 17 April 2017, and that if she was intending not to return she would have to give 12 weeks' notice. Ms Hibberd asked the Claimant to confirm her intentions to Theresa Richards and said that if she did not return to work she would be due to repay £11,000 under the training agreement.

28. It appears that after this Theresa Richards made some attempts to contact the Claimant by telephone, and on 24 February 2017 Katie Hibberd wrote to the Claimant to say that Theresa Richards would like to see her for a "welfare visit" on 9 March

2017. This was later postponed by Katie Hibberd to 15 March 2017. The Claimant did not attend, and when contacted about this said that she had already sent a resignation letter to the Respondent's head office.

29. The Claimant said that by the end of February she had seen a paediatrician who had reassured her that her daughter's health issues were unlikely to recur. At that point she felt that there were no complications in the way of her return to work, so there was no need for her to contact Theresa Richards, and she proceeded to seek out childcare providers with the intention of returning to work as required in April 2017.

30. There is in the tribunal bundle a resignation letter from the Claimant to the Respondent dated 13 March 2017 and stamped as received on 15 March 2017 saying:

> *"Please accept this letter as my immediate resignation from Scrivens.*
>
> *It is my understanding that the Period relating to my training and service agreement has been suspended during my maternity leave and that Scrivens says there are 20 months of the Period outstanding which will restart when I come back to work on 18th April 2016.*
>
> *I have looked through the agreement and the other documents that I have and I cannot find any mention of such suspension of the period when on maternity leave. I have been discriminated against and treated unfavourably because I became pregnant and took maternity leave …*
>
> *My contract of employment has been fundamentally broken and I am resigning in response."*

31. It is the Claimant's case that while she had known from an early stage of the "pause clause" she had only been prompted to review her employment documentation when thinking of arrangements for her return to work, and the possibility of family leave of various kinds, in late February 2017. She says that it was at that point that she felt that she had been misled by the Respondent and realised that the pause clause was not part of the original agreement.

32. Shortly after that Claimant's resignation the Respondent made a formal demand for repayment by the Claimant of £11,000. It appears that they then withheld her holiday pay for the final holiday year of employment by way of set-off against this figure.

THE LAW, DISCUSSION AND CONCLUSIONS

33. Both parties helpfully provided full skeleton arguments or written submission setting out their case. We have read and considered these in full when coming to our conclusions on this case. We will not set them out in full in this decision, but instead will refer to the relevant law and any material disputes of law in considering the individual issues.

34. We will make our findings by reference to the agreed list of issues in this case, subject only to some variation in the order of the questions, for the sake of convenience. We will deal firstly with the contractual issue:

Breach of contract – express clause

Did the Respondent commit an actual or anticipatory breach of contract by 'pausing' the period for compliance with her training fee agreement while she was on maternity leave?

35. Since it is common ground that the Respondent did operate such a pause, the Respondent's only defence is that this pause was permitted by the Claimant's contract and so was not a breach of contract.

36. At the outset of the hearing, we asked Ms Whelan to identify any provision of the original training agreement which could be interpreted as including the "pause clause". She referred to the Schedule as referring to the Respondent's need to "*recoup its costs by virtue of profitable services*". We do not see that this can be read as incorporating a pause in the Period for maternity or other long-term absences. In any event, it was not Ms Hibberd's evidence that the agreement originally contained a right for the Respondent to pause the period. She said that her letter of 11 January 2016 (if not her earlier notification) was intended as a variation of the agreement. She said that this was a variation that was sought in the case of each pregnant employee, and a variation that was effective in the Claimant's case by virtue of her lack of objection. It was not argued that there was any contractual right to impose a unilateral variation.

37. We have no hesitation in rejecting this argument from the Respondent. There is nothing in the letter of 11 January 2016 to suggest that this was an attempt by the Respondent to vary the contractual term. It is phrased simply as something the Respondent is going to do. That of itself cannot amount to a variation, still less something that was capable of acceptance by silence on the part of the Claimant. We note the comments of Elias P in Solectron Scotland Ltd v Roper [2004] IRLR 4 that:

> *"The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct."*

38. We have some doubts about whether such a doctrine of acceptance by conduct or by silence has any real application to a supposed variation of contract which is not described either indirectly or directly as such by the employer, and which only takes effect (if at all) a considerable period of time in the future. However, even if it does it is clear to us that the Claimant did not accept it by her silence or conduct, and that therefore the Respondent saying that it would operate the pause clause in the event of the Claimant leaving amounted to an anticipatory breach of contract.

Pregnancy or maternity discrimination

By 'pausing' the period for compliance with the training fee agreement while the Claimant was on maternity leave, did the Respondent treat the Claimant unfavourably because she exercise or sought to exercise the right to ordinary or additional maternity leave.

39. Under section 18 of the Equality Act 2010:

> *"(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."

40. Under regulation 9 of the Maternity & Parental Leave etc. Regulations 1999:

> *"(1) An employee who takes ordinary maternity leave or additional maternity leave:*
>
> *(a) is entitled, during the period of leave, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent, and*
>
> *(b) is bound, during that period by any obligations arising under those terms and conditions …"*

41. Under regulation 9(2) "terms and conditions" does not include terms and conditions about remuneration, but (reg 9(3)) "*only sums payable to an employee by way of wages or salary are to be treated as remuneration*".

42. The "pause clause" requires the Claimant (in comparison with someone who did not take maternity leave) to undertake additional service before being free of the obligation to repay her training fee.

43. We do not see how this is anything other than unfavourable treatment because of taking maternity leave. Ms Whelan's answer to that appears to be that it was permitted by the contract and that without the pause clause a woman on maternity leave would be better off than any other employee – she would be actually at work for less than three years, whereas any other employee would have to actually work for three years.

44. On her first point, we have found above that it was not permitted by the contract, and even if it were that would not prevent it amounting to discrimination. On her second point, we doubt her characterisation of this as being the proper way of looking at the issue, but in any event while there is a law prohibiting unfavourable treatment of those on maternity leave, there is nothing to prevent more favourable treatment of those on maternity leave.

45. The imposition and use of the "pause clause" appears to us to be a classic case of unfavourable treatment due to maternity leave, and thus unlawful discrimination on the basis of pregnancy or maternity.

Breach of contract – implied term

Was this a breach of the implied term of trust and confidence?

46. Mr Keith relies on a number of matters, set out at para 16 of his skeleton argument, in support of his contention that as well as being an express breach of contract this is a breach of the implied term.

47. Ms Whelan suggests that the Respondent's actions, however they are interpreted, did not go to the root of the contract or deprive the Claimant of the whole or a significant part of the benefit of the contract. The contract has not been renounced by the Respondent and could still have been performed despite the Respondent's actions. Everything that was complained of had been done on the basis that the Claimant would return to work, not that the Respondent did not want the Claimant to return to work.

48. From the start, the Respondent has misrepresented to the Claimant the nature of the "pause clause". She was simply told that the pause clause would apply to her

maternity leave. The Respondent now accepts they were not permitted to do this under the original wording of the agreement, but suggests that this was an attempt at a consensual variation of contract. There is nothing in any of the letters to suggest that this was an attempt at a consensual variation of contract. If the Respondent had realised that its agreement did not say what it thought it did, then the correct approach would have been to be open with the Claimant about this, rather than attempt to present this as always having been the case. In any event, all of this was done in aid of a clause which fundamentally amounted to discrimination on the basis of pregnancy or maternity.

49. There is no general rule of law than any act of unlawful discrimination automatically amounts to a breach of the implied duty of trust and confidence. However, it seems to us that in most cases where unlawful discrimination is found that will also amount to a breach of the duty of trust and confidence. That is particularly so here, where there is the aggravating factor of the Respondent's misrepresentation of the pause clause. We find that the Respondent's behaviour is a breach of the duty of trust and confidence. Ms Whelan's attempts by reference to commercial contracts to say that the contract was still capable of being performed do not seem to us to apply well in the context of this case.

A fundamental breach?

Was that breach fundamental to the employment contract and/or the implied term of trust and confidence?

50. A breach of the duty of trust and confidence will automatically be a fundamental breach of contract (Morrow v Safeway Stores [2002] IRLR 9). Considerations in relation to the breach or anticipatory breach of an express term of the contract are, in this case, very much the same as set out above in considering the duty of trust and confidence. For the same reasons, we consider that the breach of the express term of the contract is a fundamental breach.

Affirmation/waiver

Did the Claimant delay too long before resigning?

51. There may appear to be something of a difficulty for the Claimant in the question of whether she delayed too long before resigning. She was first told of the "pause clause" in September 2015, but only resigned 18 months later in March 2017. This may be argued to amount either to an affirmation of the breach or a waiver or it.

52. Mr Keith's answer to that (citing Chitty on Contracts para 24-003) is that a person cannot be said to have affirmed a repudiatory breach of contract until "*first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him*" – the alternatives being to accept the repudiatory breach or affirm the contract.

53. The extract from Chitty he relies upon cites a number of international shipping cases, which are somewhat difficult to translate across to the employment context.

54. In the employment context, many constructive dismissal cases will be brought on the basis of mistreatment by an employer, said to amount to a breach of the duty of trust and confidence. In such circumstances it is highly unlikely that without legal advice an employee will have any understanding that the treatment amounts to a breach of contract or that they have a legal right to resign. Very often that legal advice will only be taken after the resignation occurs, and it is only then that the employee will have any understanding of their legal rights – yet arguments based on affirmation or waiver of the offending treatment will often be made and sometimes accepted by the tribunal.

55. What we do take from the extract from Chitty cited above is that the employee must, in a broad sense, realise that the employer is doing something wrong before they can be found to have affirmed or waived any breach of contract. For instance, if an employee has been paid below the national minimum wage for many years it may only be on taking advice that he or she realises the entitlement that he or she had and, to the extent that a failure to pay the national minimum wage can be said to be a breach of the duty of trust and confidence, we do not think that that employee can be said to have affirmed or waived that breach simply by having accepted the lower payment over many years.

56. A striking feature of this case is that the Claimant did not mention the pause clause despite raising a wide-ranging grievance in respect of her pregnancy and maternity leave in February 2016. It appears that at that time she did not see anything wrong with what the Respondent was doing. It is her case that it was only much later that she checked her contract and realised that the employer was not following the terms of the training fee agreement. She resigned almost directly after that.

57. We accept what she says about not having realised earlier that the pause clause was not contained in the training fee agreement. If she had, she would have raised it in the earlier grievance. It also makes sense that she would refer back to her contractual and other documents ahead of her return to work, and then realised that the pause clause was not in the original training fee agreement. On that basis, we do not consider that she waited too long before resigning, or either waived or affirmed the Respondent's breach of contract.

Causation

Did the Claimant resign in response to the breach?

58. The question of whether the Claimant resigned in response to the breach (or for some other reason) is one that had been discussed at length between us.

59. The appropriate legal test is set out by Jack J in Tullett Prebon v BGC [2010] EWHC 484 at para 77: "*it* [is] *enough for the employee … to show that he resigned in response at least in part to the employer's breach*".

60. For the Claimant it is said that she was keen to return to work and was in the process of arranging childcare but then found out about the Respondent's breach of contract and immediately resigned.

61. "*At least in part*" does not set a high bar for the Claimant. Her evidence was that this was the reason for her resignation, and it is certainly expressly stated as such in her letter of resignation.

62. The Respondent had a number of points it makes against her. The Respondent says that she was at best very reluctant to return to work, had not made any practical arrangements for her return and, whatever the rights and wrongs of the Respondent's earlier behaviour, the pause clause simply ended up being a convenient pretext for the Claimant to resign when she never intended to return to work anyway. The Respondent suggests that this was done at least in part to construct an argument that would avoid her having to pay back any of the training fee, and also points to the fact that the Appellant had previously felt able to raise a grievance about problems, but this time resigned without giving the Respondent any opportunity to correct, investigate or clarify matters. The Respondent also says that the resignation was timed in order to avoid a meeting with Theresa Richards about her return to work, and points out that since leaving the Respondent the Appellant has not yet resumed work as a dispensing optician.

63. On the question of the Claimant's ability and willingness to return to work, she has said that she was willing and able, indeed keen, to return to work. We have some difficulty with accepting this entirely at face value, given that she did not seek to meet Theresa Richards, and also given the fact that she has not since leaving the Respondent sought other work as a dispensing optician. It also seems likely to us that someone who was so keen to return to work with the Respondent would have raised the question of the pause clause with the Respondent before resigning. It is striking that in contrast to her previous behaviour, the Claimant simply resigned on discovering the problem with the pause clause. Her explanation for that was that the complaints she had made previously had been ignored and she had no reason to believe matters would be any different this time. Mr Keith took us to various passages in her previous grievance meeting in showing how that had been handled by the Respondent. The grievance was not upheld, but the handling of the grievance does not seem to us to be such as to mean that the Claimant would have been entirely put off raising any subsequent matters. There is no direct evidence to support the Respondent's submission that this was done simply in an attempt to avoid having to repay any of the training fee.

64. As mentioned above, this point has been discussed at length between us in considering the claim. Our conclusion is that the matters relied upon by the Respondent go some way to showing that the pause clause may not have been the sole reason for the Claimant's resignation, and that there may have been other factors in play. However, they do not go so far as to suggest to us that it was not, "at least in part", the reason for her resignation. It was the express reason she gave at the time and has constantly given, and followed what we find to be a clear case of breach of her contract and maternity discrimination. Accordingly, we conclude that the Claimant satisfies the necessary legal test and did, in the formula used on the list of issues, resign in response to the breach of contract.

65. The Claimant was therefore constructively dismissed. It has not been suggested that there was any potentially fair reason for this, and the dismissal is therefore unfair.

66. Questions of the Claimant's efforts to find other work since leaving the Respondent, are, of course, likely to be relevant to the question of remedy for unfair dismissal.

Employer's contract claim

Was the Respondent entitled to 'pause' the period for compliance with the training fee agreement while the Claimant was on maternity leave?

Did the employer commit an actual or anticipatory fundamental breach of contract in doing so?

Did the Claimant accept the breach and terminate the contract?

If so, did any clauses in that contract survive the termination

67. As set out in the preceding paragraphs, the answer to the first three questions is no, yes and yes. That leaves the fourth question: did any clauses in that contract survive the termination?

68. In the apparent absence of any direct employment law authority on this point, Mr Keith in his submissions refers to various passages from Chitty on Contracts, citing paras 24-018 and 24-024. In her submissions on the point Ms Wheelan simply says that the amount of the training fee has not been challenged and is due as a matter of contract. She does not address the position if the Respondent is found to have committed a repudiatory breach of contract.

69. In the course of considering this point we too have looked at Chitty on Contracts. It is somewhat difficult to apply cases decided in the context of commercial contract law to employment law, but the legal principles must be the same. Under the hearing "obligations which survive discharge", at para 24-050 it says:

> *"… from the time of discharge, as a general rule both parties are excused from further performance of the primary obligations of the contract which each has still to perform. However, obligations for the resolution of disputes will remain in full force and effect, "as may other clauses having a contractual function which is ancillary or collateral to the subject-matter of the contract … Ultimately, it is a question of construction whether or not the parties intended the contractual obligation in question to survive the termination of the contract."*

70. Given that the repayment of the training fee was a matter that only took effect on termination of the contract, it would seem that the parties did intend the obligation to survive the termination of the contract. It could never have any effect otherwise.

71. However, in the context of employment law that is not the end of the matter. The well-known case of General Billposting Co Ltd v Atkinson [1909] AC 118 concerned post-termination restrictions – as in this case, contractual provisions taking effect on termination – and found that they would not survive a termination following the employer's repudiatory breach of contract. The principle in General Billposting has since been doubted (see, for instance, Phillips LJ, in Rock Refrigeration Ltd v Jones [1996] IRLR 675) but appears to remain good law at least in the context of post-termination restrictions.

72. On discussion and consideration of the matter, it appears to us that this is a point on which we would benefit from further legal submissions from the parties.

73. We have therefore decided to defer consideration of liability on the employer's counter-claim to allow the parties to make further legal submissions on the point. Those should be directed particularly at the question of whether the obligation to repay the training fee can survive the Claimant's acceptance of the Respondent's repudiatory breach of contract, and, without limiting the parties' submissions, relevant points would appear to us to be the extent to which the employment contract and training agreement can be regarded as separate matters, the effect of General Billposting and whether it has application outside the field of restrictive covenants.

74. Although strictly speaking a matter of remedy rather than liability, it should be clear from our conclusions above that if there were to be any obligation to repay the training fee that would be at the lower level of £5,500 rather than the amount the Respondent sought to obtain through the use of the pause clause.

75. As regards the Respondent's claim that the Claimant was in breach of contract for failing to give proper notice, it will be apparent from our findings that we consider she was entitled to resign without notice given the Respondent's repudiatory breach of contract.

Holiday pay

Is the Claimant owed money for accrued but untaken holiday pay at the date of termination?

76. As we understand it is common ground between the parties that the Claimant had a legal entitlement to holiday pay on termination of employment. The Respondent simply says that none was paid as it was entitled to set this off against the unpaid training fee.

77. Since we are at this point determining liability only it appears to us that we must find that the Claimant is due holiday pay – albeit that questions of set-off and the particular amount (if any) owing will need to be determined at the remedy hearing.

Remedy hearing

78. As set out earlier, a remedy hearing has been listed (with associated directions having been given) and it will now proceed to determine the correct remedy for the Claimant along with the question of liability and remedy on the employer's counter-claim.

Employment Judge Anstis
9 March 2018