EMPLOYMENT TRIBUNALS

Claimant: Mrs R Greatrix

Respondents: (1) Super Duper Goods Ltd (2) Mr T Al-Toma (3) Mr K Lee

Heard at: Leicester

On: 10, 11 and 12 September 2018
19 October 2018 (in chambers)

Before: Employment Judge Faulkner
Ms C Pattisson
Mr M Alibhai

Representation

Claimant: Miss L Harris (of Counsel)
Respondent: Mr M Williams (of Counsel)

JUDGMENT

1. The Respondents did not treat the Claimant unfavourably because of her pregnancies.

2. The Respondents did not treat the Claimant less favourably because of her sex.

3. The reason or principal reason for the Claimant's dismissal was not her pregnancies.

4. The Claimant's complaints of pregnancy discrimination, sex discrimination and unfair dismissal are therefore dismissed.

REASONS

Complaints

1. The Claimant pursues the following complaints before the Tribunal:

1.1. Unfair dismissal, on the basis that she says she was dismissed because she was pregnant, thus relying on section 99 Employment Rights Act 1996 ("ERA");

1.2. Discrimination because of pregnancy as defined by section 18(2) Equality Act 2010 ("EQA"); and

1.3. Discrimination because of sex, that is direct discrimination as defined by section 13 EQA.

Issues

2. It was agreed at the outset that the Tribunal would deal with matters of liability only, going on to deal with remedy should the Claimant succeed in any of her complaints. It was also agreed therefore that the issues to be decided were as follows.

Unfair dismissal

3. In respect of unfair dismissal the sole issue was what was the reason for dismissal?

Pregnancy discrimination

4. In respect of pregnancy discrimination, it is agreed the Claimant was dismissed. She alleges that her dismissal was an act of pregnancy discrimination. She also alleges that prior to her dismissal she was subjected to the following detriments because of her pregnancy:

4.1. On 15 March 2017 when she told the Third Respondent of her first pregnancy his response was "are you joking?";

4.2. On informing the Second Respondent of her first pregnancy at around the same time he asked when she thought she would be leaving and whether she would want to return to work part-time;

4.3. On 17 and 24 August 2017, shortly after being advised of her second pregnancy, the Second Respondent untruthfully informed her that some of her work was wrong and had had to be redone;

4.4. On 23 August 2017, the Second Respondent required her to perform work which it was not possible for her to carry out and which he could have completed himself, which the Claimant contends was intended to place her in an impossible position and result in mistakes in her work;

4.5. On 18 August 2017, the Second Respondent subjected her to unfair criticisms of her performance;

4.6. On 24 August 2017, the Second Respondent sent her an inaccurate account of their meeting on 18 August 2017.

5. The Respondents raise time limit issues in relation to 4.1 and 4.2 above. This raises the question of whether the alleged conduct in either of those respects and the other alleged conduct set out above was conduct extending over a period such as to be treated as done at the end of the period.

6. If it was not, on the basis that the Claimant's complaints in those respects were brought after the end of 3 months starting with the date of the acts to which they relate, it must be asked whether they were brought within such other period as the Tribunal thinks just and equitable.

7. In relation to such of the above complaints as were brought in time, the first question is whether the Claimant has established the detriments relied upon? If so, did any of the alleged detriments constitute unfavourable treatment?

8. If so, the next question is whether the relevant Respondent, in the protected period, treated her unfavourably because of her pregnancy or because of illness suffered by her as a result of it.

9. In respect of the burden of proof, it is necessary to consider whether the Claimant has proved facts from which the Tribunal could decide in the absence of any other explanation that the relevant Respondent has contravened section 39 EQA. If so, has the relevant Respondent shown that they did not contravene it?

Sex discrimination

10. The Claimant alleges:

10.1. That between January and February 2017, the Third Respondent made negative comments about having children indicating adverse consequences for the Claimant's employment were she to do so;

10.2. The First Respondent failed to allow her sufficient time off work following a miscarriage discovered on 30 March 2017, specifically failing to inform her she could take a week or two weeks off and requiring her to return to work sooner – she returned to work on 10 April 2017;

10.3. From May 2017 until the termination of her employment on 31 August 2017, the Second Respondent's attitude towards the Claimant changed following her return to work, not praising her or communicating with her as he had done prior to her pregnancy and miscarriage;

10.4. From May 2017 until 31 August 2017, the First Respondent required her to carry out work, specifically costing and price negotiation, which was not part of her role, for which she had not been trained and for which no help was offered;

10.5. The First Respondent required her to make up time for doctor's appointments she took in connection with her miscarriage, once in April 2017 and three times in May 2017;

10.6. On 14 June 2017, the Second and Third Respondents referred to her miscarriage during a performance review meeting;

10.7. On 14 June 2017, she was marked down at that performance review in respect of her attendance because of the doctor's appointments she took in respect of her miscarriage;

10.8. From 22 June until 31 August 2017, the Second and Third Respondents left the Claimant to attend to follow up actions consequent on securing a new client (Pretty Little Thing), outside her expertise and with insufficient information and support, which she contends was a concerted effort to set her up to fail in her role;

10.9. Between May and August 2017, the Second Respondent failed to provide artwork for the Claimant to enable her to complete her work thus making it more difficult for her to secure new orders, which she contends was deliberately intended to make her fail;

10.10. On 6 August 2017, the Second Respondent refused her request for retention of a second set of product samples and then criticised her regarding the absence of a second set of samples, which she alleges was also an attempt to set her up to fail in her role;

10.11. That if her dismissal on 31 August 2017 was not pregnancy discrimination, it was an act of direct sex discrimination.

11. The Respondent raises time limit issues in relation to 10.1, 10.2, 10.5, 10.6 and 10.7 above. The question arises therefore whether the alleged conduct in any of those respects and the other alleged conduct set out above was conduct extending over a period such as to be treated as done at the end of the period.

12. If not, on the basis that the Claimant's complaints in those respects were brought after the end of 3 months starting with the date of the acts to which they relate, the next question is whether they were they brought within such other period as the Tribunal thinks just and equitable.

13. In relation to such of the above complaints as were brought in time, the first question is whether the Claimant has established the detriments relied upon.

14. If so, did the relevant Respondent treat her less favourably than they treated or would treat others? The Claimant relies on a hypothetical male comparator.

15. If so, was the less favourable treatment because of the Claimant's sex?

16. In respect of the burden of proof, it is necessary to consider whether the Claimant has proved facts from which the Tribunal could decide in the absence of any other explanation that the relevant Respondent has contravened section 39 EQA. If so, has the relevant Respondent shown that they did not contravene it?

Facts

17. The parties produced an agreed bundle of over 300 pages. Page references below are references to that bundle. The Tribunal read some of that material at the parties' request, before hearing oral evidence, making clear it was for parties to draw its attention to any document they deemed relevant for it to see, not for the Tribunal to search for what might be regarded as important.

18. Witness statements were prepared for the Claimant, the Second Respondent and the Third Respondent, each of whom also gave oral evidence. Paragraph references below are to those statements and are identified by initials – "RG" for the Claimant, "TAT" for the Second Respondent and "KL" for the Third Respondent, so that for example "RG5" is a reference to paragraph 5 of the Claimant's statement. There were additional statements prepared by a Mr M Patel, a UK-based supplier to the First Respondent and (within the bundle) Mr A Bakti, a supplier to the First Respondent based in Turkey. Neither witness attended to give evidence and therefore as explained during the Hearing, the Tribunal can attach very little weight to either statement. The Tribunal also heard helpful submissions from both counsel.

19. Based on the above material, the Tribunal makes the findings of fact set out below, in each case on the balance of probabilities. It focuses on those findings which it is necessary to make to decide the issues set out above, and therefore does not resolve every factual conflict between the parties, of which there were many. The Tribunal reminded itself throughout the proceedings that this is not a case of ordinary

unfair dismissal, in which procedural matters can be of paramount importance to the assessment of whether a dismissal is fair or unfair. It may or may not be appropriate to draw inferences from procedural shortcomings on the First Respondent's part, but the Tribunal's focus in respect of dismissal must be whether, as the Claimant claims, pregnancy was the reason for it. It is also important to make clear that it is not for the Tribunal to assess the quality of the Claimant's performance. In essence, the Respondents say her employment was terminated because of performance problems, whereas the Claimant says their criticisms were wholly unfounded and thus a cover for the real reason. Again, what the Tribunal has to focus on is what operated on minds of the Second and Third Respondents in reaching their decision, though of course if performance concerns appear to be wholly unfounded based on the evidence, that might lead to an inference of discrimination being drawn.

Background

20. The Claimant's Claim Form was received at the Tribunal on 11 December 2017. For ACAS Early Conciliation purposes, Day A for the First Respondent was 24 October 2017 and Day B 13 November 2017; for the Second and Third Respondents Day A and Day B was 28 November 2017.

21. The First Respondent has been in business for around 5 years. As far as relevant to this case, it is concerned with the design, manufacturing and sale of branded and own label goods in the fashion and accessories market. It had at the relevant times four employees – the Claimant, the Second Respondent, the Third Respondent and Annie Stafford who acted as a model and as an administrator. The Claimant was employed from 4 November 2016 as senior womenswear designer until her dismissal with effect from 31 August 2017. She had 6 years' previous experience as a fashion designer, including with some much larger companies. The Second and Third Respondents are directors and owners of the First Respondent. The Second Respondent was the Claimant's line manager; his focus is the design and manufacturing aspects of production. The Third Respondent is responsible for administration, financial matters and day to day operations.

Recruitment of Claimant

22. The advertisement which eventually led to the Claimant's recruitment is at page 65. As far as relevant to this case, it said, "Your key focus will be to create design packs including trend boards and graphic working drawings. Your work will be put in to sampling and you will fit garments and suggest suitable amendments. Communication is key … as you will liaise with our customers face to face, via email and phone to generate orders and build relationships". The stated essential requirements of the role included having "some knowledge of the pattern cutting process (not required to create patterns but should understand and make suggestions on changes needed during garment fitting)". The job description went on to say that experience of graphic print design, graphic prints and patterns and pattern cutting were not essential but advantageous. The Claimant at RG5 says that her role was to create design packs, either in response to a customer request or to showcase to customers for sale.

23. The Second and Third Respondents were both present at the Claimant's interview. They say that she was asked about her ability to do not just design but also the fitting of a design to a model. The Second Respondent described the fit process to the Tribunal as involving a number of stages. Initially the First Respondent would liaise with the factory to provide drawings with measurements, fabric and trims, in other words everything needed to produce a sample. A fit would then be carried out to ensure everything was correct; it was at that point that it was

sent to the client. If the client was happy, it became a gold seal i.e. what the client wanted when the garment was put into production. If the client was not happy, adjustments would have to be made.

24. The Claimant says (RG44) that she was told by the Second Respondent during the interview that she would not be doing fits alone, but that they would do them together. She says this because she was told "We put them on Annie [Stafford]". She also says (RG95) that the Second and Third Respondents brushed over the issue, saying that they used Ms Stafford or the Second Respondent's wife for this purpose. She says she stated that she had previously fitted garments from the design point of view but denies what the Second and Third Respondents say (at TAT8 and KL10), namely that she said she was confident in fitting garments and making amendments to them; she says she did not say this as she not done pattern cutting since University. The Second Respondent accepts that pattern cutting was not essential to the role of designer, although he regards it as pretty much the most important element of the job to fit a garment and make amendments after a fit. He therefore says this was the primary focus of his questioning at the interview. In so far as it is necessary to resolve the conflicting evidence in this regard, the Tribunal's conclusion weighing up the evidence of both parties is that the Respondents did state at interview that the Claimant would be involved in fitting, which would include "suggesting suitable amendments". That is consistent with it clearly being an essential part of the role according to the advertisement. The Tribunal also accepts however that she was told that it was not something she would be doing alone.

25. The Respondents accept that the advertisement did not mention any requirement to secure new business. Nevertheless, the Third Respondent says he asked the Claimant about this at the interview (KL1) and was told she was confident about it. He says he specifically asked about winning knitwear business from Matalan, with whom the Claimant had worked previously, and she said she could get it. He adds (KL12) that he made clear she was expected to get new business, though in oral evidence he conceded that he was not saying it was an essential requirement of the role, just that he asked the question. On the basis of that concession the Tribunal concludes that the Third Respondent's oral evidence is the more accurate account. The Claimant denies what the Third Respondent says, though in her solicitors' letter after her dismissal – see page 216, paragraph 17 – it was said in relation to new customers, "… our client was asked if she was confident she could win new customers. This had been discussed at interview and our client confirmed she was confident". That is consistent with the Third Respondent's written evidence at KL1 and his oral evidence, and the Tribunal therefore accepts as an accurate account what the solicitors' letter said. The Respondents' case is that fitting, obtaining new business and costings and price negotiation, were part of the Claimant's role. The Tribunal concludes that fitting most certainly was, and that whilst costing and price negotiation were not stipulated as requirements, the obtaining of new business was something the Respondents anticipated the Claimant would deliver based on their discussions. The Claimant says (RG60) that graphic design was also discussed at interview, she said she couldn't do it and the Second Respondent said he did it so it was not an issue. This appears to be broadly consistent with how graphic design worked in the business in practice and so the Tribunal accept the Claimant's evidence on this point.

Commencement of Claimant's employment

26. The Claimant's contract of employment, in the form of a short offer letter, is at pages 57 to 58. It does not include any terms relevant to the issues before the Tribunal. The First Respondent's Staff Handbook is at pages 59 to 64, and includes its equality policy. Under the heading, "How you do your job", the Handbook says

(page 59), "If you fall short [of the requirements of the job] because you don't have the necessary skills, knowledge or experience then we will do all we can to help you attain these". The Second Respondent says this would apply only where someone did not have experience of a particular type of work or was not hired to perform it. In respect of pregnancy the Handbook accurately and briefly sets out the statutory position on maternity leave and pay.

27. As for the Equality Policy, it makes clearly stated equality commitments, including in relation to pregnancy. Under the heading, "Equality Training" it is stated (page 64) that "A series of regular briefings will be held for staff on equality issues … equality information is also included in induction programmes. Training will be provided for managers on this policy … all managers who have an involvement in the recruitment and selection process will receive specialist training". The Second Respondent's evidence was that there had been no staff briefings, apart from the induction arrangements. He had no equal opportunities training himself prior to termination of the Claimant's employment. The Third Respondent had 8 years' employment with large retailers, managing a number of employees. He has been to various equality briefings in his career, though none in the last 2 years. The Respondents say that the Claimant's induction (carried out by the Second Respondent's wife, though she had no formal role in the business) included mention of the First Respondent's maternity leave provisions. The Claimant agrees. The Equality Policy also provided (page 62), as part of the First Respondent's commitment to its staff, that "Training, development and progression opportunities are available to all".

28. During the Claimant's employment, much of the production of garments required by the First Respondent took place in a factory in Turkey, managed by Mr Bakti. This had started just before the Claimant was employed, production having previously been carried out at a factory in Leicester, by a business called Define, managed by Mr Patel. From February to July 2017, no production was sourced from Define at all, though it did resume work on a small scale for the First Respondent prior to termination of the Claimant's employment.

29. The Claimant's starting salary was £22,000 per annum, to be increased to £25,000 after 3 months if her performance was satisfactory. After 6 weeks the Second Respondent advised her that the business was very happy with her performance. She thus received a pay increase from 1 January 2017, a month early. The Second Respondent accepts that he would want someone to demonstrate they could fulfil the main requirements of the role before getting such an increase and that this was the case with the Claimant. He says her designs were of excellent quality, though in these early stages of her employment she was not involved in processing orders (nor therefore the fit process). He describes the Claimant as polite, with a professional attitude to her work and says this is why her pay rise was brought forward. The Third Respondent confirms that his understanding from the Second Respondent at this time was that the Claimant was doing a good job.

30. At page 76 there are texts from the Second Respondent to the Claimant, praising her for her work – "Bless. You are the best", "Well done Bec. You did a great job with these", "Thanks Bec. You are the best", "Great work by the way", "Thanks Beci you are a star" and "Great work Beci". The Claimant says she received such texts regularly, though in fact there were no more than those just recounted. There was thus one text in each of November 2016, December 2016 and January 2017 and three over the space of three days in February 2017. The Claimant also says the Second Respondent often sent her ideas, the two of them working as a team – there are examples of this at pages 77 to 82 and elsewhere.

First performance review, January 2017

31. On 27 January 2017, the Claimant had her three-month performance review. Her written comments are at page 95 and the Second Respondent's at page 96. There was a dispute over whether the Third Respondent was also present at the review meeting, but that is not something it is necessary for the Tribunal to resolve.

32. The Claimant's comments said she "could complete some tasks quicker" and contribute more to improving the business. She said, "Want to put in place a better fit process and order/approval system", "Could increase my telephone communication" and "[If late] I always make the time up. Always willing to put in the extra hours and I work from home regularly during my evenings and weekends". As to "Opportunities for development", these included, "Look at taking on a new account … Help to reduce the amount of rejected gold seals … put into place a better fit process and order/approval system".

33. The Second Respondent rated the Claimant as excellent in all but two categories and both of those were rated as good. His ratings were same as or higher than those the Claimant had given herself. His comments (page 96) included in relation to work quality, focussing on her designs, "You are a perfectionist and it shows"; in relation to productivity, "I don't have to check that you are on task"; in relation to communication "Great here. Good comms with customers. Pursue unanswered questions/approvals"; and in relation to attendance and dependability, "you always cover time missed. Always make sure deadlines are met and keeps promises with buyers". As for opportunities for development, the Second Respondent's comments included, "Keep records of fits … keep samples … organised into folders … slowly manage more of ASOS [the First Respondent's only clothing client at that stage]".

34. The Claimant says that just one area for improvement was identified at this review, namely writing emails, and that the Second Respondent commented on her improvement in that regard within a week. The Respondents disagree, saying that they also asked the Claimant to keep technical and product information in an organised manner, and that they discussed "a better fit process". Both of these points are reflected in the Second Respondent's comments just noted, and indeed the Claimant's own. She does not accept however that this signalled any deficiencies on her part. She says the reference to retention of information was to a system she wanted to set up and that the Second Respondent's reference to fitting was not a comment on problems with the fit process but simply that he wanted a record of the fit process retained. As for the reduction of rejected gold seals the Claimant' s evidence is that she was saying the factory (Define) needed to do better.

35. The Second Respondent's evidence is that in fact Define had raised issues with him regarding fitting. At this stage, he says, he was investigating where the problem lay; he says, though the Claimant denies, that he raised these concerns with the Claimant and that in fact she saw the problems herself when at the factory, but says he did not mention this in the performance review as he was still at the investigative stage. That seems to the Tribunal to be reflected in the fact that there was clearly a discussion of concerns about fitting at the review meeting. The Second Respondent described the regular complaints from Mr Patel as "niggles" though Mr Patel himself says in his statement he ceased dealing with the First Respondent because of problems with the Claimant's work. The Second Respondent's response to that is that the review was in January, whilst the decision by Define to stop working with the business was in March. It is clear from the review documents that fitting issues were under discussion even at this early stage, but there is no evidence that the Second Respondent told the Claimant of Mr Patel's complaints and the Tribunal therefore concludes that he did not do so.

36. The Second Respondent says (TAT26) that the Claimant acknowledged at her review the need to produce new business. The Claimant says that taking on a new account was something she raised herself but she did not acknowledge the need to win new business. The Tribunal's conclusion is that generating new work was not discussed as a requirement of the role, but it was clearly something the Respondents wanted her to do. The Second Respondent was willing for the Claimant to take on what was the only clothing client at that stage, notwithstanding the background issues with production noted above, as he says he was trying to support her. The Tribunal finds that a fair explanation given that there is clear contemporaneous evidence of fitting issues but no contemporaneous evidence of the Second Respondent having identified where the problem lay.

37. One other point of discussion at the review was a "production tracker", a log of where each garment is in the process of production. The Claimant says this was suggested by her to improve her efficiency and that the Second Respondent said it was not compulsory, but that he had one and would send it to her. The Second Respondent denies this, saying that he told her she could use the tracker he had already created or create one herself, but either way one was needed. The Claimant says that despite several requests, the Second Respondent did not send her the tracker until late June 2017. The Respondents say she was reminded regularly it was needed. Page 96, the Second Respondent's comments, clearly refer to the need to keep records of fits and to "keep track of technical side as much as possible". The Tribunal concludes that these comments show that the tracker was important to the Second Respondent, and that this much was made clear, but in the absence of any documentary evidence expressly to this effect on balance finds that he did not make clear it was an absolute requirement to utilise it.

38. At TAT42 there are a number of references to evidence of where the Second Respondent says the Claimant did things wrong in her work. They all predate the first performance review, but no such issues were identified in the review meeting or paperwork. The Second Respondent says he would always expect a honeymoon period at the start of someone's employment, and that he was looking at all of the positive sides of the Claimant's work at that point. The Tribunal will return to this evidence in its analysis below. The summary of the Claimant's first performance review included the comment by the Second Respondent, "So happy you are part of the team, you have a great attitude to work and the quality and standard of your work is the highest level".

The Claimant's first pregnancy

39. The Claimant alleges that in January and February 2017 the Third Respondent – who at the time had a young baby – said to her, "You don't want to have kids yet … you have sleepless nights". She says this was part of general conversation when the Third Respondent would talk about having had a bad night at home. The Claimant also alleges that the Third Respondent said words to the effect that if she had children, would have to give the First Respondent a year's notice and the Respondents would then have her doing jobs she didn't like so that she would leave her employment. She says that the Third Respondent made these comments at least once a week over a two-month period, at a time when she was trying for a family. She says that this was sex discrimination, though the Third Respondent did not make these alleged comments to Annie. The Third Respondent strongly denies these allegations. He says he may have made comments about the challenges of being a parent of young children (KL43), as many parents do, but said nothing to discourage the Claimant from having children of her own. He says he did not know at this point that she was planning to have a family (KL44). He says that in any event

the comments about sleepless nights were in no way directed at the Claimant, but were part of general conversation in the office. He categorically denies saying she would have to give a year's notice and that she would be treated adversely so that she would wish to leave. These comments were not mentioned in the grievance raised by the Claimant after her employment ended. The Tribunal will return to the conflicting evidence of the parties when dealing with this allegation in its analysis below.

40. The Claimant says she felt uneasy about informing the Respondents of her first pregnancy. She was the First Respondent's first pregnant employee. She informed the Second Respondent on 9 March 2017 and says he told her there was no maternity policy, which she thinks meant no enhanced maternity pay, and asked her when she thought she would be leaving and if she would want to return part time. The Second Respondent denies that this was said. He has a young child himself and his evidence (TAT31) is that he congratulated her and said if she needed anything to let him know and that she could take as much time off as she needed. The Claimant denies that she was told to take as much time off as needed. She also says that she told the Second Respondent that she was scared to break the news to the Third Respondent, something the Second Respondent does not accept.

41. The Claimant alleges that when she informed the Third Respondent on 15 March 2017 his response was, "Are you joking?" and that when she said no, he congratulated her. The Third Respondent's evidence is that he was pleased for the Claimant (KL15) and told her to let him know if she needed anything. At the time he had two young children. He says (KL16) that he does not remember or believe he said, "Are you joking?" but that if he did, this was because it came as a surprise. The comment was not meant to be derogatory, but (in our words, not the Third Respondent's) "Oh wow". He says he sometimes gets tongue-tied and is "sorry that it came out in this way". The Tribunal will return to the conflicting evidence on this matter in its analysis below.

42. The Third Respondent says it never occurred to him that the Claimant's pregnancy was going to be a problem. He recalls a conversation with the Second Respondent about their policies and thinks he looked at the Government website which made clear that statutory maternity pay could be recovered. It seems highly likely to the Tribunal that the Third Respondent did this, given his responsibility for the First Respondent's finances and the fact that the Claimant was its first pregnant employee. Aside from the named Respondents, the other employees of the First Respondent are currently three women including one who has a printing role which is typically carried out by men. Ten of its fifteen employees over the years have been women.

43. The Claimant says that from the point she announced her pregnancy, she received less praise from the Second Respondent, i.e. she no longer received the sort of texts referred to above. She also says that before her pregnancy the Second Respondent would often engage in social conversation with her, but that afterwards this stopped and he would just say good morning. She says he would speak to Ms Stafford and ask about her weekend but would not address her in the same way, describing him as cold and short towards her, giving her one-word answers.

44. At RG30, she refers to a different timescale in relation to this allegation, saying that in the first two weeks after her return from sick leave following a miscarriage (see below), work continued as normal and that it was therefore from the beginning of May that the Second and Third Respondents exhibited a change in attitude towards her, with little praise or communication at all. She felt she was no longer the "golden girl" (RG32). She describes not being her usual bubbly self, as her mental recovery from

miscarriage took some considerable time. The Second Respondent denies any change in his attitude, saying he tried to remain respectful to all staff. The Tribunal will return to analysing the evidence in relation to this allegation in its analysis below. It is clear however that this is an allegation of sex discrimination, falling as it did outside of the protected period. The Claimant says the behaviour she complains about was not because she is a woman, given Annie was spoken to more sociably, but was to do with her pregnancy which is unique to women.

45. As already intimated, the Claimant's first pregnancy sadly ended prematurely because of miscarriage on or around 30 March 2017. When she told the Second and Third Respondents, she received the texts at pages 105 and 118. The Third Respondent texted her on 3 April (page 105) saying, "Hi Bec, just to let you know my thoughts are with you and Jamie [the Claimant's husband], Charlotte [the Third Respondent's wife] went through a similar thing so I understand it's not easy. Hope to see your giggly self in the office soon …", then in response to her explaining her stay in hospital, "Take your time Bec – best place for you is at home …". The Claimant replied "Thanks, I will see how I go … I hope one day we will be lucky enough to have kids", to which the Third Respondent then replied, with reference to friends who went through similar experiences, "They call them Rainbow Babies after miscarriage. It's a special thing though it does [sic] seem it. Life will be paid forward". The Claimant accepts these texts reflect well on the Third Respondent. The Second Respondent's response to the news that the Claimant had miscarried, would have to go into hospital and couldn't face coming into work on Friday 31 March was (on 30 March at page 118), "Oh Beci, I'm so sorry to hear that. Don't worry about tomorrow. God bless you and Jamie. Let us know if you need anything".

46. The Claimant's complaint in relation to her sickness absence and return to work is that she expected to be told to take a week or two off – she did not ask for it, but that is what she wanted and it was not offered. She accepts the Second and Third Respondents were sympathetic when told about her miscarriage, but in relation to time off says she didn't feel the Second Respondent was very forthcoming and that she had to keep texting him and say she was struggling but would aim to be in work the next day. She says she felt like the Respondents would be unhappy if she didn't turn up for a week or two. She texted the Second Respondent after her operation. His response (on 5 April at page 119) was, "Oh man. So not a good day. At least it's all behind and you can look to the future". The Claimant replied in agreement and said she would not make it in the next day, that she was going to aim for Thursday or Friday but would "see how I feel as the week goes on if that's ok. If I don't make it in this week then I'm sure I will deff be there Monday". The Second Respondent replied, "OK cool. Keep me posted on how you are getting on. Rest up", to which the Claimant replied, "Will do". At page 114A is a further text from the Second Respondent to the Claimant, "Bless … you chill and come in on Monday. No stress for Friday". The Claimant says she felt she had no choice but to return to work on the Monday. The Respondents deny pressurising her to return, saying it was her choice – the Second Respondent says he referred to Monday as that is when the Claimant had suggested returning. That is in when she did in fact return and so she was off for six working days in total.

47. The Respondents say that any change in communication between them and the Claimant was due to a decline in her performance. Their case is that by May 2017 they had identified problems with her fitting and were also concerned about there being no new business for her designs. The Second Respondent said in evidence that after the Claimant returned to work, everything was okay for a couple of weeks, but she came to seem less enthusiastic about actioning things, for example not being as willing to change CADs (her designs). He also says that the business received fewer orders from ASOS (as noted, the only clothing client for the business) which he

believes added to the Claimant's anxiety. At TAT38 he says that he reminded the Claimant regularly to implement agreed actions from the first performance review but whilst she acknowledged the need, she did not do so.

48. The Claimant says that beginning in May 2017 she was given work which was not part of her role and in which she had no experience, including costing garments and price negotiation. She says she was given no support or training. This is denied by the Respondents. This allegation is addressed in more detail below.

49. The Claimant says she was expected to make up time in the evenings when she took time off for medical appointments, one in April 2017 and three in May 2017. She says that whilst the Second Respondent did not refuse permission to attend the appointments, when she asked him about them, his response was, "Ok", leading her to feel that she was an annoyance. She says that she always verbalised that she would take her laptop home to make up time and again the Second Respondent just said "Ok". The Respondents say that whenever the Claimant took work home, this was on a voluntary basis. She says (RG34) that whilst she was not actually told to make up sny time, working at home was the effect of the level of work expected of her. Although the Second and Third Respondents also took work home (though not Ms Stafford) the Claimant says this was less favourable treatment because of her sex, as the medical appointments for which she was making up time resulted from her miscarriage. Whilst, as noted, the Claimant's comments in her January review included a statement that she was always willing to work extra hours, she says this was at the start of her employment when she was happy to do so of her own volition because at that point she was passionate about her work.

Second performance review, June 2016

50. On 14 June 2017, the Claimant had her second performance review, with the Second and Third Respondents both present. At page 124 is a draft review form which the Claimant says she completed several weeks before the meeting; the typed-up copy is not in the bundle. The Second Respondent's comments are at page 125. Page 125a, the Third Respondent says, are notes he made prior to the review meeting. The Claimant says she had not seen them until these proceedings and the Third Respondent agrees they were not shown to her at the time. It was not put to the Third Respondent that he did not make them contemporaneously and therefore the Tribunal accepts that he did.

51. The Claimant again received excellent and good ratings. Her attendance was one of those categories marked as good, rather than excellent. The Claimant says this was due to her medical appointments. The Second Respondent's review document said this: "There has been quite a bit of appointments here [sic] which is understandable and you always make up hours. Your mood was affected by recent events also but again this is understandable".

52. The Respondents say the "good" grading was not because of the medical appointments, which they say they had told the Claimant were understandable (the Tribunal notes this is consistent with what is stated by the Second Respondent in his review comments) and which the Second Respondent says he had no issue with whatsoever. He says that he marked her down as there had been times when she arrived late or had to stay at home to look after her dog or because builders were working on her house. He says this was not an issue either, as the Claimant always notified him, but nevertheless meant that she could not be rated as excellent, though "good was still good". The Second Respondent also says that the Claimant's replacement (whose appointment is dealt with below) has had a lot of time off work – two to three weeks in the first two months of her employment – because of eldercare

and medical issues. His unchallenged evidence was that he has discussed with her the strain this causes for the business and that if it was to become excessive, he would have to review her position. The First Respondent now has a fifth employee, also a woman who is aged 27, called Kata who is occasionally late as she travels some distance to work; Ms Stafford's attendance is said to be good.

53. The Claimant says that she did not – and would never – stay at home to look after her dog when she was supposed to be working. Her own mark in this category (on page 124) was "good", though she says that on the final version she marked herself as "excellent"; she remembers this because she recalls from the review meeting that the Second Respondent marked her down and she thought it unfair. The Tribunal returns to this issue in its analysis below.

54. The Claimant says that she was told at this review that her mood was low but that her work was good and to a high standard. We accept this as consistent with the Second Respondent's comments on page 125. It is agreed her miscarriage was raised, when talking about her low mood, which the Claimant says she found upsetting. The Third Respondent says (KL29) that he expressed sympathy with the Claimant and acknowledged she had been going through some difficult personal matters but told her he was expecting a lot more from her. He wanted her to be herself again, a bit more upbeat. This is consistent with his comment at page 125a under the heading, "Enthusiasm and attitude", which reads, "Get a bit a spring [sic] back in your step!". The Third Respondent says he mentioned the miscarriage at the meeting so as to show understanding of what had caused her not to be her previous upbeat self before making the comments along those lines. Again, the Tribunal returns to this matter in its analysis below.

55. The Claimant's case is that only one required improvement was identified in this review, namely the need to secure new customers. In the Third Respondent's comments at page 125a under the heading, "Initiative and creativity", he stated, "Bring more to the company, had a lot of experience but not seen much of that transfer". The Claimant says that she had identified and won new business – RG43 refers to new work from ASOS – adding that she also got in touch with previous contacts, though some attempts at winning new work, such as in relation to a business called Lavish Alice, did not work out. She says that there were some instances where she did follow up leads for potential new business and some where she did not, such as Urban Outfitters. She also says her workload had increased. The Second Respondent says he encouraged the Claimant to stay positive in seeking to generate more business, which is consistent with his comments at page 125 where under the heading, "Enthusiasm and attitude" he said, "we need to stay positive" despite some difficulties with ASOS.

56.The performance review also discussed garment fits. At page 125, under the heading, "Work quality", the Second Respondent wrote "I think there may be some issues with fits. Some of the comments are still confused and it seems to be affecting samples. How can we fix this?". Under the heading, "Initiative and Creativity" he commented, "I think we need to work on improving fit process and possibly learning how to fit a garment properly. You get a little bit panicked when something is wrong". The Claimant says this was a reference to helping the factory understand her instructions better and denies this was directed at her performance. Her case is that it is the job of a designer to go into a fit to give design comments, but it is the garment technician who knows how to make the patterns and amendments the designer wants, which she says is not what she was employed to do. She does not accept that a designer in a very small company has to be jack of all trades, saying that in any fit, there would be a designer, buyer and technician (this was by reference to where she previously worked). The Third Respondent says he was

aware from general discussion in the office that there were problems with fits. At page 125a he wrote, "Need a better fitting process – suggest going on fit training/better recording of comments".

57. The Claimant says that the Second and Third Respondents agreed that she had successfully implemented a new way of doing fits with the factory in Turkey, saving time and money. The Second Respondent does not agree (TAT41). The Claimant also says that the fact there was a language barrier with the Turkish factory and the fact she wasn't a garment technician were recognised by the Second Respondent as factors which made things difficult. The Second Respondent does not accept that either. Although nothing in the Second Respondent's comments at page 125 reflects on issues with the Turkish factory, the bundle certainly indicates several emails from the Claimant to the factory expressing concerns about work that needed redoing – see for example pages 129-139, 142-144 and 155-156. The Claimant says the Second Respondent was aware of these issues. He was copied into most if not all of these emails but says that if the Claimant had given clearer and more specific instructions to the factory initially, this would have reduced the problems, something he says he raised with her verbally. In any event the garment training mentioned at the review did not materialise.

58. The Second Respondent's evidence is that he had noticed issues with fitting in the first 3 months of the Claimant's employment (TAT39) and that it was clear by May 2017 that this was an issue with the Claimant. At page 121 is a text exchange between the Second Respondent and his wife, which was private of course, dated 19 May 2017. The Second Respondent says, "I figured out a problem with bec. She can't do garment fits properly". His wife asked what he would do about that and enquired about training, to which the Second Respondent replied, "Yea that's a possibility". His wife then talked about "sacking" the Claimant but no reply is recorded in the bundle. The Second Respondent says that he told the Claimant at the review meeting that she needed to improve fits and learn to fit garments properly, having seen her working on fits with Ms Stafford and seeing that she appeared "lost". This is accepted by the Tribunal, as it is wholly consistent with his written comment about the Claimant getting "a little bit panicked when something is wrong". The Claimant says that nevertheless the Second Respondent came to understand that in fact the problems lay with the factory when she explained this to him. Thus, she does not accept that the review comments regarding fits identify a problem with her; they identify a problem, she says, but without apportioning blame. The Tribunal does not agree. In the comments noted above, the Second Respondent was clearly saying, as was the Third Respondent, that some improvement on the Claimant's part was required. Further, in the "Opportunities for development" section of the review comments, the Second Respondent stated, "Fits is an area that needs work". He was clearly referring to opportunities for the Claimant's development specifically, though no adverse consequence of failure to improve was spelt out.

59. The Claimant says that one of the problems she encountered was retaining samples in the office once they had been made in Turkey. She says the Second Respondent agreed this was important but nothing was done about it, and so samples were sent to customers without a duplicate being retained. As a result, she had to work from memory or photos. Her allegation is that this was done deliberately to set her up to fail. The Second Respondent says he advised the Claimant that samples should be retained, encouraging her to use two sample rails in the office. He says it was her responsibility (TAT28) and adds that it would make no sense to damage his own business in this or any other respect where the Claimant says she was set up to fail. The Second Respondent describes that notion as "madness". The Tribunal notes that in the Second Respondent's notes prepared for the second

performance review (page 125) one of the items under "Opportunities for development" was "Request extra sample from Adnan [Mr Bakti]".

60. Setting up video reviews with the factory in Turkey was also discussed at the performance review meeting. The Claimant says this was first time it was raised and she actioned it; the Respondents say it had been raised many times. The Third Respondent says (KL26) that he knew from sitting near the Claimant in the office that she preferred to use email. The Tribunal is clear that this was raised at the review, as in his comments at page 125 the Second Respondent recorded, "don't be afraid to call face time" and in the "Opportunities for development" section, "Face time Adnan [Mr Bakti] don't be ashamed", which certainly suggests the Claimant was uncomfortable using Facetime. At page 124, in her pre-review comments, the Claimant commented, "Increased telephone communication with Adnan and more confident at talking to him". That suggests it had been raised before, and thus the Tribunal prefers the Respondents' evidence on this point.

61. The use of a production tracker was also raised. The Second Respondent's comments (page 125) included, "production tracker should have been done from last comments; I will send it"; he says this was available to all staff on the shared drive though the Claimant says it wasn't. The Second Respondent sent the production tracker to the Claimant on 16 June 2017, and again on 6 July 2017 as it had not been completed. The Claimant says it was a huge piece of work, especially on top of everything else she was doing.

62. In the Claimant's review comments at page 124 she said, "I think I come across as being enthusiastic and positive because I am really happy within my job … I get on really well with the team and we all communicate really well … If I have appointments, I always make up the time. Happy to work extra hours in the evenings and weekends if needed to meet deadlines". The Claimant explains this by saying she still enjoyed the design aspects of the role and that her comment about the team was a reference to Ms Stafford. The Tribunal cannot accept that evidence, given the reference to "all" of the team communicating really well. The Claimant also says that the form was filled out in mid-May, at which point the issues she raises in this case were only just emerging; the review took place in June. The review summary by the Second Respondent was "Very happy you are part of the team and you continue to produce excellent quality work and designs are up to date and relevant".

New client win

63. In late June 2017, the First Respondent won a new client, Pretty Little Thing ("PLT)" – each of the Claimant, the Second Respondent and the Third Respondent attended the meeting at which they secured the business. The Claimant complains that the Second Respondent's assistance was needed to deal with follow-up actions, but he was not in next day and was then on leave. The Second Respondent says he came in for an hour on a day off before going away, to discuss follow up, which the Claimant essentially concedes, though she says it was a brief exchange. It seems plain from page 145 (the booking details for the Second Respondent's leave) that his flights had been booked only a few days beforehand.

64. It is agreed the Claimant was involved in costing discussions with both PLT as the new customer and the Turkish factory as the supplier. At page 144j is an email sent by the Third Respondent after the meeting telling PLT who was responsible for what. In respect of the Second Respondent, it says "Graphics/ Pricing/ Manufacturing" and in respect of the Claimant it says "Design, CADS, Inspos, Mood boards, Samples". The Claimant says this shows she was not responsible for costing. She says that nevertheless she was left to cost garments with no idea of

what to charge or an acceptable profit margin, whilst also continuing with her design role. She says she received no assistance from the Third Respondent despite her requests, saying that he simply replied, "It's up to you". She says these actions, or inactions, on the part of the Second and Third Respondents were intended to let her fail in her work. She says that they knew she was trying for a baby and she felt she was being an annoyance in asking for help.

65. By contrast the Second Respondent says (TAT84) that costings and price negotiations were integral to the Claimant's work of liaising with customers and generating orders but that he was nevertheless heavily involved in price negotiation. The Third Respondent says (KL22 and KL23) that he sent several emails to PLT to assist. There are examples of such emails in the bundle, though the Claimant says they were a small fraction of the emails she sent. The Third Respondent also created an Excel document to help the Claimant work out costings, but the Claimant says this was of limited assistance. Her oral evidence was that the Second and Third Respondents were inconsistent and that sometimes she didn't get a response.

66. The Claimant also complains that from June to August 2017, on top of the other work she was doing, she had to do graphic design, though this was not part of her role nor did she have the appropriate training. This was, she says, another change in the Second Respondent's behaviour after she announced her first pregnancy, though the complaint is one of sex discrimination as the alleged conduct fell outside the protected period. She says that from May the Second Respondent started to ask her to do prints whereas before he had always done them himself. She also complains that in respect of more complex artwork, she was kept waiting by the Second Respondent, making it difficult to secure new orders, including from PLT – see RG60. Her case is that he delayed in sending her graphics four or five times from June to August 2017. She relates these actions to her first pregnancy also and describes them as "conscious actions" to make her fail, saying that she was effectively being expected to do three roles. The Respondents say that the Claimant had indicated on her CV that she was able to create graphics, and so the work she was asked to do was well within her skillset. The Second Respondent says that the Claimant waited for him to implement simple amendments which she could have done herself and also says that some of the delays were due to a cyber-attack in Turkey. Again, the Second Respondent was keen to emphasise in evidence that it would make no sense for him to act in a way that would damage his own business. The Tribunal will return to the parties' competing evidence in its analysis below.

67. On or around 20 July 2016, the Claimant secured the first order from PLT. She texted the Second Respondent – page 152 – saying "Just got our first order in from PLT". The Second Respondent's reply was, "Woop". The Claimant contrasts this with the feedback she received from him before her first pregnancy. The Second Respondent says he was pleased with the news and expressed that, but knew there would be limited profit from the work hence the more limited response.

Second Respondent's visit to Turkey, August 2017

68. From 6 to 15 August 2017, the Second Respondent was in Turkey. At TAT59, he says that he went there to manage production of an order as there were now serious problems with samples and fits. Given the evidence recounted above in relation to the Claimant's second performance review, the Tribunal accepts that explanation for the visit. From 7 August 2017, the Claimant was off sick for three days. In response to a text from the Third Respondent saying, "Bring the dog if you like today" (page160), the Claimant texted saying, "Hi Kev, that would have been great but unfortunately I'm not going to be able to come in today. I had to go to the out of hours doctor on Saturday and I've spent the entire weekend in bed. I've got sinusitis

and it still keeps getting worse by the day so I need to rest. I know the timing is crap …".

69. The Second Respondent says that whilst in Turkey he discovered that some garment packs – everything necessary to create a sample – which were to be completed by the Claimant before he left, had not been done. The Third Respondent says (KL31) that he asked the Claimant whether the Second Respondent had all he needed and that she replied she still had to send him three or four garment packs but that he should be able to manage with what he had. That is consistent with the further text exchange at page 160 in which, replying to the Third Respondent's question to this effect, the Claimant said, "Think I had 3/4 packs left to send, but he has the images and fabric info etc so should be ok. I've told him to text me if he needs to ask me anything". The Third Respondent says (KL32) that this put pressure on the Second Respondent. By contrast the Claimant says had she been in work she could have completed this task fairly quickly, i.e. it was not a big omission on her part.

70. On 7 August 2017, the Second Respondent texted his wife from Turkey – page163 – saying, "I'm tempted to advertise for someone else. She hasn't sent all the rokoko styles. I flew to Turkey to sort this out". The Claimant says that although at this point the Second Respondent was not aware of her second pregnancy (which the Tribunal will come to below), he knew she was trying for a baby – in her eyes it was inevitable she would do so after her miscarriage – and in any event it was after her first pregnancy. The Second Respondent says the Claimant had been given weeks to prepare the garment packs and they were still not done correctly.

71. On 10 August 2017, PLT rejected the samples related to their first order (pages 167a to 167e), saying in an email to the Claimant and the Second and Third Respondents, "We have received the below production samples and these aren't as the approved? Please see attached measurements – our fit comments were [details are given] ONLY [original emphasis] … These haven't been followed … As a result these are rejected and we require a new sample …". The Respondents' case is that PLT had given the Claimant specific instructions in the fit comments. The Claimant agrees PLT were not happy but says that this was an issue with denim samples with which she not been involved. The Tribunal does not accept that explanation, given that the samples to which PLT were referring at pages 167c and 167d do not appear to be denim samples at all, by contrast with those referred to in a subsequent communication at page 167g.

72. On 9 August 2017 the Second and Third Respondents exchanged text messages – page 164 – the salient parts of which were as follows: the Third Respondent, "Still no Becky" (referring to her sickness absence); the Second Respondent, "Great. We need to advertise I think"; the Third Respondent, "Sweet". At page 165 there was a further text exchange between the Second Respondent and his wife: the Second Respondent, "Annoyed about beci"; his wife, "Of course she's wasting your time and money"; the Second Respondent, "I don't know how she feels but I get the feeling she could have made more effort [this is of course a reference to her sickness absence]"; the Second Respondent again, "Gonna put an advert out. I think it will only get worse. Actually this new order from ASOS had none of her designs in there". The Second Respondent then asked the Third Respondent for a copy of the job description for the Claimant's role – page 166.

73. On 10 August 2017 the Second Respondent texted the Third Respondent again – page 168 – saying, "Beci is slippin. All patterns are wrong. PLT samples rejected. Her measurements were wrong. Not good for first order". The Third Respondent said, "Your [sic] doing it this time", to which the Second Respondent replied, "I've

done it before. Gemma, Ellis". Gemma is a former employee who had not been dismissed, but had been taken through a performance review, whilst Ellis had been dismissed two years previously because of performance concerns. The Second Respondent says he also discovered whilst in Turkey that some of the design or garment packs which the Claimant had prepared, which included measurement details she had provided, were wrong and had to be resampled (i.e. the sample made again) wasting time and cost. The Claimant says that the problem was with the factory interpreting the packs and using poor fabrics.

74. Whilst the Second Respondent was still in Turkey, he and the Third Respondent discussed a possible replacement for the Claimant. On 10 August 2017, the Second Respondent texted Saira Mian who had been shortlisted when the Claimant was recruited. He asked Ms Mian if she was looking for work – page 169 – and informed her of a possible new position (the Claimant's). In a further text (page 170) he said that the role involved "dealing with buyers … working drawings, designs etc. Fits, production". An interview with Ms Mian was arranged for 16 August.

The Claimant's second pregnancy, August 2017

75. On 14 August 2017 the Second Respondent texted the Claimant to ask if she was ok (page 166A). She replied, "Not really no. I am 6 weeks pregnant, but think I might be having another miscarriage. Just been doctors [sic] but I have to wait until Wednesday morning for an emergency scan to see what's going on, but it may be too early to tell". The Second Respondent replied, "Ok I see". He says he was very happy for the Claimant, adding at TAT71 that "part of me did think about the effect her dismissal may have on her pregnancy, but … I needed to do what was in the best interest of the Company". He says that in replying as he did, he was trying to be sensitive. He agrees that he did not ask her how she was after this date. Saira Mian was offered the role on or after 16 August 2017. She is now 30 years old, married and does not have children.

76. The Claimant told the Third Respondent of her pregnancy verbally. It does not appear to be part of her case that she was afraid to do so. The Third Respondent says (KL35) he was delighted for the Claimant given the problems with her first pregnancy. On the same day, at 9.07 pm, the Claimant texted him to ask to work from home the next day as she was to have a scan (page 186). Having not received a reply she texted again at 12.41 am on 15 August to say, "Don't worry I will come in tomorrow as normal". The Third Respondent says (KL36) that when he spotted the message he texted back. This was a minute later. He said, "Sorry Bec been busy. Are you sure?", to which the Claimant replied, "Yeh that's fine. Hopefully I will be ok". The Claimant says the absence of a reply for nearly four hours led her to assume the Third Respondent was annoyed which is why she said she would come in the next day. She believes he read the text immediately as she had a read receipt. The Third Respondent says the delay in replying was not because he was "being horrible" but because he was very busy. On the following evening, 16th August 2017, the Claimant texted the Third Respondent to communicate the good news that her scan had gone well. He replied within three minutes to say, "Good to hear Bec", to which she replied, "Thanks" (see page 187).

77. When the Claimant saw the Second Respondent on his return from Turkey on 17 August 2017, he informed her of the problems with the garment packs. The Claimant asked him to go through the mistakes so she could ensure they were not repeated, but says he brushed her off. On this basis she says the concerns were not genuine. The Second Respondent vehemently denies this, insisting that he had to edit and change the measurements and that unless he had filmed it, it would be difficult to show what had gone wrong. At TAT73 he says, "At this point I did not see the point

in trying to teach the Claimant where she had gone wrong as she had cost the Company a lot of money due to her incompetence. I told the Claimant to speak to [the contact in Turkey]". His evidence is that he knew he was going to dismiss her, so when she wanted to know where her work on the packs had gone wrong, it did not seem logical to spend time explaining it.

78. On 24 August 2017 the Claimant texted the Second Respondent about the same matter saying, "want to understand where I went wrong so I don't make the same mistake". The Second Respondent replied, "Adnan [in Turkey] will know but he's stacked right now …" (page 193). The Claimant says she raised the issue with Mr Bakti and that his reply was that he had no knowledge of the problem. In Mr Bakti's statement (page 253) he says that the fitting problems were due to the garment technician in Turkey and not because of the Claimant. That is also the Claimant's view, namely that her counterparts in Turkey could not understand her instructions because of the language difference. As already noted, the Tribunal can attach little weight to Mr Bakti's statement.

Meeting on 18 August 2017

79. On 18th August 2017, the Second Respondent asked to speak to the Claimant for what he describes as an informal review. The Claimant says that this was the first occasion on which performance issues were mentioned during her employment (RG73). In other words, her case is that no performance issues were raised in either of the formal performance reviews described above. The Second Respondent says he informed the Claimant he had been having concerns for three to four months. The Claimant denies this was said. It is not necessary to decide that conflict of evidence. It is however agreed that three issues were raised.

80. First, the Second Respondent referred to samples he had asked the Claimant to post on several occasions to ASOS. The Claimant says she had been asked only once, that this was not a major issue and that she had been establishing the correct contact to send them to. She says she boxed the samples immediately after the meeting and with the Second Respondent's agreement he took them to ASOS on a planned visit on 31 August. The Second Respondent's account is rather different. He says that despite raising the matter at the meeting and although it was only a five-minute job, the Claimant still had not sent them the following week, such that when he asked her about them again, he said that he would take them on his planned visit. The Tribunal will return to this conflict of evidence in its analysis below.

81. Secondly, the Second Respondent wanted to know why the Claimant had not responded to an email a few days before from PLT asking for new inspirations (new designs). The Claimant does not deny that she had not responded to the email at that point. She says she had prepared a pack and it was ready to send, which she did on returning to her desk. The Second Respondent says (TAT78) that as a result of this delay they did not get the order.

82. Thirdly, the Second Respondent raised the production tracker, which he says is crucial for accurately creating new garment packs. He says at TAT81 that the Claimant had failed to action this from both of her performance reviews. The Claimant accepts she had been sent the tracker a few weeks earlier, and says she had prepared it. She sent it to the team, including the Second and Third Respondents, on 31 August.

83. The Claimant accepts it was legitimate for the Second Respondent to ask her about the matters raised at this meeting, but says that he was "calling her up" on such things because of her announcement of her second pregnancy. The Second

Respondent says that although he had decided whilst in Turkey that the Claimant would have to be replaced, he held this meeting with her because he didn't know if Ms Mian would be the right person for the job, and so had to wait. His evidence is also that he and the Third Respondent were unaware of the process for dismissing someone but, based on their limited knowledge, believed there had to be period of discussion of performance issues with an employee before dismissal. In hindsight, he accepts it was not a good process but insists it had nothing to do with the Claimant's pregnancy. They had, he says, decided to terminate her employment, then learned she was pregnant. He recognised the risks this might pose for the business, but believed they had to stick to their decision.

Events after 18th August meeting

84. On 23 August 2017, whilst the Second Respondent was off-site, he called the Claimant and asked her to give him detailed measurements of a garment from a photograph he had sent her. The Claimant says he did this knowing she did not have a sample and insisted she provide the measurements even when she explained the impossibility of the task as she saw it. She says the Second Respondent had the garment and so could have measured it himself. This was therefore another attempt to place her in an impossible position. The Second Respondent says the customer had the sample, not him, and that setting the Claimant up to fail would have been to his own detriment as he needed the measurements. The Tribunal will return to the parties' conflicting interpretations of this incident in its analysis below.

85. On 24 August 2017, the Second Respondent sent the Claimant a summary of their meeting on 18 August. The Claimant says that it was not an accurate reflection of their discussions and cites this as a further act of pregnancy discrimination. The email is at page 194 and says, as far as relevant: "I discussed some concerns with you relating to performance over the past 3 – 4 months. This included overseeing [sic] vital information, not prioritising customer requests and having to be reminded about sending samples out over a 3 week period. //We also noted a general slowdown in pace and enthusiasm in your day to day role. This included not wanting to edit cads when asked to and also not implementing the [trackers] previously discussed in your quarterly performance review. //Beci explained that she felt that the workload was increasing and was struggling to be able to keep up … She also explained that she had felt like her performance had slipped due to personal reasons and it was a concern for her. As a result she also felt that we were unhappy with her performance over the past 4 months … //Beci agreed to try to improve her performance and implement systems previously discussed going forwards … //If there are other questions or comments to add please let us know". The Claimant agrees that the meeting on 18 August included discussion about prioritising customer requests and that she was reminded about sending samples; production and sampling trackers were also discussed. She disputes however that it was said either that a general slowdown had been noted or that she had not wanted to edit cads. She also denies making the comments noted above regarding her recognising the need for improvement.

86. The Claimant responded to the Second Respondent's note on 30 August 2017. Commenting on the text of his email (page 195) she in large part disagreed with his assessment of her prioritisation of tasks and the question of amending a CAD, and then went on to say that she was not struggling to stay on top of things but wanted the Second Respondent to understand how busy she was. She then stated, "I agree that the personal problems that I have recently been through has [sic] been some of the reason as to why my performance has been affected but I also believe there are [other factors] including a negative atmosphere in the office and receiving only negative feedback". She did not comment on the Second Respondent's statement

that she agreed to try to improve. She concluded, "I want all these issues resolved as I'm sure you do. I hope that over this past week I have started to show you a positive change in my work".

87. The covering email from the Claimant to the Second Respondent attaching her response is at page 198. In this email she referred to the importance of retaining garment samples and reiterated her request for feedback on what had gone wrong whilst the Second Respondent was in Turkey. She went on to say, "On reflection since our meeting, I have realised that two of the concerns that I have listed above both relate to garment fits which was also one of the topics discussed in my last review that I need to improve on. Therefore, to help me going forward can you please arrange the fit/garment training that you said you can organise?" She concluded, "Although I agree with some of your email below, there are some things I don't agree with. I have added my comments below [these are the comments just referred to above]". The Claimant says the words "I need to improve on" in the email did not mean she recognised problems with her performance. Rather she was saying that the Turkish factory needed to understand her instructions. The Tribunal cannot accept that explanation. She acknowledges that her comments referred to her performance being affected, but says this is not what she actually thought. She made them because she was scared to lose her job and so was trying to find a compromise. Given the other comments in the email and document, in which she directly challenged the Second Respondent, the Tribunal cannot accept that evidence either.

88. The Second and Third Respondents say that after that email they decided the Claimant was not willing or able to address the concerns that had been raised with her. On 31 August 2017, they arranged to see the Claimant at 5.00 pm. She was given a letter which is at pages 200 to 202. It informed her of the termination of her employment "as we do not feel that you are equipped for the role". The letter set out a number of explanations of that conclusion:

88.1. Under the heading, "Unable to get the fit process corrected", it was said this had been discussed at the first performance review, was "one of the criteria for the job title", was crucial for the business and was something the Claimant had expressed confidence about in her interview. As noted above, the Claimant says it was not discussed at interview or the first review and although it was raised in the second review, training was not arranged. The Second Respondent says (TAT88) that as a small company they did not have the time or resources to train the Claimant to fit garments, a similar comment being made in the letter. He did not investigate training as a possibility though he agrees it might only need a week or two. The Third Respondent agreed in evidence that the Respondents could have tried harder in this respect.

88.2. Under the heading, "Unable to get new business", it was said the Claimant had expressed confidence about this in interview, it had since been "mentioned a couple of times" but there had been no results in another area crucial to the business. The Claimant says she set up a sports brand with ASOS and helped secure PLT. She also says she was not hired on this basis.

88.3. The section headed, "Communication issues with suppliers" related to what the Respondents saw as the Claimant's refusal to speak with the factory in Turkey by video chat, which was also described as crucial to the business. The Claimant agrees there were issues, given the language difficulties, but says she never refused to video chat.

88.4. A number of matters were cited under the heading, “Missing vital information and lack of attention”, such as clothing labels not being checked and confusion over pricing. The Claimant says all of the points raised under this heading were untrue and not previously mentioned.

88.5. The next heading was, “Missing out on potential opportunities”. The Claimant says this refers only to the email to PLT, though it seems clear from the letter that the Respondents were also referring to the failure to send out samples to ASOS.

88.6. The section headed “Design work not representative of finished article” was said to relate to design work not properly representing the fit of a garment, and was said to have been raised after the first review. The Claimant says it was never raised, and repeatedly referred in her evidence to how her design work was complimented at the first review. Any problems were with the factory, she says, as the Second Respondent knew. The Second Respondent explains this part of the letter by saying that the Claimant’s drawing was always excellent, but the fit needed to be emphasised to help the pattern cutter understand how the garment should ultimately look.

88.7. The Claimant assumes the section headed “Didn’t action notes from performance reviews” relates to the production tracker though this was not spelt out. The letter concluded, “For all the above reasons we feel that you are not equipped for the role and as a result the business is suffering”, wishing the Claimant well for the future. The author of the letter was the Second Respondent.

89. The Claimant raised a grievance about her dismissal on 2 September 2017 – pages 205 to 207. It is not necessary for the Tribunal to go into the detail of the letter. The Respondents’ undated reply was sent to ACAS (pages 210 to 212). Again, it is unnecessary to go through that letter in detail, though the Tribunal notes: bringing in new business was stated to be “a major point of [the Claimant’s] employment”; fitting issues were said to be “one of the main reasons that [the Claimant] was dismissed; it was said it “was made clear to [the Claimant] that … action may be taken” if performance concerns were not addressed, something not evidenced elsewhere in the material before the Tribunal; the meeting on 18 August was described as putting the Claimant on a “performance review”; it concluded by saying the Respondents were happy to provide a reference for the Claimant “and we will include all the positive skills she has”. The Claimant’s solicitors’ letter has already been referred to above; it is not necessary to detail it any further.

90. In reference to why she did not bring claims relating to earlier events within the normal time limit (if they were not part of a continuing act with in-time events), the Claimant’s evidence was that she was scared and intimidated by the Second and Third Respondents, i.e. she did not want to bring a claim whilst still employed.

Law

Unfair dismissal

91. Section 99 of the ERA provides that “*An employee who is dismissed shall be regarded … as unfairly dismissed if - //(a) the reason or principal reason for the dismissal is of a prescribed kind …*”, going on to provide that “prescribed” means prescribed by regulations and relating to, amongst other matters “*pregnancy, childbirth or maternity*”. One such set of regulations is the Maternity and Parental Leave etc Regulations 1999, which provide at regulation 20 that “*An employee who is dismissed is entitled under section 99 of the [ERA] to be regarded for the purposes of Part X of that Act as unfairly dismissed if - //(a) the reason or principal reason for the*

dismissal is of a kind specified in paragraph (3)". Regulation 20(3) states, "*The kinds of reason referred to in [paragraph (1)] … are reasons connected with: //(a) the pregnancy of the employee; … //(d) the fact that she took, sought to take or availed herself of the benefits of [maternity leave]*".

92. As far as unfair dismissal is concerned, all that is relevant in this case is the reason or principal reason for dismissal. If it is one of the prescribed reasons referred to above, it is of course unnecessary to go on to consider fairness under section 98(4) ERA. If the reason or principal reason is not one of the prescribed reasons, then her complaint of unfair dismissal must fail given that she had less than two years' service at the effective date of termination.

93. The decision in **Maund v Penwith District Council [1984] ICR 143** is well-established authority that the reason for dismissal is a set of facts which operated on the mind(s) of decision-maker(s). The label the Respondents put on the reason for dismissal is not decisive; the Tribunal has to decide the reason. The burden is on the Claimant to establish that pregnancy was the reason – see **Smith v Hayle Town Council [1978] ICR 996**. That was a case concerned with dismissal for the reason of trade union activities but it is clearly applicable by analogy to complaints of dismissal where the reason or principal reason is said to be pregnancy.

Discrimination

Time limits

94. Section 123(1) of the EQA provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something, (a) when they do an act inconsistent with doing it or otherwise (b) "*on the expiry of the period in which [they] might reasonably have been expected to do it*".

95. **Aziz -v- FDA [2010] EWCA 304** was a Court of Appeal decision which accepted the force of the submission that an omission can be continuing. A continuing effect on an employee is not of itself sufficient however to establish a continuing act. In **Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the Claimant was less favourably treated and for which the Respondent is responsible. The Court of Appeal acknowledged that the burden is on a claimant to prove a continuing act, and noted at paragraph 49 that a claimant may not succeed in proving the alleged incidents actually occurred or that, if they did, that they add up to more than isolated and unconnected acts.

96. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that time will be extended – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness

with which the claimant acted once she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

97. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640,** Leggatt LJ said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Discrimination

98. Section 39(2) EQA provides that "*An employer (A) must not discriminate against an employee of A's (B) - //… (c) by dismissing B; //(d) by subjecting B to any other detriment*". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**, it was held by the House of Lords that there is a detriment for these purposes if by reason of the act(s) complained of a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work. There need not be a physical or financial consequence; distress at the way an employer handles something, if it is discriminatory, would be sufficient.

99. Section 13 EQA provides, "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Section 23 provides, "*On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

100. Section 18 deals with pregnancy and maternity discrimination and in so far as relevant for this case provides:

"*(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 …

(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 …

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as –

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2) …".

101. There are two crucial differences between direct discrimination as defined by section 13 and discrimination as defined by section 18, both of which differences were clearly recognised by the Claimant in the way she conducted her case from the

outset. First, section 18 does not require a comparison of any description – what is dealt with there is unfavourable and not less favourable treatment. Under section 13, a comparison so as to establish less favourable treatment is very much required. Secondly, the protection from discrimination defined by section 18 relates to a specific period – the protected period – whereas there is no such limitation in section 13, except of course that provided for by section 18(7) which broadly speaking says that treatment complained of in the protected period falls within section 18 and not section 13.

102. The difference between the two sections is illustrated in relation to the question of illness by the decision of the Employment Appeal Tribunal in **Lyons v DWP Job Centre Plus [2013] UKEAT 0348/13**. In that case, a claimant with post-natal depression failed in her appeal, the EAT making clear that she could not complain of discrimination as defined by section 18 because the treatment in question took place after the protected period, i.e. after her maternity leave had ended. Further, notwithstanding the gender-specific nature of her illness, it was not necessarily the case that she would succeed in a complaint of direct discrimination as defined by section 13; she would have to demonstrate that she had been treated less favourably than her employer would treat a man in similar circumstances. The EAT in so deciding applied the decisions of the European Court of Justice, particularly that in **Brown v Rentokil Ltd [1998] ICR 790.**

Burden of proof

103. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(6) A reference to the court includes a reference to—

(a) an employment tribunal …".

104. The fundamental question the Tribunal is required to determine is the reason why the Claimant was treated as she was, i.e. the reason why she was subjected to any detriment she is able to establish and why she was dismissed. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Lord Nicholls also observed that in most cases answering this question will call for some consideration of the mental processes (conscious or otherwise) of the alleged discriminator. Whilst in some cases, the ground, or the reason, for the treatment complained of is inherent in the act itself, in other cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes which led the alleged discriminator to act as they did.

105. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances, where necessary with the assistance of the burden of proof provisions. In **Amnesty International v Ahmed [2009] IRLR 884**, it was said that, "… The basic question in a direct discrimination case [this would also apply, it seems clear, to cases under section 18] is what is or are the "ground" or "grounds" for the treatment complained of … The fact that a claimant's [protected characteristic] is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does

not necessarily mean that it formed part of the ground, or reason, for that treatment**".** Similarly, in **Sefton Borough Council v Wainright [2015] ICR 652** it was held that a failure to offer an employee a vacancy certainly coincided with her being on maternity leave but that did not inevitably mean it was because of it and therefore within section 18. The tribunal was required to ask what was the reason the employee was treated as she was. The reason for an employee's treatment cannot be assumed from the fact that the treatment arises in the context of maternity leave (or, of course, pregnancy).

106. In determining why the alleged discriminator acted as they did, the tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. Rather it has to consider whether it was one of the reasons for the treatment – that is enough to establish unlawful discrimination. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan**). In **O'Neill v St Thomas More School 1997 ICR 33**, cited in Mr Williams' submissions, the EAT made clear however that the protected characteristic does not have to be the Respondents' subjective motivation for their actions; what is required is an objective test of causal connection, involving consideration of the surrounding circumstances.

107. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that **Igen** remains appropriate guidance in respect of the burden of proof. Singh LJ summarised the position by saying that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage [i.e. demonstrating that there are facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant]. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage [the second stage being the Respondent having to establish that it did not discriminate]".

108. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an act of unlawful discrimination. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246** "could conclude" refers to what a reasonable tribunal could properly conclude from all evidence before it. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. The inferences a tribunal may draw can include, in appropriate cases, any that it is just and equitable to draw from an evasive or equivocal reply to questions.

109. It is important however for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment [or in a section 18 case, unfavourable treatment] only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant and may emerge for example from the context considered by the Tribunal in making its findings of fact.

110. First of all then, the Tribunal is required to determine what occurred, including by way of relevant background. Secondly, it must determine what inferences may be drawn and why – these determinations may emerge for example from the background facts, from the context of the alleged detriments and dismissal, from the Respondents' general practice, and from statistical information where relevant. At this juncture the Tribunal is to assume there is no adequate explanation. Thirdly, it must then ask whether the burden of proof has shifted to the Respondents, i.e. whether the matter moves beyond the first stage. **Madarassy** makes clear that the first stage includes the Respondents' evidence on matters such as whether the act complained of actually occurred and the reasons for the allegedly discriminatory treatment. The Respondents' explanation for the alleged unfavourable treatment does not have to be a reasonable one; it may be that it has treated the Claimant unreasonably, but that is not enough to justify an inference of unlawful discrimination which would satisfy the requirements on the Claimant at the first stage.

111. Fourthly, if the burden of proof shifts, it is then for the relevant Respondent to prove that it/he did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the relevant Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of pregnancy or sex as the case may be. That would require the Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which the relevant inferences can be drawn, but also that the explanation is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. A tribunal would normally expect cogent evidence to discharge that burden of proof. The reason why the relevant Respondent acted as it did need not be only the protected characteristic in order for discrimination to be made out and the protected characteristic certainly need not be the "on the face of it" reason.

112. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof. In **Hewage v Grampian Health Board [2012] ICR 1054,** the Supreme Court said that the burden of proof adds nothing where there are positive findings by the Tribunal on the evidence one way or other. It is not necessary therefore in every case for a tribunal to go through the two-stage procedure. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Analysis

113. So as to follow the issues in the order identified above as closely as possible, this analysis deals first with the complaints of pregnancy discrimination, with the exception of the complaint about the Claimant's dismissal. It then deals with the complaints of sex discrimination and concludes with the termination of the Claimant's employment, which will also draw in the complaint of unfair dismissal. This means that the analysis does not deal with everything in strict chronological order, but that ought only to require brief repetition of those factors relevant to more than one complaint, which would have been unavoidable in any event. For reasons which will become clear, issues related to time limits are left until the end.

114. The first allegation of pregnancy discrimination is that the Third Respondent's reply to the Claimant when she told him of her first pregnancy on 15 March 2017 was, "Are you joking?". Putting aside time limit issues, the Tribunal concludes on the balance of probabilities that the Third Respondent did say those words, particularly

because he all but conceded that he may have done so. The Claimant had heard his comments about his own experiences of parenting and had interpreted them in a negative fashion (her separate allegation in relation to this is dealt with below). It seems likely to the Tribunal therefore that this is why she perceived this particular response negatively as well.

115. The Tribunal nevertheless accepts the Third Respondent's evidence that he saw no negative consequences of the Claimant being pregnant – he discovered that statutory maternity pay could be recovered and was clear that the business could hire a temporary replacement. The Tribunal also notes the Third Respondent's text after the Claimant's miscarriage, at page 105, in which he referred to a "rainbow baby", i.e. a baby born to someone who has previously miscarried. Albeit just over two weeks later, that comment clearly anticipated that the Claimant would, if all went well, become pregnant again and therefore suggests the Third Respondent had a positive attitude – or certainly not a negative one – to the prospect of the Claimant having a baby. The Tribunal finds therefore that the Third Respondent's comment was one of genuine surprise, rather than a comment with negative import, and that it was more than reasonably clear that this was the case. A reasonable employee would not have taken the view that she had been disadvantaged at work as a result. The Tribunal is confirmed in that conclusion by the Claimant's comment two months later in her six-month review (page 124) about the good relationships she enjoyed within the team, the fact that she does not refer to being fearful of telling the Third Respondent about her second pregnancy, and the much later omission of any reference to this matter in her grievance, all of which tend to suggest that the Claimant herself did not perceive the matter negatively at the time. She has failed to establish a detriment and unfavourable treatment and the complaint is therefore dismissed.

116. The second allegation of pregnancy discrimination is that the Second Respondent asked the Claimant, on the announcement of her first pregnancy, when she would be leaving and whether she would want to return to work part-time. The Second Respondent denies that he asked any such thing. Again, time limit issues are dealt with below. As to the substance of the allegation, the Tribunal considers that such a question could be a detriment and therefore unfavourable treatment. Whilst it would not constitute the operation of a formal management process or create any tangible adverse consequence, communicating an assumption that an employee returning from maternity leave would consider part-time working, as opposed to the full-time job she currently occupied, could reasonably be construed as a disadvantage. That said, the Tribunal prefers the Second Respondent's evidence in this regard. It notes the broad contextual factor of the make-up of the First Respondent's workforce both at that time and more generally, referred to in more detail below. It also notes the particular contextual factor of the Second Respondent's text (page 118) after the Claimant's miscarriage, in which he expressed clear sympathy and specifically used the words, "Let us know if you need anything". Those are the words the Second Respondent says he used when responding to the Claimant's announcement of her pregnancy. Given the clear record of the use of that phrase in close proximity in time and subject matter to the date of the conversation in question, the Tribunal concludes that it is far more likely than not that the tenor of the discussion on that day was as the Second Respondent asserts. Accordingly, the Claimant has not on the balance of probabilities proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Second Respondent had contravened section 39(2) EQA. Her complaint about this matter is dismissed.

117. The third allegation of pregnancy discrimination is that on 17 and 24 August 2017, the Second Respondent untruthfully informed the Claimant that some of the

garment packs she had prepared for his visit to Turkey were wrong and had to be resampled. The Claimant's case is that the reason the Second Respondent said this was because she was pregnant. She submits that if the work had been done incorrectly, the Second Respondent would have been able to say what the problems were, whilst he says that having decided to dismiss the Claimant, there was no point spending time going through the matter in any detail.

118. During the Second Respondent's visit to Turkey, problems were identified in relation to a certain number of garment packs not having been completed before he left and also in relation to the first order by PLT. Putting aside whether the former was serious and who was responsible for the latter, it is plain from his private text exchanges with the Third Respondent and with his wife that the Second Respondent genuinely believed these problems lay at the Claimant's door. The Tribunal thinks it highly unlikely, with those two matters immediately in view, that instead of raising either or both of those the Second Respondent would have selected for discussion on his return a matter which he knew to be untrue. Equally, it is highly unlikely that he would have referred the Claimant to a third party (Mr Bakti) to discuss the issue knowing it to be unfounded. It seems far more likely that he selected this matter for discussion because it too had arisen during his trip and – rightly or wrongly – he believed the Claimant to be responsible. The Tribunal notes Mr Bakti's evidence on this issue, though it can attach insufficient weight to it to cast doubt on this conclusion. In any event, the complaint is that the Second Respondent made reference to the issue untruthfully, so that whether Mr Bakti had a different view as to who was responsible for the problems with the garment packs is nothing to the point. It is also clear from the private text messages that whilst he was away the Second Respondent had decided that the Claimant's employment should terminate. His explanation for his refusal to engage in a detailed discussion about the garment packs, whilst not commendable, is therefore certainly plausible. The Tribunal thus finds that the Claimant has not in relation to this allegation proved facts from which it could conclude in the absence of an adequate explanation that section 39(2) has been contravened. Her complaint about this matter is dismissed.

119. The fourth allegation of pregnancy discrimination is that on 23 August 2017 the Second Respondent required the Claimant to measure a garment by reference to a photograph, a task which (and which she says he knew) it was not possible for her to carry out. This is related of course to the Claimant's view that there should have been another sample of each garment in the office, discussed in the Tribunal's findings of fact. As noted, the Second Respondent listed in one of the "opportunities for development" in his review meeting notes (page 125), "Request extra sample from Adnan [Mr Bakti]". It cannot be concluded therefore that he was seeking to obstruct the Claimant from carrying out her duties by refusing to countenance that as a possibility. The Tribunal was also struck by the Second Respondent's repeated statement that it would be "madness" to take steps to damage his own business; in this particular case, he says he needed the measurements to take whatever action was required in relation to the sample. Whilst of course this is not a ready-made answer to any and every complaint of discrimination, clear evidence would be required to establish that the owner of a business acted in a way that was deliberately detrimental to that business in order to ensure that an employee failed in her duties, particularly where, as here, it is a small business struggling to generate sufficient orders. In that context, it seems much more likely to the Tribunal that the Second Respondent's request reflected, as he said, the need to some extent at least for an employee to be a "jack of all trades" in a small enterprise. The Tribunal thus concludes that the Second Respondent's request was a genuine one. As **Madarassy** makes clear, the simple fact of being pregnant and being asked to do something the Claimant was concerned about is not enough to establish pregnancy discrimination. Again, the Claimant has not proved facts from which the Tribunal

could conclude, in the absence of an adequate explanation, that section 39(2) of the EQA has been contravened and therefore this allegation is also dismissed.

120. The fifth allegation of pregnancy discrimination is that on 18 August 2017, the Second Respondent subjected the Claimant to unfair criticisms of her performance. It is pertinent to note in dealing with this allegation that the Claimant herself accepted in evidence that it was legitimate for the Second Respondent to ask her about the three matters that were raised at this meeting. What she says however is that the Second Respondent was "calling her up" on such things because of her announcement of her second pregnancy, which is a somewhat different allegation. She accepts that she had not sent the samples to ASOS, that she had not responded to the email from PLT and that she had not completed the production tracker, the last of these being something the Second Respondent had raised at the review in June (page 125). The Claimant offered in evidence to various explanations as to why she had not attended to these matters, essentially having prioritised other things. This is reflected in her reply to the Second Respondent's note of the meeting which she sent on 30 August 2017 (pages 195 and 198). She did not in that reply describe the criticisms as unfair as such, stating that "my judgment is different to yours" as to what was most important and urgent and also going on to say that she wanted "all these issues resolved".

121. In this evidential context, whilst the concerns raised were not the most significant of the various matters which were eventually included in the dismissal letter, the Tribunal does not accept that the criticisms were unfair; there was a difference in perception and judgment no doubt, but they were not unfair in the sense of being wholly unwarranted. What is more pertinent however, given that the Claimant's case is that the concerns were raised because she was pregnant, is that the Respondents had decided before knowing this that she should be dismissed on performance grounds, as evidenced by the text exchanges involving the Second Respondent whilst he was in Turkey. That indisputable evidence fits with the Respondents' case that the meeting of 18 August was held in order to follow some form of procedure prior to informing the Claimant of her dismissal. As poor as the Respondents' employment procedures may have been in this and other respects, the Tribunal accepts this explanation for calling the meeting. Thus, the Second Respondent did not raise the three concerns because of the Claimant's pregnancy but as examples of the performance issues which he believed should lead shortly thereafter to her dismissal. On this basis the Claimant has not established facts from which the Tribunal could conclude in the absence of an adequate explanation that section 39(2) EQA has been contravened and this complaint is also dismissed.

122. The sixth allegation of pregnancy discrimination is that on 24 August 2017, the Second Respondent sent the Claimant an inaccurate account of their meeting six days earlier. This can be dealt with more briefly. The Claimant's reply to the Second Respondent's note of the meeting (pages 195 and 198) did not say that it was inaccurate. The last paragraph of the covering email at page 198 said, "Although I agree with some of your email below, there are some things that I don't agree with. I have added my comments …". Within those comments, the Claimant expressed disagreement with the Second Respondent's assessment of the various matters discussed, but that is not the same as saying that the account of the meeting was inaccurate. In fact, the Claimant engaged with the very points the Second Respondent had raised. The Claimant's grievance letter of 2 September 2017 (pages 205 to 207) did refer to the Second Respondent's account of the meeting being inaccurate, specifically that it did not refer to all of the issues raised by the Claimant and that the context of what was said had been changed. The letter went on to state however that the Claimant's reply of 30 August "set out the points where I disagreed with you", disagreement which as just noted related to the assessment of

the issues raised rather than the accuracy of the note. The Tribunal has no doubt that the Claimant disagreed with the Second Respondent's assessment, but it is not satisfied that she has discharged the burden on her to prove facts from which it could conclude – in the absence of an adequate explanation – that section 39(2) EQA has been contravened. This complaint is also therefore dismissed.

123. The first complaint of sex discrimination is that between January and February 2017, the Third Respondent made negative comments about having children indicating adverse consequences for the Claimant's employment were she to do so. Time limit issues aside, it is plain that the Third Respondent did indeed make comments about difficulties sleeping because of his young child. Doubtless they were similar to comments made in workplaces up and down the country on a regular basis. Having seen the Third Respondent give evidence, on this specific point and generally, the Tribunal concludes that it is far more likely he made these comments in general conversation in what was after all a small office, rather than directing them at the Claimant. He presents as someone who would not have hesitated to share his experiences in this regard. Accordingly, the Tribunal concludes that the comments about losing sleep did not amount to a detriment to the Claimant, however broadly that term is interpreted, nor did it constitute less favourable treatment than would have been afforded to a hypothetical man as it seems plain that the Third Respondent would have shared his experiences with anyone who would listen.

124. That seems to be only the first part of this allegation however. The Tribunal takes it that the second part, namely that the Third Respondent indicated adverse consequences for the Claimant's employment were she to have children herself, goes beyond the Third Respondent simply relaying incidents of losing sleep. The Tribunal does not accept the Claimant's evidence in this regard. First, it is inconsistent with the profile of the small workforce engaged by the First Respondent over the years. Other than the named Respondents, all three of the current employees are women, one of whom is engaged in a printing role which is predominantly carried out by men. Ten of the fifteen employees of the business since its inception have been women, whilst the Claimant's replacement, Saira, and the new employee, Kata, are of childbearing age, as is Annie. It could be said that this is not wholly surprising for a clothing business, but it is nevertheless a contextual factor which undermines the Claimant's case in this regard. Secondly, the Tribunal notes again the Third Respondent's text to the Claimant after he learned of her miscarriage (page 105). His clear anticipation, one might even say his wish, that the Claimant would have a "rainbow baby" is wholly inconsistent with the notion that he would have indicated adverse consequences of the Claimant becoming pregnant. Thirdly, the absence of any mention of reluctance on the Claimant's part to inform the Third Respondent of her second pregnancy is similarly inconsistent with her case. Fourthly, the same is true of the Claimant's positive comments about the team in her second performance review, albeit some months later, as fifthly is the fact that the Claimant did not mention this matter in her post-employment grievance. For all of these reasons, the Tribunal concludes that the Claimant has not established the facts on which she relies for this part of this allegation, which is therefore dismissed.

125. The second allegation of sex discrimination is that the First Respondent failed to allow the Claimant sufficient time off work following her miscarriage discovered on 30 March 2017, failing to inform her that she could take a week or two weeks off and requiring her to return sooner. Again putting time limits aside, the Tribunal concludes that the Claimant has not established her case on the evidence. The text messages exchanged between the Claimant and the Second Respondent at pages 119 and 114A clearly demonstrate that the Claimant was not put under any pressure to return to work by a particular date. The text at page 119 told her to rest up, asking her to keep the Respondents informed, whilst that at 114A ("You chill and come in on

Monday. No stress for Friday") was in response to the Claimant's message saying that she would definitely be in on the Monday if she did not make it in that week. The Second Respondent's explanation that he referred to Monday in his message in response to the Claimant's suggestion seems to the Tribunal perfectly logical and wholly understandable.

126. What this allegation in fact amounts to is not a complaint that the Claimant was put under pressure to return, but that the Respondents omitted to actively put to her the suggestion that she take a week or two off. In the light of the Claimant's text messages volunteering to return on the Monday, the Tribunal does not think that allegation can stand. Moreover, the Claimant at no point verbalised her wishes, making an assumption that any request would be treated unfavourably. That assumption was inconsistent with the sympathy the named Respondents had shown to the Claimant in their text messages just days earlier. The Claimant has thus failed to establish that she was subjected to a detriment in this regard, but even if she had, there is no evidence to suggest that the Respondents would have treated differently a man who had said the same things. The Claimant has not met the burden which is upon her in respect of this complaint either and it is accordingly dismissed.

127. The third allegation of sex discrimination is that from May 2017 onwards, the Second Respondent gave less praise to the Claimant and was less communicative with her than he had been before. It is clear that in the early days of her employment the Second Respondent did send the Claimant text messages praising her work though there were not a particularly large number, but it is not disputed that the number of such texts decreased after the Claimant's return to work following her miscarriage. As such, applying a broad interpretation, the Tribunal finds that she was subjected to a detriment in this regard. The Tribunal does not believe however that the Claimant has established a prima facie case of sex discrimination, on the basis that it is clear that the reason for the change was something other than her sex.

128. The Claimant's evidence in this respect was somewhat inconsistent, as already noted. In her oral evidence she said that things changed from when she announced her pregnancy. In her statement however, she says that on her return to work everything was fine for a couple of weeks, and it was then that attitudes and communication changed. The Tribunal prefers the evidence in her statement on the basis that it is consistent with her comments ahead of the June performance review (page 124) that "we all communicate well". That being settled, the Tribunal does not think it logical to conclude that the Claimant returned to work following her miscarriage, for a couple of weeks found everything remained as it had been, attitudes then changed, and that this was due to her having been pregnant. It seems unlikely that an employer would continue to treat an employee in exactly the same way in the period immediately after her pregnancy had ended and then because of that same pregnancy begin to treat her differently. A much more likely explanation for the difference in behaviour is that asserted by the Second Respondent who says that this is precisely when he began to observe problems with the Claimant's performance. This is borne out by his text to his wife at page 121, in which he said that he had figured out a problem with the Claimant, that she could not "do garment fits properly". It is also borne out by the Respondents' evidence that the Claimant became less enthusiastic at around this time and by the Claimant's own evidence that her mental recovery took longer than she had anticipated. This in turn is consistent with the Claimant's much later email, of 30 August, in which she acknowledged that her personal problems had affected her work. The parties' cases in respect of timing are aligned and the evidence clearly leads to the conclusion that the reason for the change in attitude, whether texts praising the Claimant's work or – perhaps unconsciously on the Second Respondent's part – social communication, reflected the emerging concerns about the Claimant's performance as the Second

Respondent perceived them. His response to the first PLT order is consistent with this context. The Tribunal heard no evidence to suggest that a hypothetical man would have been treated differently. It is satisfied that the reason for the change in behaviour – what was in the Second Respondent's mind – was the perception of the Claimant's performance, not her sex. This complaint also fails.

129. The fourth allegation of sex discrimination is that from May 2017 until 31 August 2017, the First Respondent required the Claimant to carry out costing and price negotiation without training or help. She submits that the Respondents thus made her life difficult as they had threatened to. The Tribunal has concluded that there was no such threat. As for the allegation itself, there is a separate, similar allegation in relation to follow up work with PLT which is dealt with below, but in relation to her broader, more general assertion that she was required to do this kind of work without proper training or assistance, the Claimant simply did not produce evidence sufficient to establish her case. The Tribunal can only determine matters based on what has been drawn to its attention in evidence. In this instance, the Claimant has not established facts which would satisfy the burden of proof which is upon her. This complaint too is dismissed.

130. The fifth allegation of sex discrimination is that the First Respondent required the Claimant to make up time for doctor's appointments which she took in connection with (though after) her miscarriage, once in April 2017 and three times in May 2017. The Tribunal concludes that the Claimant has not established the facts on which her allegation is based. As set out in the findings of fact, the Claimant made clear in her first performance review that she was always willing to work over; she said the same in her second review at page 124 – "If I have appointments, I always make up the time. Happy to work extra hours in the evenings and weekends if needed to meet deadlines". The Claimant says this was of her own volition at the start of her employment, but the review comments fell either side of the appointments and reflect quite the opposite of her being required to make up the time. In her oral evidence she said that she felt she was being a nuisance and an annoyance in taking the time off, that this is why she took her laptop home to make it up and that when she informed the Second Respondent of this his response was, "Ok". In her witness statement (RG34) she says that whilst she was not told to make up the time, working at home was the effect of the level of work expected of her. There was no evidence, even on the Claimant's own case therefore, to suggest she was put under any pressure to make up for her medical appointments. With the Claimant having taken it upon herself to do so without indicating any reluctance or disquiet – in fact the contemporaneous evidence of her performance review comments is quite the opposite – it cannot be said even on a wide interpretation that she was subjected to a detriment. Whilst a detriment can of course arise by omission, perhaps in this case that the Respondents failed to prevent her from taking her laptop home, that is not the Claimant's case and there is no evidence to suggest that a hypothetical man would have been treated any differently. The Claimant's case in this regard must be dismissed.

131. The sixth allegation of sex discrimination is that on 14 June 2017, the Second and Third Respondents referred to the Claimant's miscarriage during her performance review meeting. It is agreed the miscarriage was referred to. Without context, this might be said to amount to a detriment for the purposes of the EQA. The context is however very important. Again, the Tribunal notes the sympathetic texts the named Respondents sent to the Claimant after the news of her miscarriage. It also notes that broadly speaking it is accepted that she and the Second Respondent in particular had a good relationship at this time and that the generally good relationships and communication within the team were referred to by the Claimant in her own comments preparing for the meeting. This fits entirely with the

Third Respondent's explanation that the miscarriage was mentioned to show that the Respondents understood why the Claimant had experienced low mood when raising the point about wanting to see her with "a spring back in [her] step" (page 125a). That is in turn consistent with the Second Respondent's review comments at page 125 which included not only reference to "recent events" but the wider context of the business "not having a great time with ASOS right now", which he believed had also affected the Claimant's enthusiasm. The Tribunal concludes therefore that the Claimant has not established that she was subjected to a detriment in this respect. The reference to her miscarriage was an acknowledgment of the difficulty the Claimant had been through, a demonstration of understanding of one of the factors which had caused her not to be her previous self, given as context to the comments about wanting to see her be more upbeat. Even if it were a detriment, the Tribunal does not accept that because a man could not have suffered a miscarriage, it must follow that there was sex discrimination. **Lyons** makes clear that is necessary to consider whether a similar comment would have been made to a man whose mood and enthusiasm at work had waned because of illness. The Tribunal heard no evidence to suggest that he would not. This complaint is also dismissed.

132. The seventh allegation of sex discrimination is that on 14 June 2017, i.e. at the second performance review, the Claimant was marked down for attendance because of her doctor's appointments in connection with her miscarriage. It is agreed that the Claimant was marked as good instead of excellent, which is plainly enough to be a detriment, regardless of the fact that the Claimant gave herself the same rating (page 124); being marked down in an appraisal by one's employer can certainly be reasonably construed as a disadvantage. The Tribunal also rejects the Respondents' explanation for the reduced mark, namely that it was because she had stayed at home to look after her dog or because of building work. First, in the January review she was rated as excellent for attendance, even though she had clearly taken time off – the Second Respondent said "you always cover time missed" (page 96). Secondly, the Second Respondent's comment in the second review regarding attendance (page 125) was, "There has been quite a bit of appointments …". That is far more likely to relate to medical appointments than having to deal with builders or staying at home to look after the dog. The Tribunal concludes therefore that the Claimant was subjected to this detriment because of her medical appointments.

133. It nevertheless rejects again the Claimant's argument that because those appointments related to her miscarriage sex discrimination is established. **Lyons** makes clear that is not the case; it is in the nature of a sex discrimination complaint that a comparison must be made with a man whose circumstances were not materially different. The only evidence before the Tribunal in this regard, and it was unchallenged, is that Ms Mian has also been spoken to about her attendance, which has been less than satisfactory because of a combination of elder-care and medical issues; the Second Respondent was also less than pleased when the Claimant took time off because of sinus problems whilst he was in Turkey. Whilst of course the Claimant herself cannot be her own comparator and Ms Mian is also a woman, the fact that the Second Respondent commented adversely on the Claimant's absence unrelated to her miscarriage and the fact that the Respondents have addressed absence issues with Ms Mian is clear evidence that it would treat all of its employees in the same way in materially similar circumstances, a hypothetical man included. On this basis, the Claimant has not proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that section 39(2) of the EQA has been contravened. This complaint too is dismissed.

134. The eighth allegation of sex discrimination is that from 22 June until 31 August 2017, the Second and Third Respondents left the Claimant to attend to follow up

actions, consequent on securing PLT as a new client, outside her expertise and with insufficient information and support. Again, the Claimant says this was intended to make her life difficult as had been threatened. The Tribunal again concludes that the Claimant has not proved facts such as would discharge the burden of proof. First, it attaches no significance to the Third Respondent's email to PLT at page 144j. The email stated who the day to day contacts for particular parts of the First Respondent's business would be, but was an external communication and so cannot be taken to mean that the Claimant could not be expected to do anything other than what is there mentioned. Secondly, the Second Respondent did come in briefly on the day after the client win, to discuss follow up actions. Thirdly, what the Claimant did reflects the fact that the First Respondent is a small business in which employees have to be deployed to a variety of tasks as well as the fact that the Second Respondent was going away at the last minute. Fourthly, as already noted, very clear evidence would be needed to support an allegation that amounts to saying the named Respondents would do something, or fail to do something, that would deliberately harm the business they own (and which on the clothing side was struggling) in order to make life difficult for the Claimant. Fifthly, the Third Respondent was clearly involved in some follow up actions as the Claimant accepts, including email exchanges with PLT and giving her a spreadsheet. In the face of this evidence, the Claimant's case became that the named Respondents were not consistent and that sometimes she did not get a response from them. The Tribunal concludes that, again, this reflects the nature of running a small business. In that context, and in light of the evidence just summarised, the Tribunal concludes that a reasonable employee would not take the view that they had been disadvantaged in the sense required by the legislation, however challenging doing the work might have been. There was therefore no detriment, but even if there had been, there was no evidence before the Tribunal to suggest that in the context in which the parties were working a hypothetical man would have been treated differently. A particular protected characteristic combined with difficulties at work is not enough, without something more, to establish a prima facie case of direct discrimination. This complaint must also therefore be dismissed.

135. The ninth allegation of sex discrimination is that between May and August 2017, the Second Respondent failed to provide artwork for the Claimant to enable her to complete her work, also leaving her to do some artwork and printing herself, thus making it more difficult for her to secure new orders. There was very little specific evidence put before the Tribunal on this point and so it is difficult to resolve the question of whether the Second Respondent left the Claimant to do artwork more often after her first pregnancy than before, which is what lies at the heart of the Claimant's case. The Respondents' case that more straightforward artwork was not outside of the Claimant's expertise is supported to some extent by references in the Claimant's CV which suggest she had done some work of this nature before – for example (page 224) "edit print graphics and colour ways". There is little else of a specific nature to go on. There are however two broader contextual points which lead the Tribunal to conclude that the Claimant has not established facts which discharge the initial burden of proof. The first is that her case to the effect that the Second Respondent waited until May to begin to disadvantage her in this way because she had been (or would become) pregnant, does not make sense given that she returned to work a month earlier after her miscarriage. The second is that again, the Tribunal would require clear evidence that the Second Respondent had acted in a way calculated to damage his own business. There is no such evidence. It is much more likely that any delay in sending artwork to the Claimant was in the nature of the business, a small concern with many demands particularly on the owner-directors. The evidential burden on the Claimant has not been discharged and this allegation too is therefore dismissed.

136. The tenth allegation of sex discrimination is that on 6 August 2017, the Second Respondent refused the Claimant's request for retention of a second set of product samples and then criticised her regarding the absence of such samples. This is another allegation in respect of which the evidence before the Tribunal is sparse. In her Claim Form at paragraph 25 (page 19) the Claimant refers to the matter of samples being discussed at the June performance review and says that it was agreed this was important but that the named Respondents failed to implement any such arrangement, leaving her to work from memory or photographs. She contends that this too was part of a concerted effort to set her up to fail. At RG64, referring to the Second Respondent's trip to Turkey on 6 August 2017, she says that the only versions of the samples were sent to the customer (PLT). Referring to text exchanges on 10 August 2017 (page 162), she says that the Second Respondent dismissed her concerns, saying that the samples were at the factory in Turkey, but she should not worry and should focus on actioning new samples and development. PLT rejected the samples (page 167a).

137. The Tribunal is not satisfied that the Claimant has established the facts that she relies on to discharge the burden of proof which initially rests with her. As already noted, there seemed no reluctance on the part of the Second Respondent at the June performance review to arrange for samples to be retained. Further, the texts at page 162 do not show that he refused the Claimant's request. He simply said that he did not have them, and when the Claimant said she would ask Mr Bakti, he replied that she should not worry too much about that. It also remains unclear to the Tribunal at what point the Second Respondent is said to have criticised the Claimant for the absence of samples. Again, the Tribunal can only reach its conclusions based on the evidence which is drawn to its attention by the parties. It must also note again to the importance of there being clear evidence of an owner-director of a struggling business potentially doing damage to a new customer relationship in order to make an employee fail. The Claimant has not proved the facts which are at the heart of this allegation.

138. The Tribunal finally turns to the question of the Claimant's dismissal. Dismissal is of course unfavourable treatment. The crucial question is whether it was because of the Claimant's pregnancy. In support of her claim that it was, alternatively it was because of her sex, and unfair, the Claimant submits in essence that everything went well with her employment until her pregnancy in March 2017 and subsequent miscarriage. These events made the Respondents look at her in a new light. She was careful to say in evidence several times that she was dismissed both because of the fact she was then pregnant again and/or because of her earlier pregnancy. She relies on a number of matters to support this argument. Some of those matters, such as receiving fewer congratulatory text messages, were at the heart of allegations which have already been dismissed, such that it would be improper to include them in the analysis at this juncture. The Claimant can nevertheless still point to the following:

138.1. She received her pay rise earlier than had been set out in her offer letter/contract, reflecting the strong start to her employment.

138.2. She had a positive first performance review, which included discussion of her taking on more work with the First Respondent's then sole clothing customer.

138.3. Her second performance review in June 2017 saw her receive ratings in every category that were either good or excellent.

138.4. The equality training promised in the First Respondent's Equality Policy was not carried out.

138.5. The same Policy's commitment to provide training to all staff was not applied to the Claimant in respect of the performance shortcomings relied upon to justify her dismissal, nor did the Respondents follow through the specific proposal to send her on garment training, which may only have taken a couple of weeks.

138.6 The Second Respondent provided somewhat inconsistent accounts of when he first became aware of problems with the Claimant's performance. At the meeting with her in August 2017 he said it was around April or May, but in his oral evidence he said it was before the first performance review in January. His explanation that in the earlier period he had identified problems but was trying to work out where responsibility lay does to some extent address the differing accounts, but there remains something of an inconsistency in his evidence.

138.7 The Tribunal accepts the Claimant's submission that the evidence of Mr Patel seems to have been introduced by the Respondents to bolster their case in respect of the Claimant's performance. Neither the Claimant nor the Tribunal were taken to what Mr Patel said, though admittedly that is probably because he did not attend the Hearing.

138.8. To the same effect the Respondents did seem to the Tribunal to have introduced both in the dismissal letter (specifically under the heading, "Missing vital information and lack of attention") and in evidence at this Hearing matters relating to performance which were never raised with the Claimant.

138.9. The Second Respondent's response to the announcement of the Claimant's second pregnancy – "Ok, I see" (page 166a) – was markedly less warm than his response to the news of her earlier miscarriage.

139. Taking all of this evidence together, the Tribunal is satisfied that the Claimant has proved more than just the fact of her pregnancy and unfavourable treatment. Assuming at this stage no adequate explanation from the Respondents, she has in this case proved facts from which the Tribunal could conclude that section 39(2) of the Act has been contravened. Putting it in lay terms, the facts of the case as just outlined clearly call for an explanation from the Respondents. Putting it more technically, the Claimant has shifted the burden to the Respondents to show on the balance of probabilities, that the dismissal was in no sense whatsoever on the grounds of pregnancy or sex. That requires the Tribunal to assess the reasons given by the Respondents for the dismissal, noting that it is entitled to expect cogent evidence if that burden is to be discharged.

140. The first, and main, issue the Respondent relied upon was problems with fitting garments. All parties accept there were fitting problems. The Claimant questions however why this issue was not addressed in her January review or before her first pregnancy and says that the Respondents are unable to point to any document that shows she had any such issues. The reference in the dismissal letter to "Design work not representative of finished article" seems to cross over with fitting but neither the Tribunal nor the Claimant were taken to that as a separate issue. The Respondents submit by contrast that comments about fitting ran throughout the Claimant's employment. Having considered the relevant evidence, the Tribunal accepts that submission based on the following:

140.1. It was clearly a requirement of the role, the job advert stating "you will fit garments" (page 65).

140.2. As the Tribunal has concluded, the Respondents did state at interview that the Claimant would be involved in fitting.

140.3. The first performance review raised in a low-key way, as one of the "opportunities for development", the requirement to "Keep records of fits. Measurements if needed. Keep track of the technical side as much as possible", which is an early suggestion of room for improvement in this area.

140.4. In May 2017 the Second Respondent sent a private text to his wife (page 121) saying that the Claimant could not do garment fits properly.

140.5. At the second review in June 2017, the Second Respondent made several comments about this issue (page 125) including, "I think there may be some issues with fits. Some of the comments are still confused and it seems to be affecting samples. How can we fix this?". Under the heading "Initiative and Creativity" there was reference to the need to improve the fit process and "possibly learning how to fit a garment properly". Under the heading "Opportunities for development" was the comment, "Fits is an area that needs work". Reading these comments overall, the Tribunal cannot accept the Claimant's case that none of this is directed at her and that all that was being said was that she needed to help the factory understand her instructions better.

It is not for the Tribunal to decide the Claimant's level of competence in respect of fitting garments, but it is nevertheless clear that the importance of doing so was established at the outset and that concerns that she was not doing it correctly featured well before her dismissal relative to her short period of employment. The private text at page 121 is particularly strong evidence that this was a genuine concern on the Respondents' part.

141. Then there was the winning of new business. The Claimant submits that it was never made clear to her this was a requirement of the role and that in any event she did help win new business so even if this was a requirement, it was a sham reason for dismissal. Against that, it is clear from the solicitors' letter at page 216 that the Claimant had expressed confidence at interview that she could win new customers. The Respondents concede that this was not expressly made a requirement of the role, though it is clear from the June review that it was discussed as something she was to pursue, with the Second Respondent stating as an opportunity for development (page 125), "Try for new leads Urban, ASOS own label" and the Third Respondent (page 125a), "Bring more to the company, had a lot of experience but not seen much of that transfer … look for new accounts". It is clear that things with ASOS were not going well and unsurprising therefore that the Respondents raised the need for new customers. It is agreed that the Claimant secured the first order from PLT though as her solicitors' letter acknowledged, that was a customer that was handed to her. Taken overall therefore, whilst it is well-recognised that new customers do not come easily in any line of business, there is sufficient evidence that this was a matter of concern to the Respondents which they genuinely concluded the Claimant had not satisfactorily addressed.

142. In respect of communication issues with suppliers, this was an issue that had clearly been raised at the second review by both named Respondents, and the Claimant's own comments at page 124 clearly suggest it had been raised before. "Missing out on potential opportunities" referred to not responding to PLT and not sending samples to ASOS. The Tribunal has found that the Respondents were entitled to raise those concerns as the Claimant agreed.

143. Weighing up all of that evidence, specifically the evidence that the Respondents had documented concerns about the Claimant's performance on a number of occasions and in a number of respects (albeit some of that in private messages) before her dismissal, the Tribunal is satisfied that on the balance of probabilities it

has proved that the dismissal was in no sense whatsoever on the grounds of the Claimant's pregnancy. The Tribunal is fortified in that view by the following additional matters, many of which have featured in analysing earlier allegations and which need only at this point be stated by way of reminder:

143.1. The profile of the First Respondent's workforce over the years;

143.2. The fact that the Claimant's induction including mention of the First Respondent's maternity provisions, which could be said to anticipate the possibility of a future pregnancy;

143.3. The sympathetic texts sent by both named Respondents, which the Tribunal agrees went beyond what many employers would say;

143.4. The Third Respondent's reference to a "rainbow baby" which strongly indicates that he positively anticipated the Claimant becoming pregnant for a second time and wished for that to happen;

143.5. The Second Respondent's text of 7 August, before knowing of the Claimant's second pregnancy (page 163), saying that he was tempted to advertise for someone else in the light of the absence of a complete set of sample packs, and the subsequent texts progressing the same thought process (pages 164 to 165, 166 and 168);

143.6. The decision to recruit Sara Mian, again before knowing the Claimant was pregnant – whilst the Claimant argues that the Respondents knew she would get pregnant again, there was no evidence or indication that this was in their thinking beyond the fact that the Claimant was married and of childbearing age; and whilst the Claimant submits that the decision to dismiss her was only made after the Second Respondent's return from Turkey and thus precipitated by the announcement of her second pregnancy, it is clear that the Claimant's dismissal was firmly in view before then and that all that remained was for the Respondents to be satisfied that they wished to recruit Ms Mian so that the dismissal decision could be finalised;

143.7. The Claimant's own comment on 30 August (page 195) that her performance had been affected (by personal and other factors);

143.8. The willingness of the Second Respondent in particular to praise aspects of the Claimant's work, specifically her design ability, even in the Tribunal hearing, and his willingness (page 212) to provide a reference highlighting those positive points.

144. In the light of all of the above the Tribunal accepts that the advance pay rise and the positive first review reflected the early stages of the Claimant's employment when the problems with fitting in particular had not been properly assessed. It views the failure to undertake training on equality issues as a reflection of the somewhat disorganised state of some of the Respondents' ways of working, whilst the decision not to train the Claimant – as unusual as it is to say that training would not be offered where it related to a core element of the role – clearly reflected the fact that the Respondents had become wholly unpersuaded that she could turn things around. As for the addition of new material into the dismissal process, the Second Respondent frankly admitted that the process was, with hindsight, inadequate. The Tribunal concludes that the addition of new material was one part of that inadequacy and, like the addition of further material into this Hearing, an indication of the Respondents' unfamiliarity with good employment practice in some respects. The named Respondents' replies to the news of the Claimant's second pregnancy were less effusive than their replies to the news of her miscarriage, but the Third Respondent

nevertheless expressed it to be “good news” (page 187) and in the light of all the other evidence summarised above the Tribunal accepts the Second Respondent’s explanation for his more guarded reply.

145. In summary, as already stated, the Respondents have discharged the burden of proof upon them. The reason for dismissal was not the Claimant’s pregnancy but genuine concerns about her performance. The complaint of pregnancy discrimination in this regard is therefore dismissed. Similarly, the Tribunal is in no doubt in the light of all of the evidence as to the reason for dismissal, that a hypothetical man whose circumstances were not materially different – namely someone in a similar role in respect of whom the Respondents had similar concerns – would also have been dismissed. The dismissal of Ellis, though the Tribunal heard little about it, was for similar reasons and so confirms that. The alternative complaint of sex discrimination also fails. Further, the Tribunal is satisfied that what operated on the named Respondents’ minds in deciding to dismiss the Claimant was not her pregnancy but her performance. The Claimant has not discharged the burden that is on her to prove that pregnancy was the reason or principal reason for her dismissal and therefore her complaint of unfair dismissal also fails.

146. It is unnecessary for the Tribunal to determine any issues relating to time limits given that all of the Claimant’s discrimination complaints have been dismissed. For completeness and briefly however, had the relevant allegations been established, the Tribunal would have found the ostensibly out of time complaints to be conduct extending over a period with those which were plainly in time, on the basis that the named Respondents were the common actors in all of the allegations, the subject matter of the out of time and in-time complaints was somewhat variable but broadly connected, and the lapse of time between the out of time and in-time allegations was relatively short.

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Employment Judge Faulkner

Date: 22 November 2018
JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE