EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Chopra	**v**	BrandAlley UK Limited

Heard at: Central London Employment Tribunal **On: 8-10 May 2019 (and in Chambers on 17 May and 7 June 2019)**

Before: **Employment Judge Norris**
Members: **Ms S Plummer**
Mr J Walsh

Appearances
For the Claimant: Mr A Weiss, Counsel
For the Respondent: Mr R Owen-Thomas, Counsel

RESERVED JUDGMENT

The Tribunal's unanimous decision is as follows:

1. The Claimant's complaints of constructive unfair and wrongful dismissal and indirect sex discrimination are well-founded and succeed;
2. The complaints of pregnancy and direct sex discrimination and harassment related to sex were brought more than three months after the last act complained of, and it would not be just and equitable to extend time; they are accordingly struck out;
3. The Respondent was not in breach of the ACAS Code of Practice as alleged and therefore the Claimant is not entitled to an uplift to her compensation;
4. The complaint of a failure to pay holiday pay has been resolved and is accordingly dismissed on withdrawal;
5. The claim proceeds to a Remedy Hearing before the same panel at London Central Employment Tribunal on 17 July 2019 at 10.00 unless the parties advise the Tribunal of settlement prior to that date.

WRITTEN REASONS

1 Background

1.1 The Claimant was employed by the Respondent (an online fashion and lifestyle retailer) from 16 April 2015, initially as a Buyer and then, with effect from October 2015, Senior Buyer in the Respondent's Footwear team.

1.2 In or around August 2016, the Claimant became pregnant; her son was born on 20 May 2017. She applied to return to work flexibly by an application to the Respondent's HR manager on 14 March 2018. This application was rejected on 9 May 2018. The Claimant appealed unsuccessfully later that month, being notified of the outcome on 7 June. On 12 June 2018 she resigned with immediate effect.

2 Conduct of the case

2.1 This matter has had an unfortunate chronology (though this was not the fault of the parties). The claim form was presented on 18 September 2018 and served on the Respondent on 9 November. The response was lodged on 6 December 2018. At that stage, both parties were represented, and the Claimant has remained so. The Respondent's solicitors came off the record after submitting the ET3.

2.2 The Hearing was provisionally listed on 9 November 2018 for four days (8-13 May 2019 inclusive) before a full panel; standard directions were given, and the parties were notified that there was to be a Preliminary Hearing (Case Management) ("PHCM") on 24 January 2019 at 11.00. The PHCM was subsequently taken out of the list for 24 January and was not relisted. Hence, the parties had prepared for the Hearing without having had the matter reviewed by an Employment Judge. It is to their credit that they have done so co-operatively and without resorting to any applications to the Tribunal from either side. There was an agreed list of issues, to which we return below.

2.3 At the outset of the Hearing, it was explained to the parties that the Tribunal panel could not sit on 13 May 2019, (the fee-paid Employment Judge was not due to sit on that day and had a client commitment). The Hearing proceeded nonetheless, and with the assistance of Counsel, we were able to conclude the evidence by mid-afternoon on 10 May. An Order was made by agreement for the exchange of written submissions by the date the panel had arranged to sit in Chambers, namely 13 May. However, due to unforeseen circumstances, the panel could not, in fact, sit on that day (the Members were required for another Hearing) and therefore it was agreed the Chambers day would take place on 14 May instead. A provisional second day for deliberations of 7 June and a provisional Remedy day for 17 July 2019 were also diarised.

3 The Hearing

3.1 The panel spent the whole of the first morning reading in to the case, and took an early lunch so that we were able to start hearing evidence at 13.00. Throughout the first afternoon, save for a comfort break, we heard from the Claimant. She was cross-examined by Mr Owen-Thomas and there were questions from the panel before she was re-examined by Mr Weiss.

3.2 The Claimant had also served on the Respondent the witness statement of Miss Giddeon-Powell, a former colleague (Buying Assistant/Assistant Buyer) who, it appears, reported to the Claimant. Miss Giddeon-Powell left the Respondent in August 2018, after the Claimant had resigned. It appears that her statement was not exchanged in accordance with the Tribunal's standard orders; the signed copy before us was dated 17 April 2019. We heard that Miss Giddeon-Powell is abroad

and could not be reached during the course of the Hearing. The Respondent did not accept her evidence and asked us to exclude her statement altogether. The Claimant invited us to accept her evidence and place on it such weight as we considered appropriate.

3.3 We delayed making a decision on Miss Giddeon-Powell's evidence until the close of the Respondent's case on day three of the Hearing. By that stage, it was clear that she was not responding to texts or emails; they were showing as "unread" at her end. Had she responded, and indicated she was available e.g. by Skype or similar, we would have heard from her, notwithstanding the late disclosure of her witness statement.

3.4 However, in her absence and having heard the parties' submissions, we concluded that we would accept her statement into evidence but place very little weight on it indeed. The Claimant has been represented by solicitors throughout (including settling the ET1) and yet they did not, it appears, clarify with Miss Giddeon-Powell whether or not she would be available for the hearing, until late April, even though the case had been listed since November and even on taking instructions to draft her statement, made no application for a witness order or for arrangements to be put in place to hear live evidence from her. Her statement is signed by her and contains a statement of truth; though served late, it had been served on the Respondent, but there was no opportunity for the Respondent to cross-examine her or for her evidence to be tested before the panel. The evidence to which she speaks concerns mainly one of the Respondent's witnesses, from whom we did hear, and for whom there is some supporting evidence in the bundle, to which we return below. Therefore, on balance we considered it was more prejudicial to the Claimant to exclude Miss Giddeon-Powell's evidence altogether than it was to the Respondent to accept it in evidence but we placed very limited weight on it.

3.5 On the morning of day two, we heard evidence from Mr Daniel ("Danny") Shaw, who provided maternity cover for the Claimant and has remained as a consultant for the Respondent since the Claimant's resignation, again covering her role as Senior Buyer, Footwear. Following questions from the panel and re-examination, he was released at 11.25. After a short break, we heard evidence from Ms Gabriela Paraskova, who works as a Junior Buyer in the clothing team. There were no panel questions or re-examination for Ms Paraskova, who was released and an early lunch taken.

3.6 The re-start after lunch on day two was briefly delayed and then we heard from Mr Robert Feldman, the Respondent's Chief Executive Officer. Again, subject to a short break, his cross-examination took up the remainder of the day, with panel questions and re-examination taking us to 16.30.

3.7 On day three we heard from Mr Andrew Miles, Operations Director, who had conducted the appeal against the rejection of the Claimant's flexible working application and also considered her grievance. Allowing for a short break, panel questions and a single question in re-examination, this took us to 12.30. Some documents had been forwarded and were being copied; these were not

forthcoming so we took an early lunch and on reconvening afterwards, Mr Feldman was re-called to address them, and some other issues arising during the course of the oral evidence, including as to the whereabouts of two potential witnesses.

3.8 These witnesses were: Ms Caroline Withey, Buying Director and the Claimant's line manager while she was working at the Respondent; and Ms Sarah Clay, Merchandising Manager. We gather Ms Clay was senior to the Claimant but the Claimant did not report to her. We return to the potentially relevant evidence that they may have had to give below, and to the question of whether we should draw any inference from their failure to attend (following the cases of *Wisniewski v Central Manchester Health Authority*[1] and *Oladipo v Lush Retail Limited*[2]).

3.9 Mr Feldman's evidence was finally completed by 14.20 on day three, and the Tribunal considered the question of Miss Giddeon-Powell's evidence, dealt with above. The decision was reserved.

3.10 We received written submissions from both Counsel before deliberating in Chambers where those submissions were considered in detail, though we do not replicate their content here.

4 Issues

The issues for the Tribunal to decide were set out in the bundle and were, in summary, as follows:

i) <u>Constructive unfair dismissal</u>:

a) Did the Respondent's conduct amount to a fundamental breach(es) of the term of mutual trust and confidence and the sex equality clause under section 66(1) Equality Act 2010 (EqA)?

b) If so, were they sufficiently serious to constitute a repudiatory breach(es) entitling the Claimant to consider herself dismissed within the meaning of section 95(1) Employment Rights Act 1996 (ERA)?

c) If so, was the dismissal substantively and/or procedurally unfair?

The conduct relied upon comprises allegations that:

- On 22 July 2016, Ms Clay instructed the Claimant to drink alcohol in front of Ms Withey at the next monthly drinks event "to prove you're not pregnant" to Ms Withey;
- On 29 September 2016 (i.e. once the Claimant was in fact pregnant), Ms Clay again pressured the Claimant to drink alcohol at a work event in front of Ms Withey to prove that she was not pregnant;
- In the week commencing 5 December 2016, Ms Withey spoke curtly to the Claimant on learning of the Claimant's pregnancy;
- On 24 March 2017, Ms Clay put her hand on the Claimant's stomach and said "Eurgh, there's an alien in there";

[1] *QBENF 96/0572/CMS1*
[2] *UKEAT/0050/18*

- On 30 March 2017, the Claimant greeted Ms Withey who responded by saying "Hello Fatty…oh, I really shouldn't say that, should I" and then chuckled to herself;
- By letter of 9 May 2018, the Respondent rejected the Claimant's flexible working request without making an alternative flexible working proposals;
- On 7 June 2018, Mr Miles dismissed the Claimant's appeal and rejected her grievance.

ii) <u>Pregnancy and Maternity Discrimination</u>:

Did the Respondent treat the Claimant unfavourably under section 18 EqA by reason of her pregnancy, namely:

a) On 29 September 2016 (i.e. once the Claimant was in fact pregnant), Ms Clay pressured the Claimant to drink alcohol at a work event in front of Ms Withey to prove that she was not pregnant;

b) In the week commencing 5 December 2016, Ms Withey spoke curtly to the Claimant on learning of the Claimant's pregnancy;

c) On 24 March 2017, Ms Clay put her hand on the Claimant's stomach and said "Eurgh, there's an alien in there";

d) On 30 March 2017, the Claimant greeted Ms Withey who responded by saying "Hello Fatty…oh, I really shouldn't say that, should I" and then chuckled to herself.

iii) <u>Direct sex discrimination</u>:

Did the Respondent subject the Claimant to direct sex discrimination under section 13 EqA, namely:

a) On 22 July 2016, Ms Clay instructed the Claimant to drink alcohol in front of Ms Withey at the next monthly drinks event "to prove you're not pregnant" to Ms Withey;

b) On 29 September 2016 (i.e. once the Claimant was in fact pregnant), Ms Clay again pressured the Claimant to drink alcohol at a work event in front of Ms Withey to prove that she was not pregnant.

The Claimant relies on a hypothetical male comparator;

iv) <u>Indirect sex discrimination</u>:

a) Did the Respondent subject the Claimant to indirect sex discrimination under section 19 EqA, namely by letter of 9 May 2018, rejecting the Claimant's flexible working request without making an alternative flexible working proposals and on 7 June 2018, Mr Miles dismissing the Claimant's appeal and rejecting her grievance?

b) Specifically, did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant's role, namely that she was required to attend for work at the Respondent's offices in London on Monday to Friday each week?

c) If so, did this PCP put women in general at a disadvantage and in particular, did it put the Claimant at such a disadvantage, namely that she was unable to manage her childcare responsibilities?

d) Was the PCP a proportionate means of achieving a legitimate aim (the Respondent's identified aims being for its managers to provide consistent management to their team and to be available in the office to meet both team and customer demand)?

vi) Harassment:

Did the Respondent subject the Claimant to harassment on the grounds of sex under section 26(1) EqA by engaging in unwanted conduct related to sex, namely:

a) On 22 July 2016, Ms Clay instructed the Claimant to drink alcohol in front of Ms Withey at the next monthly drinks event "to prove you're not pregnant" to Ms Withey;

b) On 29 September 2016 (i.e. once the Claimant was in fact pregnant), Ms Clay again pressured the Claimant to drink alcohol at a work event in front of Ms Withey to prove that she was not pregnant;

c) In the week commencing 5 December 2016, Ms Withey spoke curtly to the Claimant on learning of the Claimant's pregnancy;

d) On 24 March 2017, Ms Clay put her hand on the Claimant's stomach and said "Eurgh, there's an alien in there";

e) On 30 March 2017, the Claimant greeted Ms Withey who responded by saying "Hello Fatty…oh, I really shouldn't say that, should I" and then chuckled to herself?

f) Did any proven conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

vii) Unlawful deductions:

Is the Claimant owed any pay for accrued but untaken annual leave entitlement, and if so, how much?

We gather from the submissions that this complaint has been accepted, the amount has been agreed and the money paid over to the Claimant. In the circumstances, we need make no findings on this complaint.

viii) Wrongful dismissal:

Is the Claimant entitled to payment in respect of her notice period?

ix) Breach of the ACAS Code(s):

a) Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("Code") by failing to provide the Claimant with the right of appeal in respect of the outcome of her grievance brought by letter of 17 May 2018?

b) If so, what, if any, uplift, is the Claimant entitled to in respect of any award of compensation made to her?

x) Section 123(3) EqA:

a) Do the acts complained of by the Claimant form part of a continuing course of discriminatory conduct by the Respondent extending over a period time under section 123(3) EqA?

b) If not, what, if any, of the acts complained of that are out of time should be allowed on the basis that it is just and equitable to do so?

5 Law

5.1 Unfair dismissal (constructive)

5.1.1 An employee is dismissed by virtue of section 95(1)(c) ERA if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

5.1.2 Case law confirms that where an employer, without proper cause, behaves in such a way as is calculated or likely to destroy or seriously damage the employment relationship, the circumstances in section 95(1)(c) are met and the employee is entitled to resign with or without notice. Such conduct may consist of a course of conduct culminating in an incident or episode commonly known as a "last straw", or it may be a one-off serious breach. Where there is a "last straw" incident, that need not in and of itself be something that would be a breach, provided the cumulative effect is established.

5.1.3 The burden of proof of showing on balance of probabilities that there has been a repudiatory breach by the employer is on the Claimant.

5.2 Pregnancy and maternity discrimination

5.2.1 Section 18 EqA renders it unlawful for an employer to treat a woman unfavourably in the "protected period" of her pregnancy, i.e. between the date when the pregnancy starts and (for present purposes) when her period of additional maternity leave ends. No comparator is required; the question is entirely addressed to whether the unfavourable conduct is because of the pregnancy/maternity or not.

5.2.2 As with the other forms of discrimination alleged in this case, the burden of showing facts from which the Tribunal could find there has been a breach of the Equality Act is on the Claimant; if she does show such facts, the burden shifts to the Respondent to disprove the discrimination.

5.3 Direct sex discrimination

5.3.1 By virtue of section 13 EqA, direct discrimination occurs when an employer treats an employee less favourably than they treat or would treat others because of a protected characteristic (in this case, sex).

5.3.2 Direct discrimination because of sex requires a comparator who does not share the protected characteristic but who otherwise is in not materially different circumstances.

5.4 Indirect sex discrimination

5.4.1 Section 19 EqA states that an employer discriminates against an employee if it applies a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of the employee's (in this case, sex).

5.4.2 A PCP will be discriminatory if it is applied to men and women, but puts women at a disadvantage compared with men, puts the particular claimant at a disadvantage and the respondent cannot show it to be a proportionate means of achieving a legitimate aim. In *Bilka-Kaufaus GmbH v Weber von Hartz*[3] (decided before the EqA came into force but still relevant before us) it was held that in order to satisfy the test of justification, the measures taken by the employer must correspond to a real need on the part of the employer, must be appropriate with a view to achieving the objectives pursued and must be necessary to that end.

5.5 Harassment

5.5.1 Section 26 EqA provides that harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic, and that conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Sex is a relevant protected characteristic for these purposes; pregnancy or maternity are not.

5.5.2 In deciding whether conduct has the effect complained of, the Tribunal must have regard to the employee's perception and the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

5.6 Wrongful dismissal

By virtue of section 86 ERA, an employee is entitled to be given notice of not less than a week for each completed year of service, up to a maximum of 12 weeks. Such a period may be increased by virtue of a contractual obligation.

5.7 Breach of the ACAS Code

An uplift of 10-50% may be applied to an award of compensation where an employer has unreasonably failed to comply with the ACAS Code of Practice on disciplinary or grievance matters. Conversely, a reduction within the same parameters may be applied where the unreasonable failure is the employee's.

5.8 Time limits

The Equality Act requires complaints to be lodged with the Tribunal (in reality, for a prospective complainant to enter Early Conciliation) within three months of the act complained of or, where there has been continuing discriminatory conduct, within three months of that conduct ceasing.

[3] *[1987] ICR 110, ECJ*

6 Findings of fact

We make the following findings of fact:

6.1 The Claimant was employed under a contract of employment that appears in the bundle in two versions. The second, which is the relevant one so far as her claim is concerned, shows that her employment commenced on 16 April 2015 and gives her place of work as 120 Moorgate, although she could be required to undertake duties and/or be based in office locations anywhere within the M25. She was required to give and entitled to receive three months' notice of termination of her employment. Her core working hours were 37.5 per week Monday to Friday inclusive but she was expected to work such hours as were required to meet her contractual obligations. There was a non-contractual disciplinary and grievance process set out in the Company handbook.

6.2 In the bundle we had a "Senior Buyer job spec". The Claimant gave unchallenged evidence that she had not seen this document during her employment. However, she accepted in any case that it was a true reflection of the competencies required and responsibilities involved in the role, to which she was promoted in October 2015.

6.3 In November 2015, it was confirmed that the Claimant had passed her probation and she received a £7,000 per annum pay increase.

<u>Alleged discriminatory/harassing comments</u>

6.4 The Claimant has made allegations, as noted in the list of issues, that from around July 2016, comments were made by or about Ms Withey and Ms Clay that caused her to believe that they shared a negative view of pregnancy generally, children, and pregnant workers in particular.

6.5 This arose first in the context of the Claimant ordering non-alcoholic drinks for the monthly work function. It is alleged that Ms Clay informed the Claimant that Ms Withey thought the Claimant was pregnant because of this order and suggested that the Claimant should drink alcohol on the next occasion to demonstrate to Ms Withey that she was not pregnant.

6.6 It arose a second time in September 2016, by which point the Claimant was, as noted in the list of issues, pregnant. Again, it is alleged that Ms Clay pressured the Claimant to drink alcohol to prove to Ms Withey that she was not pregnant. The Claimant pretended to drink alcohol, and narrated how she felt stressed at being put under pressure in this manner. It is not suggested that there was an instruction to drink alcohol emanating from Ms Withey, rather that it was Ms Clay who was pressurising the Claimant to do so.

6.7 This matter was not raised with the Respondent and hence not addressed with Ms Clay until the Claimant's appeal against the flexible working rejection and grievance of 17 May 2018. When it was raised, it is asserted that Mr Miles interviewed Ms Clay on 24 May 2018. At that meeting it is said that Ms Clay accepted there had been a discussion in July 2016 about drinking alcohol between her, the Claimant and a colleague Elisa Taylor, who was pregnant. She said she

did not recall the subsequent (September 2016) discussion. In other words, Ms Clay when asked, is not recorded as having denied that she suggested to the Claimant she should drink in front of Ms Withey to show she was not pregnant.

6.8 We have two concerns with the involvement of Ms Clay and indeed Ms Withey in these incidents. The first is, as we have noted, neither of them attended the Tribunal to give evidence. Mr Feldman said when he was re-called that Ms Withey (who is still the Respondent's Buying Director) had spoken to him in early 2019 and indicated that she wanted to go on holiday in or around early May, and both he and Mr Miles said that Ms Withey was on leave for the week commencing 6 May. However, the Tribunal had notified the parties of the provisional listing date when it sent out the claim in November 2018. Although the PHCM listed for January did not take place, neither party indicated that the provisional dates would give them any difficulty. Accordingly, we find that Ms Withey was allowed to book annual leave which coincided with the Hearing dates, and no attempt was made either to ask her to reschedule or to adjourn the Hearing if that proved impossible. Similarly, Ms Clay still works for the Respondent and so far as we are aware, was in the office throughout the Hearing. They had relevant evidence to give, and we are entitled to draw an inference from their absence.

6.9 The second concern is that the notes of the interviews purportedly conducted by Mr Miles in May 2018 are typed up. They are not signed or dated in manuscript. Two of the records (those of the interviews with Ms Withey and Ms Taylor) bear dates in May 2019 [sic]. Mr Miles said in evidence that they had been typed contemporaneously and emailed to him. No covering email was in the bundle and the purported note-taker Mr McInnes did not give evidence. We find it inherently unlikely that if the notes had been typed contemporaneously in May 2018, they would have borne the date of a year later. Accordingly, we find these notes are not contemporaneous and therefore we place very little weight on them.

6.10 In any case, as we have noted, the notes do not suggest a denial of the pre-pregnancy comments by Ms Clay or the events of September 2016. That leaves us in a position where the Claimant's evidence as to the events of July and September 2016 (and indeed thereafter until her maternity leave began) is unchallenged and in the circumstances, we accept that those events took place as the Claimant describes.

6.11 The Claimant says, and for the reasons given above, we accept, that when she told Ms Withey in early December 2016 of her pregnancy, Ms Withey did not congratulate her immediately but instead asked how long she would be off work for and when the Claimant said she did not know at that stage, Ms Withey went on to make comments about the difficulty of finding somebody to replace her. We note that Ms Withey did subsequently apologise for not having congratulated the Claimant. While the initial response may have lacked warmth, we do not have sufficient detail on the balance of probability to find it curt.

6.12 On 24 March 2017 it is alleged that Ms Clay put her hand on the Claimant's stomach and said "Eurgh there's an alien in there". Ms Clay's reaction when asked whether this took place is recorded as being that a friend of hers who had been

pregnant had told her that it sometimes feels like an alien. She denied having put her hand on the Claimant's stomach. However, for the reasons we have set out above, we accept the Claimant's version of events.

6.13 On 30 March 2017, the Claimant alleges Ms Withey greeted her by saying "Hello Fatty" and although she then corrected herself, she did so whilst chuckling. Ms Withey is recorded as having accepted that she made this comment and as having apologised if the Claimant was upset by it. In the circumstances, we find that it happened as the Claimant describes.

6.14 It is common ground, as we have noted, that the Claimant did not raise these incidents until May 2018. We accept that she did not raise them at the time either internally through a grievance or externally through a Tribunal claim, because she knew she would shortly be going on maternity leave and did not want to create an unpleasant atmosphere in the office. However, we do also accept that these incidents caused her distress and that she had to be consoled by her husband. We deal below with the time limit issues to which the delay gives rise.

<u>Flexible working during pregnancy</u>

6.15 Prior to going on maternity leave, the Claimant spoke to Lucy Ratican, HR Manager, about the possibility of working from home one day a week. The Claimant's unchallenged evidence was that during the latter stages of her pregnancy she struggled with the commute to and from work. There was a meeting between them at which Ms Withey was also present, in February 2017, to discuss this request. Given that neither Ms Ratican nor Ms Withey were called to give evidence to the Tribunal, we accept the Claimant's unchallenged evidence that Ms Withey conveyed her disapproval of the proposal that the Claimant was putting forward but she agreed it nonetheless. That agreement was for the Claimant to work from home one day a week, taking her ante-natal appointments on her home-working day. The Claimant wrote to Ms Ratican and Ms Withey confirming what had been agreed. It does not appear that either of them answered her.

6.16 There is evidence in the bundle to show that the Claimant was extremely flexible even within that agreed arrangement. There was no fixed day, and from the outset the Claimant proposed that she would take the day working from home according to business need, and did so. We find that where business need did not permit the Claimant to work from home, the Claimant informed Ms Ratican and Ms Withy that she would be in the office all week (e.g. the week commencing 13 February 2017). In fact, however the Claimant then emailed them both again on 8 February informing them that she would be working from home on 10 February and on 15 February, incorporating her ante-natal appointment on the latter date.

6.17 On 17 February 2017, the Claimant emailed Ms Withey and copied Ms Ratican to say she had been going to work from home the following Thursday (23 February 2017) to incorporate a scan and an evening event related to the pregnancy. This was also so that she could attend meetings with two clients on the Friday 24 February. However, she had issues with her workload and would be out of the

office all day on 20 February 2017; therefore, she said, she would not work from home on 23 February but would come in after her scan and leave for the evening appointment. She further confirmed that she would be going to the hospital for blood tests on 3 March 2017 but would have her mobile with her while there. When she found out that two colleagues would be off on 3 March, she changed her plans and said she would be in after the appointment.

6.18 The contemporaneous email exchanges do give us some indication of the urgency or otherwise of the meetings that were being arranged in Footwear. On 17 February 2017, for example, the Claimant said that Puma had just confirmed a meeting for 24 February and that she had already arranged to see another client, Oliver Sweeney, on that date. Another illustration was again with Oliver Sweeney, as apparently following that 24 February meeting, it was proposed on 27 February 2017 to organise a further meeting "in a month's time" for the Claimant and others to meet Oliver Sweeney's new MD. The Claimant replied ten minutes later suggesting 28 March 2017, and having not heard from the client, chased on 22 March. The reply on 6 April 2017 proposed 19 or 20 April, and on 10 April Mr Feldman agreed 09.30 on 20 April 2017.

6.19 We heard oral evidence from Ms Paraskova regarding the brand meetings that have taken place in April 2019 in the Ready to Wear team. She acknowledged that she does not have experience of the Footwear team or their arrangements for meetings, and hence her evidence was of little value in deciding the issues before us. Ms Paraskova indicated that her own manager, Mr Cardoso, is highly energetic, having several brand meetings every week and sometimes two or three a day. She set out how far in advance the meetings were scheduled and suggested that sometimes it was at extremely short notice, reflecting the nature of the business.

6.20 As we have noted, given that Ms Paraskova has no experience of Footwear, her evidence is of less assistance to us than, for example, Ms Withey's might have been as to the urgency of Footwear meetings. However, even though Ms Paraskova asserted that the Ready To Wear team might have only very short notice, we note that the chart shows ten meetings (of which one is a phone call) in the month of April 2019, being three or (in one week) four meetings a week. Of those nine face-to-face meetings, all bar one had at least 24 hours' notice. We heard evidence that there has been considerable growth in the business since the Claimant went on maternity leave. We consider it reasonable to infer from the figures as to the growth of the business that it is now busier than it was when the Claimant went off in early/mid 2017, and yet the evidence still shows that the very considerable majority of meetings are booked on notice.

6.21 Mr Shaw, who, as we have noted, was engaged as a consultant initially to provide maternity cover for the Claimant but has continued to offer services in that capacity ever since, gave oral evidence about short notice meetings. He said that he is able to attend at short notice because he is flexible. Mr Shaw's witness statement indicated that he was originally brought in on the basis that he would do three days a week so that he could continue to develop his own start-up. He said he would

need to be able to attend the Respondent's premises on any of the five working days each week.

6.22 In practice however, Mr Shaw has worked much more than three days a week, although still just under a full-time equivalent on an annualised basis (the Respondent says 207 days against 223). He says that he has provided his services from the Respondent's offices save where he has been meeting suppliers in London, the UK or overseas. He did not give even an approximate number or percentage of his time spent at those external meetings and nor did he say in his statement how urgently they have been arranged. He did say that in order to be available at the Respondent's offices when required, he frequently needs to work late into the evenings and to start early. He does not believe that he could carry out the role effectively if he worked from the London offices on only three fixed days each week. Though we note that he has not in fact tried, we can accept that the job is not one that can be done part-time working three fixed days a week.

6.23 We find the Claimant was similarly flexible during the period before her maternity leave, and there has been no suggestion that any meetings or buying opportunities were missed as a result of her working from home one day a week, nor has there been any suggestion Mr Shaw has missed a meeting or potential business opportunities lost because of the flexibility that has been afforded to him.

6.24 The approach that the Respondent took to the Claimant's working from home during her pregnancy is evidenced by Ms Withey commenting on 14 February 2017 that the Claimant was taking the following day "off", when in fact the Claimant was working from home. When the Claimant corrected her, Ms Withey still said "Yes, that's what I mean", and asked who was going to manage a particular stocklist. We infer that this broadly reflects her attitude as alleged by the Claimant – i.e. that the Claimant would not be working "properly" if she was doing so from home.

6.25 The Claimant did not work in the office after 28 April 2017, using up her accrued annual leave with a view to starting her maternity leave on 6 June 2017; but her son was born on 20 May 2017. For ease of reference, we refer to 28 April 2017 as the start of her maternity leave.

<u>The Claimant's flexible working application</u>

6.26 In February 2018, Ms Ratican texted the Claimant to ask about her plans on return from maternity leave. The Claimant replied saying that she would like to return working flexibly and suggested using her KIT days to return one day a week in the lead-up to her return. Ms Ratican sent the Claimant a flexible working application form and guidance on its completion, but did not respond regarding the KIT days. The Claimant submitted her formal application on 14 March 2018, proposing working three days in the office and two at home; usually the three in the office to be Monday to Wednesday but with flexibility if there were business needs. She suggested a trial period for the working pattern proposed.

6.27 The Claimant's proposed childcare arrangements following her maternity leave were as follows: the Claimant had arranged that she would take her child to her

parents' house three days a week and then make her way in to the London office; and that she would be working from home with a nanny looking after her child on the other two days a week.

6.28 On 13 April 2018, the Claimant met Ms Ratican and Ms Withey to discuss her flexible working application. We find, as the Claimant contends, that the meeting commenced with Ms Ratican advising her that the role was not a flexible one and that there were no flexible options available to her. The Claimant pointed out that Mr Shaw had been providing cover on a part-time and flexible basis, but Ms Withey repeated that the role was not flexible and that even four days a week would not work. The Claimant inferred (as we find, reasonably) that this was evidence of Ms Withey's continuing equation of working from home with being "off" altogether.

6.29 The Claimant asked whether she could job-share with Mr Shaw, with him covering the two days in the office that she did not do. Ms Ratican appeared positive about the suggestion; Ms Withey did not, although she said, "we can take a look", shrugging her shoulders. The meeting ended without the Respondent tabling any alternatives or discussion of a trial period.

6.30 On 9 May 2018, Mr Feldman wrote to the Claimant dismissing her application. This was notwithstanding that he had not been present at the meeting (which he describes as an "informal" one at which no notes were taken; it is unclear why he, rather than Ms Withey gave the outcome). In his witness statement, Mr Feldman says he did discuss the issue with Ms Withey, and he appears to have been told that the Claimant was proposing a 3:2 split, including that the Claimant would vary her days in the office under one iteration of that pattern, and that she had additionally mooted the option of a job-share with Mr Shaw.

6.31 Mr Feldman says that he and Ms Withey considered the team's performance had been affected as a result of there not being a Senior Buyer "on site" every day. Specifically, in his witness statement he said that Footwear was "down" against targets by 2% by the end of 2017, compared with the Respondent overall which was 28% above target. In early 2018, there were signs of recovery, which he and Ms Withey wanted to consolidate, and they believed that would be best achieved by the Claimant working from the office full-time.

6.32 We had in the bundle a table of comparative figures showing the Respondent's financial results for 2016, 2017 and 2018. From the start of the Claimant working flexibly in February 2017, Footwear was up 48% on 2016 against 13% across the Respondent overall, in March 2017 up on 2016 by 32% (which was the same as growth overall) and in April 2017 56% against 45% for the Respondent overall. Growth in Q1 of 2017 as a whole, for part of which the Claimant was working from home one day a week, was up 53% against 2016 in Footwear, against 33% overall.

6.33 Growth in Footwear then dropped when Claimant went on maternity leave and did not pick up until Mr Shaw came to work for the Respondent. We have noted that he only worked three days a week initially, then he moved to four days a week once his other project was on hold and consequently placed less demands on his time. Thereafter, even with Mr Shaw working as a contractor with other business

interests, and not working at all one day a week almost every week, the department was still beating its targets and improving its performance year on year.

6.34 We have considered and analysed Mr Shaw's time sheets in the bundle, against which he has invoiced the Respondent. We can see that he initially invoiced for three days' work a week for the Respondent, then three to four, then more recently and more frequently, four to five. We note also that it was always proposed the Claimant would work five days a week; the only issue was the location.

6.35 The other issue that Mr Feldman thought was significant in the requirement for the Claimant to be in the London office full-time was the development of the Footwear team. That team, we heard, currently comprises two personnel in buying and one administrator (whose full name Mr Shaw did not know). It is not, we are satisfied, a large team, and nor does it appear Mr Shaw has been particularly "hands-on" in managing it; not knowing the full name of one of three team members is not suggestive of close management.

6.36 There is also no evidence that Ms Powell, who was the Buying Assistant when the Claimant worked for the Respondent, suffered from the Claimant's switch to four days in the office and one day at home prior to her maternity leave commencing, and indeed, it is common ground that Ms Powell was promoted immediately after the Claimant went on maternity leave, having worked roughly 50% under the Claimant working full time in the office and 50% under the Claimant working flexibly (one day a week at home).

6.37 The third issue for Mr Feldman in his discussions with Ms Withey was the detrimental impact on the Respondent to attract the business of prospective brands. Mondays, he says in his statement, are usually reserved for internal meetings both within the Respondent and more widely in the industry, and hence the Claimant would be unavailable for half the remaining days. Mr Feldman says he supported and agreed with Ms Withey's views on this, and therefore wrote the letter to the Claimant rejecting her flexible working application.

6.38 It is right to say that in Ready to Wear, according to the table given in Ms Paraskova's statement, there are no meetings listed as having taken place on a Monday in April 2019. This is of course just a snapshot of one month in a different team from that in which the Claimant worked. However, of the ten meetings scheduled (including, as we have said, one phone call), two were on Friday 12 April and one was on Thursday 4 April 2019. The remainder (and hence a considerable majority) were on Tuesday or Wednesday.

6.39 Again, we treat this evidence with caution because it is not directly relevant to the Claimant's position. It does suggest that working from home two days a week would not have a highly detrimental impact, particularly if the Claimant had even a small amount of notice (e.g. 24 hours) so that she could arrange for her son's nanny to come early or stay late so that she could go in on one of her notional "working from home" days, or swap round one of the days on which her parents were caring for him.

6.40 Mr Shaw's contract for Services and his invoices are perhaps more helpful in this analysis. His contract shows that he is not required to work either a fixed or finite number of hours or days in any week. He has express discretion as to the hours worked day to day, though he agrees to use reasonable endeavours to meet any deadlines given to him.

6.41 The Schedule setting out the Services that Mr Shaw is contracted to provide is similarly broad and non-specific; it says simply that he is engaged to "provide buying services to the Company related to footwear". There is no mention of the requirement to attend internal meetings (or indeed external ones, though this may be implicit in the nature of the buying services) or to manage staff.

6.42 So far as his invoices are concerned, these also show a disparity in Mr Shaw's attendance compared to what Mr Feldman was asserting as the needs of the business. An analysis of the weeks worked in 2017 (April 24 to calendar year end) shows that Mr Shaw was out on six Mondays and in on just six Fridays. In the whole of 2018, he did not work at all on 20 Mondays but did work on 27 Fridays. In 2019 to the date of the Hearing, he was in on 10 Fridays and out on just two Mondays.

6.43 Overall, in the 105 weeks from the start of his engagement to the date of the Hearing, Mr Shaw worked four or more days in a fraction under two thirds (a total of 66 weeks) whereas in the other 39 weeks – just over a third of the total - he worked three and a half days or fewer. In four weeks of the 105 weeks, he did no work at all for the Respondent.

6.44 We have noted that when the Claimant was working from home one day a week, and thereafter when Mr Shaw was literally working part-time as opposed to working full-time but in a flexible pattern as to location, not only did the Footwear team not struggle, it met or exceeded targets and did as well, if not better than, the Respondent generally. If, as Mr Feldman suggested in oral evidence, this is because the Footwear targets were less stretching than for the rest of the business, we have not seen any supporting evidence of that. We are also mindful of his evidence that Footwear has the highest rate of returns, but we were not shown how, if at all, that distorts the figures. Certainly, Mr Shaw has received frequent bonuses for meeting targets, which one would not expect him to receive if the team was behind, and nor would we expect him to receive the £5,000 bonus he was awarded at the end of 2018, which appears to be against the Respondent's overall performance rather than just based on the results in Footwear.

The appeal against flexible working outcome and grievance

6.45 The Claimant appealed Mr Feldman's decision, and it was in her appeal letter of 17 May 2018 that she also first raised formally a grievance complaining of the pre- and pregnancy comments, describing the approach taken by Ms Withey in particular as negative and ill-mannered. She pointed out that there appeared to be a pre-supposition that her proposed working arrangements would have a detrimental effect on quality and performance; that Mr Shaw had been working flexibly (and indeed part-time) but she had been treated less favourably; that there

was no evidence to support the suggestion that there would be such a detrimental effect and she had continued to support the Respondent working from home, including at weekends.

6.46 Mr Miles was appointed to deal with the appeal. This was a curious decision by the Respondent because although he was and is a senior manager within the Respondent, he was of course junior to Mr Feldman who was and is the CEO. We find a reasonable inference is that Mr Miles would lack the authority to overturn the outcome of the flexible working application, as indeed proved to be the case.

6.47 Mr Miles compiled a response that we had in the bundle dated 23 May 2018, and which he delivered to the Claimant in person at a meeting on 7 June 2018. He asserted that the proposed flexible working pattern represented a "significant risk" to the management and performance of the department which had "until recently struggled to meet its targets"; this he ascribed to having only part-time maternity cover for the Claimant's role.

6.48 In that response Mr Miles appears to continue to equate flexible working with part-time working. However, he claimed that Mr Shaw "often comes into the office five days per week" and "we regularly see him in the office five days a week". This, on the analysis of the time sheets, must have been incorrect - or at least, if Mr Shaw was at that point coming in to the Respondent's offices five days a week, it was not exclusively to carry out work for the Respondent. In the 13 months since Mr Shaw had been engaged by the Respondent up to 7 June 2018 when Mr Miles gave the appeal outcome, Mr Shaw had invoiced for a five-day week on just two occasions.

6.49 Mr Miles also set out some figures and statistics in his report under a heading "Footwear department performance". We are unable to reconcile these precisely with the sheet labelled "2018 v 2017 v 2016 overview", though this may be because Mr Miles was dealing with the position mid-month and we have figures only to month end.

6.50 Mr Miles asserted however that there had been a "significant investment in time and resource" leading to 30% growth year on year, without specifying what that investment comprised (and contrary to his later suggestion in the meeting on 7 June 2018, in which he stated: "The department has already been struggling. They have not had the support they need"). In fact, that was the Q1 percentage growth; by the end of April 2018, growth in Footwear rose to 82% and by July 2018, it appears, 238%. Mr Shaw had worked on nine Fridays in the calendar year up to the end of July 2018, and only half days on two of those Fridays, and he only worked one Monday in July 2018. Whatever may have been the case in the weeks leading up to the Hearing, Mr Shaw frequently did not work for the Respondent at all on Fridays, and as noted above, had done only two five-day weeks in the year to the date of the appeal.

6.51 Mr Miles continued that flexible working was considered a risk to on-boarding new suppliers and repeated that departmental performance was also at risk, as he claimed strong leadership was required to achieve the high targets set. He did not

suggest that the targets had been in any way weaker than those set for the rest of the business.

6.52 Accordingly, he proposed that the Claimant return to work in the office five days a week for at least six months, following which there would be a review. As Mr Feldman had done before him, he discounted entirely the suggestion of a job share arrangement with Mr Shaw, on the basis it would involve disruption to the team. He said that the Respondent could not "100% ascertain if flexible working is viable for this role at this stage". He did not, we find, discuss the possibility with Mr Shaw first. However, he stated in the meeting on 7 June 2018, "Danny would find that [job-sharing] difficult as he needs a guaranteed level of work. Danny would have had to reduce the amount of time he works as a contractor".

6.53 It is fair to say that Mr Shaw in oral evidence did not display enthusiasm for the prospect of job sharing. However, the clear implication of what Mr Miles said in the June 2018 meeting was that Mr Shaw had been consulted about the possibility and had given reasons against it. This simply had not happened. Mr Shaw did not say anything about requiring a guaranteed minimum level of work, not least because he was not asked.

6.54 In his report, Mr Miles acknowledged that the Respondent has the technical capability for employees to work remotely. This position was not reflected in the oral evidence before us, when a number of barriers were suggested, such as not having a speaker facility on the phones and the fact that staff sit in an open-plan area and would be distracted by someone having a conversation on Skype or similar.

6.55 This was countered by the Claimant's accepted assertion that the radio is playing in the same area. It does not strike us as likely that an occasional work-related discussion on a speakerphone would be more distracting than having the radio on constantly; and none of the panel could accept that the Respondent's employees do not have mobile phones or other devices on which a conferencing facility is available, even if they do not have landlines with a speakerphone. That is not the same as requiring the Respondent to invest in technology, as Mr Owen-Thomas submitted. We simply prefer the answer Mr Miles gave in his report; the Respondent does have the technical capability for Senior Buyers to work from home.

6.56 The conclusion to Mr Miles' report does not clearly state whether he upheld the Claimant's grievance or what specific findings he made in that regard. For the reasons we have set out above, we find that the Claimant's unchallenged account of the incidents on which she relies is truthful.

6.57 We are prepared to accept that a person who is not organised or not committed to the role would struggle if they were dividing their working time between their London office and home. But the evidence shows the reverse is true of the Claimant. She is clearly both organised and committed. We can also accept that it might be more convenient for the Respondent if the Senior Buyer was always present in the office. However, this overlooks the fact that no buyer is ever 100%

in the office, because both parties agreed that there are meetings to attend. Even Mr Cardoso, who we were told is so dedicated to his job that he has not taken a foreign holiday and will come in to work even while he is on annual leave if he deems it necessary, is not in the office all the time; he is, as Ms Paraskova's evidence suggested, often out at meetings. This is the same for Mr Shaw and was the same for the Claimant. We find that the likelihood is, the Claimant would have made the situation work after her baby was born, just as she had when she was pregnant.

6.58 The Claimant did not appeal the outcome of her grievance. There is a facility for an appeal in the grievance policy. We find that the Claimant's attention was not specifically drawn to the option, but nor was she prevented from appealing.

6.59 Evidence was brought on day three purporting to show that the Respondent has been making efforts to recruit a buyer or senior buyer. Mr Feldman suggested that the aim was to recruit a buyer who could be developed to become a senior buyer and that this was a replacement for the Claimant/Mr Shaw. In fact, we find that this was a recruitment exercise for the replacement of another colleague in the team, a buyer. We are not persuaded that any efforts have been made to replace the Claimant, or if they have, it is to bolster the Respondent's defence in this case and not out of genuine necessity.

7 Conclusions

7.1 <u>Constructive dismissal</u>

7.1.1 We have found that the Respondent's conduct in relation to this complaint took place as alleged by the Claimant, with the single exception of Ms Withey speaking "curtly" to the Claimant on being told of the latter's pregnancy on 5 December 2016.

7.1.2 We consider that the findings as to the Respondent's conduct which we have made above have created a situation, without proper cause, which was likely to destroy the relationship. We accept that there is no standalone complaint as regards the flexible working application itself; but we can and do consider our findings as to the manner in which that application was dealt with as part of our conclusions under this head. It is cumulative conduct with which we are concerned.

7.1.3 Indeed, the primary and most recent element of that conduct is the manner in which the senior management failed adequately or at all to consider the Claimant's flexible working request, though the earlier events before and while the Claimant was pregnant did contribute to the impression of prejudice and intolerance on the part of Ms Withey and, to a lesser extent, Ms Clay. We conclude that the Respondent did not give the flexible working request genuine consideration because Ms Withey and, perhaps more significantly, Mr Feldman, had set their minds against it from the start, and said so. Mr Feldman misquoted the figures before us and appeared from the outset to be wholly unwilling and unable to approach the Claimant's desire to work flexibly in anything like a positive fashion. We conclude that this is symptomatic of the environment in which the Claimant

found herself, and it led to the breakdown of mutual trust and confidence between her and the Respondent.

7.1.4 Further, Mr Miles did not conduct a genuine appeal. He could not overturn the original decision to refuse the request; he had no authority to do so. Hence it was not really an appeal at all, but the façade of one. He did not speak to Mr Shaw and did not even consider using the Claimant's KIT days as she had offered. His only proposal was that the Claimant's request could be reconsidered after six months.

7.1.5 We conclude that this was a false trial of what the Claimant wanted. The Respondent's senior management team wanted Claimant back from maternity leave, but solely on their terms. They were proposing to trial the wrong thing; we are unable to see how trialling a role full time would have helped them to know if part time would succeed.

7.1.6 Hence the Claimant was placed in an impossible position. She would have had to set everything up to come back full-time, then after six months, alter her arrangements while the "trial" took place, then alter them again if it did not work out and the Respondent required her to return full-time. The proposal to wait six months before even considering starting a part-time trial merely emphasises the Respondent's implacability and shows that the managers did not have a flexible approach. Even six months of working full-time in the London office would have placed an intolerable burden on the Claimant. We accept the Respondent's submission that it is not legally required to make speculative offers to the Claimant in response to her flexible working request; but it is part of the implied term of mutual trust and confidence that it consider her request properly and in good faith. The reason why the Claimant resigned was indeed the rejection of her appeal, but it must be seen in the context of what had gone before, even if, as we conclude below, that past conduct cannot now found a claim or claims for discrimination on a standalone basis because it is out of time.

7.1.7 We conclude therefore that the Respondent's conduct, taken as a whole and culminating in the dismissal of the Claimant's appeal as to her flexible working application, was likely to destroy or seriously damage the relationship, and hence amounts to constructive dismissal. Accordingly, we conclude that the Claimant was dismissed unfairly; this complaint is well-founded and succeeds.

7.2 <u>Pregnancy and maternity discrimination</u>

7.2.1 We have, as noted, found that the conduct complained of during the Claimant's pregnancy took place as she describes, save in relation to Ms Withey's "curtness" on learning of the Claimant's pregnancy.

7.2.2 This was conduct occurring up to April 2017 at the latest, because that is the date on which the Claimant went on maternity leave. There is no allegation of conduct after that date under this head. There has been no reasonable explanation for why the claim was not brought earlier. We can appreciate that the Claimant might not have wanted to make things difficult for herself if she always intended to return after her additional maternity leave (although that would not necessarily mean that

she did not have to comply with the statutory time limits in any event); but once the grievance was concluded and the outcome known to her, she could have acted immediately to bring the claim. She did not do so for at least another three months. There being no good reason to extend time using our just and equitable discretion, we strike out this complaint because we do not have jurisdiction to hear it.

7.3 Direct sex discrimination

7.3.1 In the same way, we have found that the conduct relied on for this complaint has been largely proven. Three issues arise: the first two are that this is a complaint which duplicates the previous one, and it is out of time with no good reason to extend time. Indeed, the first conduct relied on (in July 2016 Ms Clay instructing the Claimant to drink alcohol to prove to Ms Withey she was not pregnant) occurred more than two years before the Claimant went to ACAS for Early Conciliation. For those reasons we do not have jurisdiction to hear it and it is struck out.

7.3.2 The third issue is the comparator. We have some concerns about comparing the Claimant (believed to be or actually pregnant) with a man who is believed to be or actually is suffering from a medical condition which means he should avoid alcohol. We can understand why the comparator has been pleaded in those terms, because he must be in not materially different circumstances from the Claimant, save that he does not share her protected characteristic of sex. It is arguable that he must therefore be subject to suspicion from Ms Withey and/or Ms Clay, presumably that suspicion being that he will be less effective in the workplace if he drinks and/or be on the verge of taking a period of time off due to his condition, although that does not quite put him in not materially different circumstances. In any case, we are aware that pregnancy should not be equated with illness. It may not be necessary to place a male comparator in the position where he has, or is suspected to have a particular medical condition. It may be enough to have a comparator who is a man, without more, because Ms Withey and/or Ms Clay would not have believed a man to be pregnant. In the former situation, the man would perhaps have been treated no differently, while in the latter, the complaint would be made out. In light of our conclusion that the claim is out of time, however, we do not reach a definitive decision on this point.

7.4 Indirect sex discrimination

7.4.1 We conclude that the Respondent was applying a PCP, i.e. that the Senior Buyer must attend the London office Monday to Friday, and would have continued to apply it for at least the first six months of the Claimant's return to work after maternity leave. This is clear from Mr Miles' appeal outcome, in which he states that the Respondent "is unable to commit to a flexible working arrangement at this time, however we are open to further discussions regarding this in the future" and "job sharing is not currently a viable option". We note that the Respondent is and has throughout been making an exception for Mr Shaw, albeit he is not the Respondent's employee. That does not mean the PCP does not exist. It was applied to the Claimant.

7.4.2 We further conclude that consistent management of the team is a legitimate aim, as is meeting the team's and customer demands. However, we are not persuaded that the PCP is a proportionate means to achieve those legitimate aims.

7.4.3 We have considered whether the PCP puts women in general at a disadvantage. We conclude that it does, according to the statistics from the ONS, which show that women still bear the greater responsibility for childcare by comparison with men. If women did not have greater responsibility than men for childcare, the PCP of working in the office would not disadvantage them as a group because they would be free to work whatever hours and in whatever pattern or location the employer required. Where a person has childcare responsibilities, it follows that they are constrained by the hours that that childcare is available and the arrangements that must be made to access it.

7.4.4 Clearly the PCP imposed put the Claimant specifically at a disadvantage. It was not solely the requirement to work full-time that put her at a disadvantage, but the requirement to work full-time in the office. The issue was that the responsibility for her childcare arrangements would have fallen squarely on the Claimant, in that it was the Claimant who would have had to rise early and come home late in order to take her son to and from her parents' house on the days when she was going in to work in London, and she did not consider that to be manageable five days a week. We can accept that. It is little surprise that the Claimant would not have wanted to submit either herself or her child to such a punishing schedule, which she suggested (without contradiction) would require childcare to be available from 06.00 to 19.30 each day.

7.4.5 As confirmed in *Essop v Home Office* and *Naeem v Secretary of State for Justice*[4], it is irrelevant that the PCP does not put everyone with the protected characteristic at the disadvantage (and hence irrelevant that a female Senior Buyer in the Ready to Wear team, who lives in London, has not faced the same difficulties as the Claimant did in working from the office five days a week), nor is there a requirement to show a causal link between the PCP and the protected characteristic; it is enough to show the causal link – here, arising from social factors – between the PCP and the disadvantage, suffered by both the group and the individual.

7.4.6 The Respondent's legitimate aims have apparently been achieved with Mr Shaw not being in the office all the time. Indeed, it would make no sense to require that Senior Buyers must be in office all the time to achieve consistent management, because, as we have found, they are not. They are not in the London office, for example, if they have to go to the Respondent's warehouse, are on holiday (they cannot all be expected to forego or cancel annual leave as Mr Cardoso has allegedly done) or off sick or have to attend a meeting at a client's offices. Mr Shaw confirmed that another buyer or more senior person such as Ms Withey will cover if something is urgent and a Senior Buyer's input is required but none is available. We have found that there is no need to impose a requirement to install new or expensive systems to enable discussion between the buying team if one team

[4] [2017] UKSC 17

member is not physically present; we have yet to encounter a smartphone that does not have a loudspeaker facility.

7.4.7 The Claimant would have been contactable throughout the working week (including being able to respond to impromptu time-limited offers from suppliers, though that was not pleaded as a legitimate aim) and available to come in to the office even with short notice or go out to meetings if needed. Ms Paraskova and Mr Shaw's evidence supports our conclusion that there is flexibility within which meetings and specifically their timings can be arranged, even where there is urgency in an offer being made that will go to a competitor if not accepted by the Respondent.

7.4.8 The Claimant was not required to be exclusively at her house on the two days that she was proposing to work from home, and she would not have had the responsibility of childcare once her nanny arrived. We find that the Claimant could have left for a meeting as soon as the nanny came to her house, and further that the Claimant had arranged that the nanny could come early or leave late (for a premium, which the Claimant was happy to pay to keep her job). She could therefore have been almost as flexible as Mr Shaw. The Claimant had already shown that with goodwill on her part (which we have no doubt would have continued on her return from maternity leave), working flexibly from home could be made to work, including as to her management of the team (e.g. in relation to Ms Giddeon-Powell's promotion while the Claimant was working from home one day a week). The Claimant would still have been in the office for the majority of the time.

7.4.9 In any event, we have regard to the majority decision in the European Court of Human Rights in *Eweida v United Kingdom*[5], wherein it was noted that the fact British Airways had changed its uniform policy to allow for the wearing of symbolic religious jewellery demonstrated that the initial prohibition was not of crucial importance. In this case, the fact that the Respondent has throughout permitted Mr Shaw to perform the role, albeit as a contractor rather than an employee, not only from different locations but on a wholly flexible and often part-time basis, shows in this case too that the PCP was not of "crucial" importance. Indeed, the failure to show any, or any compelling, evidence that the Respondent has sought to replace the Claimant after she went on maternity leave or at least in the year since her resignation, instead being content to continue the arrangement with Mr Shaw, suggests the PCP was not of importance at all.

7.4.10 We are required, according to the Court of Appeal in *Hardy & Hansons PLC v Lax*[6], (albeit a case brought under the Sex Discrimination Act 1975) to make our own decision as to whether the Respondent's PCP is objectively justified, rather than considering whether it is in the range of reasonable responses in these particular circumstances. Thomas LJ noted in that case that the Tribunal can be expected to give at least a basic economic analysis of the business and its needs, such analysis being thorough and critical and showing a proper understanding of

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[5] [2013] ECHR 37

[6] [2005] ICR 1565

the business of the enterprise. We have endeavoured to do that here, but we have have had only a single sheet of figures which appears to contradict the position relied on by the Respondent generally and Mr Feldman specifically; we have heard nothing from Ms Withey as to the "stretching" or otherwise nature of the targets set for Footwear or the rest of the Respondent, but we do have evidence that Mr Shaw, working part-time, has achieved those targets which have been set and has regularly received bonuses including (apparently) against the Respondent's overall performance.

7.4.11 In denying the Claimant's application, the Respondent focussed entirely on the "risk" it purported to foresee, notwithstanding the arrangement with Mr Shaw was objectively and subjectively working well, and rather than trial the Claimant's proposed flexible working pattern even for a short time to see whether it could be made to work (and without considering at all the other option she put forward, namely job sharing with Mr Shaw), the Respondent rejected her application entirely. It was not proportionate to refuse even to contemplate a variation to the PCP for six months. We conclude that the Respondent had not sufficiently explored the possibilities being put forward by the Claimant and has overstated its objections. Accordingly, this complaint succeeds.

7.5 Harassment

As with the pregnancy and direct sex discrimination complaints, this complaint is considerably out of time and there is no good reason to extend time; it is therefore struck out.

7.6 Wrongful dismissal

Since the Claimant's complaint of constructive dismissal succeeds, we find that she was also wrongfully dismissed as a result of the Respondent's repudiatory breach of contract, and accordingly the Respondent is liable to pay her in lieu of her notice period.

7.7 ACAS uplift

7.7.1 We do not consider that the Claimant is entitled to any adjustment to the award of compensation (the sum of which is to be assessed at the Remedy Hearing on 17 July 2019 if not resolved earlier between the parties). The position in this regard is neutral; there is no positive obligation on an employer to draw their employee's attention to the right of appeal, and that is particularly so where, as here, the Claimant is articulate and has access to the policy in which the right is laid out.

7.7.2 While there were significant defects against the policy in the manner in which Mr Miles approached the Claimant's grievance and in the outcome he delivered, there were no breaches of the ACAS Code *per se*; and as we have found, the Claimant was not prevented from raising an appeal if she had wished.

7.7.3 This element of the claim is not well-founded and is therefore dismissed.

7.8 Summary

Overall, therefore, the complaints which succeed are those of constructive unfair and wrongful dismissal and indirect sex discrimination; the complaints of pregnancy and direct sex discrimination and harassment are struck out; and the complaint of a failure to follow the ACAS Code is dismissed. The complaint of a failure to pay holiday pay is dismissed on withdrawal.

8 Remedy

8.1 The panel will reconvene to consider the issue of remedy, unless the matter has been resolved by agreement prior to the agreed date. The parties are reminded that the services of ACAS remain available to them up to and including the day of the remedy hearing.

8.2 The Claimant is ordered to serve on the Respondent an updated schedule of loss in light of our findings and conclusions above, by no later than 24 June 2019. The parties are to exchange any further disclosure on which they will seek to rely in relation to remedy by no later than 1 July and any further witness statements by 8 July. The parties are to inform the Tribunal by no later than 4pm on 12 July whether they have been able to reach agreement. If they cannot, they are ordered to exchange skeleton arguments by 4 pm on 16 July and to bring a copy with them to the remedy hearing, which will start at 10.00 on 17 July 2019 at London Central Employment Tribunal unless otherwise advised.

Employment Judge Norris
13 June 2019

Sent to the parties on:

18 June 2019
For the Tribunal:

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