



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss E Farmer

v

1. Great Central Plastics Limited
2. Mr Anthony Phillips
3. Mrs Baljeet Phillips

Heard at: Watford

On: 25 to 28 June 2018

Before: Employment Judge Skehan
Mr S Bury
Ms L Thompson

Appearances

For the Claimant: In person

For the Respondent: Ms P Hall, Consultant

JUDGMENT

1. The claimant's claim for automatic unfair dismissal contrary to s.99 (3) of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant's claims against the first respondent, second respondent and third respondent that she has been discriminated against because of her pregnancy and/or because of her sex contrary to s.13, 18 and 39 of the Equality Act 2010, fail and are dismissed.

REASONS

1. The claims in this matter were brought against:
 - 1.1 The first respondent, referred to as 'the respondent' in this judgment. The respondent is a small employer, employing approximately 23 people. The respondent is a designer and manufacturer of high quality plastic injection moulded products for both promotional and automotive industry;
 - 1.2 The second respondent is Mr Anthony Phillips, referred to as 'Mr Phillips', who is the Managing Director of the respondent;

- 1.3 The third respondent is Mrs Baljeet Phillips, referred to as 'Mrs Phillips', a Director of the respondent, responsible for the respondent's HR function and married to Mr Phillips;
2. At the outset of the hearing we noticed that the Form ET1 was difficult to read in parts. The claimant provided clarification by reading the particulars contained within the ET1. With the agreement of the parties, we set out the issues to be determined by the employment tribunal with reference to those identified by Employment Judge Hyams on 27 October 2017. The claimant claims that she was dismissed unfairly because of her pregnancy. The claimant also claims that she was discriminated against because of her pregnancy and because of her sex, ie that the respondents breached s.13, 18 and 39 of the Equality Act. In addition, the claimant claims that she was paid less than a female comparator because she, the claimant, was pregnant. The respondent's representative confirmed that the respondent admitted that the claimant was dismissed by letter dated 20 March 2017.

The issues

3. The issues to be determined by the employment tribunal were:
 - 3.1 Was the claimant dismissal on 20 March 2017 to any extent because the claimant was pregnant or a woman?
 - 3.2 Was the respondent's decision not to uphold the claimant's subsequent appeal against her dismissal made to any extent because the claimant was pregnant or a woman?
 - 3.3 Was the claimant treated any less favourably than she would have been treated if she had not been pregnant and/or a woman in the following ways?
 - 3.3.1 Mrs Phillips saying, on 14 February 2017, "If it carries on like this there is no point in having an assembly room".
 - 3.3.2 Mrs Phillips, on 23 February 2017, telling the claimant not to use a ladder at work.
 - 3.3.3 By the claimant being paid by the respondent at the rate of £7.50 per hour when her colleague, Ms Mitchell, was paid for a period of four to six weeks before the 20 March 2017 at £8 per hour.
 - 3.3.4 By the manner in which the claimant was treated by Mr Phillips after she told the respondent that she was pregnant, namely:
 - 3.3.4.1 Mr Phillips failing to say sorry to the claimant when a door opened and nearly hit her by accident on 15 February 2017.

3.3.4.2. Mr Phillips ignoring the claimant when she and he were in the vicinity of each other. The claimant clarified that Mr Phillips had ignored her both before and after her pregnancy. However, the behaviour had become worse following her pregnancy.

3.3.4.3. By the manner in which Mr Phillips responded to the claimant's complaints made on 20 March that Ms Mitchell was being paid £8 an hour when the claimant had only been paid £7.50 per hour.

3.4 A Section 1 statement of Initial Employment Particulars was not produced by the Respondent within two months of the claimant commencing employment in accordance with S.1 of the Employment Rights Act.

The Law

4. The claimant's claim was presented as a claim of direct discrimination on the grounds of pregnancy and/or sex and brought under s.13, S18 and 39 of the Equality Act 2010. Section 13 provides that a person 'A' discriminates against another ('B') if, because of the protected characteristic he treats B less favourably than he treats or would treat others. The protected characteristic in this case is pregnancy and/or sex. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against or victimise their employee by way of: B's terms of employment; dismissing B; or by subjecting B to any other detriment.
5. Section 18 of the Equality Act 2010 provides that a person 'A' discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy. In deciding whether a female employee has been discriminated against because of pregnancy within the meaning of section 18 of the Equality Act 2010, the test is whether she has been treated unfavourably, rather than less favourably, the test for direct discrimination under section 13 of the Equality Act 2010 in respect of the other protected characteristics, and there is therefore no need for a comparator. To fall within section 18, a woman's pregnancy or maternity leave does not have to be the only or even the main reason for her unfavourable treatment. This is the same position under "normal" direct discrimination law. Accordingly, a woman's pregnancy only needs to materially influence the employer's conscious or subconscious decision-making for the unfavourable treatment to be discriminatory
6. The burden of proof provisions is set out in s.136 of the Equality Act. This provides that if there are facts from which a court could decide in the absence of any other explanation that a person contravenes the provisions of the Equality Act, the court must hold that that contravention occurs. This provision does not apply where the respondent can show that it did not contravene that provision.
7. The claimant did not have sufficient length of service to bring an 'ordinary' unfair dismissal claim under section 98 of the Employment Rights Act 1996.

The claimant claimed that her dismissal was automatically unfair as the reason or principal reason for her dismissal related to her pregnancy contrary to section 99 of the Employment Rights Act 1996.

Findings of fact

8. As is not unusual in these cases the parties have referred to in evidence a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party or deal with it in the detail in which we have heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principle finding of fact. We make findings of fact on the balance of probability taking in to account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
9. On behalf of the claimant we heard evidence from:
 - 9.1 the claimant herself. The claimant, acting in person, had not provided a full witness statement relating to the allegations made. The employment tribunal accepted the narrative as contained within the Form ET1, together with the claimant's brief statement as making up the claimant's statement.
 - 9.2 Ms Mitchell, who was a former employee of the respondent and resigned on 20 March 2017. Ms Mitchell is also the mother the claimant's partner, Mr Mitchell, and grandmother to you the claimant's baby.
 - 9.3 Mr Mitchell. Mr Mitchell is the claimant's partner who also worked with the respondent. He was present at the respondent's workplace on 20 March 2017 and was also present at the employment tribunal. During the course of the hearing, the claimant requested that we hear from Mr Mitchell and a short witness statement was prepared on his behalf. Permission was granted for Mr Mitchell to give evidence.
10. We heard evidence on behalf of the respondent from:
 - 10.1 Mr Phillips, the MD of the respondent;
 - 10.2 Mrs Phillips, the director tasked with responsibility for HR;
 - 10.3 Mr Wilson who was the claimant's line manager and manager of the assembly room, where the claimant worked;
 - 10.4 Mrs Ann Philips, the respondent's company secretary and responsible for health and safety within the respondent.
11. All witness gave evidence under oath or affirmation and their witness statements were accepted as evidence in chief. All witnesses were cross examined.

12. The claimant was employed by the respondent as an assembly quality operator on 29 February 2016 within the respondent's assembly room. The claimant was described by the respondent as 'temporary staff'. At no time did the respondent provide the claimant with any statement of terms and conditions of employment or a written contract of employment.
13. The assembly room was a relatively new department within the respondent's business. Initially Mr Phillips managed the assembly room. As it was a new department the management team spent a lot of time training and assisting the staff to get to an acceptable level of output. Mr Phillips ran the assembly room between May 2016 and October 2016 when management was taken over by Mr Wilson. Mr Phillips had difficulty in managing the assembly room. He described his management style as an open, direct approach. He explained that he tended to voice what he saw and could be seen as abrupt or interpreted by staff as abrupt. Mr Phillips considered staff in the assembly room were more sensitive to his management style. The longer an employee worked with the respondent the more they got to know what Mr Phillips was like as a manager. Mr Phillips said that he was direct and abrupt with all staff and it was common knowledge within the workplace that he was that kind of person.
14. Mr Phillips told us that when the claimant was in the assembly room she was constantly coming down to the office to ask him questions. Mr Phillips said that the rest of the workforce tended to get on with work. However, the claimant appeared to be constantly asking for clarification and Mr Phillips had not got time to deal with queries. Mr Phillips describes the claimant as 'the self-appointed spokesperson of the room'. Mr Phillips gave examples of a query in relation to deliveries that the claimant believed were not there. However, those deliveries were present but the claimant could not find them. The respondent worked on updating its internal processes to streamline the assembly room process. We were not provided with any examples of unreasonable requests or questions asked by the claimant.
15. Ms Mitchell told us that at first, she had a lot of respect for Mr Phillips. She had enjoyed working at the respondent. However, she said that Mr Phillips was often unprofessional and often lost his temper and would openly shout at staff in the office. Ms Mitchell said that these instances left staff feeling awkward. There was an issue in the assembly room in October 2016 when the staff within that room, including the claimant, complained to Mrs Phillips about Mr Phillips. Mr Phillips had sworn, not at any particular individual, but within the assembly room and within earshot of the employees there. Following these complaints, the respondent decided to change the management structure in the assembly room. It was acknowledged that Mr Phillips' personality did not work with the staff in the assembly room. Mr Wilson had a more sociable and friendly relationship with the employees within the assembly room. Both parties agreed that the relationship between Mr Phillips and the claimant was difficult throughout the claimant's employment. They had different personalities. Mr Phillips felt that he was walking on eggshells in dealing with the claimant.

16. The respondent did not raise any disciplinary or performance issues with the claimant during the course of the claimant's employment. No allegation of misconduct on the part of the claimant was investigated by the respondent. In the circumstances, with the exception of the Christmas party to the extent mentioned, we consider the allegations made in relation to the claimant's conduct during the course of the hearing and also in relation to the claimant's personal relationships to be irrelevant to the matters to be decided in this case.
17. Following the respondent's Christmas party, allegations of poor behaviour on the part of the respondent's employees were relayed by the local publican to Mr Phillips. Mr Phillips believed the claimant to be one of those responsible for poor behaviour. During the hearing there appeared to be confusion in relation to the identity of the employees who were suspected of poor behaviour and nothing was presented to allow us to conclude that the claimant was guilty of any poor behaviour. At no time were the allegations discussed with the claimant. Mrs Phillips confirmed that had these allegations been discussed with the claimant, they would have been discussed in an informal manner and no disciplinary action was envisaged. However, Mr Phillips was embarrassed and annoyed by the behaviour of his employees during the Christmas party. He considered, rightly or wrongly, the claimant to be involved in the poor behaviour and this placed a further strain on his fragile relationship with the claimant. During the claimant's evidence she confirmed her belief that Mr Phillips was embarrassed and annoyed by the behaviour of the employees during the Christmas party, particularly due to the fact that he lived in close proximity to the pub in question. On 3 January 2017, shortly after the Christmas party, the claimant informed the respondent that she was pregnant. The claimant's partner, Mr Mitchell, also worked for the respondent, as did Ms Mitchell, Mr Mitchell's mother.
18. We heard evidence from Mr and Mrs Phillips that Mrs Phillips was excited at the prospect of a 'company baby'. They had been in business for 20 years and never before had three employees who were all employed by the business, related to a new baby. Mrs Phillips told us that she was studying her CIPD and the claimant's pregnancy was the first maternity that she would have dealt with within the company. This would allow her to put her academic knowledge into practice. Mrs Phillips evidence was that the claimant's pregnancy was a positive welcome development for the respondent. Mrs Phillips' evidence in respect of attitude to the claimant's pregnancy and her open approach and open-door policy on HR is accepted. She was available to and contactable by staff to discuss any issues that may arise. The claimant had Mrs Phillips' mobile phone number and had contacted her on occasions to discuss various work and personal matters.
19. Mr Phillips was also informed of the claimant's pregnancy and said that he had not given the claimant's pregnancy much thought.
20. On 14 February 2017, the claimant spoke to Mrs Phillips about her anticipated antenatal scan. She requested that Ms Mitchell, who also worked in the assembly room be given annual leave to accompany the claimant and Mr Mitchell for the scan. This request was to be a surprise for

Ms Mitchell. Mrs Phillips told the claimant that at that particular time, Wendy, another member of the assembly room, was expected to be on Jury service. While the claimant and Mr Mitchell's time was immediately agreed, she was not able to agree Ms Mitchell's time off immediately. However, she said that she would review this closer to the time. An email reflecting this response was sent internally by Mrs Phillips. Mrs Phillips also made a comment along the lines of, 'if this carries on, I will have to close the assembly room'. Mrs Phillips evidence was that this was said in jest in a light-hearted manner because if the claimant, Ms Mitchell and Wendy were all off together, the respondent could not produce anything that day. The claimant's evidence was this comment was a direct threat to the claimant's job security due to her pregnancy which upset the claimant greatly.

21. The claimant complains that Mrs Phillips, on 23 February 2017, told the claimant not to use a ladder at work. Mrs Phillips told us that various comments had been made to her by the claimant's colleagues indicating that they were uncomfortable using a ladder at work while she was pregnant. The claimant's colleagues were concerned that the claimant was leaning back on the ladder to get long boxes off shelves. This had happened on more than on occasion. Mrs Phillips spoke to the claimant in private and told the claimant that her colleagues were uncomfortable with her using the ladder and asked her not to do so. The claimant objected to the use of the word 'uncomfortable'. Mrs Phillips said that she tried to explain that her colleagues were concerned and were happy to help her take things off or put things on shelves for her. The claimant believed that there was no issue with her using the ladder. She had other children and was used to carrying on as normal during pregnancy. During cross examination the claimant said that her complaint in relation to this matter was not that Mrs Phillips asked her not to use the ladder, as the claimant considered this request to be reasonable, but that Mrs Phillips was more concerned with the claimant's colleagues feeling uncomfortable than the claimant's own wellbeing. Reference was also made during the course of the hearing to a request by the respondent that the lift should be used when carrying boxes between floors on health and safety grounds.
22. Within the ET1 the claimant complains of Mr Phillips, on 15 February 2017, failing to say sorry to the claimant following an incident when he nearly hit her with the door that he opened. Prior to the hearing, the claimant was properly asked for further particulars of this complaint by the respondent. The claimant incorrectly believed that the particulars were not required. It is of course the case that the claimant was required to put all relevant evidence relating to her allegations into her witness statement and disclose this information to the respondent as ordered at the case management discussion. We accept that the claimant's failure to comply was due to her unfamiliarity with the litigation process. However, the results of the claimant's failure to particularise this claim was that Mr Phillips did not have clarification all the allegation. His witness statement focusses on the wrong door. This became apparent only during cross examination. Mr Phillips' evidence was that he had no recollection of the alleged incident. We consider the confusion on Mr Phillips' part in respect of the door to be genuine. This leads us to conclude that Mr Phillips has genuinely no

recollection of these events. We accept his evidence in relation to this matter.

23. The claimant told Mrs Ann Phillips, on 28 February 2017, during the course of an NEM risk assessment, that Mr Phillips opened the door which nearly hit her and did not apologise and the claimant has been consistent throughout this matter in relation to the allegation. On the balance of probabilities, we find that it is more likely than not that this incident did occur as described by the claimant, however, Mr Phillips did not realise the 'near miss' that had occurred. There was no glass panel in the door in question and he simply did not register or remember the incident. We accept that this caused considerable distress to the claimant.
24. We were referred to an email from a client of the respondent on 11 January 2017 relating to extra production requirements. This additional production generated a higher price from the client. Mr Phillips requested volunteers to undertake overtime to meet particular client demand and two employees volunteered. These were Ms Mitchell and her colleague Mr Shelton. Mr Phillips told the employees that the additional revenue generated from the client would be passed on to them. We were referred to a file note signed by Mr Shelton dated 18 April 2017 that stated:

“Whilst operating the Station during the overtime hours of 17:00 to 18:00 Tony came out to Donna and me and explained that the customer was being charged extra to account for the overtime. Tony told us that he appreciated the fact that we had volunteered to do overtime and he would pass the extra on to Donna and myself.”

25. Ms Mitchell agrees that she was informed that she would receive additional pay for the overtime she had undertaken. Mr Phillips said that the additional revenue was passed on to Ms Mitchell and Mr Shelton by way of an increase in the hourly rate from £7.50 to £8 an hour for a limited period of time. Mr Phillips said that this rate increase applied to all of the hours worked by those two employees, not just the overtime hours. Ms Mitchell says that when she received a payslip on 17 March 2017 she noticed that her hourly rate had increased from £7.50 to £8 per hour. She was confused by this. Ms Mitchell said that she expected to be paid £10 per hour for the overtime she had worked and was unaware that the payment would be made by way of temporary variation to her basic hourly rate. No details were provided by Mr Phillips as to who explained the arrangement to Ms Mitchell or when the arrangement was explained to Ms Mitchell. The way in which overtime was to be paid to Ms Mitchell and Mr Shelton was unusual and nothing was confirmed by the respondent in writing.
26. When Ms Mitchell saw £8 recorded as her hourly rate in her payslip she said she was genuinely confused and thought that everybody within the respondent was on an additional 50p an hour. Ms Mitchell discussed her increased basic rate with the claimant. At the time the claimant was completing identical work to Ms Mitchell and neither she nor Ms Mitchell understood why Ms Mitchell was receiving 50p per hour more than the claimant. On 17 March Ms Mitchell had, to put it mildly, a lot on her plate personally with many competing situations requiring her attention. Mr Phillips had a discussion with Ms Mitchell on 17 March 2018 where he

claimed that he explained the reason for the difference in pay rates being temporary overtime payments. During this discussion Mr Phillips also informed Ms Mitchell that the overtime would be coming to an end and her pay rate would be reduced from £8 to £7.50 per hour. None of this was recorded in wiring for Ms Mitchell. Ms Mitchell's understanding of that conversation was that her base rate was being reduced from £8 an hour to £7.50 an hour. Ms Mitchell said that due to her personal commitments she was unable to continue with the overtime requirements in any event. We accept that there was genuine confusion on Ms Mitchell's part in relation to the link between overtime and her increased and decreased rates.

27. The following Monday, on 20 March 2017, the claimant asked Mr Wilson whether she could have a meeting with Mrs Phillips and whether Mr Wilson would sit in on that meeting. Mr Wilson agreed and asked if there was anything he could help with. The claimant said it was to do with her hourly rate as she was getting 50p less than Ms Mitchell. The claimant said that her work was not appreciated. During the conversation Ms Mitchell said that she had had a pay rise. Therefore, Mr Wilson went to discuss the matter with Mr Phillips directly. Mrs Phillips was not in the workplace that morning. Mr Phillips went to the assembly room to discuss the matter and was told by the claimant that she was on £7.50 an hour. Ms Mitchell told Mr Phillips that there was a problem with her pay and she had not been told about the pay rise. Mr Wilson says that Ms Mitchell was reminded that she had been previously told, along with Mr Shelton, that she would get extra for working on a one-off job. Both the claimant and Ms Mitchell were upset in relation to their pay. It was accepted that Mr Phillips did not shout during this meeting. However, the claimant says that he was loud and agitated with and aggressive in his manner, trying to control his anger. The claimant asked Mr Phillips if he valued her work. Mr Phillips said that he replied that he valued all employees' work. The claimant alleges that Mr Phillips refused to answer the question telling he claimant she should speak to Mrs Phillips about her concerns. Mr Phillips told both employees to speak to Mrs Phillips about their concerns in respect of pay and left the assembly room. The claimant says that she was very upset during this encounter and believed that she was close to a panic attack.
28. Both the claimant and Ms Mitchell packed their personal belongings that they kept in the assembly room and left the building on the morning of 20/03/2017. As they left the building they said goodbye to several colleagues. It is common ground that Ms Mitchell left a message for her son, Mr Mitchell, not to follow her. Mr Phillips says that he was told by Mr Mitchell that the claimant had requested Mr Mitchell to leave with the claimant. This was denied by both the claimant and Mr Mitchell. The claimant said that she would not have encouraged her partner to leave as they were dependant on his salary.
29. Mrs Phillips describes a confused scene at the respondent's workplace on that morning of 20/03/2017 with many employees adding various comments. It is possible that there is confusion in relation to what was said by Mr Mitchell. The respondent believes that conflicting instructions were given by the claimant and Ms Mitchell to Mr Mitchell as part of a

preconceived plan. Should the plan have been pre-meditated and effectively cooked up on the previous Friday night as alleged by Mrs Phillips, both the claimant and Ms Mitchell would have had ample opportunity to clarify Mr Mitchell's role, if any. We accept the claimant, Ms Mitchell's and Mr Mitchell's evidence that no instruction was given by the claimant to Mr Mitchell for him to depart with her on the morning of 20/03/2017. We have seen no evidence to support the respondent's contention that the claimant and Ms Mitchell's departure was premeditated or an attempt to cause maximum damage to the respondent's business.

30. Ms Mitchell said that she had not discussed leaving the workplace with the claimant. When she left the workplace, she was resigning with immediate effect as she believed that Mr Phillips had been inappropriate and rude and unprofessional in the way in which he had spoken to her and dealt with the issue in relation to her increase and decrease in hourly rate. In Ms Mitchell's words she was 'done with the respondent' and had no intention of returning to work.
31. The claimant claims that she left because she was so upset during the altercation that she had no option but to leave. The claimant claims that it was her hope that the matter would be sorted out and she would be able to return to work. The claimant had left her work boots at work but sent a message to Mr Mitchell during the course of the afternoon asking him to bring them home for her. When the claimant and Ms Mitchell left their employment on 20 March 2017, work within the assembly room effectively stopped for that day. However, the respondent, through redeployment of staff, managed to start production relatively quickly.
32. Mr Philips and Mrs Phillips gave evidence of their belief that the claimant and Ms Mitchell acted with intent to cause maximum damage to the respondent's business. They believe that the 'walk out' had been staged and pre-planned.
33. The employment tribunal could not identify any difference in the actions of Ms Mitchell and the claimant on 20/03/2017. Nor could the employment tribunal identify any difference in the treatment by the respondent of Ms Mitchell and the claimant on 20/03/2017.
34. The claimant believed that the onus was on the respondent to contact her following her departure from the office to ascertain what the problem was and how it could be resolved. The claimant was very upset and we were referred to the medical evidence referencing the claimant's acknowledged pre-existing conditions of anxiety and depression. At no time prior to the claimant's email on 23 March 2017 did the claimant contact the respondent.
35. The respondent considered that the claimant, by leaving her workplace without permission in this way, indicated that the claimant no longer wished to be employed by the respondent. In an effort to avoid any misunderstanding as to the status of the claimant's employment the respondent wrote to the claimant on 20 March terminating the contract of employment. The respondent accepts that it dismissed the claimant in the

circumstances. The claimant and Mrs Mitchell's departure from work caused a disruption to the respondent's business.

36. Following receipt of the respondent's letter confirming the claimant's dismissal, the claimant informs the respondent on 23/03/2017 that she did not intend to resign and made allegations of discrimination. For this reason, the respondent allowed the claimant a right of appeal. This appeal was carried out independently as the claimant refused to deal directly with Mr and Mrs Phillips. The claimant confirmed during her evidence that their relationship had further deteriorated. The appeal concluded that there was no discrimination on the grounds of the claimant's pregnancy. The respondent elected not to reinstate the claimant. Following the claimant's departure from the workplace, Mrs Phillips told us that the respondent became aware of some internal petty grievances between the claimant and some existing staff who had commented that the atmosphere within the workplace had improved following the claimant's departure.

Deliberations and findings

37. Was the claimant dismissed on 20 March to any extent because she was pregnant and/or a woman?
- 37.1 We find that the claimant was dismissed because she left her workplace on 20 March. The respondent considered that the claimant, by leaving her workplace without permission in this way, indicated that the claimant no longer wished to be employed by the respondent. In an effort to avoid any misunderstanding as to the status of the claimant's employment the respondent wrote to the claimant on 20 March terminating the contract of employment. The respondent accepts that they dismissed the claimant in the circumstances.
- 37.2 We are conscious that the claimant is acting in person and we have given consideration to the circumstances giving rise to the termination of the claimant's employment to ensure that no allegation of discrimination remains unexamined.
- 37.3 The claimant believed that she was being paid £7.50 per hour in circumstances where Ms Mitchell, a colleague, doing identical work, had been given a pay rise and was being paid £8 per hour. Ms Mitchell did not understand the reason for the increase in her hourly rate and therefore the claimant attributed her lack of a pay rise to a sense that she was not a valued employee and connected this to her pregnancy. We accept the claimant and Ms Mitchell's evidence in relation to their genuine confusion. We consider it more likely than not that Mr Phillips had either not explained the unusual way in which he had passed on overtime payments ie not as an increased rate for the overtime work but a general increase to the hourly rate for all work, or he had not explained it sufficiently for Ms Mitchell to understand it. The unusual arrangement is not recorded in writing or by email and the responsibility for the confusion lies with Mr Phillips. This was the crux of the dispute between the claimant and

the respondent on 20/03/2017. It is not surprising that Ms Mitchell considered that she had had a pay rise and that, as she was unaware of the reason for the pay rise and unsurprising that she assumed the claimant had had a similar pay rise. It is also unsurprising, considering that the claimant was doing identical work to Ms Mitchell, that she considered herself undervalued and detrimentally treated. It is not surprising that the claimant connected her lack of pay rise to her pregnancy in these particular circumstances.

- 37.4 We consider that the initial circumstances of an unexplained pay rise awarded to the claimant's colleague are sufficient to meet the first step within the burden of proof as set out in s.136(2) of the Equality Act and we consider that these are facts from which we could decide in the absence of any other explanation that the respondent has breached the provisions of the Equality Act. In this case, the burden of proof has passed to the respondent to show that it did not breach the provisions. Ms Mitchell accepts that she was to be paid an additional amount for the overtime that she undertook. We have seen emails from the client both initiating the additional production requirement and winding it down. We have accepted Mr Phillips evidence that the additional payments provided to Ms Mitchell related to this overtime work. At the heart of this confusion, Mr Phillips was acting fairly in passing on additional revenue to low paid employees. In light of the above we consider that the respondent has shown to the tribunal that the reason for the difference in rate of pay between Ms Mitchell, Mr Shelton and the claimant was connected to the overtime work undertaken by Ms Mitchell and Mr Shelton and we accept the difference in rate of pay was in no way connected to the claimant's pregnancy or sex.
- 37.5 Ms Mitchell and/or Mr Shelton are not valid comparators, as their circumstances are not materially the same as the claimant's in that she had not volunteered for overtime. The correct comparator, to the extent one is needed for the claimant's sex discrimination claim, is a hypothetical comparator who had not volunteered for overtime and, as the overtime is the only reason for the pay rise, we consider it more likely than not that a hypothetical comparator would be treated in a similar manner to the claimant.
- 37.6 Ms Mitchell, who was not pregnant was treated in an identical way to the claimant following their heated discussion with Mr Phillips. It is difficult for the employment tribunal to see how the claimant's claim for pregnancy related discrimination may succeed when a non-pregnant employee was treated in an identical manner. We conclude the reason for the claimant's treatment related to the claimant's actions and behaviour. On leaving employment on 20 March 2017 the claimant complains that the respondent did not contact her. We consider that on a general basis when an employee packs all of their personal belongings and leaves a place of employment during the working day, this can be taken as a signal

by the employer that the employee may no longer wish to be bound by the terms and conditions of her contract of employment. The basic provisions of any contract of employment is that the employee works and the employer pays the employee for their work. In the circumstances we consider that the onus was on the claimant to contact Mrs Phillips to discuss her issues in respect of pay as she had been repeatedly asked to do by Mr Phillips. We have found that Mrs Phillips ran an open and accessible HR function that was easily used by employees. The claimant and Mrs Mitchell's departure from work caused an obvious disruption to the respondent's business. It is understandable that the respondents were unhappy with the business disruption and the manner in which the claimant and Ms Mitchell left the workplace. It is more likely than not that this was the reason why the respondent did not contact the claimant following her departure. We heard from Ms Mitchell that she intended to resign immediately by leaving the workplace. The respondent correctly interpreted Ms Mitchell's intention. The claimant acted in an identical manner. There is no evidence to support the allegation that the respondent's failure to reach out to the claimant in these circumstances was less favourable or unfavourable treatment relating to her sex or pregnancy.

38. The next question that we have looked at is whether the respondent's decision not to uphold the appeal to any extent was because the claimant was pregnant and/or a woman.

38.1 The respondent on being informed by the claimant that she did not intend to resign, allowed the claimant a right of appeal. This appeal was carried out independently. The appeal concluded that there was no discrimination on the grounds of the claimant's pregnancy. In the circumstances the respondent had a discretion as to whether or not to reinstate the claimant. During the appeal process the claimant refused to deal directly with Mr and Mrs Phillips. The claimant confirmed during her evidence that their relationship had further deteriorated. Further, following the claimant's departure from the workplace the respondent became aware of some internal petty grievances and some existing staff had commented that the atmosphere within the workplace had improved following the claimant's departure. We also accept that the respondent believed that the claimant had orchestrated her departure along with Ms Mitchell to cause maximum damage to their business. And while the tribunal has seen no evidence to support this contention, we accept that the respondent held this belief. All of these matters were taken in to account by the respondent in reaching its decision not to reinstate the claimant. We therefore conclude that the reasons for the respondent's failure to uphold the claimant's appeal was because they believed that the dismissal was not in any way tainted by discrimination and the above factors, coupled with the claimant's relatively short service, led them to conclude that there was a breakdown of trust and confidence and they elected not to reinstate the claimant.

39. The next issue that we considered was whether the claimant was treated unfavourably or less favourably than she would have been treated had she not been pregnant and/or a woman and in the following ways:

39.1 by Mrs Phillips saying, "If it carries on like this there is no point in having an assembly room. Mrs Phillips comment was made in circumstances whereby a member of a small team was expected to be away from the workplace on jury service. The claimant and Mr Mitchell were expected to be away from the workplace for the claimant's antenatal scan. The request for Ms Mitchell's holiday to attend this scan would mean that the claimant's staff numbers in the assembly room were close to zero. We consider that Mrs Phillips comment was relating to three members of staff being away at the same time. We note that Mrs Phillips did not deny the holiday request but said that she would consider it nearer the time. We accept Mrs Phillips' evidence actions that her throw-away comment related only to staff absence. We find that the reason for such an absence and the claimant's pregnancy was irrelevant to Mrs Phillips. We have seen no evidence that could link this comment to the claimant's pregnancy or less favourable treatment of the claimant because of her sex.

39.2 The next incident is in relation to using the ladder. We find it difficult to understand the claimant's claim in respect of this matter. During cross examination she confirmed that she did not object to Mrs Phillips telling her not to use the ladder. She considered this to be a reasonable request. We consider that when an employer is made aware of a health and safety concern relating to a pregnant employee using a ladder, particularly in relation to practicalities of removing large boxes that require the individual to lean back on the ladder, it is reasonable that such concerns be raised with the individual and appropriate assistance provided to ensure that the pregnant employee is not placed in a position where she feels obliged to undertake work that may be dangerous. We appreciate that in this particular case the claimant has older children and is used to the necessity of carrying on as normal during pregnancy. However, the employer cannot rely upon the willingness of a can-do attitude of an individual employee to ignore a potential health and safety risk. We consider the instruction to the claimant not to use the ladder as made to the claimant to be a reasonable one. Similarly, we consider the instruction in relation to boxes and using the lift to be a reasonable instruction. The claimant's real complaint in respect of this allegation is the fact that the claimant considered Mrs Phillips was more concerned about the claimant's colleagues feeling 'uncomfortable' rather than Mrs Phillips having any genuine concerns for the claimant's health and wellbeing. We find that once Mrs Phillips was aware of the potential health and safety issue she had an obligation to raise it with the claimant. The fact that it stemmed from colleagues feeling uncomfortable with the claimant's use of the ladder is, in our opinion, irrelevant. We do not consider

this comment to constitutes unfavourable/less favourable treatment of the claimant on the grounds of her pregnancy or sex.

40. The next allegation is in relation to the respondent paying £7.50 per hour when Ms Mitchell was on a rate of £8 and we have addressed the circumstances surrounding the difference in pay rate above and we conclude that that the reason for the discrepancy in pay related to overtime conducted by Ms Mitchell and was wholly unconnected to the claimant's pregnancy.
41. We have considered the allegation relating to Mr Phillips failing to say sorry to the claimant when a door opened and nearly hit her by accident on 15 February 2017. We accepted that the incident occurred. However, we have also found that Mr Phillips can genuinely not remember it and it is common ground that the incident was not mentioned to Mr Phillips at the time. We accept that as Mr Phillips was at the opposite side of a door without a glass panel from the claimant, that he did not see how close the claimant had been to the door and did not appreciate that it was 'a near miss'. As Mr Phillips did not realise there was anything to say sorry about, his failure to do so cannot be unfavourable/less favourable treatment of the claimant due to her pregnancy and/or sex.
42. The next allegation is Mr Phillips ignoring the claimant when she and he were in the vicinity of each other.
 - 42.1 The claimant said that Mr Phillips had ignored her both before and after her pregnancy but the behaviour had worsened following her pregnancy. This allegation was wholly unparticularised by the claimant. It was clear to the employment tribunal that the claimant had a difficult relationship with Mr Phillips throughout her employment. Mr Phillips is the MD of the company. He is busy. He wants the employees to do their jobs with optimum productivity without question or complaint. His own evidence was that his approach is straight forward and can be seen as abrupt. It is safe to say that Mr Phillips is not considered 'a people person'. This is acknowledged by the respondent and the respondent had taken steps to limit Mr Phillips' interaction with the assembly room employees by changing the management structure in the assembly room.
 - 42.2 We consider the background of the Christmas party to be relevant to this particular allegation. Mr Phillips told us that he was annoyed and embarrassed by the employee behaviour at the Christmas party in the local pub and he attributed some other bad behaviour to the claimant. The claimant told us she always felt ignored by Mr Phillips. However, this had worsened following the announcement of her pregnancy. However, during cross examination, the claimant also told us that she believed Mr Phillips attitude towards her had changed following the Christmas party and this had affected his treatment of her. This may well be unfair on Mr Phillips' part as there appears to be confusion as to the claimant's part in any

embarrassing behaviour, however regardless, it is obvious to us that following the Christmas party, further distance between the claimant and Mr Philips emerged. We consider it more likely than not when taking the evidence as a whole, that Mr Phillips was unable to interact successfully with the claimant on a social level. He felt as if walking on egg shells and dealing with the claimant and dealt with this by avoiding or limiting his contact with the claimant. There was a personality clash and we accept that the contact between the claimant and Mr Phillips may well have diminished further following the Christmas party. However, we have seen no allegation specific enough or evidence to support any allegation that the claimant's pregnancy has played any part in Mr Phillips' treatment of the claimant.

43. Finally, it was admitted by the respondent that they did not comply with s.1 of the ERA and no statement of initial employment particulars have been provided. However, as the claimant's substantive claims have been unsuccessful there is no remedy in respect of this breach.
44. In light of our findings above and taking the evidence as a whole, we conclude that the claimant's claims as set out within her form ET1 fail and are dismissed. These reasons were given orally at the conclusion of the hearing and provided in writing following a request from the claimant.

Employment Judge Skehan

Date: 23 July 2018.....

Sent to the parties on:

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For the Tribunal Office