THE EMPLOYMENT TRIBUNALS

Claimant **Respondents**
Ms S Collinson **Drs Michie, Baines, Umshanker, Pearson & Hardy (t/a Blacketts Medical Practice)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 13-16 May 2019

EMPLOYMENT JUDGE GARNON Members Ms B Kirby and Mr M Radcliffe
Appearances
For claimant Mr P Hargreaves Solicitor
For respondents Mr M Howson Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is

1. the claims of constructive unfair dismissal, unlawful deduction of wages, indirect sex discrimination and associative disability discrimination are well founded. The parties will inform the Tribunal **by 3 June 2019** if they require a remedy hearing to be fixed.

2. the claims of failure to deal with a flexible working request ,direct sex discrimination , pregnancy/maternity discrimination and victimisation are not well founded and are dismissed.

REASONS (bold print is our emphasis)

1. Introduction and Issues

1.1. The claims are constructive unfair dismissal unlawful deduction of wages and failure to deal with a flexible working request in accordance with s 80G under the Employment Rights Act 1996 (ERA); direct or indirect sex discrimination (s13 and s19 Equality Act 2010 (EqA); pregnancy/maternity discrimination (s 18 EqA); associative disability discrimination (s 13 EqA); victimisation (s 27 EqA);

1.2. A list of issues had been agreed. In Price-v-Surrey County Council Carnwath LJ, observed "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented".*

1.3. Chapman-v-Simon precludes the tribunal dealing with acts which are not pleaded. Office of National Statistics –v-Ali held each type of discrimination is separate from the others. It is necessary to identify both the act and the type of discrimination relied upon. Absent from the agreed list was indirect sex discrimination. Mummery J's Judgment in

Selkent Bus Company –v-Moore explained why ***the addition or substitution of other labels for facts already pleaded*** is an amendment which may be allowed at any time. In Abercrombie v Aga Range Master Limited [2013] IRLR 953 Lord Justice Underhill said:-
" ..the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old..It is thus well recognised that in cases where the affect of a proposed amendment is simply to put a different legal label on facts already pleaded permission will normally be granted …".

1.4. Mr Howson helpfully agreed indirect sex discrimination should be considered. The list of issues also says there may be limitation points but we will address those if and when we come to them. Somewhat abbreviated , the real liability issues are as follows

1.4.1. Did the respondents, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them and the claimant ? if so did the claimant resign in response to that breach without first having affirmed the contract?

1.4.2. Did the respondents treat the claimant less favourably because of her children's disability than they treated or would have treated others?

1.4.3. Did the respondent treat the claimant less favourably than they would have treated a male employee who had just become a parent?

1.4.4. Did the respondent apply to its employees one or more provision , criterion or practice (PCP) which puts women at a particular disadvantage when compared with men? If so, did it put the claimant at that disadvantage? If so, do the respondents show the PCP to be a proportionatre means of achieving its legitimate aims?

1.4.5. Did the respondent treat the claimant unfavourably because she had taken maternity leave ? If so, did that treatment take place either inside the protected period or outside it in implementation of a decision made within it?

1.4.6. Did the claimant do a protected act or the respondents believe she had or might ?. If so, did the respondent subject claimant to detriment because of that?

1.4.7. Did the respondents fail to deal with the claimant's flexible working request in a reasonable manner or not rely on one of the statutory grounds when refusing her application?

1.4.8. From January 2018 to the end of her employment was the claimant paid the wages properly payable to her under her contract?

2. Findings of Fact

2.1. We heard the evidence of the claimant and read the written statement of her fiancé Mr Christopher Pryke. For the respondent, we heard its Practice Manager , Ms Jayne Turner, its senior partner, Dr Andrew Forbes Michie, and another partner, Dr Elizabeth Hardy.

2.2. The respondents run a GP surgery for 10,000 patients in the Darlington area. It is open Monday to Friday 8am-6pm Saturday 9am -1pm and for one or two late clinics. The claimant worked as a receptionist 1pm-6pm Tuesdays, 8am-5pm Wednesday including a one hour unpaid lunch break, 9am-1pm Thursdays and 8am-noon Fridays. She is the only receptionist in recent years to have qualified as a phlebotomist and she did phlebotomy sessions noon-1pm Tuesdays and Fridays where she would take blood samples from patients. Initially the Friday session was to cover someone's maternity leave but that person never returned. At most times there are 3-4 receptionists working simultaneously so, allowing for sickness and holidays, the average hours required are about 20-24 per person . There are some who work more and some less. There are 6 other people qualified to take blood samples 4 nurses and 2 Healthcare Assistants (HCA's).

2.3. The practice is particularly busy on Mondays as it has been shut for most of the weekend. When we asked Ms Turner to explain what reception staff worked on a Monday she gave us the following information
Lisa Grandi 8:30 to 18.30
Nicola Green 8:15 to 18.00
Alison Hall 8:15 to 13:00 on reception and 14:00-17:00 on medical records
Victoria Martin 12.00 to 19:15, that night having a late clinic
Jade Martin 7:45 -16:50
Lisa has primary school children and also works on Tuesday and Friday afternoon
Nicola has grown children and works on a Thursday in the administration department in the morning and reception in the afternoon
Alison works all day Tuesday and works Thursday on medical records
Victoria does have small children and has care problems since her mother died so would have some difficulty being flexible
Jade has no children works Monday,Tuesday , Wednesday morning, Thursday, and Friday morning.

2.4. Ms Turner omitted from the list she gave us initially one person. When the claimant started her maternity leave the respondents decided to hire **as maternity leave cover** a young woman, Samantha(known as Sam) Weeks. She has no children and started on a probationary period 21 ½ hours as a medical receptionist Her offer letter is dated 13 February 2017 .Everybody including the claimant speaks highly of her but she has far less experience than the claimant in a job which involves training and practice. She used not to work on Monday or Tuesday morning but did Tuesday afternoon Wednesday all day Thursday morning and Friday morning. She successfully passed her probationary period and on 10 October 2017 was given an extension of a temporary contract to 31 May 2018. That date was at least a month after the claimant's additional maternity leave would have ended even if she had taken all of it. Because maternity pay stops after 39 weeks most people come back then which would have brought the claimant back in February. The letter says to Ms Weeks: "*I would be grateful that from 1 January 2018 if you would work an extra shift on Monday starting on reception at 10:45 am to 5:30 pm. This will allow Allison to move across to provide cover to medical records during this time.*" This shows a change of Allison's duties was anticipated in October 2017.

2.5. As will be seen shortly, the claimant started to ask about changing her hours in November 2017. On 15 December 2017, 3 days after the claimant flexible working request had been refused, a letter was written to Ms Weeks stating:
I am writing to confirm that from 1 January 2018 you will work the following:

Monday 10:30 am till 12 noon 1 pm till 5:30 pm
Tuesday off morning 1 pm till 6 pm
Wednesday 8 am till 12 noon 1 pm till 5 pm
Thursday 8 am till 1 pm
Friday 8 am till 12 noon
This will be an increase in your temporary contract hours to 28 per week from 1 January

2.6. To complete the picture, on 26 June 2018 Ms Weeks was given an extension to her temporary contract to 31 August. On 16 August it was further extended to 30 November. On 16 November 2018 she was given a permanent contract with the hours as above. The last line of the letter thanks her for providing cover for holiday and sick absence of other staff.

2.7. Also at the end of 2017 the practice was planning to start a new lifestyle clinic called the Bliss Group in which Lisa would do some work. It was due to start as a pilot scheme on about 8 January 2018 and they did not know what take-up was likely to be.

2.8. The claimant was born on 18 November 1982. She was employed as a Medical Receptionist from 16 June 2015 She later qualified as a Phlebotomist. Her phlebotomy hours were being increased as confirmed in a letter of 17 October 2016. She was on track to progressing in a more clinical role.

2.9. When she told the respondents about her pregnancy with twins, in November 2016, they were supportive. In January 2017 they carried out a risk assessment and it was decided for good reasons she should not do phlebotomy while pregnant. On 28 April 2017 twin boys were born 11 weeks prematurely . She started maternity leave the next day. The twins spent 3 months in hospital with serious health issues including holes in the heart and chronic lung disease both of which required intensive treatment to keep them alive. Only in August 2018 did they come off oxygen support. Both are accepted by the respondents as being disabled. They were unable to attend nursery because of the need for oxygen and their depleted immune systems which meant they could potentially catch illnesses in a nursery setting.

2.10. It was a stressful time for the claimant and on 4 July 2017 she had a consultation with Dr Umashankar. It was decided she needed support but she was not prescribed any medication. On 2 October 2017 she had a consultation with Dr Hardy. The twins were back in hospital and she was staying there most nights feeling very anxious. Dr Hardy suggested some counselling and on 13 October 2017 prescribed an anti-depressant.

2.11. On 10 October Sam Weeks had her contract extended until 31 May 2018.She had no child care commitments. The claimant believes the respondents thought at this point she might not be coming back to work because of how ill the twins were.

2.12. On one occasion during her maternity leave she visited the surgery and was chatting to Lesley Binks, the senior receptionist. She made some comment about return to work, and Ms Binks said: "*But you won't be coming back to work after your maternity leave though, will you*?" She confirmed she would be. Not returning was never an option for her. She loved the job, and wanted to continue her clinical career progression. Her mother and sister both work part-time and had agreed to care for the twins between them on their days off (Mondays and Wednesdays) until the twins were well enough to attend a nursery.

2.13. In November 2017 the claimant asked for a meeting to discuss returning to work in February. On 14 November she met with Ms Turner and Ms Elizabeth Dobson, the finance manager. When she outlined her request Ms Turner said it would be put to the partners to decide and added "*I'll do my best for you*." Ms Dobson then said: "*Don't worry Stacey, if we can't accommodate your request we'll give you time to find another job*." The claimant believes they would not have taken this attitude had she given birth to non-disabled babies. She thinks they thought because of her children's' disabilities she would be unreliable in the future, and they did not, in her words " *want to deal with the hassle*" . She accepts neither Ms Binks nor Ms Dobson are part of the Senior Management Team (SMT) which is Ms Turner , Sandi Wood, Deputy Practice Manager, and the Senior Practice Nurse .

2.14. At page 130 there is an email from Ms Turner on 14 November 2017 in which she states she will take advice from Peninsula. The claimant initially wanted a phased return but, because of what she perceived to be a reluctance at the meeting to give her changed hours, decided not to push for too much, so later texted Ms Turner saying she could work the full days of Monday and Wednesday immediately upon her return.

2.15. On 17 November 2017 Ms Turner sent the claimant a text "*Hi Stacey, further to our chat on Tuesday please cud put yr request in writing & drop into surgery asap. Please can u add the dates of yr preferred pattern of working, many thanks Jayne x* ".

2.16. On 21 November the claimant submitted a request for Mondays and Wednesdays, 8am-5pm. On 22 November 2017 Ms Turner emailed the partners saying she would take advice from Peninsula and wrote to the claimant inviting her to a meeting on 24 November which, for good reasons, was rearranged to 8 December 2017.It took place with Ms Turner and Ms Wood. The claimant asked when she could do her phlebotomy clinic, but before she could finish the question Ms Turner said there was no room available. Phlebotomy appointments are arranged every 10 minutes in a one hour session. There is always demand and a session could be booked on any day of the week. One at 8am would be popular with patients who needed to get to work at 9 am. The absence of an available and suitable room would be a genuine problem.

2.17. The claimant felt they were trying to put barriers up to discourage her form returning. We asked Ms Turner why she had not at least approached the other reception staff who at that time were scheduled to work on a Monday to ask them if they would swap, even a couple of hours, for another day. Her first answer was she would go to the partners. Dr Michie in evidence was quite clear all the doctors primarily concentrate on clinical work and delegate the running of the practice to the SMT. That is a commonplace arrangement and explains why Dr Michie had little personal knowledge of the circumstances of the claimant or any other employees but relied on information relayed to him by Ms Turner. We put to Ms Turner it seemed incongruous she would speak to the partners before she had even asked the other staff what they could do. She could give no reply at all to the question put to her save to say, as others did, she "knew" the other staff's personal circumstances .

2.18. The claimant was asked if she would be able to provide holiday and sickness cover at short notice, even though she had never been required to do the latter previously. She said she could do planned holiday cover to an extent, because her partner worked different shift times on alternate weeks and so he may be able to step in, but because the twins could not attend nursery she could not commit to being fully flexible and not to short notice sickness cover. Ms Turner's statement says "*During all of our staff interviews we ask 'how*

flexible are you' as it is important for our staff to have the flexibility to work extra shifts to cover sickness absence/holidays as per the Employee Handbook (page 76)." There is a huge difference between covering for unexpected sickness absence at short notice and covering for planned leave booked weeks in advance. Page 76 of the Handbook only mentions the latter. Ms Turner kept returning to the point this is an NHS practice in which they must have full staffing and therefore everybody must be able to be "flexible". She was quite unable to answer how that can be reconciled with ever employing women in the perinatal period or disabled people. Of course, in practice if people do have a reason they cannot cover, Ms Turner recognises there is nothing she can do to force that person. All the respondents can expect from any employee, and all they get, is an undertaking the employee will use his or her best endeavours to provide cover if they can. So why ask for a **guarantee** from the claimant?

2.19. Ms Turner emailed the partners setting out what they had discussed Including that the claimant "*could not guarantee*" being able to provide holiday/sickness cover (page 142). She rolls the two together and fails to mention the claimant had said she would try to cover planned absences . Ms Turner's statement mentions the partners " *concerns being that the practice was already fully staffed on a Monday and there was no additional patient demand for phlebotomy on the Monday or Tuesday* (a mistype for Wednesday)". The email goes on to request the matter be discussed at Tuesday's partners meeting "*as I will need to get a letter out to her asap, as she is down to attend the Christmas party on the Saturday evening.*" She did not attend the party, because she had started to get the impression she was not wanted at work. A copy of this email was seen by her in 2019 following a Subject Access Request (SAR) as was one of 11 December in which Ms Turner wrote there was a partners' meeting the following day to discuss "*the Stacey situation*."

2.20. At page 144 the respondents' notes of the partners meeting run to a single page. It started at 8:30 am and finished by 9:30 am because the doctors would then be starting clinical work .If there was a detailed discussion it certainly is not reflected in the minutes which make very little reference to the question of whether the claimant's hours could be changed to a Monday. Dr Hardy said all the doctors knew they were fully staffed that day , but the question of anyone else being moved to another day was not even considered . Mr Howson, in closing submissions said that would mean the "other " day would be overstaffed. Not so if Ms Weeks maternity cover hours were reduced or someone else volunteered , temporarily or permanently, to reduce their hours .Instead the notes focus on "*it is important for **all staff** to have the flexibility to work extra shifts to cover sickness absence/holidays both at short notice as per our Employment handbook*." The notes conclude her request would be refused but rather than referring to the claimant in the third person, are addressed to her: "*At the end of lengthy discussion, the Partners felt that agreeing to the changes would: 1) have a detrimental effect on our ability to meet our patient's demands because you are unavailable to provide cover during holidays/periods of staff sickness 2) create unacceptable difficulties for us due to an insufficiency of work during the Mondays you proposed to work as we are fully staffed on this day*." This is identical to the letter later sent to the claimant refusing her request (page 145). It must be remembered at this stage the claimant was not asking for any change of her Wednesday hours, only to cease working on Tuesdays Thursdays and Fridays and work fewer than her previous hours on a Monday. A bald refusal of that request and insistence on her working her previous days meant she could not do the job so would have to leave.

2.21. Dr Michie oral evidence was the partners never "*put together in their minds*" that a letter to the claimant saying simply "NO" to her request meant her job was gone. He thought a refusal and right of appeal would prompt the claimant in his words "*to re-think the possibilities for childcare*" . The Employment Judge asked if that amounted to " *Go home and try harder* " and he agreed it did . The Employment Judge asked what made him think she had not tried her hardest already. He accepted there was no evidence she had not .

2.22. Ms Turner's statement says " *The two reasons cited were that we were already fully staffed on Monday and so there was no vacant position for the Claimant to take. There were also concerns regarding how flexible the Claimant would be to undertake additional shifts which, as the Claimant was reducing her hours, was a relevant consideration as* ***an employee on reduced hours can commonly be asked to pick up additional shifts".*** In effect, Ms Turner and the partners expected the claimant to be as " flexible" as everyone else regardless of her twins ill health.

2.23. On 13 December the claimant received an email from Ms Turner (page 146) whom she had asked her to send the practice's flexible working policy, her contract, and the Equality and Diversity policy, saying there was no flexible working policy and instead referred her to Section 80F Employment Rights Act 1996 without further explanation. On page 153 an email from Ms Turner of 14 December 2017 to the partners refers to the documents the claimant had asked for and states: "*I spoke to Peninsula who sent me a link to the Employment law act [sic] which I forwarded to her*." The request signals the claimant may do a protected act.

2.24. The email also refers to the claimant's request for her contract when she started the bloods clinic and says "… *there was no new contract merely a letter In change of hours, it didn't even mention blood clinics".* It reads as though Ms Turner was looking to reject that part of the claimant's role was contractual.

2.25. On 17 December 2017, the claimant stated in her appeal letter she had told Ms Turner she could provide some cover, but not commit to cover in all cases. She referred to the opportunities for career progression given prior to maternity leave, now being removed. She said she believed the way she had been treated was discriminatory and unfair. This is a protected act. Ms Turner emailed the partners on 19 December saying she wanted to speak to"*AFM* (presumably Dr Michie) *and TP*" (of Peninsula) and confirming Ms Weeks' contract had been extended to 31 May 2018.

2.26. On 2 January the respondents invited the claimant to a meeting to discuss her appeal on 9 January 2018. It was conducted, at Peninsula's recommendation, by Ms Elizabeth Cook of "HRFace2Face". Her report, dated 19 January 2018, made recommendations :
That whilst the Employer cannot accommodate the full flexible working arrangement, an alternative arrangement should be suggested. The reduction in working hours should be accommodated as well as the working days of Monday and Wednesday.
SC should receive written confirmation of the flexible working arrangements ***and review dates should be in place*** *and any discussions at such meetings should be documented and kept on file as record of the meeting.*
A copy of this report in its entirety should be made available to SC *with the appropriate cover letter*
At page 182 Ms Cook wrote the claimant's position regarding providing cover for sickness was "*reasonable due to the uncertainty of when this cover would be required*."

2.27. Dr Michie said this outcome was " *not what we had hoped for*" adding he thought Ms Cook would support what the partners had decided in December. Dr Hardy disagreed with his view. Frankly, Ms Cook's recommendations were exactly what should have happened from the outset and, had they been followed fully, would have prevented the claimant's later grievance, her resignation and this case ever having to be brought. The report was received by the respondents on 22 January.

2.28. On 23 January the respondents contacted the claimant to say they needed a meeting. The claimant asked if it was to discuss the outcome of her appeal. Ms Turner replied it was and they would go through the report with her then. On 24 January she emailed Ms Turner asking if they could send the outcome in writing along with the report .Ms Turner replied she and Dr Michie wanted the claimant to attend to go through the report The claimant emailed again on 25 January, asking if could see the report before the meeting so she could prepare. Only then was it sent.

2.29. On 26 January she attended a meeting with her friend Anne Willis . Dr Michie, Ms Turner and Sarah Naisbitt as notetaker were present . She was told flexible working would be granted on a temporary basis **until the end of April** based on her returning in February. This was effectively a trial period. She was offered Mondays 10:30 until noon and 1 pm until 5:30 pm Wednesdays 8 am to noon and 1 pm to 5 pm (14 hours) and an hour's phlebotomy session on Fridays not the 16 hours she requested. This would prevent her getting Working Tax Credit and contrary to Ms Turner's evidence we find she and through her the respondents, knew this. The respondents rationale is they were "fully staffed" for the first two hours on Mondays, but (a) everyone agrees it is a very busy time and having the claimant in work would have cost two hours pay , £16.80. (b) they had not asked any of the staff who were in if they would be prepared to "swap" or forego their hours temporarily to help a valued colleague in need. She had always said she could only arrange childcare for Mondays and Wednesdays, so the respondent knew she would be unable to do phlebotomy on a Friday.

2.30. Dr Michie says there is no reason phlebotomy could not be done by the claimant on a Monday morning except for the absence of a suitable room . He personally made no enquiry as to whether such a room could be **made** available. Though we accept the nurses and HCA's should have first priority on such rooms we have no evidence from the respondents that anyone else explored the possibility. Dr Michie's statement says

"on the 12th December 2017 it was decided to reject the flexible working request. because there was no available shift for the Claimant to work on Mondays (the Claimant had previously never worked Mondays). We were also concerned about the Claimant's limited flexibility to cover other shifts. Flexibility is a requirement of all of our staff in order to cover sickness and holidays as the needs of our patients is our greatest concern.

However this situation changed in January 2018. By this time the situation of Monday working had changed as two members of the reception team were seconded away from their Monday work to other areas. Ms Lisa Grandi was to work in the reception from 8:30am – 10:30am and then from 10:30am she was to work elsewhere. Furthermore Ms Allison Hall was seconded to medical records for Monday afternoons. We therefore proposed a compromise the Claimant would work from 10:30am – 5:30pm on Mondays .. and 8:00am until 5:00pm on Wednesdays ..."

These staff movements were foreseeable, though not guaranteed, **before** 12 December. We do not accept a change of situation caused the respondents to offer what they did, rather in was Ms Cook telling them their earlier stance was indefensible

2.31.The claimant was told the proposed arrangement would commence on her return on 12 February and remain in place until 27 April, when it would be reviewed. She said the twins may still not be able to attend nursery at that point, but was reassured 27 April was for reviewing the arrangement, and it could continue beyond that date. If she had been told it could be changed at any earlier time she would not have been able to agree as she was not in a position to work any hours over and above what she had proposed. This was the first "offer " from the respondent .

2.32. On 29 January 2018 the claimant emailed Ms Turner to confirm she could not work on Fridays, accepted the hours on Mondays and Wednesdays and confirmed she would return on 12 February. This was a counter offer, because her not working Fridays had not been agreed by the respondents. The claimant then received a letter from Ms Turner dated 29 January which included: "*Should this arrangement have a detrimental effect on the operation of the organisations, it may be necessary to review the situation at an earlier date… and if it is having a detrimental effect, then it may be necessary for you to revert back to the terms and conditions of employment that were in existence prior to your request*." This "counter counter offer" **was not accepted**. Ms Turner's statement says
The reason why we put a review date of the 27th April 2018 was due to the Claimant's own preference. During the flexible working appeal meeting the Claimant stated that this was only a "short term problem needing a short term solution" and that it was planned "that the twins will be weaned off oxygen in April". The reason for the review date at the end of April was for all parties to assess whether the new working pattern was working (for both us and the Claimant) and to assess the Claimant's personal circumstances. If the flexible working request was granted on a permanent basis then the Claimant could not return to her pre-maternity leave hours without other staff deciding to leave or voluntarily alter their shifts. Thus the Claimant would be trapped in these new hours. At the time we were keeping the Claimant's pre-maternity leave hours available for her to return to which she could have done after April if the twins were successfully weaned off oxygen.
We also offered the Claimant a one-hour phlebotomy session on Friday from 2:30-3:30pm. The Friday session was due to revert back to Annie however she did not return from maternity leave. We therefore offered this slot to the Claimant. Unfortunately this was the only time we could offer as this was the only time that a nursing room was available as two nurses finish work at Friday lunchtime. The Thursday session we couldn't offer to the Claimant as she had requested not to work Thursdays.(She had requested not to work Fridays too)
The Claimant subsequently emailed me on the 29th January 2018 accepting the new proposed hours for Monday and Wednesday but that she would not be able to do the proposed phlebotomy clinic on a Friday at the hour offered. I acknowledged the acceptance the same day (page 193).

2.33. Up to this point the respondents' offers were reasonably in accordance with Ms Cook's recommendations. Then comes the major departure, which caused all the claimant's stress, anxiety and upset which followed:
I wrote to the Claimant on the 29th January 2018 formally setting out the new working pattern that had been agreed and the agreed review date of the 27th April 2018. A line was inserted stating "should this arrangement have a detrimental effect on the operations of the organisations, it may be necessary to review the situation earlier". ***The purpose of this line was to allow some flexibility on our part in the event that the new working pattern was not working and detrimentally impacting upon the practice.***

2.34. In her oral evidence Ms Turner said this sentence was added on advice from Peninsula. Dr Michie was clear the partners had not insisted on it. The claimant sent an email rejecting the proposal as it was not what had been agreed. She received a letter dated 5 February from Ms Turner which did not address that .She contacted ACAS who said this was not even an agreed trial period. Ms Turner said a letter at page 199 was a retreat by the respondents meant to give the claimant some reassurance. It contains the paragraph
Although the change to your working patterns has been granted on a temporary basis, it does not mean that it won't or can't continue. However, it would be remiss of us to make a decision about the circumstances in a few months when we don't know what the circumstances would be, hence the reason why we will review the situation at the agreed time and decide how we move forward.
When we asked what "the agreed time" was, she said 27 April. In that case why put the extra sentence into the letter at all? As it was the cause of the present impasse, why not unequivocally withdraw it?

2.35. The claimant was experiencing stress, anxiety and panic attacks. On 6 February 2018 she had a consultation with Dr Adisa who signed her off sick for 6 weeks with stress-related problems. She handed in the sick note that day. It had taken 10 weeks for the claimant, who was in a vulnerable state of mind, to prise from the respondents an offer of a trial period which could have been made before Christmas and, when she thought she had it, it was taken away by the unnecessary sentence designed to allow the respondent "flexibility".

2.36. The following day Ms Turner sent a letter inviting her to a meeting to discuss her absence . This was far too early to embark upon sickness management processes and was understandably viewed as such a step by the claimant. The letter stated the meeting could take place at the surgery, her home address, or elsewhere if she preferred but suggested the surgery on Thursday 15 February 2018.

2.37. As the respondent was aware, she had no childcare for the twins on Thursdays and it was half term so she would have her two older children at home as well. She emailed Ms Turner explaining this and asking if the meeting could be held at her house. On 19 February, the claimant said she did not feel strong enough to meet at the surgery, but if they insisted, could she provide a list of questions prior to the meeting. Ms Turner responded the proposed meeting should be at the surgery "*as opposed to imposing on yourself and conducting the meeting within your home.*" Ms Turner also mentioned a potential referral to Occupational Health(OH), "*as they may be able to assist with what is triggering your stress*." The respondents must have known what was triggering her stress. On 22 February 2018, Ms Turner sent the claimant a self-referral form for OH.

2.38. Ms Turner asked the claimant to a meeting at the surgery on 22 February, **also a Thursday**. Ms Turner was oblivious to, or simply not reading, what the claimant had written about this . The meeting was cancelled by the respondents due to practice commitments indicating the claimant had somehow managed to get care for the twins . Ms Turner then sent another email suggesting Monday 26 February, again at the surgery. She did not address the request to have the meeting at the claimant's house. Dr Michie's statement says
When approached by Ms Turner about this I decided that this would not be appropriate. The Claimant had two very young twin children, under the age of one, who also had medical needs and I felt that it would be distracting for everyone for the meeting to take place in her home with them present. As the Claimant lived only a few minutes walk away from the

practice I believe it was reasonable for such a professional meeting to take place in the practice. This was not intended to disadvantage her in any way.
Welfare meetings with sick employees commonly happen at the employee's home. Due to the respondent's inflexible approach the meeting never took place. Dr Michie now says he regrets his decision.

2.39. On 27 February the claimant received her payslip and noticed she had been paid based on a 14 hour week. Because she had rejected the proposal when told it could be brought to an end at any point, she understood her contracted hours remained unchanged. She emailed Ms Turner who responded she had agreed a 14-hour week so this was not a mistake.The claimant replied on 1 March she had rejected the final offer . Ms Turner responded she had accepted for Monday and Wednesday, so these were her new hours.

2.40. Some 5-6 weeks passed with no progress to a resolution. On 9 April the claimant attended OH at the hospital. The OH nurse said she was not aware what questions the respondents wanted her to answer as they had not completed the form correctly so she had to phone to find out. The OH report showing the questions Ms Turner wanted asked and the responses simply confirms the claimant said she was suffering from stress; her fit note was due to expire on 13 May 2018; and when she was ready to return to work a phased return could be considered; and there were no health and safety risks. The respondents wrote to her on 17 April 2018 sending a leaflet about how to self-refer for counselling (page 241).

2.41. Ms Turner's statement says "*The Claimant had repeatedly stated that it was the Flexible Working Request process that was the source of her stress but we felt that we were was making every effort to resolve this, including the use of third parties to reach agreement. Similarly, we felt that the two full days issue had been resolved to the Claimant's satisfaction as we had given the Claimant almost everything that she wanted."* She seems oblivious to the reasons for the claimant rejecting the offer being the unnecessary caveat, and even in her evidence to us, did not recognise it was a change of a fundamental nature.

2.42. Pausing there, the other feature none of the respondents' witnesses seemed to recognise was that whatever hours Sam Weeks was working were as maternity cover for the claimant. Ms Weeks was promising but inexperienced in comparison the claimant. We accept their evidence that, having invested time and money in training the claimant, she would have been the preferred person to fill those hours. The evidence shows they were trying to keep Ms Weeks. In our view, their aim, consciously or not , was to keep Ms Weeks as a good substitute in case the claimant became unreliable. Why would she? The clear inference is the respondents thought, again consciously or not, her disabled twins may prove more of a childcare problem than even the claimant had anticipated.

2.43. On 1 May, the claimant submitted a grievance again including allegations of discrimination, another protected act . On 10 May she was invited to a grievance hearing on 22 May at the surgery She was signed off sick again until 7 July 2018. On 16 May Dr Pearson emailed Ms Turner to ask when they could stop paying the claimant. Ms Turner responded it was August (page 255).

2.44. At the claimant's request the grievance meeting was rearranged for 5 June. On 4 June Ms Turner sent an email saying when the claimant arrived she would be taken straight to the meeting room on the top floor, as "*This saves any staff the awkwardness of meeting with her.*" She now says two staff had been contacted by the claimant and felt "conflicted ". There

is no evidence from those staff to support that and it was not put to the claimant. This was one of the emails she saw just before she resigned. It upset her, and understandably so.

2.45. The grievance meeting was conducted by Dr Hardy. The claimant was accompanied by a representative from Unite, and Sarah Naisbitt took notes (page 263). The claimant explained she felt she had been treated differently since the birth of the twins. Our view of Dr Hardy's oral evidence was she saw the grievance as complaining about the respondents' targeting of the claimant for directly discriminatory reasons. There is some justification for her view because parts of the grievance do make such an attack . However, the main thrust of it is they had "got it wrong" . Dr Hardy had never handled anything like this before and had no training in doing so . The meeting itself was conducted fairly well.

2.46. On 22 June the claimant chased up the outcome as the respondent's grievance procedure says she should receive a response in 10 days On 22 June 2018 she was sent a letter from Dr Hardy rejecting her grievance (page 272-6). We find no element of "cover up " in the outcome. It simply expresses the view, genuinely held to this day by Dr Hardy, that the respondent acted throughout with good intentions. There is no recognition that the 12 December decision and the extra sentence in the 29 January offer were wrong.

2.47. The claimant appealed on 28 June 2018 pointing out inaccuracies in Dr Hardy's findings and made it clear she had no confidence the respondent would treat her fairly should she return to work. Dr Michie in an email he sent to Ms Turner and the partners but only by mistake to the claimant wrote "*What timing!!"*. We accept his explanation this was just an expression of annoyance at it arriving 10 minutes before the practice closed at the end of the week. The claimant emailed back asking what he meant, but he never responded.

2.48. On 3 July, Dr Hardy acknowledged the appeal (page 284) then sent a lengthy letter on 6 July (page 285-7), in which she addressed and dismissed all of the points made in the appeal letter. Dr Hardy's statement says**:"***I decided to respond to the Claimant with my thoughts on her appeal via a letter dated the 6th July 2018 (pages 285 – 287). Nevertheless the partners felt that the grievance appeal should be dealt with in a formal and impartial manner. We therefore instructed an HR Face2Face consultant to deal with the grievance appeal.* Dr Hardy meant well, but it is an elementary mistake for a person against whose decision an appeal has been made to attempt to deal with it herself.

2.49. On 12 July the claimant emailed Dr Hardy (page 289) expressing how disappointed she was and referring to Dr Michie's comment "What timing!!" asking what was meant by it. Dr Hardy did not address Dr Michie's comment when the explanation he gave us , given by him or her. may have allayed the claimant's concerns. Instead she asked the claimant to set out the basis of her appeal, though she had already. The claimant emailed it was being discriminated against in regards to her flexible working request; being victimised when the proposed flexible arrangement was changed from what had been agreed verbally; and her pay being subject to a deduction She did not feel these points had been properly addressed.

2.50. On 31 July she was invited to a grievance appeal hearing on 15 August 2018 to be conducted by HR Face2 Face . By this point she had little faith in her employer ,so emailed Ms Turner on 9 August to that effect also saying attending would only cause her further distress. She was told the meeting would go ahead in her absence. Ms Turner provided other means by which she could participate -written submissions or a representative to attend in her stead.

2.51. On 19 August the claimant made an SAR and received some documents on 30 August. Whilst reading through them and looking back over the past few months she realised just how bad the relationship with the respondents had become. She came to the conclusion she would not be able to go back. She had no other job to go to.

2.52. On 4 September she emailed her resignation to Dr Michie explaining her reasons were the discriminatory treatment; their failure to properly deal with her flexible working request; their subsequent victimisation. Dr Michie emailed on 7 September 2018 asking if she was sure she wanted to resign, given the grievance appeal was still pending. By this time she already felt she could not trust the respondents again. She later received the outcome report by HRFace2Face rejecting all points except in relation to her request to have the welfare meeting at her home, which the report said would have been reasonable.

2.53. She now feels she has lost not just a job, but a career developing clinical skills. She started a new job in a pub on 15 September 2018 on the National Minimum Wage. Ms Weeks had been kept on temporary rolling contracts as they wanted to keep the claimant's job open for her to return to. Ms Weeks only permanently replaced her on 1 December 2018.

3. The Relevant Law

3.1. The EqA in s39 includes

(2) An employer (A) must not discriminate against an employee of A's (B)—

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

3.2.Section 4 says "sex", "pregnancy/ maternity" and "disability" are protected characteristics.

3.3. Unlawful discrimination requires a discriminatory **act** and a **type** of discrimination**.** Section 13 defines Direct Discrimination thus
*(1) A person (A) discriminates against another (B) if, **because of a protected characteristic**, A treats B less favourably than A treats or would treat others.*

Put simply, "direct" involves finding the reason why the respondent acted as it did.

3.4. In Coleman-v-Attridge Law the claimant was a legal secretary for a firm of solicitors. She was the principal carer for her disabled son. She claimed she suffered unlawful discrimination, on account of her son's disability (so-called "associative discrimination") and her resignation was in response to that discrimination. The Disability Discrimination Act 1995 (DDA) did not, on its face, apply to associative discrimination because it said

*(5) A person directly discriminates against a disabled person if, on the ground **of the disabled person's disability**, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability ..*

It was argued the effect of the relevant EU Council Directive 2000/78/EC ("the Directive"), was to outlaw such discrimination and it was open to the Tribunal to construe the DDA accordingly. In July 2006 Employment Judge Stacey made a reference to the European Court of Justice (ECJ). In its decision on 17 July 2008 (2008 ICR 1128) the ECJ held associative direct discrimination did fall within the terms of the Directive. A similar decision was reached with regard to harassment. The ECJ had acknowledged the Directive made no

express reference to associative discrimination but its objects, as set out in the recitals, required a broader approach. The ECJ said

56 …Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by article 2(2)(a).

Underhill P added words to the DDA to achieve that end. The EqA requires no added words because it does not say the disability must be that of the claimant

3.5. Section 27 of the EqA says
(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

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

Section 39 (4) then says

An employer (A) must not victimise an employee of A's (B)—

(c) by dismissing B

(d) by subjecting B to any other detriment.

3.6. In Nagarajan-v-London Regional Transport, Lord Nicholls explained conscious motivation on the part of the discriminator is not a necessary ingredient of victimisation, and the same is true of direct discrimination. Benign motive does not save a respondent from liability where the necessary causation is established , Amnesty International-v-Ahmed However, the respondent must do or not do something **because of** the protected act . If it resents the allegation but acts as it would have anyway, there is no victimisation.

3.7. Section 18 says, in summary, a person a discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably **because of** (a) the pregnancy, or (b) illness suffered by her as a result of it or (c) she has or will exercise her rights to maternity leave.

3.8. Section 19 says:
*(1) A person (A) discriminates against another (B) if A **applies** to B a **provision, criterion or practice** which is **discriminatory** in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

The relevant protected characteristics include disability and sex but not pregnancy/maternity. Webb-v-EMO Air Cargo held, as only women can be pregnant or mothers, unfavourable treatment because of pregnancy or maternity, or a PCP which disadvantages them in such circumstances, will constitute sex discrimination.

3.9. The conceptual difference between s19 and other types of discrimination must be grasped. Mummery L.J. said in a DDA case Stockton Borough Council -v-Aylott

26.. In the case of direct discrimination on a prohibited ground the aim is to secure equal treatment protection for the individual person concerned on the basis that like cases should be treated alike. The essential inquiry is into why the disabled claimant was treated less favourably than a person not having that particular disability.

27. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members of that group, who appear not to have been discriminated against on the ground of disability, have not in fact had equal treatment protection on the basis of the prohibited ground as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice.

Discrimination occurs when one treats people whose circumstances, apart from the protected characteristic, are the same, differently OR when one treats people the same when their circumstances, because of the protected characteristic, are different. The first is covers s 13 and s18, the second covers s19 . None of them require ill motivation . An employer may intend no harm but cause it. That employer is liable.

3.10. “Proportionate means of achieving a legitimate aim” used to be called “justification” . Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, 191: *"justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."* Pill LJ in Hardys and Hanson plc-v-Lax began by citing a sex discrimination case Allonby v Accrington and Rossendale College [2002] ICR 1189 per , Sedley LJ*:*

"27. The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect. On the contrary, by accepting that "any decision taken for sound business reasons would inevitably affect one group more than another group" it fell into the same error as the appeal tribunal in the Brook case [1992] IRLR 478 and the Enderby case [1991] ICR 382 and disabled itself from making the comparison.

28. Secondly, the tribunal accepted uncritically the college's reasons for the dismissals. They did not, for example, ask the obvious question why departments could not be prevented from overspending on part-time hourly-paid teachers without dismissing them. They did not consider other fairly obvious measures short of dismissal which had been canvassed and which could well have matched the anticipated saving of £13,000 a year. In consequence they made no attempt to evaluate objectively whether the dismissals were reasonably necessary – a test which while of course not demanding indispensability, requires proof of a real need.

29. … ***Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the***

dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

Then Pill L.J. said

*32 .. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary**.** I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.*

3.11. Section 136 includes
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

Reversal of the burden of proof is explained in Igen-v- Wong and Madarassy –v- Nomura International. Ladele-v-London Borough of Islington is a fine statement of the law in direct discrimination from which we quote selectively :
(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport– "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: ..
(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive . These are set out in Igen v Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:
"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."
If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination.
(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council

"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."
Of course, in the circumstances of a particular case ***unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation****: see the judgment of Peter Gibson LJ in* *Bahl v Law Society* *paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.*

3.12. Just as unreasonableness of treatment does not show the reason why something was decided upon Glasgow City Council-v-Zafar neither does incompetence, Quereshi-v- London Borough of Newham). However, as Sir Patrick Elias said Law Society –v- Bahl
99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable…
100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations…
101. The significance of the fact the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable.

3.13. Both motherhood and her children's disability combined to account for the claimant's problems . In Ministry of Defence-v-DeBique Cox J, dealing with indirect discrimination under the Sex Discrimination Act and the Race Relations Act said ;
In general, the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience. The Claimant in this case considered that the particular disadvantage to which she was subject arose both because she was a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted. The Tribunal recognised this double disadvantage reflected the factual reality of her situation.

3.14. Section 123 imposes a time limit of 3 months starting with the date of the act to which the complaint relates, or "*such other period as the employment tribunal thinks just and equitable*" . Conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. Mr Howson did not press time limit points in his submissions but we can see why he said some acts may be out of time. However, if a claim is out of time then the Tribunal have the power to consider it if it is just and equitable to do so. The guidelines on

exercising that discretion are best described in British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant. Using internal proceedings is not in itself an excuse for not issuing within time but is a relevant factor, Robinson v The Post Office.

3.15. Section 95(1)(c) ERA provides an employee is dismissed if: -
“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

3.16. An employee is “entitled” so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform it, Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct must be more than just unreasonable.

3.17. When the respondent rejected the claimant's request to change her work pattern on her return from maternity leave ,the unreasonable application of a condition which adversely impacts upon women, namely the requirement to work whatever hours suited the respondents and be flexible , is capable of amounting to a fundamental breach of contract (Shaw v CCL Ltd EAT/0512/06) .In that case, an Employment Tribunal made substantial findings of unlawful discrimination, not appealed, but dismissed the unfair dismissal claim . The EAT held on appeal the only conclusion was she was constructively dismissed. The acts of direct and indirect discrimination constituted repudiation of the contract which was accepted promptly by the claimant when she resigned for that reason. There was no explanation or defence of fairness and so the dismissal was unfair.

3.18. Where the employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT said: -“*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, **it is not necessary to show the employer intended any repudiation of the contract**. The Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that **its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer**. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.”*

3.19. The House of Lords in Malik v BCCI said if conduct, **objectively considered,** was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. “Reasonable and proper cause” too must be objectively decided by the Tribunal. It is not enough the employer thinks it had reasonable and proper cause Bournemouth University v Buckland 2010 ICR 908.

3.20. An employer is liable for the acts of managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa. “ Managers” would include people like Ms Dobson and Ms Binks even though they were not on the SMT.

3.21. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period, Lewis v Motorworld Garages [1985] IRLR 465 and London Borough of Waltham Forest v Omilaju [2005] IRLR 35. Resignation is acceptance by the employee that the breach has ended the contract. Conversely, he may expressly or impliedly affirm the contract and thereby lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport [2002] IRLR 472, but we will in this case give the shorter, but effective, explanation in Cantor Fitzgerald v Bird [2002] IRLR 267, that affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

3.22. Part VIII of the ERA contains s80F, 80 G, 80 H and 80 I. As Mr Howson said, they are primarily procedural requirements which do not enable a Tribunal to substitute its view of what the respondent should have done. This is in sharp contrast to the justification test. The time limit for bringing claims runs from the date of the decision on appeal.

3.23. Section 13 (3) of the ERA provides

*(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.*

"Properly payable" means properly due under her contract. The Court of Appeal in Agarwal v Cardiff University held tribunals are entitled to determine questions of contractual interpretation in the context of a wages claim. Contracts are made when one party makes an offer which the other accepts, valid consideration usually mutual promises, is given and there is an intention to create legal relations. There must be a meeting of minds "consensus ad idem" on all material terms . It takes a contract to vary a contract. So if any variation is not legally binding ,the original terms " the status quo ante" remain unaltered.

4. Conclusions

4.1. We start with three of the claims which succeed.

Indirect sex discrimination

4.1.1. The respondents' requirements (a) for the claimant to work her pre maternity leave contracted hours at times and on days which best suited the practice and (b) be able to cover shifts both for holidays and, at short notice, sick absence of other staff were PCP's. The respondent would apply them to men and women. They place women at a particular disadvantage because it is an established fact they are more likely to need to work at times to suit the arrangements they can make for childcare. The PCP's put the claimant at that disadvantage. The respondent has a legitimate aim of ensuring good patient care which involves having enough reception staff at all times, not too few, and not spending too much on wages by having too many. As the claimant could not, as opposed to would not, commit to working hours on the days she had previously, showing that refusing her a change of hours to be a **proportionate** means of achieving its aims is the only remaining question.

4.1.2. "Justification" is about striking a balance. Paraphrasing Sedley LJ in Allonby the disparate and adverse impact of the PCP on women with problems arranging childcare is considerable. In the claimant's case, refusal of her request for altered hours meant she would lose her job . What is required of us at the minimum is a critical evaluation of whether the respondent has demonstrated a real need to refuse the request and if there was such a need, consideration of the seriousness of the disparate impact on women including the claimant and an evaluation of whether the former were sufficient to outweigh the latter.

4.1.3. A mark of a good representative is not to try to defend the indefensible . Mr Howson rightly did not say the 12 December decision was proportionate but argued the appeal and what followed cured that. We disagree. The respondents' witnesses were unable to offer any explanation of why other staff were not asked to alter their hours to "make room" for the claimant to work 8 hours on Mondays. Phlebotomy rooms posed a problem but we heard no evidence to show making a room available had been explored , let alone reasonably found to be unworkable. Monday mornings are very busy and the worst case scenario for the respondent, if no-one else had changed their hours, would have been paying the claimant £16.80 per week for a trial period with the risk she might not be fully occupied. The offer made in accordance with Ms Cook's recommendation contained a fixed review date but that was withdrawn by the unnecessary extra sentence making it practically impossible for the claimant to accept. If they had given the claimant a proper trial period and she had failed due to childcare problems to maintain regular attendance , the respondents' justification argument would have improved. In short, the respondents thought only of what was convenient and advantageous for the practice and were unwilling to think creatively about options which would have enabled a valued and experienced employee to retain a job and career.

4.1.4. Mr Hargreaves submits this act resulted in dismissal so the time for bringing the claim starts then , and it is in time. While we tend to agree, if it started from the refusal in December 2018 or the inadequate offer in January 2019, it is plainly a case it is just and equitable to consider as it satisfies all the relevant tests in Keeble.

Constructive unfair dismissal

4.1.5. We hope our findings of fact convey why the cumulative effect of the respondent's , at best incompetent, handling of essentially a straightforward request made for very important reasons would cause any employee to lose all trust and confidence in their ability to deal with her predicament fairly. The respondent had no reasonable and proper cause for its actions. At no point did the claimant affirm the contract, so questions of last straw do not arise. She plainly resigned in response to their fundamental breach of contract. That said we are not of the opinion the respondents intended to breach her contract. Indeed, to this day, they appear to fail to understand what they have done wrong.

Unlawful Deduction of Wages.

4.1.6. This claim succeeds on the basis it takes a contract to vary a contract. There was no consensus ad idem on all terms of the varied contract so the prior contracted hours remained unaltered.

4.2. We turn to the claims which fail

Pregnancy/maternity discrimination

4.2.1. None of the detriments to which the claimant was exposed were **because of** any of the matters set out in section 18. Her pregnancy and maternity leave in itself did not trouble the respondents at all.

Direct Sex Discrimination

4.2.2. This claim as put in the list of issues definitely fails. There would have been no different treatment of a male employee of disabled children who had similar childcare problems than there was of the claimant.

Victimisation

4.2.3. The claimant carried out protected acts and it was anticipated she may carry out more . Dr Michie seemed to resent the claimant's protestations most and indeed formed the view she was a embarking on a tick box exercise in order to bring a claim. This is a wholly wrong assumption. She did not need to raise a grievance before resigning (see Seligman & Latz-v-McHugh) and did so purely to try to find a way internally to save her job and career . However, we cannot find any acts or omissions of the respondents which were any different from what they would have been had the grievance letters and other assertions of the claimant been confined to unfairness as opposed to raising discrimination. If the respondent had "covered up" what it knew to be discriminatory treatment, it would be perfectly possible for the claimant to show that subjected her to detriment, but in this instance there was no cover-up, simply robust assertions by Dr Hardy that she believed the respondent had acted properly, a belief she holds to this day.

The Flexible Working Claim

4.2.4. Mr Howson is right on two counts. First, section 80 G ff requires is a mechanical tick box exercise and the respondent just about ticks all the boxes. Second, this is time-barred and the test for extending time being the strict "not reasonably practicable" one, it fails.

Associative Direct Disability Discrimination

4.3.1. Direct disability discrimination occurs where a particular disability is at least in part the reason why a person acted as they did. It is comparatively rare, as opposed to discrimination contrary to section 15 which is unfavourable treatment because of something arising in consequence of a person's disability. The commonest examples of direct discrimination are where assumptions are made about a person's disability as was the case in Stockton Borough Council-v-Aylott.

4.3.2. We trust our findings of fact and earlier conclusions make clear our view that the intransigence with which respondents approached the claimant's request for fewer hours on different days was at best incompetent and totally unreasonable. Dr Michie said the respondents were **caring** employers. We believe the partners and Ms Turner are caring people. Ms Turner has a host of non-HR practice management tasks to perform. All the doctors are busy delivering patient care. Dr Michie frankly said he is the senior partner in the sense he has been there the longest, but he is not what would one could call a managing partner. There is not one. The partners rely on Ms Turner to do most managerial tasks but the boundary between her authority and that of the partners is very blurred. She kept saying she took advice from Peninsula but any advice is only as good as the instructions. No-one within the practice is trained in equality issues so a simple situation was made hard with a devastating effect on the claimant. They all were too busy and insufficiently aware of their

obligations as employers to deliver results which would have been “caring”, even though their motivation was to be so. A man who finds another lying injured on the roadside and tries , with no knowledge of first aid , to help him may cause the patient serious injury by moving him in the wrong way. Good intentions are no substitute for knowledge of what needs to be done. But is there another reason for the respondents’ decisions than incompetence?

4.3.3. The claimant has shown primary facts from which we could infer that, so unreasonable was the stance the respondents took, there must be another explanation for them taking it. We believe, as does the claimant, Ms Turner and some or all of the partners subconsciously assumed the claimant would be unreliable as well as inflexible because the children were disabled. She may for example, if the children’s carer were to catch a cold, have to ring in and say she could not do a shift . That is a risk for every employee who relies on carers. In this instance it was assumed for her would be a regular occurrence. They did not want rid of the claimant but they were determined to keep Sam Weeks on the basis she was a safer bet.She was praised for covering other employees shifts, which she could do easily. Ms Turner was wholly understanding of the childcare problems facing “Victoria” (see 2.3 above) but , when it came to the claimant asked for a **guarantee** of flexibility which she knew she could not give.

4.5. Reversal of the burden of proof in this case is critical. As stated by Lord Nicholls in Shamoon -v- Royal Ulster Constabulary Tribunals can avoid “*arid and confusing disputes*” about the identification of an appropriate hypothetical comparator by focussing on the critical question of the reason why respondent acted as it did. So weak have been the respondents’ explanations for why it acted as it did, they have failed to show they treated the claimant no less favourably than they treated Sam Weeks and, more importantly, no less favourably than they would have treated the claimant herself had her children been healthy. The “reason why” they did so was , consciously or not and at least in part, the assumptions they made about the twins’ particular disability

4.6. Employment Judge’s postscript, without discussion with the members.

4.6.1. On 14 May 2019, the second day of our hearing this case, the Court of Appeal handed down judgment in Owen v AMEC Foster Wheeler Energy Ltd , which I did not see until the day after giving judgment . It held an employee with multiple disabilities did not suffer direct disability discrimination when an offer of an overseas assignment was withdrawn after a medical assessment identified a high risk he would require medical attention when overseas. In comparison with a person who lacked the claimant's disabilities, but who was at a similar risk of needing medical attention overseas, he was not less favourably treated.

4.6.2. The claimant argued the decision not to post him overseas was indissociable from his disabilities. He drew an analogy with Amnesty International v Ahmed where the employer refused to appoint a woman of Sudanese origin to the post of Sudan researcher due to concerns over her safety. The Court of Appeal in Owen held the tribunal's construction of the hypothetical comparator had been consistent with the guidance of the EAT in High Quality Lifestyles Ltd v Watts in that it had not included the claimant’s particular disabilities. Lord Justice Singh observed it is not the case a person's health is always entirely irrelevant to his or her ability to do a job and he thought the concept of indissociability, applied to other protected characteristics in cases such as Ahmed, did not readily translate to disability. The claimant had not pleaded s15 discrimination and, if he had it, would have been justified.

4.6.3. In my view, the Owen decision makes no difference to the outcome of this case because there is a plain and obvious distinction on the facts . In Owen the employer did not make assumptions about Mr Owen's condition, it made careful enquiry and based on that could show a person with similar needs for a different reason would have been treated the same. In our case, the respondents acted purely on assumption . In any event, as will be seen in the next section, the claimant's remedy will not be greater because we have found two types on discrimination proved as opposed to only indirect sex discrimination

5. Indications on Remedy

5.1. We emphasise the assessment of non-pecuniary loss is in no sense punishment of the respondents. Their lack of any ill intention or high-handed approach means no award of aggravated damages will be appropriate. As in personal injury claims it is the effect on the claimant which matters and the respondent must take her as she is. This is known as the "eggshell skull rule". Her statement says
"The effect that my employer's treatment has had on me has been profound. My mental health has been badly affected, in that I struggle daily with anxiety and depression. Giving birth so prematurely was a situation that I wanted to move on from; I felt a lot of guilt because of all the health problems the twins had. I was looking forward to returning to work and progressing my career, as I knew that this would help me to move on. The way I was treated by my employer prevented me from doing this, and instead reinforced the feelings of inadequacy I was experiencing. It has made a very difficult situation so much harder. My relationships with my family and fiancé have been badly affected, as it has negatively dominated the last year of everyone's lives. The twins' second birthday is approaching and I feel that I have missed out on so many things because I was constantly worried about work and the way I was being treated."

5.2. This claimant was highly vulnerable following the birth of disabled children. Furthermore, loss of congenial employment is a permissible head of damages which, if awarded separately from injury to feelings, is usually in the range £2000-3000. The alternative approach is to view it as part of the injury to feelings award. In this instance on that basis we would place the award in the top half of middle band of the guidelines recently issued by the Presidents of the Employment Tribunals updating the guidelines given in Vento and DaBell.

5.3. Direct loss must be calculated but although the claimant has for the time being settled for bar work we believe she could get back to reception and clinical work in due course so her loss is not career long.

TM Garnon Employment Judge
Date signed 21 May 2019.