EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110960/2018

Held in Glasgow on 5, 6, 7, 8 & 9 November 2018

with

Members' Meeting on 12 December 2018

Employment Judge: Ms Claire McManus

Members: Mrs L Crooks
Mr A McFarlane

Ms P Rodger	**Claimant** **Represented by:-** **Mr Allison** **(Solicitor)**
Appropriate Services Ltd	**Respondent** **Represented by:-** **Mr Lane** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:-

- The claimant's claim of pregnancy and maternity discrimination under section 18 of the Equality Act 2010 is successful and the claimant is awarded the total sum of £10,223.28 (TEN THOUSAND TWO HUNDRED AND TWENTY-THREE POUNDS AND TWENTY EIGHT PENCE) in respect of compensation for this discrimination, being comprised of a compensatory award of £9,700.92 and interest on this award accrued to the date of promulgation of £522.36.

- The claimant's claim of victimisation under section 27 of the Equality Act 2010 is successful and the claimant is awarded the total sum of

£25,612.15 (TWENTY FIVE THOUSAND SIX HUNDRED AND TWELVE POUNDS AND FIFTEEN PENCE) in respect of compensation for this victimisation, being comprised of a compensatory award of £24,959.36 and interest on this award accrued to the date of promulgation of £652.79.

- The claimant's claim of unlawful deductions from wages in respect of (a) non-payment of Statutory Maternity Pay and (b) unpaid accrued holiday pay is successful. For the reasons set out in this decision NIL award is made in respect of this head of claim.

- The Tribunal makes the following recommendation under s124(2)(c) Equality Act 2010:-

'In the event of the respondent taking the decision during the remainder of the claimant's maternity leave that the claimant has become no longer entitled to SMP, then within 7 days of that decision, the relevant SMP1 form is completed and signed on behalf of the respondent and returned to her with the Mat B form given to the respondent by the claimant.'

REASONS

Background and Decisions on Amendment Applications

1. The claim (ET1 form) was presented on 2 July 2018. The response (ET3 form) was received on 6 August 2018. The claim was registered as maternity discrimination, victimisation and unlawful deductions from wages. A Preliminary Hearing ('PH') on case management issues took place on 19 September 2018, before EJ Garvie, and a Note was issued following that PH, on 20 September. Thereafter, dates for this Final Hearing were arranged, to take place on 5,6,7,8 and 9 November 2018.

2. At the outset of the hearing on 5 November there were submissions by both representatives in respect of some preliminary matters, being:-

(a) whether the ET3 should be allowed to be amended in terms of the Respondent's Further and Better Particulars of 9 October 2018 (P35).

(b) whether the claimant's proposed amendment of 23 October 2018 should be allowed (P36 – 41)

(c) Whether certain documents identified in the Inventory (at P69 – P71; P72 – P73; P75 – P76; P87 – P88; P97 – P98) are privileged and therefore inadmissible in evidence.

Decision on Admissibility of Certain Documents

3. The disputed documents were included within the Joint Inventory which was helpful produced by parties' representatives. The reference to a number after the letter 'P' in this Judgment is to a document's page in that Inventory.

4. In respect of the admissibility of the contested documents, the Tribunal considered it to be material that four of the correspondences which the respondent's representative sought to be held inadmissible were correspondence from the claimant's representative, and therefore did not contain and could not have contained any statements which could be said to be admissions by or on behalf of the respondent which could or would prejudice the position of the respondent if allowed to be referred to in evidence. In the determination on the admissibility of these documents, it was material that there is nothing in the documents which is a statement by the respondent on the respondent's position on a material matter. The content of the correspondence reflects the respondent's position in the ET3 and makes statements on alleged facts which the Tribunal would necessarily hear evidence on in order to make appropriate findings in fact. Accordingly, the respondent's witnesses would have the opportunity to give evidence to dispute those allegations of fact.

5. In respect of the correspondence sought by the respondent's representative to be inadmissible which is at P72 – P73, which was from the respondent,

the Tribunal considered it to be material that the position within that correspondence is restated in the ET3 (at paragraphs 6-9); it contains no admissions which would prejudice the respondent's position in respect of evidence; that there is no statement within the correspondence referred to which was an admission by the respondent; no advice is set out in the correspondence; it could not be said that there is anything in the correspondence which suggested that the respondent did not intend to defend the claim or to prejudice their position and the respondent would have the opportunity to give evidence to dispute the factual position set out in the correspondence as relied on by the claimant.

6. The Tribunal was referred to 3 cases by the respondent's representative, being *Daks Simpson Group plc v Kuiper 1994 SLT 689*; *Richardson v Quercus Ltd 1999 SC 278* and *Bell v Lothiansure Ltd 1990 SLT 58*. The claimant's representative relied on *Starbev GP Ltd v Interbrew Central European Holding BV [2013] EWHC 4038 9(Comm)*. The Tribunal considered *Bell v Lothiansure Ltd* to be particularly significant to the present case, and in particular the comments on the affirmation of the general rule in *Coutts* as follows:-

> " The learned Dean of Faculty drew my attention to the observations by Linley LJN Walker, supra, at P338 where his Lordship said '…no doubt there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of admissibility was raised. The fact that such letters have been written and the dates at which they were written may be regarded and in so doing, the rule to which I have alluded would not be infringed. With respect, that appears to me not to be a loophole in the general rule, the fact of writing a letter or the date at which it was written, or the fact of its receipt might be relevant without regard to the contents which are protected by the without prejudice rule. I do not think the pursuers in this case can escape from having to submit that what they are entitled to do is to refer to the contents of

> the letter with a view to founding upon a statement therein, which was made in the context of an offer advanced during negotiations. In so doing they are seeking to avoid the rule which is general in both England and Scotland."

7. The Tribunal considered it to be significant that privilege was placed on the correspondence by the claimant's representative, and that it was the respondent's representative who sought to rely on that privilege in making the correspondence inadmissible. The Tribunal did not accept that ***Bell v Lothiansure Ltd*** was authority that one party can rely on the other party having invoked privilege.

8. There being no comment on the Tribunal's decision on the admissibility of these documents by either party's representative, the Tribunal continued to then hear evidence on the basis of these documents being admitted.

Decision on Amendment Applications

9. Following submissions by both representatives and consideration by the Tribunal, on 5 November both parties' proposed amendments were allowed. In respect of the claimant's amended statement of claim, the amendment was allowed on the basis that there was a continuing course of action and in particular that the ET1 was lodged on 2 July 2018, made reference to Statutory Maternity Pay ('SMP') as follows:-

> "the claimant has lost / will lose a total of £3079.32 by the date of 24 August 2018, the point at which her pay will become SMP. This sum includes £723.12 of deductions from maternity pay and the balance in the deductions in salary in April, May and June."

10. The amendment was allowed in recognition that non-payment of SMP could not have taken place until after the claimant's commencement of Maternity Leave on 18 July 2018, which was after the ET1 was lodged. The terms of the ET1 clearly put the respondent on notice in respect of a claim based on

non payment of SMP. The claimant's amendment particularises the claim brought in respect of those alleged circumstances and is in respect of a continuing course of action by the respondent against the claimant, who continues to be employed by them. It is not a new claim but specification of loss arising from the alleged discrimination and / or victimisation. The respondent's amendment was allowed on the basis of it setting out a response to the unlawful deductions from wages claim.

11. The Tribunal required to make a further decision on an amendment application after evidence had been heard from all witness. At that stage, when final submissions were due to be heard from both representatives, the claimant's representative made a further amendment application. The precise terms so the proposed amendment were set out by the claimant's representative, which was to amend paragraph 22 by insertion of the words in italics, as follows:-

> "The claimant claims pregnancy discrimination within the meaning of s18 of the Equality Act 2010. The claimant was treated unfavourably by the respondent because of her pregnancy. As narrated, the respondent imposed a unilateral variation of the claimant's contractual hours following the claimant notifying Mr Roberts that she was pregnant. No other event occurred between the two dates. That imposition represents unfavourable treatment. The treatment occurred during the protected period. *Further, as a result of the claimant electing to take maternity leave by virtue of her email of 15 June 2018, she was subjected to further unfavourable treatment. Specifically: (a) she was not paid statutory maternity pay and (b) the respondent refused / failed to complete the form SMP1 to allow her to claim Maternity Allowance. Both occurred during the protected act."*

12. Both parties' representatives made submissions on the amendment application. The respondent's representative position was that he took

'extreme exception' to an amendment being proposed at the stage in proceedings when both parties had closed their cases. His position was that the amendment was 'not competent' because the claim in respect of non-payment of SMP had been brought as a section 18 claim (that claim having been refuted by the respondent in their amendment of 9 October, which had been allowed by the Tribunal at the start of proceedings). It was respondent's representatives position that it was not competent for the claim for payment of SMP to be re-labelled as a claim under section 47(C) at the stage in the proceedings when both parties had closed their case. The respondent's representative position was that the allegation of the respondent having 'failed to complete the form SMP1' was a completely new cause of action, predicated on the documents which had been all at the outset of the proceedings. It was submitted that that new action was out of time and allowing that amendment would be prejudicial to the respondent. It was the respondent's representative's position that the respondent was 'running a technical defence'. His position was that he 'makes no apology for that'. His position was that in preparation for this case and in the questions he had asked of Mr Roberts in evidence in chief and cross were predicated on non-payment of SMP not being an actionable complaint. His position was that that was why he did not deal in cross with the SMP1 form not having been signed. The respondent's representative's position was that on application of the principles set out in *Selkent*, the amendment should be refused.

13. The claimant's representative's position was that it was now accepted that the claim for SMP brought under an unlawful deduction from wages claim had been misconstrued in law, but that by this amendment they sought to bring the claim for non-payment of SMP under section 18(4)(a) of the Equality Act, as it was the claimant's position that she had been discriminated against by the respondent by being treated unfavourably because of her exercising her right to ordinary or additional maternity leave and that is what the claimant now sought to rely on in respect of non-payment of SMP. It was the claimant's position that the respondent had not been prejudiced in their ability to say that that was not what had had

happened (i.e. if their position had been that the relevant form had been signed and SMP had in fact been paid). It was the claimant's representative's position that it was competent to make the amendment at this stage in proceedings. His position was that the need for the amendment arose in circumstances where the respondent's sole witness gave evidence which the claimant was not expecting i.e. that had she not sent the email on 15 June 2018, then the form would have been signed allowing her to obtain entitlement to SMP and she would have been paid SMP. It was the claimant's position that the issue of non-payment of SMP was not a new issue for the respondent. Reliance was placed on there having been evidence on the respondent's position in respect of the non-payment of SMP and the relevant form not being signed. It was the claimant's representative's position that, at its highest, Mr Robert's position was that the form was not signed because of an 'oversight'. It was the claimant's representative's position that in the circumstances of these proceedings, where the employment was continuing, updating of circumstances would always be late but that the claim had been raised and the event of SMP not having been paid had incurred after the claims were lodged. It was the claimant's representative's position that there would be no prejudice to the respondent in the amendment being allowed. Reliance was placed on there having been no objection from the respondent's representative to the evidence heard about the form not being signed or non-payment of SMP, and no objection to Mr Roberts being asked about those matters in cross examination. It was noted that the respondent's representative had elected not to re-examine Mr Roberts at all. It was submitted that the claimant would be prejudiced should the amendment not be allowed and that on the principles set out in *Selkent*, it is relevant that there would be an actual rather than a tactical prejudice to the claimant. It was submitted that it is not clear what the prejudice to the respondent would be, should the amendment be allowed, given that it was Mr Roberts who had the form and was dealing with the issue and that Mr Roberts had accepted that he did not complete this form. It was submitted that the respondent had been on notice since the commencement of the claim of a claim by in respect of statutory maternity pay and any prejudice which there

may be to the respondent would be outweighed by the prejudice to the claimant if the amendment is not allowed, in which circumstances, the claimant would bring another claim to the Tribunal in respect of the non-payment of SMP, which was continuing.

14. The Tribunal was going to reserve its decision on that amendment, noting that the terms of the amendment may make no difference to the outcome of the hearing and that at the stage of the close of proceedings on the previous day, Thursday 8 November, both parties' representatives had been directed to ensure that in their submissions they address each head of claim and the loss potentially arising from each head of claim. This was noted to parties' representatives. The claimant's representative's position was to insist on the amendment application and the respondent's representative's position was to seek written reasons for the Tribunal's decision. After consideration during an adjournment, having already heard submissions on the amendment application, the Tribunal proceeded by hearing both parties' submissions on the proposed procedure which should then be followed in the event of the amendment being allowed, and noting to parties that an oral decision would be given on this amendment application, with written reasons set out in the Judgment to follow. The Tribunal then adjourned for consideration. An oral decision on the amendment application was then given, which was to allow the amendment with the exception of the word 'refused'. The reasons given were, in summary, that, on consideration of both parties' submissions, it was accepted that the proposed amendment re-labels the claim for non-payment of statutory maternity pay from an unlawful deductions of wages claim to a claim of maternity discrimination, both heads of claim having been set out in the original ET1, and that in consideration of the balance of prejudice to the parties, the amendment was allowed, apart from the word 'refused'. It was considered that the word 'refused' as an alternative to 'failed' suggests a course of action of which there had been no prior notice and considered it to be prejudicial to the respondent to allow that at this stage in proceedings. The respondent's representative requested written reasons, which are now given.

15. The Tribunal's decisions on all the amendment issues were in line with Lady Smith's summary of the relevant law (at paragraphs 20 – 26) in **Margarot Forrest Case Management V Miss FS Kennedy UKEATS/0023/10/BI**, which is with reference to the previous Tribunal procedure Rules, but remains relevant, as follows:-

'20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 rules 10(2)(q) and 27(7)). Thus, if a claimant's representative seeks permission to alter, add to or subtract from what is written in the claimant's form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim."

16. The decisions taken in respect of the amendment applications were also in line with the position in **Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT**, where it became apparent to an Employment Tribunal in the course of a hearing that the claimant was seeking to pursue a line in evidence that had not been foreshadowed in the form ET1, and the Tribunal allowed the questioning to continue notwithstanding it being objected to. The issues raised on appeal gave rise to consideration of the procedure that an Employment Tribunal ought to follow when, at a hearing, it appears that a party is seeking to present a case that differs from that of which notice has been given in the form ET1:-

> "30 We are persuaded that this appeal is well founded. The Tribunal seems, unfortunately, to have jumped too far too fast. What, in our view, it required to recognise before making its decision was as follows:
>
> 31 Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross examination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in

law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.

32 Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.

33 Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend, as discussed above. Further, unless it does so, the fair notice obligations referred to in the quotation from *Ali*, above, will not be complied with.

34 Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.

35 Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.

36 Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.

> 37 Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.
>
> 38 Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."

17. That case made reference to *Ali v Office of National Statistics [2005] IRLR 201*, where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

> "39…….. …a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states."

18. The position set out in paragraph 20 of **Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT**, is also relevant:-

> "20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the

> stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of ***Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [***1996] IRLR 661."

19. The Tribunal's decisions on the amendment applications were taken in line with the leading authority of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [*1996] IRLR 661,* [1996] ICR 836, where the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, and set out the factors to be considered as including:-

(a) The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;

(b) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

(c) The timing and manner of the application.

In Selkent, Mummery J, as he then was, set out at paragraph 26:

> "…an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application."

20. The original terms of the ET1 are such that they give notice of a claim in respect of non-payment of SMP, albeit that that claim is set out under the heading of 'unlawful deductions from wages', set out as being an effect of contractual changes having been made on 28 March 2018. Under the heading 'Pregnancy discrimination' there is reference to this 'unilateral variation of the claimant's contractual hours following the claimant notifying Mr Roberts that she was pregnant' after the sentence: - 'The claimant was treated unfavourably by the Respondent because of her pregnancy'. As at the outset of this Final Hearing the respondent was clearly on notice of a claim by the claimant in respect of non-payment of SMP. The respondent was clearly from the outset on notice of a claim of maternity discrimination, victimisation and unlawful deductions from wages. The ET3 'Particulars of Response' sets out as a 'Headline Defence'

> "It is denied that the claimant is owed wages as alleged.
> It is denied that the claimant has suffered less favourable treatment as a result of her pregnancy as alleged or at all.
> It is denied that the claimant has suffered any act of victimisation as a result of committing a 'protected act' as alleged or at all."

21. Both of the claimant's proposed amendments arose from the same factual matrix and did not bring a new claim in respect of which consideration of time bar required to be made. The first amendment set out the continuing course of events in respect of which the claimant claims maternity discrimination and victimisation. The first amendment neither re-labelled or brought a new claim, but rather updated the continuing sequence of events

in circumstances where the employment is continuing and the respondent has not made any SMP payments to the claimant, nor signed the SMP1 form. Those circumstances were not known at the time of submission of the ET1. The respondent has had the opportunity to defend the claim, and has done so.

22. It is of relevance that the claimant's employment with the respondent is continuing and that she continues to not be in receipt of SMP. No time bar issues arose with either amendment. No new claim is brought. The second amendment particularises the failure to sign the SMP1 form and the non-payment of SMP as detriments arising from the maternity discrimination and / or victimisation claims. This is a re-labelling of what was brought as an unlawful deduction from wages claim as part of the discrimination claim.

23. In making its decision on the claimant's second proposed amendment, the Tribunal took into account the respondent's representative's position that he was making a 'technical argument' in respect of the defence of the claim and that he 'made no apology for that'. In doing so the Tribunal took into account the overriding objective set out in Rule 2 of the Employment Tribunals (Rules of Procedure) Regulations 2013 to deal with cases fairly and justly. This 'technical defence' was that the loss in respect of non-payment of SMP cannot be an unlawful deduction from wages because it is not payments wholly due from the respondent, and the respondent's position was then that, without the amendment, loss in respect of non-payment of SMP could not be sought under the maternity discrimination or victimisation claims. On that analysis, there would be considerable injustice and hardship to the claimant should her loss arising from the detriments re non – payment of SMP not be included in the compensation awarded under her discrimination or victimisation claims. At the time of the second amendment being proposed, the Tribunal had already heard evidence on Fredrick Roberts' position in respect of not having signed the SMP1 form. That line of questioning had proceeded without objection, which was consistent with the respondent having been on notice that there was a claim in respect of non-payment of SMP. In all these circumstances, the amendment was allowed as set out above.

24. Having allowed the claimant's second amendment (in part), and agreed to then proceed in line with the respondent's representative's proposed further procedure, a further adjournment followed to allow time for the respondent to prepare their written response to the claimant's second amendment. The ET3 was allowed to be amended in terms of this response, which was as follows 9the terms of which were not objected to by the claimant's representative):-

> "The respondent was not subject to an obligation to complete form SMP1. Any failure to complete form SMP1 did not constitute unfavourable treatment. In any event, the respondent did not fail to complete the form SMP1 as a result of the claimant electing to take maternity leave."

25. Following the respondent's representative's request in respect of further procedure, the Tribunal then allowed Mr Roberts to be recalled to give evidence in chief on the matters set out in these latest amendments, and for the claimant to be recalled to enable the respondent to put their case on this matter to her. There was no objection to that proposed further procedure by the claimant's representative. It was noted that that order of witnesses giving evidence was contrary to the previous, but in the circumstances, the Tribunal was prepared to proceed on the basis proposed by the respondent's representative. The Tribunal then proceeded with recall of Mr Roberts for examination in chief specifically on the points in the respondent's amendment of 9 November 2018, cross examination on that matter, and any questions by the Tribunal and re-examination if considered to be appropriate, followed by recall of the claimant for cross examination on the points in the respondent's amendment and any re-examination on that, and any questions from the Tribunal, if considered to be appropriate.

Proceedings

26. The Tribunal heard evidence from the claimant and from Fredrick Roberts (Registered Manager of the Respondent). At the commencement of the hearing it was indicated that evidence may also be heard from the claimant's mother (for the claimant) and from Suad Abdullah (for the respondent). The

Tribunal was later advised that evidence would not be heard from either of them. Further detail of the position re Suad Abdullah is set out below.

Issues

27. The Issues for the Tribunal to determine were:-

(1) Did the respondent subject the claimant to a detriment because of her being pregnant or exercising her right to maternity leave?

(2) Did the respondent subject the claimant to a detriment because of her having done a protected act in terms of s27 of the Equality Act 2010?

(3) Are any sums due to the claimant in respect of unpaid wages?

Findings in Fact

28. The following material facts were admitted or found by the Tribunal to be proven:-

(a) The Respondent is a private company providing home care, cleaning, catering and handy man services to individual service users within their own homes. The respondent's main source of income is from its home care services. The respondent operates out of rented office premises. The sole Director and only Shareholder of the respondent company is Suad Abdullah. Fredrick Rodgers is the husband of Suad Abdullah and he is employed by the respondent as the Registered Manager of the respondent company. He has authority to act for the respondent.

(b) The claimant commenced employment with the respondent on 13 November 217. The contract of employment in respect of this engagement is at P47 – P51 and reflects the agreement that the claimant work 35 hours a week, at a rate of £10.20 per hour. Clause one of that contract is headed 'Commencement of employment and continuous employment' and states:-

> "Your period of continuous employment begins on the 13/11/2017."

The Job description is set out in that contract as:-

> "To supervise the care of company's clients, staff, and take responsibility for the day-to-day running of the service. (Reference to your application job description.)"

Clause 3 of that contract of employment is headed 'Job location(s) and states:-

> "Your place of work is:
>
> Station House, Suite 213, 279 Abercromby Street, Glasgow, Lanarkshire, G40 2DD, Scotland
>
> Flexibility in terms of location has been agreed:
>
> Staff will be required to work in various clients' premises and other office locations."

The respondent has no other office location. Home care provision is carried out in the service users' own homes. The claimant's responsibilities were only in respect of the home care aspect of the respondent's business. No 'application job description' was before this Tribunal. Clause 7 of that contract sets out the following provisions in respect of holidays:-

> "You are entitled to 28 days holiday per year. This includes public holidays.
>
> You will occasionally be required to work public holidays. Your holiday year begins on 1st January. Unused entitlement may not be carried forward to the next holiday year."

There is no provision for a company pension scheme.

Clause 11 of this contract is headed 'Ending the employment'. It begins:-

> "This employment is permanent, with a probationary period of 3 months. The contract will be reviewed after this period. If you want to leave this employment you must give us minimum statutory notice i.e. if you have worked for us for at least one month, you must give us at least one week's notice.
>
> We must give you minimum statutory notice if we want to end this employment."

Clause 12 of this contract is headed 'Disciplinary procedure'. This clause begins:-

> "It is company policy that the following procedure should be followed when an employee is being disciplined or dismissed."

Clause 12 lists matters which may be dealt with under this disciplinary and dismissal procedure as including 'misconduct'; 'substandard performance'; 'harassment or victimisation'; 'misuse of company facilities including computer facilities (e.g. email and the Internet)'; 'poor timekeeping'; 'unauthorised absences'. No disciplinary procedure action has been taken by the respondent against the claimant.

(c) The only written contract between the claimant and the respondent is that at P47 - P51. There is no provision in this contract for any payment of Maternity Pay. There is no provision in that contract for pension arrangements or opt out. The claimant has no entitlement to contractual maternity pay separate from her entitlement to Statutory Maternity Pay ('SMP'). The claimant's employment with the respondent is continuing as at the dates of the hearing in this case.

(d) The claimant met Fredrick Roberts when she was working for a lady who has a large amount of care requirements. The claimant worked as that lady's Home Carer, and also arranged the rest of her home care package, and acted as a supervisor to the lady's other carers. That lady would sometimes use the respondent to provide some carer services. The claimant met Fredrick Roberts when he provided

care services to that lady, during the course of his employment with the respondent. The claimant approached Fredrick Roberts because she wanted a supervisory role in the provision of home care, and she believed that working for the respondent would give her the opportunity to grow with the company and to progress her career with them.

(e) At the time of the claimant's recruitment, the respondent's employees were Fredrick Roberts, the claimant and four Home Care workers, who were on either a 14 hour or a 16 hour contract of employment. One of these Home Carers is the claimant's mother. These Home Care workers' contractual hours were not sufficient to meet the respondent's arrangements to care for service users. In order to provide the required level of service, three of the Home Carers worked overtime hours and Frederick Roberts and the claimant also carried out Home Care duties. From the commencement of her employment, the claimant regularly delivered home care services directly to service users in addition to her duties as a Supervisor. The claimant's duties as Supervisor included updating policies, carrying out one to one 'supervision' meetings with Home Carers in compliance with Care Inspectorate requirements, preparing for Care Commission inspections, researching legislation relevant to the respondent's provision of care services, assessing service users' care requirements, keeping the employees' files in order, drafting care plans, communications, including drafting a Newsletter, and marketing and developing the respondent's business, particularly by seeking to bring on new service users for the respondent's business. The claimant also provided cover for home care, as required. When the claimant was working 35 hours a week for the respondent, she usually spent around 10 hours a week providing direct home care services to service users in their homes. The claimant was initially provided with a mobile phone for work use. The claimant answered calls for job advert placed by the respondent and answered emails

and calls from potential service users. The claimant answered such calls and emails outwith her normal working hours.

(f) The claimant reported to Frederick Roberts as her line manager. The claimant's discussions with the respondent in respect of her work were normally with Frederick Roberts. Staff rotas were drafted by Suad Abdullah. The claimant told Suad Abdullah if any Care worker was looking for a holiday or an increase in their hours at a particular time. The delivery of home care services is of prime importance to the respondent because that is what generates its income. If the claimant had a discussion with Suad Abdullah about a substantive work matter, the claimant would set out in an email to Frederick Roberts what had been agreed with Suad Abdullah.

(g) There is an element of variability in the extent of home care provided by the respondent to service users because the arrangements between them allow for short notice cancellations without any penalty. This means that on some occasions a service user will cancel their arrangements with the respondent at short notice. The arrangement with most of the individuals to whom the respondent provides home care services is for those services to be provided for a set number of hours on a regular weekly basis. Some service users give notice of e.g. a week for a request for additional hours to be provided by the respondent, e.g. to cover another carer's holiday. Some service users only use the respondent's services on an ad hoc basis e.g. to cover other carer's holidays. The respondent operates an ongoing recruitment policy because of the time required for a new recruit to go through the necessary checks, including PVG checks and because sometimes a new recruit will leave after only a short time in the job.

(h) At the commencement of her employment, the claimant had a good working relationship with Frederick Roberts and Suad Abdullah. On 13/ 2/ 2018, a team meeting took place between Suad Abdullah, Frederick Roberts and the claimant. The minutes of this meeting are

set out in the document at P52 – P53. Under the heading of 'Review of last meeting minutes', these minutes note work which had been carried out in respect of seeking new business and marketing. Under the heading 'Recruitment and Training', these minutes record the respondent's ongoing recruitment process and two new Home Care workers having been recruited. In the period between the commencement of the claimant's employment with the respondent and these two staff being recruited, the respondent had taken on three new service users. These minutes record the claimant having been updating staff files to ensure they all comply with 'Safer recruitment', and having given all current staff their first supervision of the year. In this context, 'supervision' means the regular meeting which requires to take place with home care staff in compliance with the Care Inspectorate requirements. These minutes note staff training requirements and that Fredrick Roberts "has signed Pauline (the claimant) up for a train the trainer course" which the claimant was to complete "asap". The action plan notes in respect of the claimant states action to be taken in respect of the claimant obtaining 'access rights' and that "Fredrick will carry out Pauline's supervision on Thursday 15th February, following her 3-month probation, in her role as home care supervisor." This reference to the claimant's 'supervision' was again in the context of the Care Inspectorate requirements. The claimant's 'supervision' did not take place on 15 February 2017. There is no indication in these team meeting minutes of the respondent company being in a difficult financial situation or of any steps which were or may have to be taken by the respondent in order to address any such financial difficulties. There is no indication in these team meeting minutes of the possibility of any change to the claimant's role, duties or hours of work. There was no discussion at that meeting on 13/2/18 of the respondent having any current or potential financial problems or any indication of a future material change in respect of the claimant's employment.

(i) In the period between the commencement of the claimant's employment with the respondent and the team meeting on 13/ 2/ 2018, three new service users had begun to use the respondent's services and two new Home Care workers had been recruited. These services users initially only used the respondent to provide a small amount of hours per week. One of those service users increased their weekly care hours provided by the respondent. This increase in service users and required care hours led to the claimant and Fredrick Roberts carrying out more direct care duties, providing care to service users in their home.

(j) The claimant sent the email which is at P54 – P55 to the respondent at 17:05 on Monday, 19 February 2018. The claimant sent this email from her work email address to 'enquiries@appropriateservices.com'. Emails sent to that email address are picked up by Frederick Rogers. This email stated:-

> "Hi Frederick,
>
> I have some news….. I'm pregnant!!
>
> I'm still getting used to the news so I can imagine it will come as a surprise to you too. I have done a bit of research and attached some links (see below) that may be useful going forward.
>
> The main thing of immediate importance would be a maternity risk assessment, as there will be a few service users. I cannot work with – namely (names of two individuals stated but not repeated herein for confidentiality purposes) and (further named individual stated and again not repeated herein for confidentiality purposes) (due to cat litter tray needing cleaned). I haven't found a specific risk assessment form template online so far, but I'm sure we can make one up.

I have a physio consultation next Monday 26 February due to issues in previous pregnancy, so will be able to fill you in after this, if there are any specific tasks that put me at greater risk.

Otherwise, I hope that this news will not affect my work too much over the coming months."

(k) The claimant sent with this email attachments which were links to 'Pregnant employees' rights-GOV.UK' and 'Statutory Maternity Pay and Leave: employer guide – GOV.UK'. These links led to information on UK government websites setting out 'Legal rights for pregnant employees, including paid time off for antenatal appointments, maternity leave and pay' and 'Employer guide to Statutory Maternity Pay (SMP) and Leave, rates, eligibility, notice period, form SMP1, recovery'. The claimant sent these links because she was aware that the respondent had no experience of dealing with a pregnant employee and she thought that it would be in the respondent's interests to make Frederick Roberts aware of employers' obligation in these circumstances. Frederick Roberts read this email and the information in these links forwarded to him by the claimant with the email. The respondent was put on notice by this communication from the claimant that she was pregnant and intended to exercise her statutory rights as a pregnant employee, including her right to maternity pay and maternity leave. As at the dates of this Employment Tribunal hearing, the claimant has received no payments of Statutory Maternity Pay. The claimant mentioned a risk assessment in her email to Frederick Roberts because her role with the respondent involved moving and handling service users and she knew that as she became more heavily pregnant there would be an increased risk to her and to service users. The claimant was aware from her previous pregnancies that a risk assessment should take place.

(l) On 20 February 2018, the day following the claimant having notified the respondent about her pregnancy and its implications for the

respondent, Frederick Roberts congratulated the claimant on her pregnancy. There was no discussion on the impact of this in respect of the claimant's employment. At no time did Suad Abdulla congratulate the claimant on her pregnancy. The respondent's office was in shared business premises, with a communal kitchen and the respondent's business being located in one room, where the desks used by Frederick Roberts, Suad Abdulla and the claimant were set out close together, in a U shape. The claimant had a good working relationship with Suad Abdulla prior to the news of her pregnancy. Frederick Roberts did not inform Suad Abdulla of the claimant's pregnancy on being notified of this by the claimant. Several weeks after notifying the respondent, when in the respondent's office with Suad Abdullah, the claimant made a comment to her about her 'bump showing'. Suad Abdulla expressed surprise and the claimant concluded from this that Suad Abdullah had not been told about the claimant's pregnancy. Fredrick Roberts had delayed in telling Suad Abdullah that the claimant was pregnant.

(m) On 21 February 2018, the claimant had her supervision meeting with Frederick Roberts. The notes in respect of this meeting are at P63 – P66, and were signed by the claimant and by Frederick Roberts on 28 March 2018. There is no indication in these notes of the respondent being in any financial difficulty, or of the possibility of a reduction in the claimant's hours. The content under the heading 'Feedbacks' includes the following:-

> "Pauline said she appreciates the fact that she's been able to get immediate response from me once she sends me an email. I promised that the company will add more resources, (human and financial) once we expand / grow in order to adhere to the high-quality assurance policy we have in place."

Under the heading 'Workload' is stated:-

> "Responding to her workload, Pauline said from the first day she took up the role of Supervisor, she started prioritising

tasks such as reviewing and updating policies, care plans, meeting staff and service users etc. She said time management is crucial when it comes to workload and will always inform me if her workload is too much.

She said she will be willing to take over the management of the service if I have to go on holiday as emailing and phoning will make things very much easy for her."

Under the heading 'Expectation from Supervision Workload' is stated:-

"When Pauline was asked about her expectation(s) about Supervision, she said it's a way to have feedback about her position / role. She said it's all about what the Manager expects her to do and anything that is important that I haven't said to her yet.

I told Pauline that in my judgement she is doing a good job and she should continue with that."

The claimant position at that meeting indicated to the respondent that if there were any circumstances affecting the claimant's role with the respondent then she expected to be told about them at that meeting. Despite this, no indication was given to the claimant at that meeting about the respondent being in any financial difficulties or there being any possibility of a reduction in her hours of work.

Under the heading 'Personal factor(s) affecting work' is stated:-

"Pauline had sent me an email two days before her supervision that she is pregnant, so the meeting was an opportunity for us to discuss this in detail.

Pauline said that since she was badly treated in her previous jobs when she was pregnant, and we've not had a pregnant employee before in the company, she is keen that we get things right. She also said in a previous pregnancy she had

loose ligament and had a lot of physio done. She said she will need to watch the tasks that she does (e.g. vacuuming, etc.) and letting service users know this as well.

Pauline told me she is 13 weeks pregnant and she is due to deliver on the 29/08/2018. I explained to Pauline about the impact of her situation with regards to her responsibilities, but she said that she knows her limitations and will let me know when she has reached her limit. She also suggested that working from home could be a possibility if she cannot come to the office.

She said she had done extensive research on employment and pregnancy, and one can take an early maternity leave at 29 weeks. She also advised me that the company can claim back 92% of maternity pay."

(n) Also on 21 February 2018, the claimant emailed the respondent at their 'enquiries' email address informing of various pregnancy - related appointments. The claimant set out to the respondent her intention to come to work before and / or after the stated appointments. This email is at P57. On 22 February 2018, the claimant set out to the respondent in an email information in respect of a maternity related appointment at 10.45am on 15 March and her intention to come to the office from 9 – 10 am and after 12pm on that day. This email is at P56. The claimant did not intend to be absent other than was required for her to attend the required pregnancy related appointments. When attending her pregnancy related appointments, the claimant did not take a full day off work. The respondent did not communicate to the claimant that there was any difficulty with her attending these appointments, or that the time taken by her in attending these appointments was in any way excessive. On 27 February 2018. The claimant sent an email to the respondent's 'enquiries' email address, with the subject heading 'Update after physio'. This email is at P58 and states:-

"Hi Frederick,

All went well at physio appointment yesterday - I have to go back in six weeks, and managed to get an appointment on same day as another appointment to minimise disruption (Monday 9th April 1:30 PM).

She advised in terms of risk assessment that it sounded like we were doing the right thing. She agreed that regular communication regarding my abilities and difficulties is the way forward, and that the risk assessment should be adapted to my changing needs. She advised that I should be aware that tasks may take me longer (like walking up stairs) so I should give myself more time to do these.

She said we may need to look at adaptations in the office like my chair, etc.

At the moment she has given me a support bandage for my bump and some physio exercises to do."

(o) The claimant had made this physiotherapy appointment because in her second pregnancy, when the claimant was working providing direct home care services, the claimant had had ligament problems, and she wished to take steps to counteract this. The claimant intended to continue to provide direct are services for the respondent until near the end of her pregnancy. The respondent's reply to this email is at P59. It was sent from Frederick Roberts on 27 February 2018 and states:-

"Hi Pauline,

Thanks for the physio update. I will arrange for us to do risk assessment this week and see how we can take this forward."

The respondent did not carry out a risk assessment in respect of the claimant at any time following the claimant notifying them of her pregnancy.

(p) As at the dates of this Employment Tribunal Hearing, no risk assessment has been carried out by the respondent in respect of the claimant. Frederick Roberts presumed that the claimant could not work not only with the three service users she named in her email to the respondent of 19 February 2018, but also with other service users who he understood had similar care requirements. Frederick Roberts understood that he had an obligation not to direct the claimant to do tasks which she had difficulty with because of her pregnancy. Frederick Roberts' formed a view that the claimant's pregnancy would have a significant impact on the business because the claimant provided direct care services to service users, was limited in the services she could provide to service users and because the respondent would have an obligation to pay the claimant while she was on maternity leave and not earning direct income for the respondent. Frederick Roberts considered the primary importance of the business was to provide direct care services to service users because that would generate income for the respondent's business. He considered it to be very significant that in the claimant's role as a supervisor she was not always providing direct care and therefore not directly generating income for the business. Because of the view formed by Frederick Roberts on the claimant's limitations while she was pregnant, without carrying out a risk assessment, Frederick Roberts formed the view that if he sent the claimant to provide direct care to service users, then she would only be able to do tasks such as make the service user a cup of tea and direct them to take their medication, and could not carry out more substantive tasks such as lifting and toileting, or cleaning tasks such as hoovering, and he would then require to send another home carer to carry out those tasks. This view was not formed on the basis of a risk assessment.

(q) Since the beginning of her employment with the respondent, the claimant had had use of a laptop computer to enable her to carry out her work duties. After 27 February 2018, Frederick Roberts began

to use this laptop (as he had done prior to the claimant's employment). The claimant did not have access to the locked filing cabinet in the respondent's office. Without access to a computer the claimant could not undertake her office based duties. Until March 2018, the laptop was in place at the claimant's desk for her to use when she was in the office. From early March 2018 the laptop was not regularly available for the claimant to use when she went to the respondent's premises. The claimant regularly contacted Fredrick Roberts to ask when the laptop would be brought into the office. When the claimant did not have access to a computer she fulfilled her role as a supervisor by attending clients' premises and using a notepad. After having no access to the laptop for a week in March, because it was not brought into the office by either Fredrick Roberts or Suad Abdullah, the claimant informed Frederick Roberts that she required access to a computer. It was then agreed that the claimant could use the PC in the respondent's office.

(r) From early March 2018, once Suad Abdullah knew about the claimant's pregnancy, her attitude towards the claimant changed and their working relationship deteriorated from that time. At the commencement of her employment the claimant had regularly sent emails to Fredrick Roberts informing him what she had been doing in respect of her employment in that week. In February 2018, because the service user hours had increased, with the resultant effect on the claimant and Fredrick Roberts being busier because they were providing more direct care to service users themselves, the claimant stopped regularly emailing the respondent with what she had been doing. She stopped this because her time in the office was more limited (because she was doing more direct care hours) and she felt that such emails were not the best use of her time. Fredrick Roberts did not raise any issues with the claimant in respect of her having stopped sending these emails. It was discussed at the claimant's supervision meeting on 21 February that the claimant appreciated getting a prompt reply from Fredrick Roberts to her emails. On one

occasion in early March, Suad Abdullah phoned the claimant to ask her what she had been doing that day. The claimant had been mostly out of the office that day. Suad Abdullah asked the claimant to email what she had done that day. The claimant did so, sending the email to the general email address, normally picked up by Fredrick Roberts. The following day Suad Abdullah phoned the claimant and spoke to her in a raised voice. She accused the claimant of not doing what she had directed in respect of sending an email. The claimant said that she had sent the email to Fredrick Roberts. Suad Abdullah said that that was not what she had been asked to do and the claimant replied that she did not have Suad Abdullah's email address. The claimant felt that Suad Abdullah was not happy with the claimant having provided a reply to her accusations. The claimant did not consider the change in Suad Abdullah's attitude towards her to have a material effect on her continuing employment with the respondent, because her work communications were mainly with Fredrick Roberts. The claimant had emailed Fredrick Roberts with the information on the day requested by Suad Abdullah and he had replied that that was fine. The claimant presumed that Fredrick Roberts would discuss communications from the claimant with Suad Abdullah if required.

(s) On 26 March 2018, the claimant arrived at the respondent's premises around 10am, having first covered a shift with a service user. Both Suad Abdullah and Fredrick Roberts were there. As soon as the claimant arrived, Suad Abdullah told the claimant that they could no longer provide her with 35 hours a week and that they were reducing her weekly hours to 14 and would be providing her with a new contract to sign. The decision to reduce the claimant's hours from 35 to 14 per week was taken by Suad Abdullah. The claimant said to Suad Abdullah that she thought that was against the law, and that she would like to do research. The claimant was upset and Fredrick Roberts acknowledged that the claimant was upset by this reduction in her hours. The claimant did not accept the change to her

contract. There was no consultation with the claimant about possible measures to be taken in respect of addressing any financial difficulties which the respondent had. The claimant was not given information as to the basis for it being the respondent's position that its financial difficulties were such that the claimant's hours had to be so reduced. The reduction in her hours was presented to the claimant as a decision which had already been made. The claimant was the only employee of the respondent who was pregnant. No other employee had their hours of work reduced. No other employee was issued with changes to their contract of employment.

(t) The reduction to the claimant's working hours was presented to the claimant after the claimant informed Fredrick Roberts that she was pregnant and after both Fredrick Roberts and Suad Abdullah knew that the claimant was pregnant. The reduction to the claimant's working hours was presented to the claimant after the claimant had informed Fredrick Roberts of various pregnancy related appointment that she would require time off to attend. The reduction to the claimant's working hours was presented to the claimant after the claimant informed Fredrick Roberts that there were certain service users that she could not work with because of her pregnancy. Fredrick Roberts and Suad Adbullah were concerned about the impact of the claimant's pregnancy on the business. In particular, there was concern that while pregnant and then on maternity leave the claimant would be a source of limited or no income for the respondent, but would represent a significant liability in respect of wages and maternity pay. Fredrick Roberts' primary focus was on those who could provide direct care service for the respondent and so generate income for it from service users. The respondent had no prior experience of employing a pregnant employee. Fredrick Roberts knew that the claimant had rights as a pregnant employee because he had read and understood the information in the links sent to him by the claimant on 19 February 2018 on 'Pregnant employees rights' and 'Statutory Maternity Pay and Leave: employer guide'.

(u) There was no indication to the claimant at the time of her recruitment by the respondent that her position would not be permanent or would only be for a temporary fixed term period. There was no indication to the claimant at the time of her recruitment by the respondent that the respondent's financial position was such that it may not be able to sustain the claimant in her position on a permanent basis. The respondent took the decision to recruit the claimant to a permanent position working 35 hours a week at the rate of £10.20 an hour in the knowledge that they owed a debt to HMRC as set out in P78, in the knowledge of their ongoing liabilities incurring in respect of rental of their office premises and in the knowledge of the number of service users and carer hours which the company had, the staff costs associated with provided that direct care service and that care hours fluctuated. The only material change to the circumstances affecting the claimant's employment with the respondent and the respondent's financial liabilities in the period from the time of the claimant's recruitment in November 2017was that in February 2018 the claimant informed the respondent that she was pregnant and indicated her intention to take maternity leave and receive maternity pay. There were no material circumstances detrimentally affecting the respondent's financial situation from the time of the respondent taking on the claimant as an employee at 35 hours a week to the time of their notification of a reduction in the claimant's working hours, with resultant financial loss to the claimant. The debts being incurred by the respondent in respect of rent and other office expenses did not change after the claimant was recruited. By February 2018, the number of care hours provided by the respondent to service users increased by around 180 hours a month in the period since the claimant was recruited in November 2017, with resultant increase in the respondent's income. From the period when the claimant was recruited, at the time of the reduction in the claimant's hours the respondent has taken on more clients and was making more money. The two Care workers which the respondent had recruited after recruiting the claimant had only worked for a short

time for the respondent. At the time of the reduction in the claimant's hours, the respondent employed four Care workers, the claimant and Fredrick Roberts. There was no proposal or discussion with the claimant that she work some hours providing direct care to service users at a lower hourly rate (that which the Care workers were paid) and some hours at the rate of £10.20 carrying out her role as Supervisor. The claimant would have been agreeable to that arrangement if it enabled her to continue to work 35 hours a week for the respondent. If the respondent had indicated to the claimant at the time of her recruitment that her position may not be permanent or that her weekly hours may be reduced from 35 she would not have taken the job because of her reliance on Working Tax Credits.

(v) In the week in which the respondent reduced the claimant's contractual hours from 35, one service user left. After the respondent reduced the claimant's contractual hours from 35, three new service users began to use the respondent's services. The requirements of these new clients equated to the respondent providing an additional 180 care hours a month. In the period between the commencement of the claimant's employment with the respondent and June 2018, the number of service users using the respondent's care services went from seven, to thirteen and then down to twelve, but with one of the service users having increased their number of care hours from the respondent. The respondent had two service users who used the respondent on an ad hoc basis. This increase in care hours required to be supplied by the respondent meant that the respondent had an increased need for employees who could provide direct care to service users in their own home.

(w) Immediately following the claimant being informed by respondent of the reduction in her hours, the claimant did some research on the Internet in respect of her rights as a pregnant employee and then sent an email to the Fredrick Roberts using the respondent's

'enquiries' email address. This email is at P61. It was sent by the claimant at 11:51 on Monday 26 March and states as follows:-

"Hi Fredrick,

as you can imagine, I am not happy about the proposed drop-in hours from 35 a week to 14 a week. I am particularly upset at the fact this has come with no warning and that I have just been told that this is expected to come into action as of tomorrow.

Firstly this is a drop in earnings of £856.80 a month before tax and directly affects my maternity pay which is calculated from 10th March to 4th May. This will mean on top of my reduced pay I will also lose £917.53 of my expected maternity pay.

I have attached some notes regarding pregnancy discrimination, which I feel this falls under. The guv.uk website states. Employers can't change a pregnant employee's contract terms and conditions without agreement - if they do, they are in breach of contract.

I have holidays planned from 29th March to 2nd April then 9th – 13th April. I trust these will be at my contracted hours of 35 hours a week since I have not been issued with or signed a new contract and have accrued these hours whilst working 35 hours a week.

The possibility of a new contract with reduced hours was not discussed at my supervision, for which I have still to receive the notes from (I understand you have been busy with things not complaint just an observation), but I have now been here 4.5 months which is far beyond the probationary three months stated in my contract.

I am happy to discuss alternative plans with you but 14 hours a week does not even qualify me for tax credits which affects my childcare and therefore not a feasible option for me."

(x) This email correspondence was sent when the claimant, Fredrick Roberts and Suad Adbullah were all sitting in the same room, being the respondent's office premises. The claimant felt uncomfortable. The claimant felt that the issues had arisen from Suad Abdullah and felt uncomfortable with Suad Abdullah in the room. The claimant felt that Suad Abdullah's attitude towards her changed from the beginning of March 2018. Fredrick Roberts did not respond to this email or then dispute the claimant's position that the respondent had taken on '180+' hours a month. By this email the claimant notified the respondent that she considered their reduction of her hours, with resultant financial loss to her, including loss of maternity pay, to be pregnancy discrimination. The claimant was very upset about this proposal to reduce her hours and the detrimental effect which the material reduction in income would have on her and her family, both in respect of wages before her maternity leave period and the amount of maternity pay during her maternity leave period. The claimant knew from her previous experience and from research into her rights as a pregnant employee that she was entitled to maternity leave. As at the time of the change to her contact, the claimant qualified for statutory maternity pay. She earned on average at least £116 a week. She worked for the respondent continuously for at least 26 weeks continuing into the 'qualifying week', which is the 15th week before the expected week of childbirth ('EWC'). The claimant's baby was due on 29 August 2018. Her EWC was week beginning 26 August 2018.

(y) The claimant knew that the amount of SMP pay is calculated with reference to average earnings over a period of 8 weeks up to and including the last payday before the end of her qualifying week. Prior to this pregnancy, the claimant had two other children, one who

attended school in March 2018 and one who attended nursery then. The claimant relied on Working Tax Credits to meet the nursery costs. The claimant's younger son attended nursery full time to enable her to work Monday to Friday, from 9am until 5pm for the respondent. The claimant required to work at least 16 hours a week to qualify for Working Tax Credits.

(z) The subsequent email correspondence between the claimant and Fredrick Robert on 26 March 2018 is at P60 – P61. Fredrick Roberts replied to the claimant's email as follows:-

> "Dear Pauline,
>
> I can understand how you feel about the proposed drop-in hours. It was not a decision we took likely, as I personally know that you are an asset to the company. Unfortunately, we are only able to come to a conclusion now after we've explored all areas of injecting more money to keep the company afloat. At the moment our outgoing is far more than our income and we don't want to sit in a position where we will be unable to pay you at the end of the month.
>
> With regards to your probationary period, the contract reads that it will be reviewed after three months and no specified date was given. Your holidays will be wrap (*sic*) and I can confirm to you that you will continue to work on 35 hours till Friday (30/03/2018).
>
> I am heading to client just now and please email me if you have any suggestion on how to take this further."

The claimant replied:-

> "Hi Fredrick,
>
> I understand the predicament since coming on board in November we have taken on new clients with a total of 180+ hours a month not including the ad hoc support, with no new

permanent staff currently covering these additional hours - in theory this more than covers my current wage. I do realise that the company needs to make a profit, not just break even, but I feel that prior to my contract being drawn up with the pre-discussed hourly rate I was offered, that this should have been looked at to ensure it was practical for the company to offer a permanent 35 hour contract.

As I said in previous email 14 hours a week not only affects my earnings but impacts on my tax credits. I need to work a minimum of 16 hours a week to be eligible for tax credits. But cannot financially support my family on less than 35 hours a week.

I'm happy to seek external advice regarding how we can resolve this or we can discuss privately the best way forward?"

(aa) On 28 March, the day when the claimant and Fredrick Roberts signed the notes from the claimant's supervision meeting (P63 -P66), Fredrick Roberts told the claimant that he was preparing her new contract. The claimant told Fredrick Roberts that she was not willing to accept the reduced hours. Shortly before the claimant was due to finish work that day, Suad Abdullah put on the claimant's desk the letter to the claimant from Frederick Roberts dated 28 March 2018 (P67) with a proposed new contract. That enclosed proposed new contract was not before this Tribunal. The proposed contract changed the claimant's start date to 2 April 2018 and her hours of work, from 35 hours over 5 days a week, to 14 hours worked on 3 ½ hours per day, Monday to Thursday. The letter is at P67 and states:-

"Dear Ms Rodger,

You may be aware that the company is not making money to pay overheads, never mind breaking even. To avoid closure, the company has decided that reducing hours is necessary at this time. Please be assured that this is not a step we took

lightly. As an Employer we recognise that this change will impact your family.

We are asking you to reduce your weekly hours from 35 to 14 effective 02/04/2018 for the foreseeable future; myself and the Director are already working without pay. Your current position and duties will remain the same.

During this period will continue to monitor the company's financial situation.

When the economic situation and the company's performance improves, your former hours may be restored.

We appreciate all the hard work you have put into your position and we do not want to lose you as an invaluable employee.

Your understanding, support and cooperation to help Appropriate Services Limited endure the current economy situation is greatly appreciated."

(bb) The claimant left this letter and the contract on her desk and did not sign the contract. The claimant had an email exchange with Frederick Roberts on 29 March 2018, set out at P68. The claimant sent an email to the respondent's 'enquiries' email address on 29 March 2018 confirming that she was not agreeable to the reduction in her hours and informing that she believed this reduction to be pregnancy discrimination, as follows:-

"Hi Frederick,

I have received a copy of the amended contract on Wednesday which I am not willing to sign.

I have reason to believe the proposed reduction of my hours, falls under pregnancy discrimination. I would appreciate if we could meet to discuss this, as requested in my previous email.

> In the meantime, there is plenty of literature online that you can read regarding changing an employee's contract during pregnancy or reduction of hours / pay during this time, and how this relates to discrimination."

Frederick Roberts reply of 29 March 2018 is as follows:-

> "Dear Pauline,
>
> Thank you for your email. As I said in my letter, this was not a decision we took lightly. We did everything we could to sustain your previous hours, including both me and Suad not taking wages. This has nothing to do with pregnancy but the fact that, at the current trend of the business, there is no way we will be able to pay you at the end of every four weeks with those hours. Imagine the end of your four weeks when you are expecting your salary, we phone you saying we are unable to pay you. That doesn't sound right!
>
> Your request for a meeting will be granted but I honestly believe that it will not change things. The honest truth is that we haven't got money to keep those hours. You are quite right to seek expert advice and we are willing to fully cooperate with them, including showing them our books, etc.
>
> It is unfortunate that we haven't got any solution at the moment but do hope the business will speedily pick up and once that happens, we will be in a position to review your hours."

(cc) There was no meeting to discuss the situation. At this time Care workers working for the respondent were working overtime hours, providing direct care to service users over and above their contractual working hours. One of the new service users which the respondent had taken on required a care package of 70 hours a week. The respondent was providing 30 hours of care a week to that service user, in the hope that the respondent would gain the other 40

hours a week business. At the time of the reduction in the claimant's working hours, the claimant's mother was employed on a 16 hour contact with the respondent but was working overtime of at least an additional 10 hours a week, providing care to that new service user. At the time of the reduction in the claimant's hours, the additional 180 hours a week from the new service users were covered by additional hours worked by the four Care workers employed by the respondent, by Fredrick Roberts and by the claimant. There had been an increase and not a reduction in the care hours required to be provided by the respondent since the time of the claimant's recruitment. This increase was in the region of 180 hours a week and could not be covered by the contractual hours of the care workers employed by the respondent. From when the claimant was employed by the respondent, when a new service user was taken on by the respondent, the direct care would initially be provided by either the claimant or Fredrick Roberts, who would assess the service user's care needs and decide which members of staff would be suitable to work for them, taking into account the service user's preferences such as that the care be provided by a care worker of a particular gender. After the period of assessment for the new service user for whom 30 hours a week was being provided by the respondent, Fredrick Roberts continued to provide his care once or twice a week.

(dd) The claimant sought legal advice in respect of her employment situation. Her instructed solicitors wrote to the respondent in the terms of email to Frederick Roberts, of 5 April 2018, which is at P69 - P71. This letter begins:-

> "We are instructed to write to you with our client's particular concerns about your recent unilateral variation of her contract of employment. Our client is concerned, absent an unconnected justification being evidenced, that this may amount to pregnancy and maternity related discrimination.

> Before reaching a view however, our client would wish to attempt to try to resolve this matter amicably."

It was set out in that letter that the claimant disputed the financial circumstances relied upon by the respondent. Her instructed solicitors request further explanation and evidence to support the respondent's position in respect of their financial difficulties. No evidence of the respondent's alleged financial difficulties was provided to the claimant. This letter set out a number of factual matters as 'key circumstances'. It stated:-

> "You have given our client the impression that you are unwilling to discuss the matter.
>
> In light of those circumstances, and having regard to your actions and responses, our client believes that the decision to reduce her hours was because she is pregnant.
>
> You may be aware that our client's status as a pregnant woman engages protection in law against being treated unfavourably because she is pregnant. The fact that you reduced our client's hours of work without notice or consultation is unfavourable treatment. Our client will suffer financial detriment as a result of that treatment. Our client has expressed concerns that you are not respecting her statutory and contractual rights and that you have not complied with the law."

The letter sought confirmation of there being no unilateral right to vary the contract of employment and 'reinstatement' to 35 hours per week. Evidence and explanations in relation to specified matters were requested within five working days. Reference was made to court or tribunal proceedings to follow (in the context of a 'without prejudice' statement). The respondent was put on notice from this letter that the claimant considered the reduction in her hours to be pregnancy and maternity related discrimination. The letter requested

a response within 5 working days because the claimant was concerned that the respondent would not respond timeously to this letter.

(ee) The respondent's reply to this letter from the claimant's instructed solicitor was an email sent on 12 April 2018. This is at P72 and is in the following terms:-

> "I write in response to the above subject.
>
> Ms Roger was contracted on the 11/11/ 2017 for the position of Home Care Assistant Supervisor after she approached us that she is looking to join mainstream care. She was offered the job and in her contract it was stated that the position will be reviewed after 3 months. The decision to reduce her hours has nothing to do with Ms Rogers pregnancy but the fact that she was due a review and the company needed to take desperate measures to avert closing down. I will highlight some figures below for you to build up the financial situation of the company.
>
> The only service the company provides at this moment in time is care at home. The average hours we provide every four weeks is 426 to wit one of the clients cancelled 74 hours quite recently. The average hourly rate is £12.50; this brings an income of £5325 every four weeks.
>
> Having said this, the hands-on staff get paid £8 an hour for every shift they do, bringing the total of their wage to £3408. The remaining £1917 is what is left to pay office staff, service company debt(s) and pay overheads. The total overhead cost of the company includes rent, insurance, registration fee, electricity, phone, software, stationery, transportation / fuel, etc, and this varies between £634 - £800 every month. Over and above these costs, we have a payment agreement plan with Her Majesty's Customs and Revenue to pay an

outstanding VAT arrears to wit we pay £2737 every month. From this, Mr McParland, it is clear to see that if something is not done, the company is down on to the road of becoming bankrupt / insolvent.

The Director and myself are couple and one thing we decided is to go without salary for the foreseeable future and you can only imagine what that means as a family. The office staff I mentioned earlier comprises of me, the director and Ms Rodger. The model of the service we provide is such that with the exception of me and the Director who work more than 35 hours a week unpaid, everyone else in the company has 16 hours or less contract and some staff are on zero hours. Although some staff are at liberty to take overtime, this is not guaranteed hours.

The letter that was served to Ms Rodger was based on a review that was due after three months of her employment and the decision was based solely on the financial situation of the company and nothing else. We pride our company to be an Equal Opportunity Employer and to wit we have employed physically disabled staff in the past and we know Ms Rodger's pregnancy will in no way limit her capacity to act as a Supervisor. It is unfortunate that we have come to this decision but as stated in her letter, if and when business picks up, we may increase her hours. We acknowledge this will have negative financial ramifications on Ms Rodger but unfortunately, this is the most we can do in an ugly situation and we hope she understands.

I hope this throws light on your request and I stand ready to produce any evidence of fact you may wish to see in the pursuit of a resolve."

(ff) The position in that letter does not accurately state the position in respect of care hours being provided by the respondent at that time. The position in that letter is inconsistent with the position set out in the notes of the team meeting on 12/2/18 and the notes of the supervision meeting on 21/2/18, neither of which give any indication of the respondent, being in a difficult financial situation and both of which were reasonable opportunities to discuss the possibility of such serious implications on the claimant. No evidence of the alleged difficult financial position was thereafter presented to the claimant other than letter from HMRC to the respondent dated 3 May 2018 which is at P78, which was produced by the respondent for these Tribunal proceeding. This letter shows a liability to HMRC of £18,538.81. It is Frederick Roberts position that this is in respect of a VAT liability previously incurred by the respondent. Such a level of VAT liability indicates that the respondent's business was generating significant income in the year in which the VAT liability incurred.

(gg) On 19 April 2017, the claimant sent an email to the respondent's 'enquiries' email address under the subject header 'Holidays'. This is at P74 and states as follows:-

> "Hi Frederick,
>
> I have had a look back through my holiday requests as follows:-
>
> 27/28/29 December (3 days)
>
> 3 Jan (1 day)
>
> if calculated correctly, I would have accrued 3.5 days holiday from November 11th to end of December (7 weeks)
>
> 29/30 March (2 days)
>
> 2 April (1 day)
>
> 9 – 13 April (5 days)

So far used 8.5 days of 28 days, leaving 19.5 days to take before maternity leave, as holidays will accrue while on maternity leave and need to be used by end of December, at which point I will still be on leave.

Please correct me if I am wrong. No holiday pay shown on wage slips."

The claimant received no reply to this email.

(hh) In the period from 2 April 2018 until Friday 27 April 2018, the claimant worked 14 hours a week. During these hours, the claimant worked mainly in the respondent's office from 9 AM until around 12:30 PM , when Suad Abdullah told the claimant that it was time for her to leave. Suad Abdullah made up the respondent's rota for cover of service users' care requirements. The claimant was not on the rota in this period. The claimant was very concerned about the respondent's unilateral implementation of the reduction in her working hours to 14 hours a week. The claimant initially reduced the number of hours when her younger son (Corey) was in nursery because she did want to incur unnecessary childcare costs and she did not require her younger son to be in nursery full time, Monday to Friday, when she was working reduced hours. The claimant had an arrangement with the nursery that her son's hours could be increased when her working hours increased. On 27 April, the claimant again told Frederick Roberts that she would require to work at least 16 hours a week to retain her entitlement to Working Tax Credit and to financial assistance with childcare. Frederick Roberts told the claimant that he would take the 'unilateral decision' to give her 16 hours and that he would not inform Suad Abdullah of this arrangement. The claimant understood that Frederick Roberts was agreeable to her working a minimum of 16 hours, and that he would seek to give her more hours, up to 35 hours a week. The claimant increased her son's nursery childcare provision back to full time on the basis of this understanding and to enable her to be available to

work up to 35 hours a week for the respondent. The claimant explained to Fredrick Roberts that she had only a 4 week window to inform Tax Credits about a reduction in her hours. Fredrick Roberts agreed that the claimant would work 16 hours a week, with 2 hours being direct care to a service user. Fredrick Roberts made this agreement on behalf of the respondent on the basis that he had authority to do so, but that Suad Abdullah would not be told about this arrangement. Following her discussion with Frederick Roberts on 27 April 2018, the claimant altered her younger son's childcare arrangements with the nursery in line with what she understood had been agreed with Fredrick Roberts, so that she was available to work for the respondent for 35 hours a week, between 9am and 5pm Mondays – Fridays.

(ii) As at the date of her conversation with Fredrick Roberts on 27 April 2018, the claimant continued to seek legal advice in respect of her employment situation with the respondent. On 30 April 2018, the claimant's instructed solicitors wrote to Frederick Roberts in terms of the email, which is at P75 – P76. This correspondence substantively begins:-

> "In the first instance, notwithstanding the purported explanation given by you in your email of 12 April 2018 for the unilateral change, we make clear that any continued employment on our client's behalf is under protest of the change. Our client does not acquiesce to the change, which you have imposed upon her to date, irrespective of the fact that she has been forced to work 14 hours per week over the last four weeks. Our client reserves the right to pursue the same, either as a claim for breach of contract within the sheriff court or as a claim for unlawful deduction from wages before the employment tribunal.

Our client invites you to restore her contract to its previous terms meantime, particularly when she is due to commence maternity leave in early course.

For the avoidance of doubt, our client does not accept the explanation given by you as to the changes which have been made to her employment. Putting to one side, the explanation given about the business's financial circumstances, the contention proceeds upon a fundamental misunderstanding of what the probationary period provided within clause 11 of our client's contract of employment means. A probationary period allows for a right of review by the employer at the end of that period as to whether the employment continues. It does not give a right to the employer to continue the employment, but on the unilateral imposition of different terms. There is nothing within the contract which suggests that Ms Rogers' hours or he would have been the subject of review.

In any event, if the financial position is quite as bleak as you suggest, that presumably would have been known to the company some time before this change was imposed. It is unclear why these changes have been imposed at this particular point and why changes in Ms Rogers case could not wait for her to go on maternity leave, which you knew would commence in June 2018.

All of that raises a reasonable inference in our client's mind that this change has been imposed because of the fact she is pregnant and will be going on maternity leave shortly.

Secondly, we understand that you have sought to prevail upon our client by offering her 16 hours rather than 14 hours but suggesting that this can only be done in the event that she takes maternity leave immediately. Our client cannot take maternity leave any earlier than 10 June 2018 and in any event, it is quite inappropriate for undue pressure to be placed

upon our client seeking to persuade her to alter her maternity leave arrangements in exchange for restoring some of the hours which have been removed from her. Our client will not agree to same.

For the avoidance of doubt, whilst our client will continue to work under the 16 hours you are now proposing that she will have, the same position as set out above applies and it is to be taken that she is doing so under protest.

Lastly, we understand from our client that the issue of deductions from her last wage has still not been resolved. Our client had worked 101.5 hours and had also accrued 21 hours of holiday. That represents a total of 122.5 hours at £10.20 per hour. Our client was only paid £542.43 and whilst we understand a further payment has subsequently been made. Our client has still not been paid. The total sum which she is due, namely £1249.50. Please make payment to our client of the outstanding balance due to her by return."

(jj) Suad Abdullah learned from this correspondence that Fredrick Roberts had agreed that the claimant work 16 hours. Suad Abdullah's position to the claimant was that she could 'forget' the additional two hours, being the two hours above 14 per week which had been initially proposed. The claimant did however continue to work 16 hours a week for the respondent. The reduction to the claimant's hours from 35 per week was a unilateral contractual variation by the respondent to which the claimant did not agree. She continued to work under protest and the respondent was aware that the claimant wished to continue to work 35 hours a week for them. There was a considerable reduction in the amount received by the claimant as a result of Working Tax Credits because the claimant's working hours dropped from 35 to 16 hours a week.

(kk) On 2 May 2018, the claimant sent an email to the respondent's 'enquiries' email address with the subject heading 'Bank holidays' as follows:-

> "Hi Frederick,
>
> Just a follow-up from the note I left on your desk.
>
> Monday 7th and Monday 28th May are bank holidays meaning nursery is closed. Can I request to work Friday 11th May and Friday 1st June to make up my hours these two weeks, rather than taking holidays, thanks.
>
> Also, you haven't got back to me on how many days holiday you count that I have taken this year?
>
> If you could let me know then we can discuss options for remaining holidays and maternity leave."

There was no response sent on behalf of the respondent to this email.

(ll) On 4 May 2018 there was an exchange of text messages between the claimant and Frederick Roberts, which is at P79 – P80. The claimant's message to Frederick Roberts was:-

> Hi Frederick, I've just checked my payslip and I've only been paid for 14 hours a week. I worked 16 hours last week which I should have been paid for and we agreed I would do 16 hours from this week?

Frederick Roberts' texted reply was:-

> "Sorry Pauline, you worked 14 hours but asked if I could pay you for 16 hours. In all fairness Pauline, I have received an email from your lawyer saying the company owe you £1296.00 and I have forced you to take early maternity leave. And also I have agreed to pay you 16 hours instead of 14 but that you still want your 35 hours a week.

> As you know my decision was unliteral and Suad was not going to know about it until such time.
>
> Under the circumstance, I cant ask you or pay you for 16 hours because I don't know where we stand with hours.
>
> Pauline we are extremely struggling and if we don't resolve this issue we might just close the business."

There was no discussion with the claimant about any possibility of a redundancy situation affecting the claimant's employment with the respondent.

The claimant's texted reply began:-

> "I understand your position, but I did work 16 hours last week as I covered 2 shifts with Graham and we agreed to 16 hours from this week as I explained my position with tax credits. The letter from my lawyer is based on the previous total when I thought my pay run was same as other staff, this will be (rest of message not before the Tribunal).

Frederick Roberts' reply was:-

> "OK Pauline, but can we do a 16 hours contract and get you to sign it and let the lawyer know that the issue has been resolved. Otherwise, I just want to draw a line under this and move forward."

(mm) There was a sequence of emails between the claimant and Frederick Roberts on behalf of the respondent on 8 May 2018 under the heading 'Maternity leave and holidays', which are at P82 – P83. This sequence of emails begins with an email sent from the claimant to the respondent's 'enquires' email address as follows:-

> "Hi Frederick,

> My MatB1 form (the official letter from midwife about maternity leave) states I have to let you know by 19th May when I plan to take maternity leave.
>
> I know you are away shortly with Alan and wondered if we will have time to discuss this before you go?
>
> I have calculated I should still have 18 days holiday to take this year. Please advise if you have something different.
>
> Thanks."

The response sent on behalf of the respondent to this was email from Frederick Roberts to the claimant on 8 May 2018 as follows:-

> "Hi Pauline,
>
> Am at Andy's doing full day. True am away til the 20/05/2018. I sent you a text over the holiday asking if you are happy to take the 16 hours so I can write out contract before leaving. I understand you said your phone's charger is broken.
>
> Can you email me your thoughts about this?"

The claimant and Fredrick Roberts then spoke briefly on the phone. Fredrick Roberts' position was that he wanted the claimant to 'drop everything with the lawyer' and then he would give the claimant 16 hours a week. The claimant was not happy with the arrangement but was prepared to work a minimum of 16 hours a week on the basis of her understanding that that would enable her to retain her entitlements to Working Tax Credits and financial assistance with childcare costs, and on the understanding that she wished to work 35 hours a week and may be allocated more than 16 hours work within her 9am to 5pm Monday – Friday availability. Fredrick Roberts' position to the claimant was that he could as a short term measure increase her hours to 16 per week but that it would be best for the company if the claimant took her maternity leave immediately, in the hope that when she came back after her maternity leave the

company would be in a position to give her more hours. The earliest date when the claimant could commence her statutory maternity leave was when the claimant reached the stage of 29 weeks in her pregnancy (10 June 2018). The claimant understood from Fredrick Roberts' position to her that if she took maternity leave immediately then she would receive maternity pay and possibly an increase in her hours on her return from maternity leave. The claimant believed that Fredrick Roberts did not appreciate that the claimant could not commence her maternity leave before she reached the stage of 29 weeks in her pregnancy. The claimant felt that she had no choice other than to work these reduced hours. The claimant did not want to be unemployed while pregnant. The claimant believed that her pregnancy would affect her ability to find alternative employment. The claimant increased her younger son's nursery hours back to full time so that she would have availability to work between 9am and 5pm Mondays to Fridays and because she did not know when within those periods she would be required to work.

(nn) The claimant confirmed her understanding of the position in respect of her working hours and her availability in an email which she sent to the respondent after that phone conversation with Fredrick Roberts. This email is at P82 and states as follows:-

> "Hi Frederick,
>
> As discussed at our meeting on Friday 27th April, a minimum of 16 hours a week would allow me to continue to claim tax credits for childcare.
>
> You also know I am happy to work up to the 35 hours a week stated in my original contract and will cover extra hours as required within my availability.
>
> I have already adjusted Corey's childcare to ensure my flexibility based on this discussion which did not come to

fruition, and has meant I am out of pocket for nursery fees that I did not need to accrue.

Unfortunately the period in which my maternity pay is calculated 10th March – 4th May has now passed and the reduced hours over that period will put me under further financial strain when I take maternity leave.

Therefore I feel I have no choice but to accept a contract for 16 hours if this is all you will offer. Can you please confirm when this would be effective from?

Could you also please advise when I am likely to be paid the £242.42 owed from March wage as well as expenses and additional 2 hours worked wk beg 30th April.

Thanks."

(oo) The claimant did not receive a reply on behalf of the respondent to the position set out by her in that email. The claimant adopted the position as set out in that email because she wanted to continue to work rather than be unemployed and because she understood that working at least 16 hours a week would allow her to retain entitlement to Working Tax Credits, would enable her to keep her younger son in nursery and would give her some income. The claimant was never issued with a contract reflecting an agreement to work 16 hours for the respondent. The claimant was paid for the referred to 'additional two hours worked in the week beginning 30 April' in June 2018. These two hours are shown in the wage slip dated 1 June 2018 which is at P110. The respondent continues to owe the claimant the sum of £242.42 in respect of the outstanding wages, which have been accepted by the respondent as due to be paid to the claimant but remained unpaid as at the dates on which evidence was heard in this Tribunal claim. A significant factor in that payment not being made is the fact that the claimant brought these Tribunal proceedings.

(pp) On 10 May 2018, the claimant sent an email to the respondent's 'enquires' email address as follows:-

> "Hi Frederick,
>
> I am leaving my mat B1 form in your top drawer in desk for when you get back.
>
> Provisionally I would like to take my 18(?) days holiday from 2nd July leading onto maternity leave starting 1st August 2018. We can discuss this properly when you get back as nothing is set in stone.
>
> I am due 29th August 2018 so ideally would want to start maternity leave by 15th August at the latest."

The claimant did not receive a response to this email.

(qq) By submitting this MATB1 form to the respondent., the claimant gave the respondent the necessary medical evidence of proof of pregnancy.

(rr) In the period from 30 April until she last attended work with the respondent the claimant sent emails to Frederick Roberts informing him of her hours worked. At no time other than in the meeting in March 2018 did the claimant have any discussions with Suad Abdullah about maternity leave arrangements or the effect of her pregnancy on her employment. At no time did Frederick Roberts direct the claimant to discuss any such arrangements with Suad Abdullah. During this time the claimant was in the same office as Suad Abdullah for at least part of her working hours and had conversations with Suad Abdullah about working matters. Suad Abdullah's treatment of the claimant deteriorated after Suad Abdullah found out that the claimant was pregnant and intended to exercise her right to take maternity leave and to be paid SMP. This deterioration arose because the claimant was pregnant and had notified the respondent of her intention to exercise her right to maternity leave. The claimant felt there to be a difficult working

relationship with Suad Abdullah following Suad Abdullah learning about the claimant's pregnancy. For this reason the claimant did not initiate any conversation with Suad Abdullah about the effect of her pregnancy on her employment or arrangements for maternity leave. Suad Abdullah took no steps to discuss any limitations arising from the claimant's pregnancy or maternity leave arrangements with the claimant.

(ss) On 11 May 2018 the claimant sent an email to the respondent's 'enquires' email address (at page 85) as follows:-

> "Hi Frederick,
>
> Hope you are enjoying your working holiday.
>
> Just an update on my hours this week
>
> Mon – Off
>
> Tues – 9am – 12.30 = 3.5
>
> Weds – 8.30am – 1.30pm (Sam then office followed by DPAC meeting) = 5
>
> Thurs – 8.30am – 12.30pm (Sam then office) = 4
>
> Fri – 9am – 12.30pm = 3.5
>
> Total = 16 hours
>
> Next week happy to use hours as suits you or just work around when Suad is in the office ….We are hoping to carry out supervisions next week.
>
> Been liaising with lady in Australia looking for cleaning for her father in Eastend. I have a meeting with him Monday morning and looking to put staff in place by end of week, 2 hours a week. I have asked Suad to check availability."

(tt) On 17 May 2018 the claimant sent an email to the respondent's 'enquires' email address (at page 86) as follows:-

> "Hi Frederick,
>
> This week:
>
> Monday – 9am – 1pm (left as Suad was arriving) = 4
>
> Tuesday – 9am – 12.30 = 3.5
>
> Wednesday – 9am – 1.15pm = 4.25
>
> Thurs – 8.45am – 1pm (arrived early to make up time as wasn't sure if Suad would be in office) – 4.25
>
> Total = 16 hours
>
> *if suad arrives before 1pm I will tell her I'm still working on care plan."
>
> This email was set before 1pm on the Thursday of that week. The claimant was setting out in this email her intention in respect of working until 1pm on that day and in respect of what she would say to Suad to explain her being in the office until 1pm. This was in recognition of the continuing arrangement where Suad would seek to ensure that the claimant left the respondent's office around 12.30pm on her working days.

The claimant did not receive a response to this email. The claimant was not contacted by the respondent with any dispute in respect of these hours being worked.

(uu) In May 2018 the claimant's younger son contracted chickenpox. He usually attended nursery during the claimant's working hours but was unable to do so with chickenpox. The claimant took holidays in May to enable her to care for her child during this time. The claimant took holidays to care for her son over two weeks, taking 4 days holiday one week and 2 days the following week. The claimant's wage slip

for May 2018 (issued 1 June 2018 and at P110) shows no payments in respect of holidays. The claimant has not been paid for these holidays.

(vv) The claimant's instructed solicitors wrote to the respondent by email on 22 May 2018, which is at page 87 - 88. This correspondence notified the respondent that the claimant intended to commence proceedings before the Employment Tribunal in respect of the reduction in her hours, unless an amicable solution could be reached. The ACAS Early Conciliation ('EC') Certificate in respect of this case is at P1. It shows date of receipt by ACAS of the EC notification as 22 May 2018 and date of issue of the EC Certificate as 06 June 2018. The ET1 (P2 – 18) was received by the Central Office of Employment Tribunals Scotland on 2 July 2018. The ET3 response form is at (P19 – 29) and was completed on the respondent's behalf by Peninsula Business Services Limited.

(ww) The claimant repeatedly requested a meeting with Frederick Roberts to discuss arrangements for her maternity leave and her holiday entitlement. The claimant received no response to her communications with the respondent in this regard and her requested meeting did not take place. Despite the claimant's repeated requests, there has been no meeting between the claimant and the respondent in respect of the arrangements for her maternity leave. P100 shows text communications between the claimant and Frederick Roberts on 30 May 2018. This communication shows that the claimant was seeking a meeting with Frederick Roberts. The claimant was seeking this meeting with him to discuss arrangements for her maternity leave. This meeting did not take place.

(xx) The claimant sent an email to the respondent on 31 May setting out her 16 hours in that week (at page 89), on 5 June setting out her position in respect of hours on that day (P91) and on 8 June setting out her position in respect of hours in that week (at P92). The claimant received no contact from the respondent to dispute her

position in those emails. Her position in the email of 8 June was that she had worked 12.5 hours and was also due payment in respect of 3.5 hours for a cancelled shift. Her email of 5 June stated:-

> "Hi Frederick,
>
> Just emailing to confirm that my hours today were 9am – 1.15pm (4.25 hours, as requested by Suad.
>
> I will be in the office tomorrow after shift with Sam. I hope we can have our meeting."

The claimant received no response to this request for a meeting to discuss her maternity leave arrangements and this meeting did not take place. The claimant emailed the respondent to the 'enquires' email on 5 June. That email is at P90 and states as follows:-

> "Hi Frederick,
>
> I'm presuming you won't make it into the office before 12.30 today to discuss things?
>
> I have copied the information below from the gov.uk website just to keep us right. As I first contacted you regarding my Mat B1 form and taking my maternity leave on 10/5/18 that means you have until Thursday, 07/06/18 (28 days as stated below) to give me written confirmation of my leave and how much maternity pay I will be paid – I have left additional info in your drawer to help you.
>
> Until we discuss my holiday entitlement it is difficult for either of us to confirm start and end dates, so its important you either reply to my previous email regarding holidays or meet face to face to discuss before next Thursday."

(yy) On the evening of 6 June 2018 Fredrick Roberts phoned the claimant to tell her that he had misplaced his keys for the respondent's office premises and arranging to collect the keys issued to the claimant for her home. Fredrick Roberts then came to the claimant's home, met

with her briefly outside and took the office keys from her. From that time the claimant has not had keys to access the respondent's office. This, together with no access to a laptop computer, has limited the work which the claimant has been able to carry out in her role with the respondent. P101 shows text communications between the claimant and Frederick Roberts on 6 and 7 June 2018. These communications took place after Frederick Roberts had collected the office keys from the claimant's home. These reflect the claimant's understanding at that time that the keys would be returned to her the following day. At 18.41 on 6 June the claimant sent a text to Frederick Roberts stating:-

> "Will collect keys at Sam's around 8.45 – 9am as appointment is at Victoria infirmary and wouldn't want to hold Sam up for any plans he has."

Frederick Roberts replied at 18:42 stating:-

> "Will get it from either me or Suad then."

Frederick Roberts then sent a text to the claimant at 8:23Am on 7 June 2018 stating:-

> "Hi Pauline,
>
> Just realised I have forgotten keys at home. Just go home after appointment. Really sorry."

The claimant replied to this at 08:25am as follows:-

> "OK was just on way to Sam's will you let me know when you are going to be in office as we really need to meet today. Thanks."

The claimant received no response to this request for a meeting or no indication that she should discuss matters with Suad Abdullah.

(zz) P102- 104 shows text communications between the claimant and Frederick Roberts from Sunday, 10 June 2018 until Wednesday, 27 June 2018. During this period the claimant could not access the respondent's office unless Fredrick Roberts or Suad Adbullah was there. In this period the claimant would go to the shared office building and sit in the communal kitchen until Suad Adbullah arrived with keys to the office. In this period she carried out the work that she could without access to a computer. This included carrying out some work providing direct care to service users. On Sunday 10 June 2018, the claimant sent a text to Frederick Roberts as follows:-

> "Just checking what's happening with keys / access to office tomorrow?"

Frederick Roberts reply to this was sent at 7:25 AM on Monday, 11 June 2018 and was as follows:-

> "Good morning Pauline. I had a problem with my phone and have just seen text of yesterday. Instead of coming to office, please just do Graham at 12.
>
> Thanks"

The work being carried out by the claimant at this time was mainly attending to service users, including 'Sam' and 'Graham'. In this email. The respondent was directing the claimant only to attend a service user on 11 June.

The claimant's reply to this text is:-

> "No problem!
>
> I have my diabetes test tomorrow morning. As previously mentioned, an email regarding maternity appointments but can work Friday to make up hours. Would appreciate some kind of response ASAP regarding maternity leave, holidays and expenses owed as the meeting is long overdue."

Frederick Robert's response to this was:-

"I know. Have a shift with Robert from 10 – 4 and so will meet tomorrow."

The claimant replied:-

"I'm only available tomorrow afternoon. Please let me know what time. Thanks."

Frederick Roberts replied:-

"Will be in the office whole day tomorrow"

The claimant acknowledged this with 'OK'.

After some text communication about a service user cancelling on Thursday of that week, the claimant sent an a text to Frederick Roberts at 12:11 on 12 June stating:-

"I'll be at office about 1pm"

Frederick Roberts replied:-

"Hi Pauline.

Why don't just wait till tomorrow?"

The claimant replied:-

"Will you be in office tomorrow"

Frederick Roberts replied:-

"Yes, will be in until Friday."

The claimant replied:-

"OK see you tomorrow".

Frederick Roberts replied

"OK Pauline"

(aaa) These communications show that the claimant was seeking a meeting with Frederick Roberts. The claimant sought a meeting with him to discuss arrangements for her maternity leave. This meeting did not take place. The claimant had not had a meeting with Fredrick Roberts since April. The claimant was concerned about what she saw as Fredrick Roberts avoiding her. The claimant considered that her office keys and work mobile phone had been 'confiscated' from her. The claimant was very concerned about her employment situation. She continued to seek to discuss matters with Fredrick Roberts. On Wednesday 13 June, the claimant sent a text to Frederick Roberts at 12:09 stating:-

"Are you in office yet?"

Frederick Roberts replied at 12:10 stating

"Not yet."

Frederick Roberts did not appear for a meeting with the claimant as arranged on Wednesday 13 June, or at all in the period from that date to the dates when evidence was heard by the Tribunal in respect of this claim. No explanation has been provided to the claimant by the respondent for this failure to meet with her. The claimant sent an email to Frederick Roberts on Wednesday, 27 June 2018, stating:-

"Still waiting for a meeting."

She received no response to this. The claimant reasonably concluded from Frederick Roberts lack of response with regard to a meeting that Frederick Roberts was avoiding having this meeting and that the respondent was unwilling to pay her during her maternity leave. This caused the claimant a great deal of worry in respect of the financial impact which the respondent's actions would have on her and her family.

(bbb) On 13 June 2018 the claimant sent an email to her instructed solicitor which accurately recounts events at that time and the claimant's thoughts in respect of this. This states:-

> "Following my email last week, I have still to have any reply from Frederick regarding maternity leave and holidays. Tomorrow will be 5 weeks since I requested a meeting to discuss this.
>
> In addition, last Wednesday (6th June) I received a call from Frederick at 6 PM asking if he could come to my home to 'borrow' my office keys as he had left his in the office. He advised that I could collect the keys Thursday morning (8:45 AM was time agreed) to allow me access to office. Around 8:23 AM Thursday morning I received a text stating he had left my keys at home and therefore I wouldn't be able to access the office. I emailed to advise that due to the short notice and this being through no fault of my own I would expect to be paid for loss of earnings on this occasion - I still have had no reply.
>
> On Sunday I sent a text to Frederick to ask whether I would have access to office on Monday 11th. I finally received a reply at 8:30 AM asking that instead of going to office could I cover a shift 12-2 PM, this again meant a loss of earnings for the day. I had previously requested Tuesday morning off to attend a maternity appointment, but as Frederick had advised he would be in the office all day I said I would attend in the afternoon to have meeting regarding maternity leave etc. When I text to confirm I was on my way to office, Frederick replied immediately requesting we leave meeting until Wednesday (today) and confirmed he would be in the office. I have arrived at office at 9 AM to find nobody in and no update from Frederick about when to expect him.
>
> If meeting ever goes ahead I will update again but I genuinely feel he is avoiding meeting with me as he has no intention of

paying my maternity pay and certainly seems to be trying to get out of giving me any of my holiday entitlement."

(ccc) The claimant was upset about the lack of contact from the respondent in respect of arrangements for her maternity leave. She believed that she had been denied access to the keys to the respondent's premises, laptop and mobile phone as a result of informing the respondent of her pregnancy. The respondent's actions in reducing the claimant's hours and in failing to discuss with her arrangements for taking a maternity leave had a significant impact on the claimant. The uncertainty in respect of what income she would receive during her maternity leave period put a strain on the claimant. She was very concerned about the impact of the situation on her family. The claimant felt that she was not wanted in the respondent's business because of her pregnancy. She sent an email to Fredrick Robert noting her lack of access to the office and asking if she could take 17 days holiday before the start of her maternity leave and commence her Maternity Leave on 18 July. The respondent did not reply to this.

(ddd) In June 2018 the claimant sought advice from Money Matters because she was very concerned that the respondent would fail in their responsibilities in respect of maternity pay. The claimant then emailed the respondent to their 'enquires' email address on 15 June 2018 (at P94) as follows:-

"Hi Frederick,

Based on lack of access to office this week and overall lack of communication regarding my holidays and leave over past 5 weeks, I can only presume you are avoiding the subject.

Due to these ongoing issues which are directly affecting my finances and my mental well-being during pregnancy

> I am emailing to confirm that I will be taking my 17 days holiday owed for this year, as of Monday 18th June 2018 followed by maternity leave from Tuesday 17th July.
>
> As said in previous emails. I am happy to meet to discuss this further, at a time suitable to you. If you do not respond in writing, I will take this as confirmation that you are honouring the above request.
>
> I would also like a response regarding my wages and expenses owed, including loss of earnings this week due to lack of access to office, as mentioned above"

The claimant received no reply for or on behalf of the respondent to this email. Because the claimant received no reply from the respondent, she proceeded, as set out in this email, on the basis that the respondent was honouring her request.

(eee) By this email sent on 15 June 2018 (P94), the claimant gave the respondent notice of her intention to commence her maternity leave on Tuesday 17th July 2018. More than 28 days notice was given prior to commencement of this maternity leave. The claimant last worked for the respondent on 14 June 2018. The claimant has received no payments of any kind from the respondent since 29 June 2018.

(fff) P105 – to P106 shows text communications between the claimant and Frederick Roberts on Friday 29 June 2018. This was as follows:-

From claimant at 08:50:-

> "Can you advise when wages will be paid? Nothing in bank and no payslip either, also still waiting on P60. Thanks.

From claimant at 10:54:-

> "Got payslip. Can you advise how the hours were broken down? Thanks"

From Frederick Roberts at 10:56:-

> "The exact hours worked from last pay date. Thanks."

From claimant at 10:57:-

> "What about holidays?"

From Frederick Roberts at 10:59:-

> "Pauline, we are half year through our financial year. Meaning as of tomorrow every staff would have been entitled to 14 days holiday.
>
> You have far exceeded that from paid holidays taken since January 1st 2018.

P106 shows only part of the text communications which followed between the claimant and Frederick Roberts on that day. P106 shows the following text communications which took place between them then:-

From claimant at 11:04:-

> "…days paid holiday this year and one day carried over from last year as I am going on maternity leave you were to advise me in writing how you want me to take my remaining holidays, 17 days within 28 days of me letting …"

From Frederick Roberts at 11:08:-

> "I don't have time to continue with this Pauline. I am heading to a client now. Will send you a detailed breakdown of holiday. You have no holiday carried forward from last year.

From claimant:-

> "no problem, I have been asking both you and Suad for this breakdown, four months so I look forward to finally getting somewhere. Would appreciate you depositing my wages…."

(ggg) Prior to March 201, holidays taken by the claimant were shown as holiday pay on her issued wage slips. The respondent uses Sage to service its payroll. The pay slips show payments in respect of the 4 weeks prior to the date of issue. From April 2018 no wage slips issued to the claimant have shown any details of holiday pay having been made. The position in respect of holidays taken by the claimant is accurately set out by the claimant in her email to the respondent of 19 April 2017 (P74).

> "Hi Frederick,
>
> I have had a look back through my holiday requests as follows:-
>
> 27/28/29 December (3 days)
>
> 3 Jan (1 day)
>
> if calculated correctly, I would have accrued 3.5 days holiday from November 11th to end of December (7 weeks)
>
> 29/30 March (2 days)
>
> 2 April (1 day)
>
> 9 – 13 April (5 days)
>
> So far used 8.5 days of 28 days, leaving 19.5 days to take before maternity leave, as holidays will accrue while on maternity leave and need to be used by end of December, at which point I will still be on leave.
>
> Please correct me if I am wrong. No holiday pay shown on wage slips."

(hhh) In the period before her reduced hours contract came into effect, i.e. until 31 March 2018, the claimant had accrued days holiday on the basis of her working 35 hours a week. The claimant's entitlement to holidays in 2018 is 28 days. She has received holiday pay in respect of 10 days holiday. The claimant took holidays in the period from 15

June until the commencement of her maternity leave on 17 July 2018. The claimant took these holidays immediately before commencing her maternity leave because she believed that the respondent wanted her out of the business as soon as possible and because Fredrick Roberts and not met with her or engaged in material communications with her in respect of when she should take holidays, including holidays she would accrue while on maternity leave, and when she should start her maternity leave. The claimant has accrued and continues to accrue holidays during her maternity leave. The claimant has received no payment in respect of holidays accrued during her maternity leave and no communication from the respondent in respect of proposals for any such payment.

(iii) The claimant was issued with a pay slip from the respondent on 9 March 2018, which is at P107. This describes the claimant as having worked 119 'Basic Hours' at the gross rate of £10.20 and a net pay of £1077.90. The claimant was issued with a pay slip from the respondent on 6 April 2018, which is at P108. This describes the claimant as having worked 119 'Basic hours' at the gross rate of £10.20 and a net pay of £1084.85. There is no reference to holiday pay. The claimant had taken holidays in this period and expected to receive holiday pay, accrued while she was working at 35 hours a week. The claimant did not receive payment from the respondent of £1084.85 in respect of this wage slip. The claimant initially received approximately half this amount (£542). Shortly after noticing that this was the amount which had been paid into her bank account by the respondent, the claimant queried the position with Fredrick Roberts. She was told by him that the company could not afford to pay her the full amount. The respondent subsequently paid the claimant a further sum of £240 in respect of this wage slip. The sum of £242.85 due to the claimant in respect of this remains outstanding. This position is reflected in the email of 30 April 2018 which is at P75 – P76.

(jjj) The claimant was issued with a pay slip from the respondent on 4 May 2018, which is at P109. This describes the claimant as having worked 56 'Basic hours' at the gross rate of £10.20 and a net pay of £361.40. The claimant was issued with a pay slip from the respondent on 1 June 2018, which is at P110. This describes the claimant as having worked 48 'Basic hours' at the gross rate of £10.20. It also shows 'Salary' of £20.40. That 'salary' payment of £20.40 was in respect of two hours worked by the claimant in the week beginning 30 April 2018, as queried by the claimant in her email to the respondent of 8 May (at P82). This pay slip at P110 shows a net pay of £510.00. This pay slip reflects that the claimant worked 14 hours in two weeks in May 2018. It does not reflect that the claimant took holidays in May. The claimant was issued with a pay slip from the respondent on 29 June 2018, which is at P111. This describes the claimant as having worked 28 'Basic hours' at the gross rate of £10.20 and a net pay of £285.60. The claimant was not paid for holidays taken by her in May 2018.

(kkk) P99 shows liabilities of £1,513.20 owed by the respondent as at 18/9/18 in respect of its rented office premises. This shows rent incurring at a rate of £372 per month in June, July, August and September 2018, together with an electricity charge of £11.88 and a 'Standing charge' of £13.32, both dated 28/06/18. These liabilities at this level and in respect of these office premises were known by the respondent and were being incurred on an ongoing basis from prior to the time when the respondent recruited the claimant.

(lll) When the claimant commenced her maternity leave she was entitled to receive Statutory Maternity Pay (SMP) from the respondent, having been employed by the respondent for a continuous period of at least 26 weeks into the 15th week before the week the claimant's baby daughter was due; having earned more than the Lower Earnings Limit, having given at least 28 days of the date when she would start maternity leave and having previously submitted her form MAT B1 to the respondent. The claimant's maternity leave

commenced on Tuesday 17 July 2018. The claimant gave birth to a daughter on 4 September 2018. There has been no communication between the claimant and the respondent while the claimant has been on maternity leave. There has been no communication between the claimant and the respondent in respect of her return to work following her maternity leave. As at the dates on which evidence was heard in this case, the only income which the claimant is receiving during her maternity leave is Working Tax Credits. The claimant has not received any of the Statutory Maternity Pay to which she is entitled. The respondent has not notified the claimant that they have made a decision not to pay SMP for any of the relevant reasons set out in form SMP1. The respondent has not completed a form SMP1 in respect of the claimant. If the respondent had decided at the material and relevant time to refuse to pay SMP to the claimant or to stop paying SMP to the claimant for one of the relevant reasons set out in part D of the SMP1 form, then the claimant may have been entitled to receipt of Maternity Allowance. A material and significant factor in the respondent's failure to complete any form in respect of payments to the claimant during her maternity leave is that the claimant has brought these Employment Tribunal proceedings claiming pregnancy and maternity discrimination.

(mmm) The respondent's failure to pay to the claimant her entitlement to SMP or, alternatively, to complete form SMP1 enabling the claimant to claim statutory payments of Maternity Allowance during her maternity leave, has had and continues to have a severely detrimental financial effect on the claimant and has caused the claimant significant distress, upset, and concern about the uncertainty of her financial situation and the worry about the impact of the situation on her family. The claimant has required to give up her housing association home because of her financial situation and as a direct consequence of the respondent's failures.

(nnn) The respondent's actions in unilaterally reducing the claimant's contractual working hours has a material effect on the extent of the claimant's entitlement to Statutory maternity Pay ('SMP') because it took effect in the prescribed period in terms of s18 of the Equality Act 2010. The SMP to which the claimant is entitled is assessed with regard to the claimant's actual earnings in that prescribed period. Had the respondent not taken the unilateral action to reduce the claimant's hours from 35 hours, the claimant's rate of statutory maternity pay would have been calculated in respect of her earnings at 35 hours per week.

(nnn) At the time of the Preliminary Hearing in this case, it was the respondent's position to the Tribunal that the Final Hearing in this case required to take place before December 2018, because the respondent's witnesses would be away from December 2018 until March 2019. At that time it was the intention of Frederick Roberts and Suad Abdullah go to Sierra Leone to develop contacts to supply for the catering side of the respondent's business.

(ooo) The reduction in the claimant's income resulting from both the reduction in her wages following from the enforced reduction in her working hours and the resultant reduction in her income from Working Tax Credits has had a very large impact on the circumstances of the claimant and her family. The worry, uncertainty and upset caused by the strain on finances and the uncertainty of knowing what income the claimant would receive during her maternity leave was a material factor in the breakdown of the claimant's relationship with the father of her daughter. The claimant income is the only source of income to the family. The claimant could not afford the rent on the family's home, which was rented from a housing association. The claimant gave up the family's home as a result of the respondent's actions in reducing her hours. That consequence has had and continues to have a considerable impact on the claimant's family, which is a source of deep upset for the

claimant. As a consequence of the respondent's actions the claimant and her children have moved in with a friend of the claimant who lives in the Castlemilk area of Glasgow. The claimant and her family previously stayed in the Govan area of Glasgow, which is a considerable distance away from where they now stay. The claimant's friend provides financial support to the claimant by not asking her to contribute to bills until her financial situation is more secure. The claimant contributes to the household food bills only. The claimant and her three children occupy two bedrooms in the claimant's friend's house. It is a source of deep upset to the claimant to be dependent on her friend in this way. The claimant is very concerned about the effect of the move on her family. The claimant's elder son has not changed school. His attendance at that school is not dependant on the school's catchment area because he attends following a successful placing request. As a result of the move he requires to take a long bus journey to school and can be late for school as a result. The claimant incurs a cost of £7.50 per week to cover her son's travel pass, which she would not have required to incur had she not required to give up the family's home in Govan. The claimant has borrowed £500 from her grandmother and £2000 from a credit union, which she pays back with monthly payments of £155 for repayment and £45 interest payments. This equates to total interest payable on this loan of £585. The claimant's younger son now attends a nursery in Castlemilk. In November 2018 the claimant required to register her younger son for school. The claimant's younger son will start school in August 2019 and required to be registered to start school in Castlemilk. The claimant would not ordinarily have chosen for her son to go to school in Castlemilk and it is a source of upset to her that she feels that she will be required to have a continued link to that area because of the circumstances she finds herself in, which were as a result of the respondent's actions following her notification of her pregnancy and intention to take maternity leave.

(ooo) The claimant's employment with the respondent is continuing as at the dates of this Tribunal hearing. Her entitlement to holidays continues to accrue. There had been no payment to her in respect of those accrued holidays or attempt to contact her to arrange or discuss such payment.

(ppp) The terms of the claimant's email to the respondent of 7 June 2018 (at P90) made it clear that the claimant intended to take maternity leave and to be paid SMP and that there were difficulties caused by Fredrick Roberts failure to discuss her maternity leave arrangements with her. With this email the claimant sent links showing information about Statutory Maternity Leave and Statutory Maternity Pay (SMP). The claimant received no reply to this email. One of these links was to the guide which is at P44. This is headed as being part of @Get your business ready to employ staff: step-by-step (https://www/gov.uk/get-ready-to-employ-somene). Statutory Maternity pay and Leave: employer guide'. The contents are set out as being entitlement, eligibility and personal pregnancy, notice period, refuse pay form SMP1, record keeping and help with statutory pay. P44 is the information in respect of 'Refuse pay form SMP1', including that form is MP1. P44 shows the other content headings having web address links. The information states:-

> "To can refuse the statutory maternity pay SMP if the employee doesn't qualify. They may be able to get Maternity Allowance (https://www/gov.uk/maternity-allowance) instead.
>
> To refuse it, give the employee, the SMP1 form within seven days of your decision. They must get this form within 28 days of their request for statutory maternity pay or the birth (whichever is earlier)."

(qqq) The respondent has not completed or given to the claimant an SMP1 form. Part B of the SMP1 form is headed 'Why I cannot pay you SMP'. There are two boxes under this heading. The form states 'I

have ticked the box that applies to you'. The option for box 1 is stated as being where:-

> "I cannot pay you SMP.
>
> I have ticked one of the boxes on part D of this letter to tell you why." (This in bold on the form)

The option for box 2 is stated as being where:-

> "I cannot pay you any more SMP after the week which ends on / / .
>
> I have ticked one of the boxes on part D of this letter to tell you why I cannot carry on paying you after this date." (This in bold on the form)

(rrr) The options for why SMP cannot be paid are set out in part D as follows (with explanatory notes at the side):-

- "You were not employed by me for long enough.
- Your average weekly earnings were not high enough.
- You did not tell me soon enough that you will stop work to have your baby
- You did not give me medical evidence soon enough.
- You did not tell me soon enough that your baby had been born.
- You were in legal custody.
- You have started work after the birth."

(sss) When the respondent decided not to pay the claimant while she was on maternity leave none of these options were relevant to the claimant. At no stage has the respondent suggested to the claimant that she is not entitled to SMP. The respondent has not signed the SMP1 form to refuse to pay SMP. Unless the SMP1 refusal form is signed by the respondent, the claimant cannot claim Maternity Allowance as an alternative to SMP. By the respondent's actions in not paying the claimant SMP and not signing the SMP1 refusal form,

the respondent has put the claimant in very difficult financial circumstances, which have had a severe impact on her.

Submissions

29. Because of the time spent in dealing with the amendment applications (in particular the claimant's representative's second amendment application), there was not sufficient time to hear both parties' substantive submissions within the originally arranged hearing dates. It was agreed that both parties' representatives would submit and exchange their written submissions by 5pm on 30 November 2018, and provide any comment on the other party's submissions by 5pm on 7 December 2018. Those dates were an extension to the dates agreed at the conclusion of the hearing of evidence. Both parties' representatives were written to after the conclusion of evidence asking for comment within their submissions on any declaration or recommendation which may be made, if applicable, under s124 of the Equality Act 2010 and notified of these extended dates for exchange of submissions. A members' meeting was arranged to take place on 12 December, which parties were notified of for their information only, with their attendance not required. Both parties' submission and comments are attached to this decision as appendices. The Tribunal accepted or dismissed the representatives' submissions as referred to in this decision.

30. At the conclusion of the hearing on evidence, both parties were asked to address in their submissions:-

    (i) The application of the principle of 'significant influence' to the facts of the present case, that principle being as indicated by Lord Nicholls in *Nagarajan –v- London Regional Transport* 1999 ICR 877, HL, and applied by the EAT in *Villalba –v- Merrill Lynch & Co. Inc. and ors* 2007 ICR 469, EAT and in *Garrett –v- Lidl Ltd* EAT 0541/08, as commented on at para. 19.49 – 19.51 of chapter 19 ('Victimisation') of IDS 'Discrimination at Work' publication.

(ii) The application of the principle of 'subconscious motivation' in the determination of a complaint under section 27 or section 13 of the Equality Act 2010 as referred to in the comment at paragraph 19.53 - 19.54 of chapter 19 ('Victimisation') of IDS 'Discrimination at Work' publication.

The application of the 'Barton / Igen guidelines' to the facts of this case i.e., the guidance on the application of the shifting burden of proof given by the EAT in *Barton V Investec Henderson Crosthwaite Securities Ltd* 2003 ICR, EAT and the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others* 2005 ICR 931, CA.

Relevant Law

31. The following statutory provisions are particularly relevant to the determination of this claim and the subsequent awards:-

Equality Act 2010:-

S18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavorably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavorably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

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

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

s27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

s12 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

Employment Rights Act 1996:-

s13 Right not to suffer unauthorised deductions.

(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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

s27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the M1 Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

Comments on Evidence

32. For the reasons in respect of credibility set out here, where there was a conflict in the evidence of the claimant compared to that of Fredrick Roberts, the evidence of the claimant was preferred. Where the claimant gave evidence on matters between her and Suad Abdullah, findings in fact was made on the uncontested evidence of the claimant. The Tribunal was told by Frederick Roberts that the sole Director of the respondent is his wife, Suad Abdullah, from whom the Tribunal did not hear evidence. Given Frederick Roberts continued reliance on it being the respondent's position that the sole reason for not paying the claimant maternity pay was because

the company did not have enough money to pay her, had the Tribunal heard evidence from Suad Abdullah, as the sole Director of the respondent, we would have been interested to hear her position on her responsibility as a Director to continue to trade in circumstances where the Registered Manager's position was that the company could not afford to meet its liabilities in respect of payments due to employees (particularly the claimant).

33. The Tribunal did not hear evidence from Suad Abdullah, although at the Preliminary Hearing in this case, and at the outset of this hearing, it was the respondent's representative's position to the Tribunal that she would, or at least could be, giving evidence. It was not until during Fredrick Roberts' evidence that he told the Tribunal that Suad Abdullah would not be giving evidence because she was unwell. The Tribunal had previously been notified (on Tuesday 6 November) that Fredrick Roberts would not be available to attend the hearing between 9am and 2pm on Wednesday 7 November, due to a requirement to provide care to a service user, and that the respondent would not be calling Suad Abdullah as a witness. There was no indication given to the Tribunal at that time that Suad Abdullah would not be called as a witness because of ill health, although that was later Fredrick Roberts position in his evidence. There was no request for Suad Abdullah's evidence to be heard on any other day or for any other accommodation to be made in respect of any health issue she may have. No medical evidence was provided to the Tribunal of Suad Abdullah being incapacitated. In all these circumstances, and in light of the evidence, the Tribunal drew a negative inference from Suad Abdullah not giving evidence.

34. The Tribunal found the claimant to be an entirely credible, impressive and reliable witness. She was straight forward in her evidence and did not seek to embellish. She became visibly upset only when giving her evidence on the consequences of the respondent's actions on her, in particular when giving evidence on the effect on her of having to give up the family's home and her upset because of her concerns about the effect of that on her children. She was not evasive and sought to answer questions put to her fully and with detail. She was able to support her position with detail, such

as information on the names of the respondent's service users (offering to provide these on an anonymised basis because of issues with data protection and confidentiality.)

35. In contrast to the claimant, Fredrick Roberts was inconsistent and evasive in his evidence and unable or at least unwilling to give the type of detail provided by the claimant, such as on the particular service users of the respondent. He did not give detail to support his position on the poor financial circumstances of the company or how that could have differed since the time of taking on the claimant as an employee. On a number of matters, most notably in respect of the failure to sign the SMP1 form, his position was that it was 'an oversight'. His evidence was that on hearing that the claimant was pregnant that he 'wished to do everything that (he) could to support her'. That was entirely inconsistent with the evidence on the course of events which then followed, which showed an utter disregard for the respondent's duties as an employer of a pregnant employee or of the effect on the claimant of the respondent's actions and failures. Other facts, such as there being no mention of maternity leave in the claimant's contract of employment, the claimant's pay slips not being itemised and there being no mention of pension or opt out arrangements in the claimant's contract of employment, were consistent with the Tribunal's conclusion that the respondent did not act in recognition of its duties as an employer.

36. In contrast to the detail offered by the claimant to support her position that there had been an increase of around 180 hours of direct care time to be provided by the respondent, Fredrick Roberts's appeared initially unable to give detail of those to whom services were provided by the respondent, and only when pressed, or given the initials or names of particular service users, did he accept the position, without then giving an explanation on how that acceptance fitted with his earlier evidence on there being fewer service users. The Tribunal accepted the claimant's evidence in respect this because the claimant was able to give detail on her position that there had been an increase of 180+ in service hours provided by the respondent, with reference to the initials of service users, while Fredrick Roberts simply said 'no, that's not true', without embellishment or detail and without explanation

of that position when the initials of the service users were put to him. When the claimant had put to Fredrick Roberts in the course of her correspondence with him that there had been an increase of 180+ service hours, he had not denied that increase. For these reasons the Tribunal accepted the claimant's position that there had been an increase in the service hours provided by the respondent as at the time of the enforced reduction in the claimant's hours.

37. A number of material matters relied upon by Frederick Roberts in his evidence were not put to the claimant and were not consistent with the contemporaneous documentation before the Tribunal. His evidence that the reduction in the claimant's contractual hours had nothing to do with a review following her probationary period was contrary to the position in email of 12 April 2018 (P72). During his cross examination, Fredrick Roberts mentioned various matters as having been discussed with the claimant in informal meetings in the office. There were no contemporaneous notes or correspondence recording any discussions with claimant on the matters suggested by Frederick Roberts as having taken place in informal discussions in the office. Fredrick Roberts was asked in cross examination why that such meetings had not been mentioned as part of the defence to the claims. His position was '*It must have been an oversight*.' It was the claimant's clear position in her evidence that aside from the brief encounter when Fredrick Roberts came to her house to collect the office keys, she had had no meetings with Fredrick Roberts since end April 2018 (which was the period suggested by Fredrick Roberts that at least some of these informal discussions had taken place). It was not put to her in cross examination that Frederick Robert's position would be that there had been several informal discussions. Fredrick Robert's explanation for this was that he had not had time to discuss his position with his representative. The Tribunal found this to be incredible.

38. Fredrick Roberts' position in his evidence about the very difficult financial circumstances of both the respondent and him and his wife personally at the time of the decision to reduce the claimant's hours was inconsistent with the respondent's position which had been put to the Tribunal at the Preliminary

Hearing in this case. Fredrick Roberts was asked by EJ McManus during the course of his evidence why the respondent's position at the time of the Preliminary Hearing in this case was that the Final Hearing required to take place before December because he and Suad Adbullah were going to be abroad from December 2018 until March 2019. His position was that they had been intending to go to Sierra Leone to develop contacts for their catering business but they were not now going to go. There was no explanation given or offered for the inconsistency of that planned trip with his evidence that the company was in very difficult financial difficulties and that he and Suad Abdullah had difficult personal financial difficulties because they had not been taking any salary from the respondent's business. His evidence was that the couple's source of income for their daily living expenses was from Suad Abdullah's 'small pension'. In these circumstances, and where the respondent continued to trade and to defend this case with legal representation the Tribunal did not accept that neither Fredrick Roberts or Suad Abdullah had been taking no income from the respondent's business since before the decision to reduce the claimant's hours from 35 per week. There was no documentary evidence before the Tribunal to support Frederick Roberts position that neither he nor Suad Adbullah had taken any salary from the respondent, as alleged, or to support his position in respect of the respondent being in extremely difficult financial circumstances. The Tribunal did not accept Fredrick Roberts evidence on this because Frederick Roberts was not credible in his position before the Tribunal, for the reasons set out here.

39. Fredrick Roberts' position in evidence was that the claimant was not due payment for holidays not yet accrued. There was no attempt to explain the non-payment of accrued holidays to the date of the Hearing in this case, in circumstances where the claimant's employment with the respondent is continuing, her entitlement to holidays is continuing to accrue, and there has been no payment to her in respect of those accrued holidays or attempt to contact her to arrange or discuss such payment, other than that the company is in difficult financial circumstances and could not afford to pay her and because these Tribunal proceedings were underway.

40. The respondent has not brought evidence to the Tribunal to corroborate their position that the company as at the time of commencement of the claimant's maternity leave (and prior to and post this time) was in extreme financial difficulties. The only evidence of a debt is in respect of liability for prior VAT and outstanding debts re their rented office premises. It was put to Frederick Roberts that that level of VAT liability suggests that the company must have had a significant amount of earnings in the period in which that VAT liability was incurred. Frederick Roberts could not provide any explanation or information in respect of that, and his response was that that was a matter for the accountant. Frederick Roberts was asked in examination in chief what the company's financial position was in March 2018. His response was that it was '*very bad'*: that they owed HMRC 'in the region of £16,000' owed money to Companies House 'to the tune of £2000' and owed money to their landlord for rent. When asked about the company's assets, his position was that the current assets are '*nothing'* other than the computer in the office, the furniture and fixings and cash in the bank which was '*only money from clients to pay staff'*. His position was at that time cash '*did not exceed £5 or £6000 and was dependent solely on the number of hours done in the month*.' When asked later if the company was 'on the road to bankruptcy and insolvency' he replied, *'if the money is not able to sustain the business then the next thing is bankrupt, insolvency'*. His position later was that he had reduced the claimant's hours from 35 to 14 '*to stop the company going into bankruptcy'*. The company is continuing to trade. Fredrick Roberts' evidence was that the position at the time of recruiting the claimant was that the company had been able to service their debts because there was money coming in. Because no profit and loss figures or company accounts had been provided, because the respondent is continuing to trade, because, for reasons of credibility, the Tribunal accepted the evidence of the claimant that there had been an increase in the region of 180 additional service hours and because of the lack of evidence to support Fredrick Roberts position that the company is in very difficult financial circumstances, on the balance of probabilities, the Tribunal did not accept that the respondent's financial circumstances are such that it cannot meet all its liabilities. These liabilities include payments due to the

claimant. Even if some cancellations by clients lead to a fluctuation, the Tribunal did not accept that the extent of the fluctuation was such that the financial circumstances of the respondent had significantly and materially deteriorated since the time of the recruitment of the respondent. Fredrick Roberts was asked why the Tribunal had not been presented with evidence of the company's financial difficulties such as profit and loss accounts or company's accounts. His position was that he didn't know about the litigation process and that if he knew that these were necessary, then he would have provided them. This position was not found to be credible, particularly in circumstances where the respondent was legally represented.

41. It was clear from Fredrick Roberts' evidence that the claimant having notified him of certain limitations because of her pregnancy was significant. His evidence on this during cross examination was '*she said she couldn't do clients A, B,C & D. I couldn't send her to those clients. The only one left is someone who has a home help. I don't have the clients to send Pauline to.'* He gave similar evidence in examination in chief, where he said:- '*Ms Rodger said to me in an email that out of 5 I can't work with 4 because of my situation. I respect her views. I take health and safety as paramount. If she says she is not able to work, I say yes to that.*' and '*Pauline is limited to what she can do for the client as complete support is for personal care, changing catheters, ironing, laundry and Pauline is limited in those tasks.*"

He was then asked 'was Pauline's pregnancy and inconvenience to the business?' and replied:-

"No, because she was not contracted to work as a carer. She was a health care supervisor. If she is working as a team, then she should be able to help as necessary. Pauline highlighted to me dos and don'ts what she can and can't do and I must respect what she said."

42. It was at this stage in cross examination that the initials of seven service users were put to Fredrick Roberts and in respect of each, he confirmed that he knew who they were and that care hours were provided to them. Later on, further initials were given to Fredrick Roberts in respect of new service users from November 2017. He also confirmed that he knew who they were

and that care hours were provided to them, apart from one individual who Fredrick Roberts claimed received '*just cleaning support'*. That was contrary to his earlier evidence that the respondent no longer provided cleaning services. When it was then put to Fredrick Roberts that the number of new service user hours he had accepted was 34 hours a week, and that that was consistent with the claimant's evidence that there was '180 +' new service users' hours a month, he denied that that was the case. His explanation was:-

" *A client can phone today and cancel their support. Pauline doesn't know the fluctuation of hours. I have first-hand experience of clients phoning at the last minute to cancel work. If she's not privy to that information then she does not know. That is the situation in the Homecare support we provide."*

43. This did not provide an explanation for his position in not accepting that there had been an increase of 180+ hours.

Frederick Robert's position was then that the claimant had '*seen the books and 'knew that once the once we pay staff £8 an hour there is nothing left to pay the Tas and overheads'.* When queried about his position that the claimant had '*seen the books'*, Frederick Roberts evidence was that what he meant by this was that when the claimant joined them, he '*gave her a list of past and present clients'*.

44. At a separate time during cross examination, Frederick Roberts' evidence was that the claimant had said to him that '*she couldn't lift clients, hoover, mop or climb stairs*'. The claimant was not asked about this. His position was that this was discussed in the minuted meeting on 26 February. The minutes of this meeting do not reflect such discussion. Frederick Roberts position was then that there were other meetings when this was discussed, but which was not minuted. These had not been put to the claimant. The Tribunal did not find Frederick Roberts evidence to be credible in this regard and did not find that these other meetings took place, preferring the evidence of the claimant, which was consistent with the contemporaneous written evidence before the Tribunal. It was not put to the claimant that she had limited the work which she could carry out for the respondent and it was

that which had necessitated her reduction in hours. A reduction in hours on that basis would be contrary to s18 of the Equality Act 2010. There was uncontested evidence that the claimant's primary duties and responsibilities were in a supervisory role, which Fredrick Roberts accepted were not limited by the claimant's pregnancy. It was significant that Frederick Roberts volunteered in his evidence '*If she had not been pregnant, then she wouldn't have told me that she was not able to work with certain clients'* and then '*she might have said that she wasn't contracted to do hands-on support. I don't know*.' His position was that there had been other informal meetings when the claimant had told him about other clients that she couldn't work with. He accepted that there was no reference to any such meetings in any of the documents before the Tribunal. The Tribunal considered Fredrick Roberts' evidence on his view of the claimants' limitations because of her pregnancy to be very significant with regard to the reason for the reduction in hours from 35 and the maternity and pregnancy discrimination claim under s18. It was accepted that there had been no risk assessment carried out by the respondent. It was not relied upon by the respondent's representative that the reduction in hours was justified because of the claimant's limitations as result of her pregnancy. Frederick Roberts accepted that no other employee had their hours reduced. Frederick Roberts' evidence was that the fact of the claimant having been on a probationary period did not play any part in the decision to reduce her hours. The Tribunal concluded from this evidence that the claimant's limitations as a result of her pregnancy were the reasons for or at least a significant influence to the decision to reduce her hours.

45. The Tribunal attached considerable significance to the evidence from Fredrick Roberts that the decision was taken to pay those who provided direct care services rather than to pay the claimant because the claimant was not bringing in income from direct care services. This evidence was significant in the conclusion that a significant influence to the non-payment of SMP is that the claimant was pregnant and is exercising her right to take maternity leave.

46. The Tribunal attached considerable significance to Fredrick Roberts' admitted lack of response to the claimant's repeated requests for a meeting to discuss her maternity leave arrangements and Suad Abdullah's failure to take any steps to discuss maternity leave arrangements with the claimant. This was very significant to both the s18 and s27 claims.

47. It was considered to be significant that Fredrick Roberts agreed to the claimant working 16 hours a week, rather than 14 hours a week, on the basis that Suad Abdullah would not know this. Fredrick Roberts accepted that that was the case, on the basis that he had authority to enter into that arrangement with the claimant. The fact of this arrangement being sought to be kept from Suad Abdullah suggests that Suad Abdullah would not have been agreeable to this. When Fredrick Roberts was asked why he had made the arrangement on this basis, his only position was that he had authority to do so, and that he did not require to discuss the arrangement with Suad Adbullah. He gave no explanation why he had adopted the position that Suad Abdullah would not be told about this arrangement. In circumstances where no evidence was heard from Suad Abdullah, as set out above, the Tribunal drew an inference from that that Suad Abdullah would not then have agreed to the claimant working 16 hours and accepted the claimant's position that the decision to reduce her hours from 35 was that of Suad Abdullah. Suad Abdullah was not there to give her position and although it was the claimant's position in her evidence that that decision had been Suad Abdullah's, after she had found out that the claimant was pregnant, that was not put to Fredrick Roberts. The Tribunal accepted that and accepted the claimant's position that Suad Abdullah was not happy about the content of the letter received from the claimant's instructed solicitors dated 30 April 2018. These conclusions are consistent with the position set out by Fredrick Roberts in his text to the claimant at P80, particularly that "…*Suad was not going to know*." This was also consistent with Frederick Roberts evidence when he was asked if Suad Abdullah was concerned about the impact of the claimant's pregnancy and maternity leave on the business. His response was "*She has a responsibility to look at the financial implications. I don't know if Suad is supportive. Pauline's dealings*

were with me as I am her direct manager. Whether Suad is supportive re her pregnancy, I don't know."

48. The Tribunal considered it to be significant that when Fredrick Roberts was asked if the claimant would have been paid her statutory maternity pay if she had agreed to a 16 hours contract. After a pause, he answered '*yes'*. He was then asked if he was worried that the financial implications for the company would be higher on her 35-hour contract. His answer was '*That was a concern. Yes'.* This evidence was significant to the Tribunal's conclusion that the reason or at least a significant influence to the reasons why the claimant's hours were reduced from 35 was because of her pregnancy and maternity leave.

49. There was direct evidence from Fredrick Roberts on the failure to complete the SMP1 form. Fredrick Roberts was asked if the fact that the claimant had raised these Tribunal proceedings was a factor in him not signing the form and not paying her maternity pay. He replied '*Correct. Yes.'* This was consistent with Frederick Robert's position at a separate time in his evidence to the Tribunal that he did not sign the SMP1 form because *'by that time we were in Tribunal'*. This was direct evidence that the respondent had acted in a particular way as a result of having brought these Tribunal proceedings (making a protected act) and in determining the victimisation claim significant weight was attached to this evidence, and inference drawn from it.

50. Frederick Roberts continually relied on it being the respondent's position that the sole reason for not paying the claimant maternity pay was because the company did not have enough money to pay her. Fredrick Roberts was asked why he did not consider making the claimant redundant. His answer was :-

> "*I personally value Pauline. When she approached me I thought she was a valuable worker. We were not going to make her redundant. That option didn't come up as we don't want her out of a job and don't want to lose her."*

51. It was then put to him (by Mrs Crooks) '*If you had signed the SMP1 form that could have allowed payment of Maternity Allowance. If you wanted to do what was best for her, but you just stop paying her*." He replied:-

> "it *was a very difficult time. We might have done more in signing the form, but the Tribunal came up. Its not an excuse. It was just an oversight. It was not deliberate."*

The following was put to Fredrick Roberts by EJ McManus:- '*The claimant is still employed (by the respondent). Why is she not receiving any payments?*". Fredrick Roberts reply was:-

> "*An oversight. I'm so, so busy. This matter had come to Tribunal. We got this letter from the Tribunal. We contacted ACAS. They said she had gone to Tribunal. I said why did you not Phone me or contact the company to see if we could mediate A response? Their response was that they have no resources. And once we've got the complaint they give us the number for ACAS. To come to Tribunal."*

52. He was then asked '*Did you consider the implications of not paying her?*" and replied "*I don't know*." This evidence was found to be very significant with regard to the Tribunal's conclusions on the reason or significant influence to the reasons for the non-payment of SMP to the claimant and the victimisation claim. It had been put to Fredrick Roberts in examination in chief (i.e. by the respondent's own representative) that it may be suggested that the respondent had not paid the claimant SMP because she had started these Tribunal proceedings. He replied '*Not correct'*. The Tribunal did not accept that evidence as credible and drew an inference from primary facts that that was the reason, or at least a significant influence as to why the claimant has not been paid SMP, as set out below. It was significant in respect of the respondent's awareness of that being the claimant's position that that question was put to the respondent's own witness by their representative in examination in chief.

53. Fredrick Roberts gave direct evidence on the claimant's entitlement to SMP. This evidence on this was found to be significant. He was asked if he had 'applied (his) mind to whether the claimant qualified for SMP. He replied '*yes'*. He was asked what his conclusion was and replied '*That if we can raise the money today we will pay Pauline*'. He was asked '*Did you view the claimant as eligible for SMP*?' and replied '*yes. If she has worked for 26 weeks then she is eligible and due maternity pay.'* He was then asked '*was that the case*?' and replied '*yes'*. The sequence of questions then finished with him being asked '*You knew she was entitled to SMP?'* and his reply was '*yes'*. After lunch, under cross examination Fredrick Roberts then accepted that he didn't respond to the claimant's proposal in respect of when she would start maternity leave (saying '*correct*'); accepted that the claimant had sent him further info about maternity leave and a link to the government website (P90) and that he had received this (saying '*yes*'); accepted that the claimant had been chasing him for a meeting ((saying '*correct*'); accepted that in her email of 5 June the claimant was specifically chasing a meeting with him in respect of her maternity leave (P91) ((saying '*yes*'); accepted that in the period from 30th May until 29th June (P100) the issue of a meeting in respect of her maternity leave had been brought up regularly by the claimant ((saying '*correct*'). When asked why the a meeting did not take place, he said '*simply because I was too busy covering clients and I have had a couple of appointments as well. Hospital appointments for health conditions I have'*. Fredrick Roberts was then asked if he had suggested that the claimant should speak to Suad Abdullah because he had no time. His reply was '*I never told her that'*. He was then asked, '*did you tell Suad that there was an issue to address (with the claimant) and you had no time?'*. He replied '*I spoke to Suad about that, yes. When I got the text from Pauline for a meeting I said to Suad I'm really tied down to have a meeting. I'm not able to meet with her*.' He was asked '*what did Suad say?'* and replied '*nothing'.* The sequence of questions and answers which followed was then:-

Did you propose that Suad deal with the situation?

I never did. Pauline and Suad were in the office. most of the time when I was away. She should have discussed with Suad. Pauline should have tried to get Suad to discuss it with her. I was expecting her to get Suad to discuss with her.

Do you accept that you were the appropriate person?

Correct

How did Pauline know you were too busy?

I'd say I was with a client, at a hospital appointment, either one thing or another.

You scheduled meetings with Pauline and didn't keep them.

Correct

This was over six weeks

Correct

You gave the impression that you would meet her to resolve.

Correct

You never did resolve

No

You had an obligation to deal with her maternity leave.

I do accept that.

Do you accept you have an obligation to pay her SMP*?*

Yes. I do.

Do you accept that the company has failed in their duties in respect of both?

I accept, yes."

54. No objection was made to this line of questioning. No questions about the claimant's entitlement to SMP were asked in re-examination or on recall. There was further questioning during cross examination which was relevant to the claimant's entitlement to statutory maternity pay. This was asked at the stage of cross examination on Fredrick Roberts' visit to the claimant to pick up keys for the respondent's office premises. That sequence of evidence was as follows:-

Why did you not raise (discussion on) her maternity leave?

I went briefly. She came outside and handed me the keys and I jumped in the car.

Did you understand how long she had to give you her proposed date for the start of her maternity leave?

28 days

You knew that?

Yes

You didn't respond

Yes

Not at all

Correct

55. At the stage of submissions, the respondent's representative sought to rely on the claimant not being entitled to payment of SMP because she had not given the necessary notice of taking maternity leave and / or of exercising her right to maternity pay. During his initial cross examination, Fredrick Roberts gave direct evidence on the point. That sequence was as follows:-

She gave you more that 28 days notice of the commencement of her maternity leave.

No. What she has done is 'I'm taking Holidays to bridge the gap'. She was using holidays that she hadn't accrued yet. I think they should be proportionate to the time worked.

That might explain the holidays but how does it explain why she was not treated as entitled to maternity pay?

I know we owe her maternity pay. I accept that.

Any other reason?

Just what I said. Due to financial difficulties.

56. And at a further stage of cross examination, as follows:-

You knew that if you did not pay SMP there would be significant consequences for the claimant?

Correct.

You failed to pay.

The issue is because of finances. If we had the money we wouldn't be here today. We pay the staff because if they don't work we don't have money from clients.

You pay the staff who work.

Yes

You elect to pay some liabilities but not all?

That's not the point. They are hands on staff. If we chose to pay Pauline and not them then we would lose staff and clients.

The other staff are not on maternity leave.

That's not the point. They work and bring in money. Its got to do with finance. We've got no money. There's not enough coming in.

So you took a decision on what you choose to pay?

A difficult decision but yes.

Pauline contacted you on 29 July about Maternity Allowance?

Yes

You said that you would need to seek advice?

Correct

Why did you not respond?

The reason was not because we got advice. It was all about getting the Tribunal up and running. We never got the advice we needed. We looked it

up and phoned in but the information we were given was mixed and conflicting. Instead of getting involved in another legal issue we thought we might as well wait til the Tribunal."

57. The full sequence of questions and answers which was Fredrick Roberts' evidence on recall was as follows:-

Taken to form SMP1 at P44. Were you under any obligation to complete this?

I don't know if I was under any obligation to complete the SMP1 form.

Why did you not complete the SMP1 form?

Like I said when I was giving my statement. It was just an oversight.

The cross examination was:-

You said you read the form in full?

Yes

Did you read the first page?

Yes

There's a heading 'Refuse Pay Form SMP1'

Yes

That's to be completed if someone doesn't qualify for SMP. You accepted yesterday that the claimant does qualify.

Yes

Did you make a decision that she doesn't qualify?

No

***You didn't complete this form**.*

No

You didn't give her this within 28 days.

No

***You didn't give within 28 days of proposed date of 15 July**.*

Correct

You say that was an oversight?

Yes

You sent Pauline a text message on 28 June saying that you were not signing the form because you were going to take advice.

I don't remember

You gave evidence that you were taking advice.

Correct. It was an oversight based on never completing the form. The timing was crucial. By the time she made this request we had this Tribunal issue and I didn't know what to do first.

Was the fact that these Tribunal Proceedings were raised a part of the reason that you didn't complete the form.

That's correct.

58. There was no re-examination. The recall of the claimant began with cross examination of the claimant, because the claimant's representative did not wish to ask any further questions in examination in chief. Cross examination commenced as follows:-

I suggest that the respondent had no obligation to complete form SMP1.

I took that fact from the Government website, the way it is worded. They did have an obligation to complete it if they were not going to pay me SMP.

They had no obligation so any failure was not unfavourable treatment.

They never gave me confirmation of their decision not to pay me within 7 days. On more than one occasion I pointed them to the government website to pay. There was no reason for him not to have that information.

I suggest that the respondent did not fail to complete the form as a result of you electing to take maternity leave.

I think it was as a direct result of me taking leave.

I suggest that the reason why they didn't complete the form was because you elected to take holidays. You electing to take maternity leave was not the reason why they didn't complete the form.

I'm not sure of the reason why they didn't complete the form.

59. On the basis of this evidence the Tribunal did not accept that argument sought to be made at the stage of submissions that the claimant was not eligible for SMP. It was put to the claimant by the respondent's representative at the stage of recall that she hadn't given the respondent notice of the date when she expected to receive Statutory Maternity Pay.

The Tribunal accepted the claimant's position in evidence that she had set out when she would be commencing maternity leave and that she expected to be paid maternity pay at the same time as that leave. The Tribunal accepted that as consistent with the emails communications which the claimant had sent previously to Fredrick Roberts with links to the employer's guides re maternity leave.

60. It may be the case that the respondent is dependent on cash flow and on obtaining income from provision of direct care services in order to meet its ongoing liabilities. The respondent continues to employ the claimant and continues to have a liability in respect of payments due to her. The respondent has sought to avoid those liabilities by electing not to pay the claimant what she is due but continuing to trade and to treat the company as solvent. It is not in dispute that the respondent has decided not to make payments to the claimant during her maternity leave. The position put forward by the respondent's representative at the stage of submissions in respect of the claimant not being entitled to SMP is directly in conflict with the evidence. There was no suggestion during the course of contemporaneous correspondence between the claimant and the respondent that she was not entitled to payments of SMP. Fredrick Roberts gave direct evidence on this point and his position was that as set out above. He did not suggest, either when giving his initial evidence or at the stage when he was recalled to give evidence, that the reason the claimant has not been paid SMP is because she is not entitled to it. The Tribunal did not accept the position put forward by the respondent's representative at the stage of submissions (and not before) that Fredrick Roberts did not have the authority to speak for the respondent and therefore the Tribunal should not consider his acceptance in evidence of the claimant's entitlement to SMP to be binding on the respondent. Fredrick Roberts was presented as the sole witness for the respondent, with authority to act for the respondent. It was his direct evidence to the Tribunal that he had authority to act '*unilaterally*' and without recourse to Suad Abdullah with regard to the claimant. He is the relevant witness to speak to the matters which determine the claimant's

entitlement to SMP. In these circumstances the respondents' representative cannot rely on their being a dispute about the claimant's entitlement to SMP.

61. The position that the claimant had been on unauthorised leave prior to her taking her maternity leave was not supported by the evidence. Although the Tribunal appreciated the respondent's position in respect of holidays not having accrued to that extent prior to the claimant commencing her maternity leave, the Tribunal accepted the claimant's position that she had taken those holidays then because she believed that the respondent wanted her out of the business as soon as possible and because she had tried in her various text messages and emails to Fredrick Roberts to set out her position and to seek agreement on when she should take holidays and when she should start her maternity leave period, but no meeting to discuss these arrangements had taken place and the ongoing uncertainty was causing her upset. This evidence was entirely consistent with the documentary evidence before the Tribunal and with the respondent's failure to contact her thereafter. Fredrick Roberts accepted in his evidence that there had been no attempt to contact the claimant to call her into a disciplinary hearing for unauthorised absence, or for any other reason. In these circumstances, the Tribunal did not accept as credible Fredrick Roberts position in evidence that had the claimant stayed at work, and not taken holidays, as of 15 June 2018 and commenced maternity leave when she did, that he would have met to discuss her maternity leave with her, and then she would have been paid SMP. This was inconsistent with the evidence in respect of his failure to meet with her prior to that stage, inconsistent with the lack of contact with the claimant after 15 June and also inconsistent with Frederick Roberts evidence that the only reason why the claimant was not paid SMP was because of the company's lack of affordability.

62. The claimant had queried the amount of holidays that she had left to take and her position to Fredrick Roberts had initially been that she was due 19 days. She then reduced that to 18, with a question mark after that figure in her communication to Fredrick Roberts. In cross examination the claimant accepted that she was due 17 days holiday. Fredrick Roberts' position in evidence was the knew how many holidays the claimant had taken (stating

'*we have a holiday calendar*') but he did not give a figure on this or provide any documentary evidence of the position. For these reasons, the Tribunal accepted that the claimant has 17 days holiday accrued in 2018 in respect of which she has received no payment. For the reasons set out below, the Tribunal has made an equivalent award in respect of that as part of the compensation in the successful maternity discrimination claim.

63. The claimant's evidence on the impact on her of the respondent's actions was uncontested.

64. The Tribunal accepted that the respondent is a small employer with no experience of employing an employee who notified them that they are pregnant and in respect of whom they have responsibilities with regard to SMP. That does not detract from the respondent's obligations towards the claimant in respect of her pregnancy and maternity leave. Lack of affordability is not a reason for failure to pay SMP. If a company cannot afford to meet its payments due to employees, then there are proper steps which ought to be taken. The respondent did not take the proper steps, and sought to avoid its liabilities to the claimant in respect of payment of SMP purely by deciding not to pay her. Frederick Roberts was asked by Mr McFarlane if he accepted that the company has responsibilities towards the claimant as her employer. His response was '*yes I do and I accept that the company has failed*.' The Tribunal agreed with that conclusion.

65. Fredrick Roberts sought to explain some of the respondent's failures as being an '*oversight'*. He relied on being too busy trying to service users' needs. This is not an adequate explanation for admitted failures to meet obligations as an employer of a pregnant employee. In all the circumstances, the Tribunal did not accept as a sufficient explanation that Fredrick Roberts was too busy dealing with clients' needs and that his failure to complete the SMP1 form was an oversight.

66. There was no explanation offered for Frederick Roberts's failure to take any steps to communicate with the claimant since she has been on maternity leave, other than that these Tribunal proceedings were ongoing. There was no explanation for the lack of any discussion with the claimant on the

arrangements for commencement of maternity leave other than Fredrick Roberts being too busy and oversight. Fredrick Roberts did suggest during his evidence that the claimant could have discussed matters with Suad Abdullah but there was no suggestion of this in the relevant text or email communications between the claimant and Fredrick Roberts and no evidence at all that Suad Abdullah sought to discuss matters with the claimant.

67. The Tribunal accepted the claimant's representative's submissions in respect of the significance of particular parts of Fredrick Roberts' evidence, and their conclusions made from this, as set out in their written submissions.

Discussion and decision

68. The claimant's representative has made submissions that the claimant is entitled to be compensated for her loss arising from the reduction in her contractual hours in terms of her claim for non-payment of wages. Section 13 of the ERA does not entitle the claimant to payment of wages which she has not earned. The claimant did not work 35 hours per week after the enforced reduction. This reduction in hours was a material change to the contract but, as discussed during the proceedings, the claimant has not resigned from her employment with the respondent and in these circumstances the Tribunal does not have to jurisdiction to hear a breach of contract claim. No breach of contract claim has been made. The claimant's representative's submissions in respect of loss arising from the reduction of hours being sought as unpaid wages are not accepted.

69. The Tribunal approached its considerations of the claimant's claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others* 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870) ('the Barton / Igen Guidelines'). The Tribunal applied the Barton / Igen Guidelines to the pregnancy and maternity discrimination claim and to the victimisation claim.

70. In respect of the claim of discrimination contrary to section 18 of the Equality Act 2010, the Tribunal found facts from which it concluded, on the balance of probabilities and in the absence of an adequate explanation from the respondent that in the 'protected period' the respondent discriminated against the claimant by treating her unfavourably because of the pregnancy, contrary to the provisions of s18(2)(a) and that the respondent discriminated against the claimant because she is exercising or was seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave (s18(4)).

71. In respect of the claim of victimisation contrary to s27 of the Equality Act 2010, the Tribunal found facts from which it concluded, on the balance of probabilities and in the absence of an adequate explanation from the respondent, that the respondent had subjected the claimant to detriments because the claimant had done 'protected' acts.

72. In making its findings in fact, the Tribunal took into account the evidence, the credibility and reliability of witnesses and the parties' representatives' submissions on the findings in fact that should be made. There were primary facts from which the Tribunal could draw an inference of discrimination and / victimisation. These primary facts are relevant to both the maternity discrimination and victimisation claims and are set out here, with reference to the statutory provision(s) to which they are relevant. The Tribunal assumed that there was no adequate explanation for these primary facts. These primary facts were:-

(1) There was no discussion of potential financial problems at the meeting on 13/2/18, or any indication of material change in respect of the claimant's employment with the respondent. (s18(1); s18(4); s27))

(2) The claimant position at the meeting on 21/2/18 indicated to the respondent that if there were any circumstances affecting the claimant's role with the respondent then she expected to be told about them at that meeting. Despite this, no indication was given to the claimant at that meeting about the respondent being in any

financial difficulties or there being any possibility of a reduction in her hours of work. (s18(1); s18(4); s27))

(3) The claimant notified the respondent that she was pregnant and directed them to guidance on their duties towards her in arising from that fact (s18(1); s18(4))

(4) Fredrick Roberts delayed in telling Suad Abdullah that the claimant was pregnant. (s18(1); s18(4))

(5) The respondent did not carry out a risk assessment in respect of the claimant at any time following the claimant notifying them of her pregnancy. (s18(1); s18(4))

(6) The timing / proximity of the notification to the claimant of the reduction in hours to the claimant informing the respondent that she was pregnant, of her statutory rights as a pregnant employee, of her absences to attend ante-natal appointments and of her limitations in respect of work for certain service users because of her pregnancy. (s18(1); s18(4))

(7) The lack of consultation about any other solution than the claimant's substantial reduction in hours. (s18(1); s18(4))

(8) The claimant was not given information as to the basis for it being the respondent's position that its financial difficulties were such that the claimant's hours had to be so reduced. (s18(1); s18(4))

(9) The reduction in her hours was presented to the claimant as a decision which had already been made. (s18(1); s18(4))

(10) There was no discussion with any other employees of the respondent in respect of measures to address any financial difficulties within the company. (s18(1); s18(4); s27))

(11) The claimant was the only employee of the respondent who was pregnant. No other employee had their hours of work reduced. No other employee was issued with changes to their contract of employment. (s18(1); s18(4))

(12) The reduction to the claimant's working hours was presented to the claimant after the claimant informed Fredrick Roberts that she was pregnant and after both Fredrick Roberts and Suad Abdullah knew that the claimant was pregnant. (s18(1); s18(4))

(13) The reduction to the claimant's working hours was presented to the claimant after the claimant informed Fredrick Roberts that there were certain service users that she could not work with because of her pregnancy. (s18(1))

(14) The reduction to the claimant's hours from 35 per week was a unilateral contractual variation by the respondent to which the claimant did not agree, but continued to work under protest (s18).

(15) There was no indication to the claimant at the time of her recruitment by the respondent that her position would not be permanent or would only be for a temporary fixed term period. (s18(1); s18(4); s27))

(16) There was no indication to the claimant at the time of her recruitment by the respondent that the respondent's financial position was such that it may not be able to sustain the claimant in her position on a permanent basis. (s18(1); s18(4); s27))

(17) The respondent took the decision to recruit the claimant to a permanent position working 35 hours a week at the rate of £10.20 an hour in the knowledge that they owed a substantial debt to HMRC, in the knowledge of their ongoing liabilities incurring in respect of rental of their office premises and in the knowledge of the number of service users and carer hours which the company had, the staff costs associated with provided that direct care service and that care hours fluctuated. (s18(1); s18(4); s27))

(18) The only material change to the circumstances affecting the claimant's employment with the respondent and the respondent's financial liabilities in the period from the time of the claimant's recruitment in November 2017was that in February 2018 the claimant informed the respondent that she was pregnant and indicated her intention to take maternity leave and receive maternity pay. (s18(1); s18(4))

(19) There were no material circumstances detrimentally affecting the respondent's financial situation from the time of the respondent taking on the claimant as an employee at 35 hours a week to the time of their notification of a reduction in the claimant's working hours, with resultant financial loss to the claimant. (s18(1); s18(4))

(20) The debts being incurred by the respondent in respect of rent and other office expenses did not change after the claimant was recruited. (s18(1); s18(4); s27))

(21) By February 2018, the number of care hours provided by the respondent to service users increased by around 180 hours a month in the period since the claimant was recruited in November 2017, with resultant increase in the respondent's income. (s18(1); s18(4); s27))

(22) The change in attitude of Suad Abdullah towards the claimant after Suad Abdullah became aware of the claimant's pregnancy.

(23) The respondent's reply to the claimant's instructed solicitor of 12 April 2018 stated "…we know Ms Rodger's pregnancy will in no way limit her capacity to act as a Supervisor." (s18(1); s18(4))

(24) Fredrick Roberts agreed to the claimant working 16 rather than 14 hours on the basis that Suad Abdullah would not be told about this (s18(1); s18(4); s27))

(25) After Suad Abdullah learned from correspondence from the claimant's solicitors of 30 April 2018 that Fredrick Roberts had agreed that the claimant work 16 hours, Suad Abdullah's position to the claimant was that she could 'forget' the additional two hours, being the two hours above 14 per week which had been initially proposed. (s18(1); s18(4); s27))

(26) Fredrick Roberts' concern about the financial implications to the respondent during the claimant's maternity leave if she continued to work 35 hours a week (s18(1); s18(4))

(27) There was no discussion with the claimant about arrangements for her to take maternity leave (s18(1); s18(4); s27))

(28) The respondent failed to respond to a significant number of communications from the claimant, as set out in the findings in fact, in respect of arrangements for her taking maternity leave, including proposals in respect of the start date for that maternity leave and the taking of holidays. (s18(1); s18(4); s27))

(29) The timing of the respondent's decision to reduce the claimant's weekly hours in relation to when the claimant became aware that Suad Abdullah knew about her pregnancy. (s18(1); s18(4))

(30) The timing of the claimant's lack of access to a company phone, laptop and office premises. (s18(1); s18(4))

(31) No other employee of respondent had discussions in respect of changes to their contractual position or otherwise because of the financial position of company (s18(1); s18(4))

(32) No pregnancy risk assessment took place (s18(1); s18(4); s27))

(33) Frederick Roberts admitted in evidence that he made assumptions in respect of what duties the claimant could do based on the names of clients she had given him as not being able to go to. (s18(1); s18(4))

(34) Fredrick Roberts took a view on what duties the claimant could / not do because of her pregnancy without a risk assessment taking place. (s18(1); s18(4); s27))

(35) No instruction or indication was given to the claimant that she should contact Saud Abdullah to discuss arrangements for her maternity leave. (s18(1); s18(4); s27))

(36) No instructions were given to the claimant on duties she should do in the period when she had no keys for the office. (s18(1); s18(4); s27))

(37) Frederick Roberts did not seek to ensure that he was aware of the claimant's limitations arising from her pregnancy in respect of her duties before adopting position that she could not service the needs of particular clients. (s18(1); s18(4))

(38) Frederick Roberts did not give proper regard to the fact that the claimant's role was as a Supervisor and her duties in that role did not include providing direct care to service users. (s18(1); s18(4))

(39) No documentary evidence before Tribunal of the company's financial position at the material time. (s18(1); s18(4); s27))

(40) There continued to be work which required to be carried out to service clients' needs in period before the claimant commenced maternity leave. (s18(1); s18(4); s27))

(41) There was no discussion with the claimant on the effect of her pregnancy on her ability to carry out her role as Supervisor (s18(1); s18(4); s27)).

(42) There was no meeting with the claimant to discuss when her maternity leave would commence. (s18(1); s18(4); s27))

(43) The claimant repeatedly requested a meeting with Frederick Roberts to discuss arrangements for her maternity leave and her holiday entitlement. (s18(1); s18(4); s27))

(44) The claimant received no response to her communications with the respondent requesting a meeting to discuss when her maternity leave should commence. (s18(1); s18(4); s27))

(45) Despite the claimant's repeated requests, there has been no meeting between the claimant and the respondent in respect of the arrangements for her maternity leave. (s18(1); s18(4); s27))

(46) No attempt was made by respondent to contact claimant to discuss arrangements in respect of her maternity leave (s18(1); s18(4); s27))

(47) The terms of the text communications between the claimant and the respondent at P81 and in particular Fredrick Roberts reliance statement '…and let the lawyer know the issue has been resolved.' (s27)

(48) There has been no communication from the respondent with claimant since June 2018. (s18(1); s18(4); s27))

(49) No contact has been made by the respondent to the claimant while she has been on maternity leave, although her employment with them is continuing. (s18(1); s18(4); s27))

(50) There has been no suggestion to the claimant from the respondent that she has been absent without authorised leave (s18(1); s18(4); s27))

(51) The respondent did not sign form SMP1, within 28 days or at all. (s(s18(1); s18(4); s27))

(52) The respondent did not inform the claimant of any decision by them to refuse to pay her SMP. (s(s18(1); s18(4); s27))

(53) The respondent has not refused to pay the claimant SMP. (s(s18(1); s18(4); s27))

(54) No payment of holiday pay has been made by the respondent to claimant in the period since claimant last attended work (s18(1); s18(4); s27))

(55) No steps have been taken by the respondent to seek to address a redundancy situation. (s18(1); s18(4); s27))

(56) The respondent continues to trade. (s18(1); s18(4); s27))

(57) The correspondence from the claimant's representative to the respondent of 30 April 2018 was a protected act within the meaning of s27 of the Equality Act 2018. (s27))

(58) The claimant had done the protected act of raising a claim of maternity discrimination against the respondent with the Employment Tribunal ; (s27))

(59) The respondent knew that the claimant had done the protected acts; (s27))

(60) Frederick Robert's position in evidence to the Tribunal that he did not sign the forms in relation to maternity leave and payment of SMP for the claimant because 'by that time we were in Tribunal'. (s27))

(61) There is no mention of maternity leave in the claimant's contract of employment. (s18(1); s18(4); s27) – with regard to an inference being drawn from this of the respondent's failure to recognise their statutory duties as an employer)

(62) The claimant's pay slips are not itemised. (s18(1); s18(4); s27) - with regard to an inference being drawn from this of the respondent's failure to recognise their statutory duties as an employer).

(63) There is no mention of pension or opt out arrangements in the claimant's contract of employment. (s18(1); s18(4); s27) with regard to an inference being drawn from this of the respondent's failure to recognise their statutory duties as an employer).

73. The findings in fact include clear positive findings that the reason for the treatment was the claimant's pregnancy, her exercising her right to take maternity leave and / or the fact that she had done protected acts. In these circumstances, the Tribunal did not then require to address the issue of the

shifting burden in proof. Had it required to do so, then the Tribunal would have drawn inferences as follows.

74. Dealing first with the claim under section 18 of the Equality Act, the claimant had proved facts from which an inference could be drawn that the respondent has discriminated against the claimant contrary to the provisions of s18. The burden of proof moved to the respondent. It was then for the respondent to prove that they were not to be treated as so discriminating. To discharge that burden of proof it was necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the claimant having informed the respondent that she was pregnant and intended to take maternity leave. The Tribunal required to assess whether the respondent had proved an explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities, that maternity and pregnancy discrimination was not a ground for the treatment in question.

75. The respondent did not present cogent evidence to discharge the burden of proof. For the reasons set out in the 'Comments on Evidence' section, the Tribunal did not accept the respondent's explanation that their treatment of the claimant arose simply because of the company's financial position. The claimant had proved facts from which an inference could be drawn that the respondent had subjected the claimant to a detriment because the claimant informed the respondent that she was pregnant and intended to take maternity leave. The burden of proof moved to the respondent. It was then for the respondent to prove that they were not to be treated as having committed that act. The Tribunal required to assess whether the respondent had proved an explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities, that maternity and pregnancy discrimination was not a ground for the treatment in question. The Tribunal applied the principle of significant influence as indicated by Lord Nicholls in *Nagarajan –v- London Regional Transport* 1999 ICR 877, HL, and applied by the EAT in *Villalba –v- Merrill Lynch & Co. Inc. and ors* 2007 ICR 469, EAT and in *Garrett –v- Lidl Ltd* EAT 0541/08. The Tribunal accepted the respondent's representative's submission that following *Indigo*

Design Build and Management Limited & anor -v- Martinez UKEAT/0021/14 the 'reason why' test applies to pregnancy and maternity discrimination. It is noted that the respondent's submissions do not address the application of 'significant influence'. The Tribunal accepted the respondent's representative's submissions in respect of the two-stage approach which should be applied, and applied this approach, although there were facts from which a finding of s18 discrimination and victimisation could be made. The approach suggested by the respondent's representative was followed for the sake of completeness. With regard to the respondent's representative's submissions on *Gay -v- Sophos plc* UKEAT/0452/10, the Tribunal has not made findings in this case that 'the acts complained of were motivated by other considerations to the *exclusion* of the proscribed factor' (our emphasis added). The respondent's representative's submissions with regard to *Laing -v Manchester City Council* UKEAT/0128/06 suggests that the respondent's position that SMP has not been paid because of the respondent's financial is not 'reasonable or sensible'.

76. It was clear from the evidence that had the claimant not been pregnant she would not have had her contractual hours reduced. The Tribunal concluded from the evidence that the decision to reduce her weekly hours was influenced by the email from the claimant setting out her limitations arising from her pregnancy in respect of her providing direct care services to certain service users. These duties in providing direct care to service user clients of the respondent were only part of the claimant's duties for the respondent, and were supplementary to her principal duties as a Supervisor. These limitations would not have arisen had the claimant not been pregnant. Fredrick Roberts accepted that the claimant's pregnancy would have no effect on her ability to carry out her duties as a Supervisor. Without carrying out a risk assessment, Frederick Roberts concluded that the claimant could not provide direct care services to clients, and in circumstances where the respondent's requirement to provide direct care hours was increasing, this was an inconvenience to the respondent, whose priority was to generate income from providing direct care hours. In respect of the s18 claim, there were multiple causes for these detriments suffered by the claimant: that the

claimant was pregnant and intended to commenced mat leave and that the financial position of the respondent was that it had a heavy reliance on generating income from the provision of hours of direct care to service users. The fact of the claimant's pregnancy and her notification of her intention to take maternity leave were not a trivial part of the background but rather were essential facts in the cause of her treatment by the respondent (i.e. the reduction in her contractual hours from 35 per week).

77. In the absence of an explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities, and following the Barton guidelines, the Tribunal concluded that the reason, or (on the application of *Narjaran*) at least a significant influence to the reason for the reduction in the claimant's hours from 35 per week, was because of her pregnancy and maternity leave, contrary to the provisions of section 18 Equality Act. There were a number of consequences which were detriments to the claimant arising from this act of discrimination. The Tribunal noted the requirement that the detriment be 'because of' the protected act. These detriments were:-

- Reduction in income for hours worked
- Reduction in holiday pay entitlement
- Reduction in amount of SMP to which she would become entitled.

The Tribunal took these consequences into account when determining the level of compensation appropriate to be made to the claimant in respect of the claim under section 18.

78. It was not the position here that, on the face of it, there was a non-discriminatory reason for the claimant's treatment. No other employee of the respondent was pregnant or on maternity leave or was treated similarly to the respondent's treatment of the claimant. The Tribunal did not accept the respondent's representative's submissions that the respondent has shown a non-discriminatory explanation for the primary facts on which the *prima facie* case is based. No particular significance is taken from the claimant's admitted lack of full awareness of the respondent's financial position.

Fredrick Roberts had not been found to be credible and the respondent has not brought documentary evidence to support his position on the respondent's financial position. Even if the Tribunal had entirely accepted the respondent's position in respect of their financial position (which it did not), the respondent could not evidence that the claimant's pregnancy or maternity leave and / or (separately) the protected act(s) had not had any influence at all on the respondent's treatment of the claimant (aside from 'significant' influence), or that there had not been any form of unconscious discrimination on these grounds. There were facts from which the Tribunal concluded that there was discrimination against the claimant because of her pregnancy and maternity leave. On the balance of probabilities, and taking all the circumstances into consideration, the reduction in the claimant's contractual hours from 35 per week would not have occurred had the claimant not informed the respondent that she was pregnant and intended to take maternity leave. The Tribunal concludes that the respondent's decision to reduce the claimant's hours was taken because the claimant had informed the respondent that she was pregnant and intended to exercise her rights as a pregnant employee. The claim under s18 of the Equality Act succeeds. The claimant has suffered financial loss as a result of that discrimination.

79. Similarly, the Tribunal also concluded that the non-payment of SMP to the claimant in the protected period was discrimination contrary to the provisions of sections 18(1) and 18(4). The Tribunal followed the same structure as set out above in respect of the primary facts and the application of the Barton / *Igen* principles and *Narjaran*. Had the Tribunal not made a compensatory award reflective on non-payment of SMP in respect of the victimisation claim, then it would have included in its calculation of the appropriate compensatory award in respect of the s18 claim an amount reflective of this non-payment of SMP.

80. In respect of the victimisation claim, following *HM Prison Service –v- Ibimidun* [2008] IRLR 940 the Tribunal is required to determine

(a) Whether the claimant has done a protected act

(b) Whether she was treated less favourably than others who did not do the protected act

(c) Whether she was subject to a detriment because she did the protected act.

81. There was no dispute that the claimant had done at least one protected act, in bringing these proceedings. The claimant in these proceedings has done more than one protected act within the meaning of section 27 of the Equality Act 2010. The following are such protected acts:-

(a) Email from claimant's representative to the respondent of 30 April 2018 alleging pregnancy discrimination.

(b) Raising these tribunal proceedings.

82. During cross examination on the recall of Frederick Roberts, he again accepted, as he had done in his initial cross examination, that the respondent had not paid the claimant any SMP payments and at no time had completed the form SMP1 in respect of the claimant. Frederick Roberts was asked if the fact of these Tribunal proceedings having being raised was a factor in his decision not to complete the SMP1 form. His response was '*That's correct. Yes.'* It had previously been accepted by Frederick Roberts in his initial cross examination that he had failed to complete this form. His reason for that was that it was an '*oversight'*. At no time in his evidence did Frederick Roberts suggest that the respondent was not paying any SMP to the claimant because she had not given appropriate notice. His evidence in respect of the claimant's entitlement to SMP is set out in the 'Comments on Evidence' section above. The Tribunal would not normally set out its notes on the evidence in such detail, but consider that to be appropriate here because of the respondent's representative's reliance on the claimant not qualifying for SMP on the basis of her not having given correct notice to the respondent of their obligation to pay her SMP, and because of the conclusions which have been drawn from this evidence in respect of the victimisation claim. The respondent's representative's submissions on this

were not supported by the evidence of Frederick Roberts, who was the only witness for the respondent.

83. There were facts from which the Tribunal could conclude that the respondent had subjected the claimant to a detriment because she had done the protected acts. From the evidence of Frederick Roberts, as set out above, there was a clear admission that the fact of the claimant having brought Employment Tribunal proceedings was a factor in his decision not to sign the SMP1 form. The claimant is entitled to receive SMP and at no stage in the evidence for the respondent was it suggested that she is not entitled to SMP. It is reasonable to conclude that had a decision been made by the respondent that the claimant is not entitled to SMP then they would have signed the SMP1 form to refuse to pay SMP. Unless the SMP1 refusal form is signed by the respondent, the claimant cannot claim Maternity Allowance. By the respondent's actions in not paying the claimant SMP and not signing the SMP1 refusal form, the respondent has put the claimant in very difficult financial circumstances, which have had a severe impact on her. That financial loss is a detriment suffered by the claimant. The Tribunal did not accept that the failure to sign the SMP1 form was an oversight. It was admitted by Frederick Roberts that a factor in him not signing the SMP1 form is that the claimant has brought these Tribunal proceedings. Because of that admission, and because of the primary facts found which are set out above as being relevant to the s27 claim, on the application of *Nagarajan* the Tribunal concluded that the fact that the claimant has brought these Tribunal proceedings is a significant influence to the respondent's failure to make any SMP payments to the claimant. The Tribunal did not accept the respondent's representative's submissions with regard to *Williams -v- The Trustees of Swansea University Pension and Assurance Scheme Swansea University* [2017] EWCA (Civ) 1008. On the facts and circumstances of this case, in failing to agree arrangements re maternity leave and failing to pay SMP the respondent has disadvantaged the claimant in the protected period because of something arising from her pregnancy and her exercising her right to maternity leave and payment of

SMP. Had the respondent met the claimant to agree her maternity leave arrangements no argument re lack of entitlement would have then arisen.

84. The respondent did not present cogent evidence to discharge the burden of proof. For the reasons set out in the 'Comments on Evidence' section, the Tribunal did not accept the respondent's explanation that their failure to make any payments of SMP to the claimant arose simply because of the company's financial position. The claimant has proved facts from which an inference can be drawn that the respondent has subjected (and is subjecting) the claimant to a detriment because the claimant has raised these Employment Tribunal proceedings. The burden of proof shifted to the respondent and it was for the respondent to prove that the fact of the claimant having done a protected act was in no sense whatsoever the reason for the non-payment of SMP (and / or accrued holiday pay) to her. The explanation offered by the respondent is that they cannot afford to pay her but they have not proved that, with no profit and loss or company accounts relied upon, and in any event affordability is not a lawful reason for non-payment of SMP or for non-payment of accrued holidays. The respondent has not proved an explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities, that the fact of the claimant having done a protected act (brought these proceedings) was not a ground for the treatment in question. The Tribunal applied the principle of significant influence as indicated by Lord Nicholls in *Nagarajan.* The fact that the claimant had done the protected acts was not a trivial part of the background which led to her treatment. Frederick Roberts was clear in his evidence that the fact that these Tribunal proceedings were underway affected the way he dealt with matters. The fact that the claimant had done the protected acts was an influence which was more than trivial on Frederick Roberts' and the respondent's decision making. There was no evidence from Suad Abdullah to dispute Fredrick Roberts evidence that he had authority to make decisions in respect of the claimant and the Tribunal does not accept the respondent's representative's submissions that Fredrick Roberts, did not have authority to act for the respondent. Following *Nagarajan*, it was not necessary for the Tribunal to distinguish between

'conscious' and 'subconscious' motivation when determining whether the claimant had been victimised. What has been concluded from the primary facts is that the fact of the claimant having done the protected acts was a significant influence to the on non-payment of SMP and failure to sign the SMP1 form, which are detriments suffered by her. It is not necessary for Frederick Roberts to have consciously realised that he was subjecting the claimant to a detriment because of her having done protected acts. Following Lord Nicholls in *Nagarajan*, the victimisation was '..not negatived by the discriminator's motive or reason or purpose.' Lord Nicholls position in *Nagarajan* was that 'Although victimisation has a ring of conscious targeting, this is an insufficient basis for excluding cases of unrecognised prejudice…..'

85. The respondent's actions in (1) failing to pay the claimant any SMP payments (2) failing to inform the claimant of any decision by them to refuse to pay SMP (3) failing to complete and return to the claimant, in the event of any such decision to refuse to pay SMP the relevant SMP1 form (3) failing to pay her for holiday pay which she has accrued during her maternity leave are actions taken which were because of or materially influenced by the claimant having done the protected acts of (i) notification from her instructed solicitors of 30 April 2018 that it was considered that the respondent's actions toward the claimant were pregnancy discrimination and (ii) raising these Employment Tribunal proceedings. By the respondent not making SMP payments (and payment in respect of accrued holidays during her maternity leave) to the claimant, the respondent has victimised and continues to victimise the claimant by subjecting her to a detriment within the meaning of section 27 of the Equality Act 2010. The victimisation claim succeeds. The claimant has suffered financial loss as a result of this victimisation.

86. The claimant qualifies for SMP. She had at least 26 weeks continuous service with the respondent up to the Qualifying Week (the 15th week before her EWC). She was pregnant at the start of the 11th week before her EWC. She has ceased working for the respondent by reason of her now being on maternity leave. Her normal weekly earnings for the eight weeks up to and

including her qualifying week were above the applicable lower earnings limit of £113. She gave 28 days notice of the date of the start of her maternity leave, which was the date she expected the respondent's liability to pay SMP to begin. She produced to the respondent medical evidence of her EWC. The Tribunal took into account that the guidance on completion of an SMP1 form (at P44) sets out that if refusing to pay SMP the employer 'must' give the completed form to their employee 'within 28 days of their request for Statutory maternity Pay or the birth (whichever is the earlier). That was not done. The respondent has not refused to pay SMP. The Tribunal noted the terms of the Social Security Administration Act 1992, section 163(1)(d) and that SMP may be paid out of the National Insurance Fund and that the overall responsibility for administration of SMP lies with HMRC. The Tribunal recognises that SMP is for the employer to pay and part can be reclaimed by them.

87. The Tribunal did not accept the respondent's representative's submissions with regard to *Hair Division Ltd, the MacMillan* UKEATS/0033/12. The Tribunal has set out in its findings in fact that the claimant is entitled to be paid SMP. That fact was admitted by the only witness for the respondent and the respondent's representative's submission that Frederick Roberts does not have authority to accept that entitlement on behalf of the respondent is not accepted. The Tribunal does not accept the respondent's submissions 'technical defence' made at the stage of submissions that the claimant is not entitled to SMP. In any event, on the facts and circumstances of this case, that 'technical defence' re entitlement to SMP is only relevant if the Tribunal had made an award in respect of non-payment of SMP in term so the claim made under s13 of the Employment Rights Act 1996 (with reference to s27 of that Act). The Tribunal has taken into account the financial loss to the claimant from non-payment of SMP in calculating the appropriate sum as a compensatory award in respect of the victimisation claim. Some of that loss could alternatively have been calculated as part of the compensatory award for the s18 Equality Act claim. What the respondent's representative seeks to rely on in his submissions re the claimant not having entitlement to SMP arose because of the

respondent's failure to respond to the claimant's repeated requests for a meeting to discuss her maternity leave arrangements and failure to discuss the arrangements. The respondent cannot now rely on those failures to avoid their obligation to pay SMP to the claimant. The Tribunal does not accept the respondent's representative's submission that no adverse inference should be drawn from the failure to pay SMP.

88. In all the circumstances, the Tribunal considered that it was appropriate in calculating the amount of the compensatory award in respect of the victimisation claim to award an amount equivalent to the claimant's total entitlement to SMP. In doing so, the Tribunal takes into account *Ministry of Defence -v- Cannock and others* 1994 ICR 918 EAT and that 'as best as money can do it', the claimant should be put into the position she would have been in but for the unlawful conduct i.e. the position she would have been in had the discrimination not occurred, and taking into account the loss caused by the discrimination the loss caused by the discrimination. The fact that the claimant has not received and is not receiving any SMP payment flows from the respondent's unlawful actions. There has been no break in the chain of causation. To continue to receive SMP the claimant ought to have notified the respondent about the birth of her daughter but she did not do so because of the respondent's unlawful conduct. Any consequence of the lack of communication between the claimant and the respondent since the birth of her child flows from the respondent's unlawful conduct. The Tribunal takes into account that the focus in compensatory awards is on compensating the claimant and that they should not be punitive (*Corus Hotels plc -v Woodward & anor* EAT0536/05).

89. Fredrick Roberts accepted under cross examination that the claimant was entitled to payment in respect of 35 hours a week on the basis of the contract which is at P47-P51. The claimant did not accept that unilateral variation but continued to work for the respondent, having made it clear that she considered the unilateral variation to be unacceptable. Tribunal found that the variation in that contract to reduce the hours was an act of discrimination contrary to s18 of the Equality Act. The respondent's actions in reducing the claimant's hours had a resultant effect on the amount of her

entitlement to (a) wages for work done (b) holiday pay (because the amount of this would be calculated with regard to reduced hours) and (b) the amount of SMP (because the reduction in hours had effect in the prescribed period for the calculation of the amount of SMP). These effects (and non-payment of SMP) were detriments from which the claimant has suffered because of this discrimination. These failures (and the failure to pay some SMP) took place in the prescribed period. The claimant is entitled to compensation in respect of this discrimination and the resultant detriments. The effect of that reduction in weekly hours was a reduction in the rate of SMP to which the claimant became entitled. The Tribunal has calculated the appropriate level of compensatory award in respect of the successful s18 claim as follows:-

(i) Effect on SMP of reduction in hours from 35 to 14:-

Due on 29 August 2018
Weekly gross rate of pay of £10.20 x 35 hours = £357
Weekly gross rate of pay of £10.20 x 14 hours = £142.80

Started Maternity Leave 17 July 2018
SMP = 90% for 6 weeks

Rate at 35 hours = £321.30 x 6 = £1927.80
Rate at 14 hours = £128.52 x 6 = £771.12
Difference for first 6 weeks of SMP = £1156.68

SMP rate for additional 33 weeks =
Rate at 35 hours = £145.18 x 33 = £4790.94
Rate at 14 hours = £128.52 x 33 = £4241.16
Difference for 33 weeks = £549.78

Difference in SMP as a result of reduction from 35 hours to 14 hours = (£1156.68 + £549.78) = £1706.46

(ii) Loss of earnings from reduction in hours from 35 to 14:-

Net loss as set out in claimant's schedule of loss at P42 – P43 = £2994.46

90. The Tribunal considers it to be appropriate to make an award for injury to feelings in respect of the aspect of the s18 claim which is separate to the s27 claim i.e. in respect of the reduction in hours from 35. The Tribunal took into account that if there was a redundancy situation affecting the claimant then the respondent could have taken appropriate steps to address that, but they did not do so. The Tribunal considered it to be significant in assessing the appropriate amount of injury to feelings award for this aspect the s18 claim that the claimant had not resigned but had continued to work for the respondent. In all the circumstances the Tribunal awards the sum of £5,000 for injury to feelings in respect of this reduction in hours. With regard to the bands in *Vento* and the Presidential Guidance, this is not a reflection of the seriousness of the discrimination, but rather a recognition that the employment continued after this act (although the Tribunal accepted the claimant's explanation that she continued in employment because she did not want to be unemployed while pregnant) and in recognition that no medical evidence is relied upon. The effect of non-payment of SMP (at any rate) is reflected in the injury to feelings award made under the s27 claim. If the s27 claim had not been successful then an additional award in respect of that aspect of the injury to feelings would have been made in respect of the s18 claim.

91. The compensatory award made in respect of the successful s18 claim (taking into account that the compensatory award made in respect of the s27 claim is reflective of the unlawful acts other than the reduction in hours and the direct consequences of that reduction) is (£1706.46 + £5000 + £2994.46) £9,700.92. An award of interest at the rate of 8% per annum is made to this award for the period from the date of the unilateral change to the date of promulgation of this decision. The period from 29 March 2018 to 21 December 2018 is 35 weeks. Interest on the ward of £9700.92 at 3% for one year is £776.07. Interest award to date on the s18 award is ((£776.07/52) x 35 weeks = £522.36. The total compensatory award made

in respect of the s18 claim is (£9700.92 + £522.36) £10,223.28. Interest continues to accrue on this award at the rate of 8% until full payment.

92. The compensatory award made in respect of the s27 claim takes into account that the claimant has received no SMP payments. Because of the reduction in hours from 35 to 14, the level of SMP to which the claimant is entitled is at calculated with regard to her working 14 hours a week. Her entitlement to SMP is to:-

6 weeks @ 90% of £142.80 = £1156.68

33 weeks @£128.52 = £4241.16

Total entitlement to SMP on 14 hours = £5397.84

93. In all the circumstances, the Tribunal takes the following into account in respect of the calculation of the compensatory award in respect of the s27 claim:-

(i) An amount equivalent to the claimant's total entitlement to SMP at 14 hours = £5397.84

(ii) The net sum due to the claimant in respect of holidays accrued during maternity leave (£1108.12 – calculated as set out below)

(iii) The sum borrowed by the claimant from her Grandmother (£500, no interest)

(iv) The interest payable on the sum borrowed by the claimant from Credit Union (£585)

(v) The cost of a travel pass for the claimant's eldest son (necessitated by the house move) = £7.20 per week (for 39 weeks = £280).

94. Had the Tribunal not concluded that a significant influence to the fact of non-payment of accrued holiday pay to the claimant was that the claimant has raised these Tribunal proceedings, nor that a significant influence to the non-payment of SMP to which the claimant is entitled was because of her being pregnant and having exercised her right to take maternity leave, then

an award in respect of non-payment of those accrued holidays would have been made in terms of the claim under s13 of the Employment Rights Act 1996, which is successful in respect of the non-payment of holidays accrued during maternity leave. SMP is wages as defined in s27(c) of the Employment Rights Act 1996.

95. The Tribunal accepted the claimant's evidence that she is due payment in respect of 17 days holiday. The claimant's total entitlement to holidays in calendar year 2018 is to 28 days. The respondent was entitled to refuse to pay holiday pay in respect of holidays which had not yet accrued, but no payments in respect of holidays accrued during maternity leave has been paid. The Tribunal has concluded that a significant influence to that non-payment is that the claimant is pregnant and has exercised her right to take maternity leave (which is discrimination under s18 of the Equality Act) and that these proceedings have been raised (which is victimisation under s27 of the Equality Act). The amount due in respect of these accrued holidays is calculated at the rate of 35 hours and paid under the award for the s27 claim. If compensation for that financial loss had not been awarded in respect of the s27 claim then the same amount would have been awarded in respect of the s18 claim. If compensation for that financial loss had not been awarded in respect of the s27 or the s18 claim then the same amount would have been awarded in respect of the claim for unlawful deductions from wages under s13 of the Employment Rights Act 1996. The loss is compensated under the s27 claim because of the effect on interest payable and at the rate of 8% from the midpoint rather than from the date of effect of the change in contractual hours. The net amount (accepting the claimant's representative's figures on the net weekly wage at £307.81 (daily net rate of £307.81/ 5 = £61.56) is £61.56 x 17 = £1046.52.

96. On the application of *Rigby -v- Ferodo [1988] ICR 29,* and given that the definition of wages set out in section 27(1)(c) of the Employment Rights Act 1996 specifically includes SMP, in circumstances where the claimant did not agree to the unilateral variation to decrease her contractual hours from 35 per week, and did not affirm the breach, then the amount of SMP due to the at the rate based on 35 hours a week is 'properly payable' to the claimant.

The unlawful deductions from wages claim in respect of SMP is successful. The claimant is entitled to be paid that as an unauthorised deduction from wages. No award has been made in reflect of any loss arising from the successful claims under s13 of the Employment Rights Act 1996 (holiday pay or SMP) because of the principles of double recovery and because the compensatory awards made are reflective of these amounts as loss.

97. In assessing the appropriate level of injury to feelings award in respect of the s27 claim (and the s18 claim other than that directly arising from the reduction in hours, as set out above) the Tribunal takes into account the *Vento* guidelines and the Presidential guidance on these. No medical evidence on the effect of these event son the claimant has been relied upon. The Tribunal accepts the claimant's explanation that her focus has been on the health of her new baby rather than her own. The Tribunal accepts the claimant's evidence and recognises the effect on the claimant of her children being upset and affected by the consequences of the respondent's actions, and in particular in respect of her having to give up the family home as a result of not receiving the payments to which she is entitled from the respondent. The injury to feelings award does not seek to compensate for the effect on the children, but rather for the claimant's upset at her children being so affected and her upset at the consequences of the respondent's unlawful actions and failures. In the circumstances, the award for injury to feelings in respect of the s27 claim (and the s18 claim other than that directly arising from the reduction in hours, as set out above) is made in the middle of the mid band of Vento. The mid band of Vento is £8,600 - £25,700 and the middle of this band is £17,150 which is what is awarded as injury to feelings for this aspect of the claims.

98. The total award made award in respect of the s27 claim (and the s18 claim other than that directly arising from the reduction in hours, as set out above) is (£5397.84 + £1046.52 + £500 + £585 + £280 + £17150) £24,959.36. An award of interest at the rate of 8% per annum is made to this award from the mid-point of the period between the letter of 30 April 2018 and the date of promulgation of this decision. This is a period of 17 weeks. Interest on the award of £24,959.36 at 8% for one year is £1996.75. Interest award to date

on the s27 award is ((£1996.75/52) x 17 weeks = £652.79. The total compensatory award made in respect of the s27 claim is (£24,959.36 + £652.79) £25,612.15. Interest continues to accrue on this award at the rate of 8% until full payment.

99. In the interests of justice, the Tribunal considered whether it was appropriate to make a declaration in respect of the claimant's entitlement to SMP (s124(2)(a)) and / or to make a recommendation in terms of the Equality Act s124(2)(c). The Tribunal has not accepted the claimant's representative's submissions to order the respondent to determine if the claimant is eligible for SMP and, if not satisfied to complete the form SMP1 and return it to the claimant because as at the date of this decision because none of the circumstances set out in Box D of that SMP1 form apply and the provisions of s124 do not allow for such an order. The Tribunal has made a compensatory award reflective of the total amount of SMP payable to the claimant by the respondent. In the event of the respondent electing to pay some or all of that award as SMP payments, the respondent may apply to the Tribunal for a variation of the compensatory award, to reflect such payments made to the claimant. Any such application for variation of the compensatory award should be accompanied by proof of payment to the claimant.

100. The Tribunal makes the following recommendation re the SMP1 form:-

> 'In the event of the respondent taking the decision during the remainder of the claimant's maternity leave that the claimant has become no longer entitled to SMP, then within 7 days of that decision, the relevant SMP1 form is completed and signed on behalf of the respondent and returned to her with the Mat B form given to the respondent by the claimant.'

101. The Tribunal does not accept the claimant's representative's submissions to award aggravated damages. The Tribunal accepts the claimant's representative's submissions to make an award of interest at 8%, as set out above. The Tribunal accepted the claimant's representative's submissions to make the award of interest in respect of the s18 claim from the date of

effect of the reduction in contractual hours and to make an award of interest on the victimisation compensatory award, calculated from the mid-point as set out above. Interest on the awards continues to accrue from promulgation at the rate of 8%.

102. The recoupment provisions do not apply to the award.

Employment Judge: C McManus
Date of Judgment: 03 January 2019
Entered in register: 09 January 2019
and copied to parties