EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105546/2017

Held in Glasgow on 11, 12 and 13 February, 28 March and 2 May 2019
(Members' Meetings)

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Employment Judge: Mary Kearns
Members: Mr HP Boyd
Ms M McAllister

15 **Mrs K Ure** — **Claimant**
Represented by:
Ms J McKinley -
Strathclyde University
Law Clinic

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Chemcem Scotland Ltd — **First Respondent**
Represented by:
Mr S Smith -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was that:

(1) the claimant was unfairly constructively dismissed by the respondent and
30 the respondent is ordered to pay to the claimant the sum of **Four Thousand, Seven Hundred and Forty Eight Pounds (£4,748)** in compensation.

The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 do not apply to this award.

35 (2) The claim for automatically unfair dismissal under section 99 Employment Rights Act 1996 is dismissed.

(3) The claim for maternity discrimination is dismissed.

(4) The claim for notice pay is dismissed.

(5) The respondent is ordered to pay to the claimant the sum of **Six Hundred and Forty Three Pounds (£643)** as net payment for annual leave accrued
5 but untaken on termination of employment.

REASONS

1. The claimant presented an application to the Employment Tribunal on 5 November 2017 in which she claimed unfair dismissal, automatically unfair dismissal, maternity discrimination, notice pay and holiday pay. She is the
10 daughter of Linda and Alasdair Beaton, who are the directors and shareholders of the first and former second respondents. The first respondent lodged a response resisting the claim. Its position per its ET3 was that the claimant was on the first respondent's payroll from 1 September 2009 until 5 April 2015 but not in their employment. Following
15 a Preliminary Hearing ("PH") on 5 January 2018 to discuss case management a second respondent Blue Ridge Equestrian Limited was added and the case set down for a preliminary hearing on 12 March 2018 to determine the identity of the claimant's employer; the dates of her employment and time bar. In the judgment that followed that hearing the
20 Tribunal held that the claimant was employed by the first respondent from 8 June 2015 until 25 September 2017. The second respondent was dissolved on 24 July 2018 and no longer exists.

2. On joint motion by parties' representatives, submissions were lodged in writing for consideration by the Tribunal at a members' meeting. In the
25 event, two members' meetings were held on 28 March and 2 May 2019.

Issues

3. The issues for the Tribunal were:-

   (1) Whether the claimant was dismissed;

   (2) If so, whether that dismissal was unfair;

(3) If it was unfair what financial award/compensation, if any is due to the claimant?

(4) Whether the dismissal of the claimant was automatically unfair under section 99 Employment Rights Act 1996 because the reason or principal reason for dismissal was pregnancy or maternity;

(5) Whether the respondent discriminated against the claimant contrary to section 18(4) Equality Act 2010 by dismissing her because she was exercising or had exercised the right to maternity leave.

(6) Whether the claimant is entitled to notice pay;

(7) Whether the claimant is entitled to holiday pay.

Evidence

4. The parties produced a joint bundle of documents and referred to them by page number. The claimant gave evidence on her own behalf and called her mother, Mrs Linda Beaton. The respondent called Mr Alasdair Beaton.

Findings in Fact

5. The following material facts were admitted or found to be proved:-

6. The first respondent is a successful civil engineering company, owned and operated as a family business for many years by Mr Alasdair Beaton and his wife, Mrs Linda Beaton. Mr Beaton owns 70% of the company and Mrs Beaton owns 30%. They are both directors. The claimant is their daughter. The claimant and her sister were on the first respondent's payroll from 1 September 2009. In or about the summer of 2010 the claimant graduated from university and went to work as a full-time journalist for Johnston Press at the Falkirk Herald. In that job she had Friday afternoons off and she would sometimes go and help her mother with the first respondent's IT issues or take cheques to the bank. She had her first child in February 2013 while still working for Johnston Press and she took her one-year maternity leave entitlement and undertook keeping in touch days before she returned to work in January 2014. The package she received in that

employment was generous; six months on full pay, three months on half pay and three months on no pay. The claimant gave the editor a rough idea of when she planned to return to work and the company contacted her nine months into her maternity leave to organise keeping in touch days. The company's HR department contacted the claimant and advised her of her entitlements.

7. In or about May 2015 the first respondent purchased the Blue Ridge Equestrian Centre which was situated close to the Beatons' home and office at Wester Crosshill Farm. The first respondent also purchased the horses and other assets of the centre. On 27 May 2015 the former second respondent, Blue Ridge Equestrian Limited was incorporated.

8. The claimant was asked by Mr Beaton to take on the role of 'General Manager' of the Equestrian Centre. Her duties were to design and set up a web-site for the Centre and thereafter to maintain it; to set up and maintain the Centre's social media profiles and deal with enquiries, emails and phone calls; to arrange horse shows; to market the Centre; to hire staff; and to deal with livery agreements. The claimant also applied to Sport Scotland for funding and dealt with an issue where the Land Register had registered the first respondent for too many hectares resulting in an over-payment of business rates. The claimant had regular meetings with her parents to discuss how the work was going. It was specifically agreed between the claimant and Mr Alasdair Beaton that the claimant would be paid by the first respondent. At that time the Centre had three other employees, all of whom were paid by the former second respondent with the first respondent providing the funds.

9. The claimant began working at the Equestrian Centre on or about Monday 8 June 2015. At that point she was still employed by the Johnston Press and she worked for the first respondent on a part time basis. Her first payment from the first respondent in respect of the role was made on Friday 12 June 2015. The claimant was paid £150 gross (£120 net). She continued to receive this sum weekly until December 2015. In November

2015 the manager of the Centre left and the claimant took on most of the management tasks. Her workload at the Centre increased. In December 2015 the claimant said to her parents that she would be happy to work full time for them at the Equestrian Centre and to leave her job at the paper provided they matched her salary. This was agreed to by both Mr and Mrs Beaton and the claimant resigned from her journalism job and increased her hours at the Centre to full time. On 11 December 2015 her weekly pay from the first respondent increased to £292.50 gross (£217.60 net). This was then adjusted and from 22 January 2016 she received £324 gross (£238.92 net) per week from the first respondent.

10. In or about January 2016 the claimant discovered she was pregnant and told her parents that her due date was 2 October 2016. She gave her mother the MatB1 form she had received from her doctor and her mother gave it to the accountants. Her intention was to take one year's maternity leave. She decided to work until her due date, but this was not specifically discussed with her parents at that point.

11. Shortly after the claimant began working at the Equestrian Centre, she began to suspect that her father was having an affair with one of her colleagues. At some point in early 2016 she confronted him, and he admitted it. He refused to end the affair and insisted that the employee concerned should nevertheless remain in employment at the Centre. On or about 23 May 2016 the claimant told her father that she was disgusted with him. After that the claimant continued working for the Centre but she worked from home as much as possible so that she would not have to see the employee in question. However, it was occasionally necessary for her to attend the Equestrian Centre for meetings and other events. Around the end of May 2016 the Beatons started divorce proceedings to end a 35 year marriage and things became extremely acrimonious between them and between Mr Beaton and his children.

12. The claimant continued working until on or around 26 September when she went into hospital to have her baby induced and gave birth to a son.

She told her parents about the birth of her son and his date of birth. Her maternity leave started on or about 26 September 2016. Her first payment of statutory maternity pay ("SMP") was received on 30 September 2016 (J5b19).

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13. At the point where the claimant's maternity leave began, the first respondent's accountant Mr Gavin Blake was taking instructions from Mr and Mrs Beaton about what the first respondent's employees were due in terms of pay. On a Thursday he would email them this information. The claimant was not given notification of the date when her Statutory Maternity Leave ("SML") would end.

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14. In January 2017 the Beatons separated and Mr Beaton moved in with the employee at the Equestrian Centre with whom he had had the affair. The family became very divided and there was a great deal of bitterness and acrimony. From this point Mr Beaton dealt with the accountants directly and Mrs Beaton no longer received payroll information or had an input into what employees were paid. The claimant was still on maternity leave and continued to receive SMP from the first respondent on the instructions of Mr Beaton.

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15. With effect from the beginning of February 2017 and without any consultation with or notification to the claimant, Mr Beaton gave instructions to his accountant to switch the claimant from the payroll of the first respondent to the payroll of the former second respondent Blue Ridge Equestrian Limited ("Blue Ridge"). From Friday 5 February 2017 the claimant's payslips started to show the former second respondent's name. At the same time, Mr Beaton resigned as a director of Blue Ridge and back-dated his resignation to the previous August. He was aware that Blue Ridge would become insolvent at the point when the first respondent stopped funding it and the plan was that it would shortly cease trading.

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16. The claimant's entitlement to statutory maternity pay ("SMP") was 39 weeks. Her SMP payments started on 30 September 2016. She was never informed by the first respondent or anyone else what her rate of

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SMP was or when her entitlement would end. The respondent paid the claimant SMP and made this up to the same rate as her usual salary until 30 April 2017. From 7 May 2017 the claimant was paid statutory maternity pay of £140.98 only until the end of her maternity pay period on 18 June 2017. At no stage was the claimant informed of the date when she would be expected back from maternity leave or offered keeping in touch days. However, she was aware that her maternity leave was 52 weeks and that this would mean she would need to return to work on 25 September 2017.

17. On two occasions, once in April 2017 and again in May 2017 the claimant was not paid the SMP to which she was entitled on the date when it was due although it was subsequently paid to her on each occasion a week late. When she queried this the first time her mother told her that her father did not want to pay her and said that she had been removed from the payroll. The claimant telephoned Mr Blake who told her: "*I've told him this leaves him wide open to an Employment Tribunal".* The claimant texted her father to query what was happening. Her father responded to say she had been paid enough. However, the payment was made up again the following week. Both times the claimant was not paid on time, she contacted Mr Blake or her father or mother to query the non-payment. Although the claimant was eventually paid what she was entitled to, she sometimes had to chase the payments. The final SMP payment to which she was entitled was made on 18 June 2017.

18. The Equestrian Centre was not a success and the second respondent ceased trading on 1 July 2017 and was dissolved on 24 July 2018. All the employees of the second respondent were transferred to the first respondent by 1 July 2017. The claimant transferred to the first respondent by operation of law (TUPE) on 1 July 2017. Since then, the business of the Blue Ridge Equestrian Centre has been operated by the first respondent, who continued to own all the assets including the land, buildings and horses used by the Centre. Those assets had previously been provided to the second respondent for use in running the Centre.

That arrangement ended on 1 July 2017 when the second respondent ceased trading.

19. In or about mid July 2017 the claimant queried with her mother why she was no longer receiving SMP from the respondents. She could see that the Equestrian Centre was still open, and the staff were still working and was confused about what was happening. On 17 July 2017 Mrs Beaton emailed Mr Beaton and Mr Blake the accountant (J4/7): "*Please confirm why Kirsty has had no paperwork from payroll since her last payment weeks ago? Also confirmation of why she was transferred from Chemcem to Blue Ridge with no notification. Despite repeated verbal requests no information has been forthcoming.*" By email dated 15:58 on 17 July 2017 Mr Blake replied "*We have been told by Alasdair that he has had a discussion with Kirsty and she is not working at Blueridge. We have not treated her as a leaver since we haven't been given specific instructions on that point yet. We have discussed Kirsty's position with you and Alasdair on many occasions.*"

20. On 20 July 2017 the claimant's mother told her "*Your Dad says you've not to get paid anymore.*" The claimant emailed her father care of the first respondent the same date (J2). She stated: *"I have now not been paid for 3 weeks running again. I have asked if I am dismissed following mat leave, and if so I need my P45 and my redundancy payment…"* She also texted Mr Beaton in similar terms (J2). He responded: *"No members of br staff have been paid for 9 weeks only u take it up with your mum."* This was untrue. On another occasion when the claimant queried why she had not been paid Mr Beaton texted back: "*You've been paid enough.*"

21. The claimant was due to return to work from maternity leave on 25 September 2017. However, she had not been informed by the first respondent of the date when she would be expected to resume work. Mr Beaton knew that the fact that the claimant's SMP entitlement had expired was the reason why she was no longer receiving payment, but out of

"badness" he deliberately did not tell her or answer her queries about her employment status.

22. On 9 August 2017 at 7:24pm the claimant sent an email (J3/1) to her parents copied to Mr Blake in the following terms:

5 "*Dear A&L Beaton*

I write to you in reference to our further conversations/messages re wages and employment with Chemcem/Blue Ridge.

I have received no wages since July 7, 2017 and have not had a P45 through, nor any questions re my employment answered.

10 *As you are aware, I am currently on maternity leave and have up until September 2017 until the leave expires.*

Earlier this year I was made aware I am no longer employed through Chemcem and was now an employee of Blue Ridge. At the time I consulted with an employment solicitor who told me that while this didn't
15 *breach employment law, I should have been made aware of the change and that if the reason was to then terminate employment/wages at a further date, then it would breach UK employment laws.*

When I stopped being paid in July – without warning -I questioned both directors and was told this was A Beaton's decision and to ask him.

20 *He sent me a text stating: 'No one at Blue Ridge is being paid'. This is irrelevant as I should never have been moved from the Chemcem payroll had finances been in trouble. I further discovered at the same time as my wages ceasing, another employee of Blue Ridge and A Beaton's partner – L Thomson – was moved from Blue Ridge payroll and put on Chemcem*
25 *as to still get paid.*

I have yet to receive a P45 and therefore am still an employee and am due wages. – whether that be from the Chemcem or Blue Ridge payroll – and should have wages due to me and a suitable notice period should you wish to terminate my employment.

I have again consulted my employment solicitor who assures me I have a very strong case to take Chemcem to an employment tribunal and should this email be left unanswered I will be left with no other option that to pursue that option…."

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23. On 15 August at 2:14pm Mr Beaton responded to the claimant from his phone in the following terms: "*Firstly u have never worked for chemcem in any shape or form u had a part time job with blue ridge receiving £200 per week somehow along the way u had a very large increase in that amount without my agreement and have not been seen at blue ridge since first week in may. If this is when your maternity started then it has long since stopped.*

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I also noticed and quested [sic] *mrs Beaton as to why u were still on the extremely high rate of pay ever after your 6 months when it should have been reduced to 50%. I hope this clears some of your questions. Dad"*

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24. The claimant's normal gross pay with the respondent was £324 per week. Her net weekly pay was £238.92.

25. In or about August 2016 the claimant and her husband had started an events business together and in August 2017 they incorporated it as a limited company. The idea was that it would mainly be the claimant's husband who would work in the business. However, the claimant ended up working more than originally planned for it due to the termination of her employment with the first respondent. The claimant and her husband did not take a wage from the company until October 2017. From October 2017 the claimant earned the following amounts (J7a – d): 27 October 2017 - £680.33; 24 November 2017 - £652.93; 29 December 2017 - £903.73. Thereafter she earned an average salary of £173.41 per week from the company (J14). The claimant's husband continued to work as a joiner while a director of the events company.

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26. The respondent's holiday year runs from 6 April to 5 April.

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27. The claimant did not return to work at the end of her 52-week statutory maternity leave because of the respondent's conduct described above. The respondent's conduct amounted to unfavourable treatment of the claimant. However, this unfavourable treatment was because of the acrimonious breakdown of the marriage of the respondent's directors and was not, to any extent because the claimant had taken maternity leave. Mr Beaton wanted the claimant to leave the first respondent because his relationship with her had broken down and so that she would not be managing his new partner. The claimant and Mr Beaton were no longer on speaking terms and he was angry that he had not seen his grandchildren for two years. Mr Beaton had gifted the claimant a house worth £350,000 and a pension worth £100,000 and he was angry and resentful at her for taking her mother's side in the marital dispute. Mr Beaton knew the claimant's maternity pay had run out on 8 June 2017. He could have told her, but he chose not to in the hope that she would not return to work at the first respondent. He could have handled it differently. It was just badness on his part. His new partner, Lyndsey Thomson was working at the Centre, as were her mother and father Jim and Anne Thomson and her daughter, Morgan Thomson and he did not want the claimant to return.

28. When it came to September and the claimant did not return from maternity leave, no one from the first respondent contacted her to find out where she was. The claimant did not return because she did not believe she had a job to return to in view of Mr Beaton's conduct towards her as described above.

29. The claimant's parents had taken out a pension for the claimant, her brother and her sister when they reached the age of eighteen. This was not associated with their employment. Indeed, the claimant's sister never worked for the first respondent.

Applicable law

Constructive unfair dismissal

30. The claimant's employment terminated on or about 25 September 2017 when she failed to return from maternity leave. The onus is on her to establish that her failure to return constituted a dismissal. So far as relevant, Section 95(1) of the Employment Rights Act 1996 ("ERA") provides that an employee is dismissed if …. and only if

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

31. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer's conduct are to be judged according to the common law. A claimant must establish a repudiatory breach of contract by the respondent. In *Malik –v- BCCI SA [1997] IRLR 462 HL* this was described as occurring where the employer's conduct so impacted upon the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract.

32. The claimant in this case requires to prove that:-

    a. There was an actual or anticipatory breach of a contractual term by the respondent;

    b. That the breach was sufficiently serious (fundamental) to justify her resignation;

    c. That she resigned in response to the breach and not for any other reason; and

    d. That she did not delay too long in resigning.

33. The claimant's argument in this case is that by behaving towards her as it did, the respondent was in breach of the implied term of mutual trust and confidence.

34. The implied term of trust and confidence was described by the House of Lords in _Malik –v- BCCI SA [1997] IRLR 462 HL_ as a term that "*the employer shall not, without reasonable and proper cause conduct itself in a manner calculated and* [or] *likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*."

Automatically Unfair Dismissal

35. Section 99 Employment Rights Act 1996 ("ERA") provides so far as relevant as follows:

"***99 Leave for family reasons***

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

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

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to –

(a) pregnancy, childbirth or maternity,…..

(b) ordinary, compulsory or additional maternity leave…"

36. Regulation 20 of the Maternity & Parental Leave Regulations 1999 ("the MAPL Regs") provides, so far as relevant as follows:

"20 Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

5 *(c) The reason or principal reason for the dismissal is of a kind specified in paragraph (3), or*

(d) ……….

(2) ……..

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

(e) The pregnancy of the employee;

(f) The fact that the employee has given birth to a child;

(g) ………

(h) The fact that she took, sought to take or availed herself
15 *of the benefits of, ordinary maternity leave or additional maternity leave;*

(i) …………

(ee) the fact that she failed to return after a period of ordinary or additional maternity leave in a case where –

20 *(i) The employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or*

(ii) The employer gave her less than 28 days' notice of the
25 *date on which the period in question would end, and it was not reasonably practicable for her to return on that date.*

(j) ……………..”

Pregnancy/ Maternity Discrimination:

37. Section 18 Equality Act 2010 provides as follows:-

“18 Pregnancy and Maternity Discrimination: Work Cases

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

(2) ……….

(3) ……….

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

(5) …………..…

15 *(6) The protected period, in relation to a woman’s pregnancy, begins when the pregnancy begins, and ends –*

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

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

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

25 (a) *It is in the protected period in relation to her and is for a reason mentioned on paragraph (a) or (b) of subsection (2), or*

(b) *It is for a reason mentioned in subsection (3) or (4).”*

Discussion and Decision

Constructive Dismissal

38. The first issue in the constructive dismissal claim is whether the claimant has shown that the respondent committed a repudiatory breach of her contract of employment. The particular term alleged to have been broken is the implied duty of trust and confidence that:-

    “*the employer shall not, without reasonable and proper cause conduct itself in a manner calculated and* [or] *likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.*”

39. In Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666 EAT Browne Wilkinson J (as he then was) put the test like this: *“The tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”*

40. We considered whether the conduct of the respondent set out in our findings in fact above, taken cumulatively, amounted to a breach of the implied term. We asked ourselves whether, taken as a whole it was calculated or likely to destroy or seriously damage the relationship of trust and confidence. We concluded that the following actions of the respondent taken together amounted to a breach of the implied term:

    (1) With effect from the beginning of February 2017 and without any consultation with or notification to the claimant, Mr Beaton switched the claimant from the payroll of the first respondent to the payroll of the former second respondent Blue Ridge Equestrian Ltd (“Blue Ridge”). He was aware that company would become insolvent once the first respondent stopped its funding and the plan was that it would shortly cease trading. Not

long after transferring the claimant to Blue Ridge, Mr Beaton transferred all the other employees of Blue Ridge including his partner Ms Thomson from Blue Ridge to the respondent.

(2) On two occasions, once in April and again in May 2017 the claimant was not paid the SMP to which she was entitled on the date when it was due although it was paid to her on each occasion a week late. When she queried the non-payment, her mother told her that her father did not want to pay her and said that she had been removed from the payroll. The claimant telephoned Mr Blake who told her: "*I've told him this leaves him wide open to an Employment Tribunal".* The claimant texted her father to query what was happening. Her father responded that she had been paid enough.

(3) The claimant was not informed by the respondent when her entitlement to SMP ended and her queries about the cessation of her pay were not frankly answered. The final SMP payment to which the claimant was entitled was made on 18 June 2017. In or about mid July 2017 the claimant queried with her mother why she was no longer receiving SMP from the respondents and was not told that her maternity pay had run out despite this fact being known to Mr Beaton. Instead, on 20 July 2017 the claimant's mother told her "*Your Dad says you've not to get paid anymore."* The claimant emailed her father care of the first respondent on the same date (J2). She stated: *"I have now not been paid for 3 weeks running again. I have asked if I am dismissed following mat leave, and if so I need my P45 and my redundancy payment…"* She also texted Mr Beaton in similar terms (J2). He responded untruthfully: *"No members of br staff have been paid for 9 weeks only u take it up with your mum."*

(4) On 15 August Mr Beaton responded to the claimant's email of 9 August in which she had requested information about her

employment in the following terms: "*Firstly u have never worked for chemcem in any shape or form u had a part time job with blue ridge receiving £200 per week somehow along the way u had a very large increase in that amount without my agreement and have not been seen at blue ridge since first week in may. If this is when your maternity started then it has long since stopped. I also noticed and quested* [sic] *mrs Beaton as to why u were still on the extremely high rate of pay ever after your 6 months when it should have been reduced to 50%. I hope this clears some of your questions. Dad"*.

(5) At no stage was she informed of the date on which her maternity leave would end as required by the MAPL Regulations 1999.

41. It was clear to us that by August 2017 the respondent was in repudiatory breach of contract, having breached the implied term. Mr Beaton was being difficult and uncommunicative with the claimant about essential matters to do with her employment. He transferred her to the payroll of a company he knew was about to cease trading, deliberately gave her false information, confused her about her position with the respondent, failed to comply with the respondent's duties under the MAPL Regulations and knowingly refused to answer her legitimate queries. In reply to a question from the Employment Judge, Mr Beaton said candidly: "*I knew what was going on. I knew her maternity pay had run out. I knew her mother knew she was not getting paid because her maternity pay was finished. I knew at that point and could have told her and chose not to. I could have handled it differently. It was just badness on my part."* In relation to point (1) above Mr Smith submitted that Mr Beaton's reason for not actively transferring the claimant back to Chemcem along with the other employees was because her maternity leave had run out and she was not being paid anything. We did not accept this submission and concluded that Mr Beaton had deliberately transferred the claimant to Blue Ridge in the knowledge that that company would cease trading as soon as

Chemcem pulled the plug. Mr Smith submitted that we should accept the evidence of Mr Beaton in preference to that of Mrs Beaton where their evidence conflicted. However, they were both directors of the respondent and the possibility that some of the conduct complained of may have arisen from the toxic relations between them or that Mrs Beaton may have been partly responsible does not assist the respondent as Mr Smith recognised. We did not accept the 'stated intention' of Mr Beaton that the claimant would be transferred back to Chemcem.

42. We concluded that the claimant failed to return from maternity leave as a direct result of the conduct set out at points (1) to (5) above and not for some other reason. This was clear from the claimant's email of 9 August 2017 and from her oral evidence which we accepted. We concluded that she did not delay or affirm the contract. Mr Smith is correct to say that the claimant's email of 9 August 2017 was responded to on 15 August and that her maternity leave ran out on 25 September. He is also correct to say that the claimant was aware that her leave would run out on that date. However, by the date when the claimant would have had to return the first respondent had, by their conduct made it clear to her that her return to her job was neither expected nor desired.

43. In all the circumstances, we have concluded that the claimant was dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996. The dismissal was unfair, there being no fair reason for it on the evidence before the Tribunal. The claim for constructive unfair dismissal therefore succeeds.

Automatically Unfair Dismissal

44. An employee has an automatic right to return to work at the end of her maternity leave period. It is assumed that she will do so unless she says otherwise. She is not required to give notice of her intention to return unless she is coming back early. She can simply turn up for work the day after the 52-week SML period ends. In this case the claimant did not do so because of the respondent's conduct as discussed above. Section 99

ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a prescribed kind. Regulation 20 of the Maternity & Parental Leave Regulations 1999 prescribes pregnancy, giving birth and taking ordinary or additional maternity leave among those reasons. We did not conclude that the claimant's pregnancy, childbirth or maternity leave etc were the reason or principal reason for her dismissal and this claim therefore fails and is dismissed.

Maternity Discrimination

45. Although the claimant originally framed her discrimination claim erroneously as one of direct discrimination contrary to section 13 Equality Act 2010, she subsequently corrected this to a claim for maternity discrimination contrary to section 18. Section 18(7) clearly excludes section 13 here.

46. Section 18 provides (so far as relevant for present purposes) that a person (A) discriminates against a woman if A treats her unfavourably because of either her pregnancy, or her exercise of the right to ordinary or additional maternity leave. The unfavourable treatment complained of in the claimant's amendment allowed on 11 February 2019 was: "*The claimant began her SML in September 2016 and was paid SMP until June 2017. The failure to clarify with the claimant her return to work on the expiry of her SMP in the face of her enquiries as to her employment status as averred was unfavourable treatment because of her maternity leave.*" We accepted that the unfavourable treatment referred to in the claimant's amended pleadings had occurred and have made findings in fact accordingly.

47. The key issue is whether the unfavourable treatment was <u>because of</u> the claimant exercising etc her right to maternity leave (this being the reason asserted in the amendment). We concluded without hesitation that the unfavourable treatment was not to any extent because of the claimant exercising her right to maternity leave. We accepted the following

evidence in cross examination from Mr Beaton about the reasons for his conduct toward the claimant: "*My daughter was not talking to me. There was a big war going on. I said 'please deal with your mother regarding this.' "Kirsty was paid everything she was due. Linda Beaton could have said 'your maternity pay's run out. You're on your 3 months'".* Mr Beaton blamed Mrs Beaton and she blamed him for the unfavourable treatment of the claimant, but both were acting as representatives of the respondent. He was asked: *"Why did the claimant leave Chemcem?"* Mr Beaton replied: *"She didn't turn back up at her work. She discussed with her mother it was not happening. She did know about her maternity leave stopping at the point she went to ACAS." "What was the reason for the confusion about her SMP?" "It was between her and her mother. I knew exactly when her SML started and when her leave and pay ran out….."* As mentioned earlier, he accepted he knew this and did not explain it to the claimant out of "badness".

48. The claimant in her own evidence in chief answered the question: "*Why do you no longer work at Chemcem?*" with the following: "*There was a huge family fall out. Also, I was fed lies while on SML. I was told that no employees had been paid at BR for 9 weeks which was untrue and that BR was insolvent, which was true when I was querying why I was the only employee on BR payroll and everyone else, including Dad's girlfriend had been transferred to Chemcem. BR was put into administration and I was the sole employee"*. In re-examination, when asked: *"What made you leave?"* she stated: *"I'd had three weeks without wages. I was in contact saying 'what's happening?'. Dad said 'take it up with Mum'. Mum said 'Dad is not paying you anymore'. The final incident was after my email of 9 August… I got an email back saying I had never worked for Chemcem. Every word was a lie. It didn't answer any of my questions. It was just an aggressive reply. It doesn't say 'Your SMP ended and we'll expect you back in September."* Neither the claimant nor Mr Beaton said anything which indicated that the reason for the claimant's treatment was that she had taken maternity leave. Mrs Linda Beaton's evidence in cross

examination about the reason for the treatment of the claimant was: "*She wouldn't have been paid after the text from Alasdair. Alasdair wanted Kirsty out so Lyndsey Thomson could be in control. LT didn't want the claimant above her.*"

5 49. We accepted the respondent's submission that even if there was unfavourable treatment it was nothing to do with the fact that the claimant was pregnant, was on maternity leave or had taken such leave. The discrimination claim is accordingly dismissed.

Notice Pay

10 50. With regard to the claim for notice pay, the notice period is covered by the compensatory award for unfair dismissal. The claimant was entitled to two weeks' notice immediately following her termination date of 25 September 2017. Thus, she is entitled to two weeks' net pay in damages. This is included in the compensatory award and the claim for notice pay is 15 dismissed to avoid double counting.

Holiday Pay

51. According to the claimant the respondent's holiday year ran from 6 April to 5 April in any year, although no one seemed sure about this and Mrs Beaton suggested it may have been the anniversary of the claimant's start 20 date which would have been 8 June. We preferred the claimant's position on this as she seemed more confident about it and not only was her evidence on the point not challenged in cross examination but Mr Smith stated that the respondent conceded that holiday pay should have been paid and was not paid. Thus, on the basis of the claimant's evidence that it 25 was April to April, the claimant is entitled to holiday pay in respect of annual leave accrued but untaken between 6 April and 25 September 2017 (25 weeks). The case law is clear that if you are on maternity leave (or indeed sick leave) you cannot be on annual leave at the same time and holiday pay accordingly accrues. (With regard to the previous holiday 30 year we did not conclude there was any entitlement because we did not

hear any evidence that unused annual leave carried over into the next holiday year. We also heard no evidence about what holidays the claimant had already taken prior to the commencement of her maternity leave.)

52. The holiday pay calculation is therefore as follows:

5 25/52 x 5.6 weeks = 2.69 x £238.92 (a week's net pay) = £643 rounded to the nearest whole pound.

Remedy for Unfair Dismissal

53. The claimant is entitled to a basic award. Her salary at the time of dismissal was £324 per week gross. The claimant had completed two 10 years' continuous employment with the respondent. Her basic award is accordingly: 2 x £324 = £648.

54. The claimant also seeks a compensatory award. Section 123(1) Employment Rights Act 1996 provides that "*the amount of the compensatory award shall be such amount as the tribunal considers just* 15 *and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*". The claimant's Schedule of Loss claims past loss at 52 weeks, with the 4 weeks immediately after dismissal at full net pay and 48 weeks subject to mitigation in respect of 20 the claimant's earnings from her joint venture with her husband. There was no evidence that the claimant had looked for any other employment beyond the new company. The Tribunal concluded that in these circumstances it would be just and equitable to award past loss of 52 weeks subject to mitigation on the basis that that was a reasonable time 25 within which to expect the claimant to either find alternative employment at the same rate as her pay with the respondent or grow her business to provide for her at that level. Her compensatory award is accordingly 52 x £238.92 = £12,423.84 less 48 x £173.41 = £8,323.68. £12,423.84 - £8,323.68 = £4,100, rounded to the nearest whole pound. Future loss was 30 not claimed and no other relevant loss was claimed on her Schedule.

Basic award 2 years' completed service @ £324.	£648	
Compensatory award Past loss Net loss of earnings from to date of Tribunal TOTAL COMPENSATORY AWARD **Total award for unfair dismissal:**	 £4,100 £4,100 **£4,748**	

55. The claimant did not claim Jobseekers Allowance or other benefits. The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 accordingly do not apply to this award.

5 **Employment Judge: Mary Kearns**
Date of Judgment: 21 May 2019
Entered in register: 22 May 2019
and copied to parties