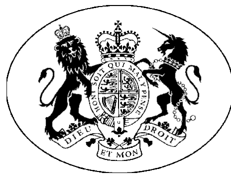

EMPLOYMENT TRIBUNALS

Claimant: **Miss S Settersfield**

Respondent: **Pine View Care Homes Limited t/a Groby Lodge**

Heard at: **Leicester** **On:** **8th, 9th and 10th October 2018**

Before: **Employment Judge Ayre**
Members: **Mrs B Tidd**
Mr C Bhogaita

Representatives:

Claimant: **In Person**
Respondent: **Mr Raja, Director**

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The Claimant was unfairly dismissed.

2. The Claimant was automatically unfairly dismissed for reasons related to her pregnancy.

3. The Respondent has made an unlawful deduction from the Claimant's wages by failing to pay the Claimant for the time that she was awake and working between midnight and 5:00 am on sleeping night shifts (also known as twilight shifts). The Claimant was underpaid by one hour for each shift at the rate of £7.20 per shift for the period September 2016 to April 2017 and at the rate of £7.50 a shift for the period April 2017 to 7 January 2018.

4. The Respondent has made an unlawful deduction from the Claimant's wages in the sum of £138.75 in respect of the Claimant's final salary and is ordered to pay that sum to the Claimant.

5. The Respondent has subjected the Claimant to a detriment by reason of her pregnancy, contrary to Section 47C of the Employment Rights Act 1996, by failing to carry out a risk assessment when asked to do so on 2 occasions.

6. The Respondent discriminated against the Claimant on the grounds of pregnancy by failing to carry out a risk assessment when asked to do so on 2 occasions.

REASONS

Proceedings

7. The Claimant brought claims of constructive unfair dismissal, unlawful deduction from wages, breach of contract and pregnancy discrimination against the Respondent. All of the claims were resisted by the Respondent.

8. There were two preliminary hearings prior to the final hearing in October. The first, which the Claimant was unable to attend as she gave birth to her second child on the day of the preliminary hearing, identified the issues in the claim. The second was to consider whether the claims should be struck out as having no reasonable prospect of success. Employment Judge Ahmed decided, for the reasons set out in his judgment, that the claims should not be struck out.

9. Both parties were unrepresented at the final hearing. The Claimant had prepared a witness statement by way of a letter dated 11 September 2018 which had been served on the Respondent in advance of the hearing. The Respondent did not prepare any witness statements in advance of the hearing. When asked why the Respondent did not have any witness statements, Mr Raja stated that it was because ‘there was no supporting evidence’ for the Respondent to respond to. At the outset of the hearing Mr Raja indicated that the Respondent did not intend to call any witnesses.

10. The Respondent had prepared 2 bundles of documents which were referred to as R1 and R2. The Respondent only had one copy of each of the bundles, and neither copy was paginated. The claimant wished to rely upon photographs of WhatsApp messages, which she had paginated and copied.

11. The Tribunal adjourned at 10:28 am on the first day of the hearing to give the Respondent time to paginate the bundles and prepare sufficient copies for the tribunal, and for the Respondent also to reconsider its position in relation to witness evidence. The Tribunal reconvened at 12:40 pm and the Respondent produced paginated copies of the bundles. R1 ran to 40 pages, although additional pages were subsequently added by the Respondent with the permission of the Tribunal, and R2 ran to 34 pages. Part way through the hearing the Respondent sought leave to add into evidence its social media policy, together with evidence that the Claimant had signed to say that she had read the policy. This additional evidence was allowed in.

12. At this point the Respondent also produced witness statements for Mr Dinesh Raja, Director, and Mrs Ricky Hamill, the Manager of Groby Lodge Care Home. The Tribunal adjourned to give the Claimant time to consider her position in relation to these witness statements which were disclosed at a very late stage.

13. The Claimant objected to the introduction of the witness statements but accepted that some of the evidence in them was helpful to her. For example, in one of the statements the witness stated that the claimant did do ‘sleep in’ shifts. The Claimant had previously understood the Respondent’s position (as set out in the ET3) to be that she did not perform sleep in shifts.

14. On balance the Tribunal did not believe that the Claimant was prejudiced by the admission of the statements. The statements were very short, less than

one page long each, and it was the unanimous decision of the Tribunal that it would be in the interests of justice to allow the Respondent to introduce the witness statements and for the witnesses to give oral evidence on behalf of the Respondent.

15. The Tribunal therefore heard oral evidence from the Claimant and, on behalf of the Respondent, from Mrs Ricky Hamill, Manager of Groby Lodge Residential Care Home where the Claimant worked, and Mr Dinesh Raja, Director and registered Manager of 4 residential homes including Groby Lodge.

The Issues

16. The issues that the Tribunal had to determine had been helpfully identified at an earlier preliminary hearing before Employment Judge Milgate. The issues were as follows:-

(i) Was the Claimant constructively dismissed by the Respondent? There were three alternative grounds upon which it was alleged that the Claimant had been constructively dismissed:-

a. Automatic constructive dismissal on the basis that the Claimant resigned because of concerns about her health and safety whilst pregnant (Section 99 of the Employment Rights Act 1996 ("**the ERA**") and Regulation 20(3)(a) of the Maternity and Parental Leave Regulations 1999 ("**the MPL Regs**"));

b. Automatic constructive dismissal on the ground that the Claimant had raised health and safety concerns (Section 100 of the ERA).

c. Ordinary constructive dismissal principles, namely that there had been a breach of the implied term of trust and confidence which the Claimant resigned in response to.

(ii) Was the Claimant entitled to any additional pay in respect of the period from September 2016 to January 2018 when the Claimant was awake and working on 'twilight' shifts when she was required to work from 9:00pm until 12:00 midnight and again from 5:00 am until 7:00 am, and was expected to remain on the premises between midnight and 5:00am to sleep but was woken as required to assist another worker.

(iii) Did the Respondent make an unlawful deduction from wages in the Claimant's final payslip in which she was paid £135.00 for 18 hours but had, she claimed, worked 40 hours. In evidence the Claimant accepted that she had in fact worked 36.5 hours in the last month of her employment rather than 40 hours, and that therefore the outstanding unpaid wages were for 18.5 hours (36.5 minus 18). At the Claimant's hourly rate of £7.50 this gave a total alleged underpayment of £138.75. The Respondent adduced no evidence to counter this element of the claim.

(iv) Was the Claimant discriminated against on the grounds of pregnancy and/or subjected to a detriment contrary to Section 47C

of the Employment Rights Act 1996. The unfavourable treatment / detriment relied upon was that the Claimant had been denied a risk assessment despite asking for one on 2 occasions.

Findings of Fact

17. We make the following unanimous findings of fact.

Background

18. The Respondent is in business as the operator of 4 residential care homes for the elderly including one at Groby Lodge in Leicester. Groby Lodge is managed by Mrs Ricky Hamill and has 12 service users or residents at any time. Those service users have varying degrees of care needs. The Respondent operates a number of standard shifts at Groby Lodge: 7:00 am to 2:00 pm, 2:00 pm to 9:00 pm and 9:00 pm to 7:00 am. The 9:00 pm to 7:00 am night shift is split into two; the 'awake shift' and the 'sleeping' or twilight shift.

19. There is a requirement at all times to have at least 2 members of staff present in Groby Lodge. Overnight this is made up of one awake carer working from 9:00 pm to 7:00 am and paid for 10 hours, and one 'sleeping' carer who is awake and working from 9:00 pm until 12:00 midnight, and then again from 5:00 am until 7:00 am. The sleeping carer is required to sleep on the premises between 12:00 midnight and 5:00 am and is called upon as necessary to assist the awake carer. The sleeping carer is however only paid for 5 hours.

Claimant's role

20. The Claimant was employed by the Respondent from May 2014, initially as an apprentice. In 2015 the Claimant became a carer in Groby Lodge where she worked on the day shift. In June 2015 the Claimant became pregnant with her first child. No risk assessment was carried out at that time and the Claimant did not ask for one. The Claimant went on maternity leave in January 2016 and her son was born in February 2016.

21. In September 2016 the Claimant approached the Respondent and asked whether she could return to work on the night shift. The Respondent agreed. From then until the termination of her employment the Claimant worked the twilight shift and was paid 5 hours a shift. The Claimant was considered by the Respondent to be a good worker.

22. The Claimant was required to remain on site between midnight and 5:00 am but was not paid for that time. Mrs Hamill's evidence was that there was a requirement at Groby Lodge to have at least 2 people on site at all times, and that if the 'sleeping' carer had left the premises, somebody else would come in to cover them. There could never, according to Mrs Hamill, be just one person in the building.

23. In its Response to the Claim the Respondent's position was that the Claimant slept at Groby Lodge between 12:00 and 5:00 am at her request and for her benefit so that she did not have to travel home at midnight and back again for 5am. The Respondent's position on this issue changed at the hearing. The Claimant gave evidence that she was required to stay on the premises between 12:00 and 5:00 and was not allowed to leave. She produced a WhatsApp

message between herself and Mr Raja in which she asked if she could leave between 12:00 and 5:00 and he replied that she could not. The Claimant's evidence on this issue is corroborated by the evidence of Ricky Hamill that when the Claimant was working the twilight shift she was required to remain on the premises between 12:00 and 5:00 and could not leave.

24. Mr Raja also said in his oral evidence that if the sleeping carer on the night shift wanted to or left the premises between 12:00 and 5:00 then the Respondent would have to arrange for somebody else to come in to cover for that person and that the person who came in to provide cover would be paid for doing so. We therefore find that the Claimant was not permitted to leave the premises between midnight and 5 am.

25. The Claimant's duties on the twilight shift were to clean the premises, including a deep clean of particular areas, assist the residents to get into bed, help the residents with their personal needs and personal care, including changing them and taking them to the toilet, and get drinks and sandwiches for the residents. The Claimant also administered medication including oral morphine. The Claimant could go to bed at midnight but was woken during the night for a number of reasons including to administer controlled medication (for which there needed to be two people present) and to assist in repositioning residents. There was one resident at Groby Lodge who needed repositioning every 2 hours. The Claimant was also woken up to assist in taking the residents to the toilet and cleaning them if they had soiled themselves. The Claimant's evidence, which we accept, is that she was woken up every night to reposition a service user and two to three times a week to administer oral morphine. She also said that she was woken up to assist with toileting and soiling duties twice a week.

26. The Claimant worked on average 4 shifts a week. Her contract provided for her to work a minimum of 3 shifts a week and on occasions she worked 5. We find that the average number of shifts worked each week was 4. She was required to complete time sheets recording the hours that she worked.

27. We also find that the Claimant worked an average of one hour each shift between midnight and 5:00 am and that she did so on average 4 times a week.

28. The Respondent's evidence, which we accept, was that employees on the sleeping night shift are entitled to be paid for hours that they are awake and working and that sleeping carers are paid for an hour if they are woken up during the night, even if they only work for part of that hour. The Respondent also gave evidence that it was the individual employee's responsibility to record extra hours worked between midnight and 5 am on the rota and on their time sheets. There was no evidence before us of that policy or of it ever having been communicated to the Claimant however.

29. When the Claimant started working on the twilight or sleeping night shift she claimed payment for 10 hours on her time sheet and was told by the Assistant Manager, who is no longer employed by the Respondent, that she could only record and claim 5 hours for a sleeping night shift. That is what she did from then on. As a result of what she had been told therefore the Claimant only claimed 5 hours' pay for each twilight shift.

30. The Claimant's hourly rate of pay was £7.50 from April 2017, so she was paid £37.50 for a twilight shift. In comparison the person doing the waking night

shift was paid £75.00 namely 10 hours at £7.50 an hour. The Claimant was not paid anything for the hours that she worked when woken up during her sleeping shifts.

31. In April 2017 the Claimant saw a link alerting her to the fact that there had been a recent decision in which it was held that workers on sleeping shifts were working and entitled to be paid National Minimum Wage for the time that they were asleep. The Claimant sent a message to Mr Raja after seeing this post raising the issue of being paid for all hours on sleeping nights.

32. Mr Raja rang the Claimant and told her that she needed to sign a contract that day or she would not be able to work her shift that night. The Claimant then received a call from Mrs Hamill who asked her to go into work. The Claimant went into work where Mrs Hamill presented her with a contract, backdated to September 2016. The Claimant was asked to sign the contract and did so.

33. Although Mrs Hamill's evidence was that she could not remember these events in April, the Claimant was very clear that they had taken place and we found the Claimant to be a credible witness. The Claimant also referred in a later WhatsApp message to Mr Raja to having raised the question of payment for sleeping nights with him previously. That message corroborates her oral evidence, and we prefer the Claimant's evidence on this issue.

34. We find that the Claimant's message to Mr Raja in April 2017 prompted Mr Raja to ask the Claimant to sign a contract which purported to make remaining on the premises between 12:00 and 5:00 am voluntary. In fact, it was not voluntary. The Claimant could not leave the premises between midnight and 5:00 am, as was confirmed in a WhatsApp message from Mr Raja to the Claimant sometime later.

35. In addition, Mrs Hamill said in her evidence that there had to be two people in the building at any one time, and that if the sleeper left the premises somebody would have to replace them because there needed to be 2 people in the building at all times. Mrs Hamill also said that she could not recall a sleeper ever leaving the building between 12:00 and 5:00. Mrs Hamill could not recall the last time that she had been called into Groby Lodge during the night when she was on call at her home, which is just 6 minutes' walk away. We find that there was a requirement for the sleeping carer on the night shift to remain on the premises and that it was not common for the on call person to be called to the home during the night.

<u>Claimant's pregnancy and risk assessments</u>

36. In early September 2017 the Claimant discovered that she was pregnant. On 18 October after her 12 week scan the Claimant notified the Respondent of her pregnancy by way of a WhatsApp message to Mrs Hamill at 20:01 on 18 October. The Claimant had been asked by her midwife what job she did and when she told the midwife that she was a carer in a residential home the midwife advised her that she should ask for a risk assessment.

37. The Claimant asked Mrs Hamill on 2 occasions if a risk assessment would be carried out because of her pregnancy. The first time she asked Mrs Hamill was in October 2017 and Mrs Hamill's response was that she would 'sort it'.

38. There was no suggestion by Mrs Hamill that a risk assessment was not

necessary or that the possible risks to the health and safety of pregnant women and their unborn children in fulfilling the role of carer had already been assessed by the Respondent.

39. The Claimant asked Mrs Hamill again for a risk assessment in December 2017 and Mrs Hamill again said she would sort it but did not. Mrs Hamill accepted that this had been an oversight on her part and, to her credit, apologised for it.

40. By the time of the Claimant's resignation on 7 January 2018, no steps had been taken by the Respondent to carry out a risk assessment for the Claimant or to reassure her that the potential risks to the health and safety of pregnant women and unborn children associated with the work that the Claimant carried out had already been assessed.

41. The Claimant was concerned about possible risks to her health and safety as a result of the duties that she was required to carry out. The Claimant was particularly concerned about health and safety during this pregnancy because she had been diagnosed with low levels of PAP A which can slow a baby's growth pattern in pregnancy and cause complications. As a result of this diagnosis she was required to have more regular scans than would otherwise have been the case.

42. The Claimant was worried in particular about the potential risks posed by:-

(a) the challenging behaviour of one service user who was on a "behaviour chart" because he had previously hit one member of staff and attempted to strangle another;

(b) using mechanical hoists and having to move service users on and off the hoists using the stand aids – particularly because of the weight of pulling service users off the hoists; and

(c) exposure to potentially infectious conditions and illnesses of the service users.

43. The Claimant gave evidence, which we accept, that on one occasion she was caring for a service user who had a rash which was suspected to be shingles. She rang Mrs Hamill for advice as to whether she was okay to do personal care for that service user (given her pregnancy) and Mrs Hamill's response was that she would be okay if she had gloves on. Although Mrs Hamill has no recollection of this conversation or of any conversations about the risk assessments we prefer the evidence of the Claimant on this issue. We found Mrs Hamill to have an extremely poor recollection of events and her evidence to be vague and at times contradictory. In contrast we found the Claimant to be straightforward, articulate and a credible witness.

44. We find that the work carried out by the Claimant was of a kind which could involve potential risks to the health and safety of expectant mothers or their babies including in particular:-

(a) the risk of violence from the resident with challenging behaviour who had previously assaulted other staff;

(b) the risk of harm associated with moving heavy weights to operate the

hoists and getting service users in and out of the hoists. We note that in a risk assessment on use of mobile hoists that was included in the bundle prepared by the Respondent; one of the risks identified is to "care staff operating the hoist – there is a risk of back injury or minor entrapment injuries to limbs when pushing/manoeuvring the hoist";

(c) the risk of exposure to infections and conditions such as shingles which could affect an unborn child; and

(d) exposure to the chemicals used for cleaning and deep cleaning

45. In response to a specific question from the Employment Judge Mrs Hamill said that she was not aware of any risk assessment having been carried out that specifically considered the role of a carer in the home and any risks that that role may pose to the health and safety of a pregnant woman or her unborn baby. She then however, in response to a question from Mr Raja, stated that she had in fact carried out 3 pregnancy risk assessments, two for a Chloe Woolman and one for Carrie McGough and that those risk assessments did not identify any specific risks. Those risk assessments were not however before us in evidence and there was no documentary evidence of any risk assessment which specifically considered the issue of the potential risks to health and safety of pregnant and new mothers and their babies arising out of the work of a carer. One of the employees for whom it was alleged a Risk Assessment due to pregnancy was carried out was pregnant at the same time as the Claimant but Mrs Hamill could not explain why in those circumstances she did not conduct a Risk Assessment for the Claimant even though Mrs Hamill stated that she carried out the Risk Assessments without the employees concerned requesting them.

46. The Respondent did produce evidence of risk assessments for use of mobile hoists, floor, stair and passageways, falls from height, water and electrical safety. It also produced its COSHH assessment and policy, its PPE policy and procedure and confirmation that the Claimant had read and understood the abuse policy and social media policy.

47. None of the documents before us however contained any evidence suggesting that the Respondent had specifically addressed in its risk assessments the risks to health and safety of pregnant and new mothers and their unborn children. On balance we find that the Respondent did not carry out risk assessments which specifically considered the risks to pregnant women and their unborn children for the following reasons:-

(a) There was no evidence of this in either of the Respondent's witness statements;

(b) There was no mention of this in the ET3 which was filed by the Respondent's then professional advisers;

(c) There was no documentary evidence of this in the bundles – despite other risk assessments being produced;

(d) Mrs Hamill's evidence was contradictory. She initially said that there weren't any risk assessments and then said that there were. We find her first answer to be more persuasive. Mrs Hamill offered no explanation as to why she had supposedly done risk assessments for others but not the Claimant; and

(e) The Respondent did not produce the pregnancy risk assessments that had allegedly been prepared for others.

Facebook post and resignation

48. On 7 January the Claimant put a post on her Facebook page in which she wrote "*so the law is every hour worked you get paid at least NMW. From 12:00 to 5:00 am I am just on call in the night but the law says I should still get paid. I signed a contract to say I would stay in the building and not go home during them 5 hours and I don't get paid for them? Does anyone know if the law over rules a contract or what?*"

49. The Claimant posted this having seen another internet post about the right to be paid for sleeping shifts. The Claimant has more than 3,500 Facebook friends and wanted to ask them for advice. We find that the purpose of the post was not (as suggested by the Respondent) to ruin the reputation of the Respondent, but rather to ask for advice. Further on in the post however the Claimant did comment that she "*had not had no risk assessment, didn't when I was pregnant with Louis either. Place is a joke*".

50. The Claimant's post was seen by people who brought it to the attention of Mr Raja. Mr Raja messaged the Claimant through WhatsApp and said "*take down the social media thread or you will face disciplinary action, if the place you work is a joke then don't work there… You have a signed contract in place if you wish to terminate it then I can do that*". One minute later the Claimant replied via WhatsApp to say that she had taken the post down and was only asking a question. Mr Raja responded in a message which included the words "*if you don't want to then you have to ask me not put it on a social media thread and ruin the good name of your employer which I may add is a sackable offence*".

51. The Claimant replied that Mrs Hamill had told her that if she didn't sign to say she would stay in the building she wouldn't be able to work nights. Mr Raja's response to that was a WhatsApp message "*I have just e-mailed HR the stuff you put on so let them decide. If they want to issue disciplinary hearings and dismiss you…*". A few moments later he sent a further WhatsApp message "*if you don't want to come in don't. This company gave you a job when you were an apprentice so I have little time for people who disrespect their place of work and have no appreciation for their managers and colleagues*".

52. The Claimant replied to that message pointing out that she hadn't said on her Facebook post where she worked or mentioned any names but had simply asked a question and said it was joke not to have a risk assessment. She referred to the fact that she had asked previously about being paid for the 5 hours that she was required to stay in the building. Mr Raja's response was "*if you are not happy with the contract you signed then hand in your notice and leave… I have spoken to Ricky. You can have week off and sort out your witness issues* [in relation to another issue, not this claim]*, in the meantime it is a sackable offence to ruin the name of your employer on social media*. "

53. The Claimant rang a solicitor for advice and subsequently submitted a handwritten letter of resignation dated 7 January resigning with immediate effect. There was a further exchange of WhatsApp messages with Mr Raja in which Mr Raja on one occasion threatened to reclaim what he said was an overpayment of wages. In a message he sent to the Claimant he wrote "*forgot to*

mention your contract states £7.20 but you have been paid £7.50 per hour. This is a mistake by the company so a letter will be in the post to reclaim the overpayment." This was the first time that there had ever been any suggestion of an overpayment.

54. The Claimant replied to Mr Raja that she had a text telling her that her wage would be going up to £7.50 from April and in the event Mr Raja did not pursue his threat to recover monies from the Claimant.

55. The Claimant subsequently sent a WhatsApp message to Mr Raja saying that she had spoken to ACAS and that they would be in contact with him within the week regarding pregnancy discrimination and constructive dismissal. Mr Raja's response, which we found most disturbing, was "*lol pregnancy discrimination. That's the best joke I have heard all day*…". The Claimant replied that not doing a risk assessment was pregnancy discrimination and also constructive dismissal. After a further exchange Miss Settersfield wrote a message to Mr Raja in which she said "well I am glad you find it amusing that you have been putting me and my unborn child at risk…". Mr Raja's response was again "*lol [*smiley face with tears of laughter emoji*] and then thank yo*u".

56. The Respondent did however write to the Claimant following receipt of her resignation asking whether she would reconsider her decision. The Claimant decided not to reconsider and her employment terminated by reason of her resignation on 7 January 2018.

57. We find that the reasons that the Claimant resigned were that:-

(a) she had asked twice for a risk assessment when pregnant and had not been provided with one and was concerned that her unborn child had been put at risk;

(b) she had not been paid for the time that she had been awake and working between 12 midnight and 5:00 am; and

(c) Mr Raja's behaviour on 7 January.

58. The Respondent alleged that the Claimant had resigned in response to the possibility of disciplinary action following her Facebook post. We find that the Claimant did not resign in response to the possibility of disciplinary action. We do however find that the Respondent's behaviour by WhatsApp on 7 January did contribute to the Claimant's resignation and that that conduct amounted to a breach of the implied term of trust and confidence. Mr Raja repeatedly threatened the Claimant with dismissal and did not appear to be taking her concerns at all seriously. Replying *"lol*" to the suggestion that there had been pregnancy discrimination indicates that the Respondent viewed the Claimant's concerns as laughable. This behaviour contributed to the Claimant's decision to resign.

59. In her last payslip the Claimant was paid £135.00 for working 18 hours during the last month that she was employed. She had in fact worked 36.5 hours that month. The Claimant had no loans or advances outstanding so was expecting to be paid in full for 36.5 hours. The Claimant's pay rate at that time was £7.50 an hour.

60. The Respondent has not provided the Claimant with a P45 despite the

Claimant asking for one.

The Relevant Law

61. Section 95(1) of the Employment Rights Act 1996 provides that:-

"*an employee is dismissed by his employer if…*

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

62. The leading case on constructive dismissal, to which we were helpfully referred by Mr Raja, is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761.** That case establishes that there are 4 tests that the Tribunal must consider when determining whether an employee has been constructively dismissed:-

(a) Has there been a breach of contract by the Respondent;

(b) Was that breach of a fundamental term of the contract;

(c) Did the employee resign in response to the breach; and

(d) Did the employee waive the breach by delaying in resigning.

The burden of proving that she has been constructively dismissed lies with the Claimant. It is well established that there is an implied term in every contract of employment that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v BCCI SA [1997] 3 All ER 1**).

63. In relation to automatic unfair dismissal (which can be either an actual or a constructive dismissal) the relevant law is set out in Section 99 of the Employment Rights Act which provides that:-

"*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if*

(a) the reason or principal reason for the dismissal is of a prescribed kind…

Prescribed kinds includes dismissals relating to "*pregnancy, childbirth or maternity*" (Section 99(3)(a) ERA).

64. Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 provides that:-

"*(1) An employee who is dismissed is entitled under section 99 of the 1996 Act 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)….

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with -

(a) the pregnancy of the employee. "

65. Section 100 of the Employment Rights Act 1996 sets out the circumstances in which an employee who is dismissed is treated as automatically unfairly dismissed for health and safety reasons, namely if the reason or principal reason for the dismissal is one of those set out in sub - sections 1(a) to (e).

66. In relation to the claim for unlawful deduction from wages the relevant law is set out in Section 13 of the Employment Rights Act 1996 which provides that:-

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

67. In relation to the claim of detriment the relevant law is set out in Section 47C of the Employment Rights Act 1996 (Leave for family and domestic reasons) which provides that:-

"*An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act by his employer done for a prescribed reason*".

Prescribed reasons include pregnancy, childbirth or maternity (Section 47C(2)(a).

68. Section 18 of the Equality Act provides that:-

"*(2) A person (A) discriminates against a woman if, in the protected period* [which runs from the start of the pregnancy through to the end of maternity leave] *in relation to a pregnancy of hers A treats her unfavourably…because of her pregnancy.*"

69. The obligation to carry out risk assessments is set out in the Management of Health & Safety at Work Regulations 1999 to which we were also helpfully referred by Mr Raja. Regulation 3 contains the general obligation to carry out risk assessments and Regulation 16 provides that:-

"Where –

(a) the persons working in an undertaking include women of child-bearing age; and
(b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother or that of her baby, from any processes or working conditions or physical, biological or chemical agents…

the assessment required by Regulation 3(1) shall also include an assessment

of such risk.

Our Conclusions

<u>Constructive dismissal</u>

70. We find that the Respondent breached the implied duty of trust and confidence that is implied into every employment contract by:-

(a) not carrying out a risk assessment for the Claimant who was clearly concerned about her pregnancy and the potential risks to her and her unborn child of her work for the Respondent, despite having been asked twice to do so;

(b) not taking the Claimant's concerns seriously as demonstrated by Mr Raja's WhatsApp messages mocking the Claimant's suggestion that there had been pregnancy discrimination; and

(c) the tone and content of the WhatsApp messages on 7 January in which Mr Raja encouraged the Claimant to resign and repeatedly referred to dismissal and sackable offences.

71. We find that the Respondent was entitled to investigate the Facebook post because of the reference to "the place is a joke" in that post, which the Claimant accepted in evidence had been ill advised. However, the nature and content of the WhatsApp messages on 7 January go beyond what would be expected of a reasonable employer by repeatedly referring to dismissal and to sackable offences prior to any investigation or disciplinary process.

72. It is well established that the implied duty of trust and confidence is a fundamental term of the contract of employment. We find that the Claimant resigned in response to that breach of contract and did not delay in doing so. We also find that the failure to pay the Claimant for the hours that she was awake and working between midnight and 5 am contributed to her resignation but was not the principal reason for it.

73. We therefore find that the Claimant was constructively dismissed. There was no potentially fair reason for dismissal put forward and we therefore find that the dismissal was unfair on ordinary unfair dismissal principles.

74. The principal reason for the Claimant's resignation, in our view, was connected to her pregnancy. She asked for a risk assessment on 2 occasions and no risk assessment was provided. The Claimant was not provided with any explanation or reassurance and concluded that the management at the home were not taking her concerns seriously. We find that the Claimant was dismissed for a reason connected with her pregnancy namely that she had asked twice for a risk assessment and none was carried out with no satisfactory explanation as to why not.

75. We also find therefore, in the alternative, that the Claimant was automatically unfairly dismissed contrary to Section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 because the principal reason for the dismissal was connected to her pregnancy as set out at paragraph 74 above. .

76. We do not find that the dismissal fell within the list of prohibited reasons for dismissal set out in Section 100 of the Employment Rights Act 1996 (health and safety reasons) because the Claimant did not fall into any of the categories set out in Section 100(1)(a) to (e) of the Employment Rights Act.

Unlawful deductions from wages

(a) For the period from September 2016 to 7 January 2018

77. We find that the Claimant's contract entitled her to be paid at the rate of £7.20 an hour from September 2016 to April 2017 and £7.50 an hour from April 2017 onwards.

78. We also find that the Respondent's policy was to pay employees an hour for every part of an hour that was worked between 12:00 and 5:00 am. Mr Raja's evidence was that if somebody was up for 10 minutes during the night they would be paid for a full hour.

79. We find that the Claimant worked an average of one hour on each sleeping shift. She was contractually entitled to be paid an additional hour for each sleeping shift at the rate of £7.50 an hour from April 2017 and £7.20 an hour for each sleeping shift between September 2016 and April 2017. The fact that the Claimant did not submit claims on her time sheet for those hours does not in our view mean that she is not contractually entitled to be paid for them and is not a barrier to her succeeding in this part of her claim.

80. There was no evidence before us of the Respondent having brought the requirement to claim extra hours on the time sheet and on the rota to the Claimant's attention. On the contrary the Claimant's evidence was that she had been specifically instructed that she could only claim 5 hours a shift.

81. We therefore find that the Respondent made an unlawful deduction from wages by not paying the Claimant for her waking and working hours between midnight and 5 am.

(b) In the Claimant's final payslip

82. We also find that the Claimant is entitled to be paid 18.5 hours for her final month worked at the rate of £7.50 giving a total of £138.75 unpaid wages in respect of her final payslip. The Respondent is therefore ordered to pay the Claimant the sum of £138.75 in respect of this element of her claim.

Detriment and discrimination

83. We have considered the allegations that the Claimant was subjected to a detriment contrary to Section 47C of the Employment Rights Act 1996 and/or submitted to pregnancy discrimination together. We have reminded ourselves of the burden of proof in relation to discrimination claims as set out in Section 136 of the Equality Act 2010. We have asked ourselves 'was the Claimant subjected to a detriment and / or unfavourable treatment' and concluded that she was. We consider that the failure to conduct risk assessments despite being asked twice to do so is a detriment and unfavourable treatment. It clearly caused the Claimant concern and ultimately was one of the main factors leading to her resignation.

84. We have noted the Respondent's position that there is no entitlement to a

specific risk assessment for each individual pregnant woman and we accept that that is the case. However, the Respondent does have an obligation to carry out a general risk assessment. That obligation includes, where it has employees of childbearing age within its workforce, as the Respondent clearly did, the obligation to carry out a risk assessment which specifically addresses the potential risks to health and safety of the Respondent's working conditions to pregnant women and their unborn children. This obligation is set out in Regulation 16 of the Management of Health and Safety at Work Regulations 1999.

85. We find that the Respondent did not comply with this obligation. It is well established that a failure to carry out a risk assessment for a pregnant employee can amount to sex discrimination. One of the leading cases on this is **Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516** a case involving a residential care home in which a pregnant employee was concerned about risks to her health and safety and no risk assessment was carried out.

86. We find that the failure to carry out the risk assessment despite twice being asked to do so amounted to unlawful discrimination on the grounds of the Claimant's pregnancy and that in the alternative it amounted to a detriment contrary to Section 47C Employment Rights Act 1996.

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Employment Judge Ayre

Date 26 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE