EMPLOYMENT TRIBUNALS

Claimant: Ms N Grant

Respondents:
1. Price Hunter International Limited (R2)
2. Mr Joshua Eden (R4)

Heard at: Manchester **On:** 25-28 March 2019
16 April 2019
(in Chambers)

Before: Employment Judge Hill
Ms M T Dowling
Mrs S J Ensell

REPRESENTATION:

Claimant: Mr Norman, Counsel
Respondents: Mr Zatman, Head of HR

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair constructive dismissal is well founded and succeeds

2. The Claimant's claim for Pregnancy discrimination is well founded and succeeds

3. The Claimant's claim for Detriment because of her pregnancy is well founded and succeeds

4. The Claimant's claim for victimisation is well founded and succeeds.

REASONS

These are the reasons for the Reserved Judgment set out above.

The Evidence

1. The Claimant provided a written witness statement and gave oral evidence. The Respondent called three witnesses; Mr Joshua Eden, Managing director; Mr Jeremy Winburn, Commercial Director and Mr Zatman, HR Manager. Mr Eden and Mr Zatman also gave oral evidence.

2. The Tribunal was provided with a list of Issue, a chronology and a bundle of documents. The bundle of documents comprised of two lever arch files. The Tribunal was not referred to every document in the bundle. References to the bundle in witness statements and in oral evidence were read by the Tribunal.

3. Mr Winburn did not give oral evidence. The Tribunal reminded the Respondent that it would read Mr Winburn's statement, but it was explained that because Mr Winburn was not present to give oral evidence or cross examination that the Tribunal would attach such weight to his evidence as appropriate. The Respondent considered its position overnight and confirmed that Mr Winburn would not give oral evidence. The Claimant confirmed that she would be withdrawing her claim against Mr Winburn.

Correct Respondent

4. It was conceded during evidence that the correct Respondent is Price Hunter International Limited.

5. Therefore the correct Respondents for the purposes of this hearing are: Price Hunter International Limited and Mr Joshua Eden (R4).

Application

6. At the beginning of the hearing the Claimant made an application to rely on tape recordings and transcripts for meetings held on 16 November 2017, 18th January 2018 and 9 February 2018. The application had been made via email on 21 March 201 and copied to the Respondent.

7. The meetings concerned were:

   a. 16 November 2017 meeting between the Claimant and 3rd and 4th Respondent regarding the whereabouts of the spreadsheet amongst other things;

   b. 18 January 2018 meeting between the Claimant and 4th Respondent regarding the master spreadsheet;

   c. 9 February 2018 disciplinary meeting.

8. The Claimant accepted that the disclosure of these transcripts and recordings was late but that they had genuinely been misplaced by instructing solicitors and were disclosed as soon as they were discovered. The claimant argued that they were important to the case and that the Respondents were not prejudiced and had had the documents since 21 March. The people involved in the conversations were also in attendance at the tribunal.

9. The Respondent argued that they had not had enough time to go through the transcripts and that they had been disclosed late. The Respondent requested an adjournment of the hearing in order to properly go through the transcripts and to verify the accuracy against the recordings.

10. The Tribunal decided that the transcripts for the first two meetings were important and that as no notes had been taken at these meetings, the evidence was relevant. The disciplinary hearing did have notes which were provided in the bundle and neither party disputed their accuracy. It was agreed that the Respondent would listen to the recording during the adjournment for the Tribunal to read the witness statements and documents and note any inaccuracies and that the Tribunal would also listen to the recordings.

11. After the adjournment it was agreed that the first two transcripts were accurate and that they would be included in the bundle of documents.

The Issues

Unfair Dismissal

12. Can the Claimant show that her resignation should be construed as a dismissal under section 95(1)(c) in that:

(1) The respondent committed a fundamental breach of trust and confidence in any or all of the following matters, taken individually or cumulatively, carried out by or on behalf of the respondent.

a. From 14 December 2017 failing to make any arrangements for a risk assessment to be carried out;

b. On 20 December 2017 emailing the claimant requesting sight of the spreadsheet despite being aware that it was not in existence;

c. On 20 December 2017 having no regard for the explanation offered by the claimant in relations to the storage of information;

d. On 22 December 2017 requesting that the claimant provide the spreadsheet by 5.00pm on 3 January 2018 which was an unrealistic deadline given the Christmas break;

e. On 22 December 2017 failing to extend the unrealistic deadline, despite the claimant’s assurance that she would start the task in the New Year;

f. On 4 January 2018 inviting the claimant to an investigation meeting for failing to comply with a reasonable management instruction;

g. On 10 January 2018 advising the claimant that the investigation would be conducted without a meeting and this could lead to a disciplinary hearing;

h. On 11 January 2018 ignoring the claimant's request to deal with matters informally and continuing with the disciplinary hearing, despite the claimant advising this was adding to her stress;

i. On 15 January 2018 arranging for someone without relevant experience to conduct the risk assessment;

j. On 15 January 2018 inviting the claimant to a disciplinary hearing over a matter which the claimant had previously been advised had been dealt with;

k. On 5 February 2018 failing to uphold any of the claimant's grievance;

l. On 9 February 2018 holding a disciplinary hearing despite being aware that the claimant was currently absent from work as a result of stress and anxiety;

m. On 20 February 2018 requesting that the disciplinary hearing was reconvened causing the claimant more stress and anxiety;

n. On 23 February 2018 insisting on there being a reconvened disciplinary hearing despite the claimant's protests.

(2) That this is a fundamental breach was a reason for the claimant's resignation; and

(3) That the claimant had not lost the right to resign by affirming the contract, whether through delay or otherwise.

(4) The Respondent does not seek to argue that the dismissal was fair.

Pregnancy discrimination – section 18 Equality Act 2010

13. Are the facts such that the Tribunal could conclude that the respondents treat he claimant unfavourably because of her pregnancy in any or all of the following alleged respects:

a. From 14 December 2017 failing to carry out a risk assessment despite being aware of the claimant's medical history, making the claimant become anxious and stressed;

b. From 14 December 2017 failing to suspend the claimant on full pay whilst the risk assessment was undertaken, or to consider alternative work or lighter duties;

c. From 14 December 2017 appointing someone without relevant experience to conduct a risk assessment, making the claimant feel that the respondents were not taking the requirement for the risk assessment seriously;

d. From 14 December 2017 continually emailing the claimant requesting to see the spreadsheet even though the claimant advised that this document did not exist, and they had not requested it since the meeting on 16 November 2017;

e. From 14 December 2017 setting unrealistic deadlines for the claimant to provide the spreadsheet, despite being aware that the spreadsheet did not exist;

f. On 4 January 2018 conducting an investigation into the claimant without any new evidence becoming apparent;

g. On 9 February 2018 commencing disciplinary action against the claimant;

h. On 23 February 2018 requesting that the claimant attend a reconvened disciplinary meeting despite the previous disciplinary hearing having been concluded;

i. If dismissal is established (see issue 1) above, dismissing the claimant;

j. From 1 March 2018 withholding the claimant's commission.

14. If so, can the respondents show that there was nevertheless no breach of Section 18?

Detriment in employment – section 47C Employment Rights Act 1996 and regulation 19 Maternity and Parental Leave Etc Regulations 1999

15. Was the claimant subjected to any detriment by any of the following alleged acts or deliberate failures to act by the respondent because of pregnancy:

a. From 14 December 2017 failing to carry out a risk assessment despite being aware of the claimant's medical history, making the claimant become stressed and anxious;

b. From 14 December 2017 failing to suspend the claimant on full pay whilst the risk assessment was undertaken, or to consider alternative work or lighter duties;

c. From 14 December 2017 appointing someone without relevant experience to conduct a risk assessment, making the claimant feel that the respondents were not taking the requirement for the risk assessment seriously;

d. From 14 December 2017 continually emailing the claimant requesting to see the spreadsheet even though the claimant advised that this document did not exist and they had not requested it since the meeting on 16 November 2017;

e. From 14 December 2017 setting unrealistic deadlines for the claimant to provide the spreadsheet, despite being aware that the spreadsheet did not exist;

f. On 4 January 2018 conducting an investigation into the claimant without any new evidence becoming apparent;

g. On 9 February 2018 commencing disciplinary action against the claimant;

h. On 23 February 2018 requesting that the claimant attend a reconvened disciplinary meeting despite the previous disciplinary hearing having been concluded;

i. From 1 March 2018 withholding the claimant's commission?

Victimisation – section 27 Equality Act 2010

16. Did the Claimant do a protected act by commencing early conciliation with ACAS?

17. If so, are the facts such that the Tribunal could conclude that the respondents' subjected the claimant to a detriment because of that protected act by withholding commission payments after she resigned?

18. If so, can the respondents nevertheless show that there was no contravention of the section?

Written Statement of employment particulars

19. If any of the above complaints succeed, what award is appropriate in respect of the respondent's failure to provide the claimant with a written statement of the main terms of her employment as required by section 1 Employment Rights Act 1996?

Remedy

20. If any of the above complaints succeed, what is the appropriate remedy?

a. The basic and compensatory awards for unfair dismissal;

b. Whether the claimant has taken all reasonable steps to mitigate her loss;

c. An award for injury to feelings under the equality Act 2010

Findings of Relevant Facts

21. The Claimant commenced employment with the Respondent on 2 January 2014 as a Business Development Manager. The Claimant was not provided with a contract of employment, job description or a statement of main terms of conditions.

22. The Respondent is the sister company of Hunter Price International Ltd that is engaged in the design, manufacture and supply of innovative products to retailers and distributors in the UK and abroad. It also traded in clearance stock but in or around 2012 a decision was made to move the clearance business to a separate company Price Hunter International Limited, the Respondent Company.

23. The Respondent Company employs 4 people including the Claimant who also during her employment did work for Hunter Price International from time to time. Its business is exclusively in the buying and selling of clearance stock, liquidated stock and any other stock being sold at discount across the general Merchandise sector.

24. The Claimant's role involved making contact with companies across the UK and abroad with a view to purchasing stock and also visiting exhibitions, trade shows and shops to identify stock buying opportunities. The role also had an element of sales attached to it and the claimant would offer the clearance stock to a small and relatively fixed customer base. Her letter of appointment is set out at page 4 of the bundle and states "The role will include contacting companies for potential purchasing of clearance stock, visiting various exhibitions for stock buying and keeping a database of all potential suppliers".

25. The Claimant's starting salary was £25,000 with commission of 0.5% on purchases. This increased to a salary of £30,000 plus commission of 1% on sales and 0.75% on purchases. Both the Respondent and the Claimant stated that the Claimant's role was largely independent, and that the Claimant was trusted to get on with her job and set her own tasks and work to her own schedule. This is confirmed at paragraph 18 of Mr Eden (R4)'s statement.

26. The Claimant explained that when she first started the Respondent had a software package called 'ACT' where information regarding potential contacts was collated. Within the first year of her employment the licence for this product expired and was not renewed. At this stage the Claimant suggested that she would use an excel spreadsheet to store her contact details and this was agreed by Mr Eden (R4).

27. It was common ground between the parties that Mr Eden (R4) agreed to the Claimant using an excel spreadsheet to store her contact details. This was around the middle of 2014 and the claimant gave evidence she started a spreadsheet but also used other methods to store her information. The Claimant's evidence was that

she kept contact details in a number of places including the excel spreadsheet; her Outlook account and kept business cards she collected at exhibitions and trade shows. The Tribunal accepted this evidence.

28. In 2015 the Claimant was asked to work on the Aldi contract for Hunter Price International Limited. The Claimant explained that this was a time-consuming contract and her workload increased. The Claimant admitted that during this time she let her record keeping 'slip' but was able to continue doing her job particularly relying on her outlook and business card records.

29. The Respondent stated that it was of the utmost importance for the Claimant to maximise the number of suppliers she was contacting and to maintain a database with all information relevant to that supplier. It was suggested that should not be able to do her job without a master spreadsheet but the respondent conceded that she was in fact performing well.

30. After the Aldi contract ended the Claimant wanted to get organised and asked for help to try and get the contacts and information she had into a more ordered fashion. She asked Elaine Cameron to help by inputting some business cards onto an excel spreadsheet. This spreadsheet did not contain all the details and was not fully completed.

31. Throughout her employment there was no evidence of any supervisions or appraisals. The database was never looked at or requested by any of the Respondents and the Claimant continued to perform well in her role. During this period the Claimant submitted her own request for a pay rise setting out her achievements. The Respondent accepted this assessment and awarded her an additional £5,000 per annum and increased her commission as set out above.

32. However, the Claimant accepted fully that she had not kept the spreadsheet Elaine Cameron had started up to date and that she had adopted various methods including keeping business cards, saving contacts in outlook and had managed her contacts by keeping emails and not used any excel spreadsheet. The claimant said that email addresses would often go out of date the records would inevitably become out of date quite quickly. She therefore found that her method of keeping formation worked for her and enabled her to continue being successful in her role.

33. It was clear her new way of working had not affected her performance. She performed well on the Aldi contract and the Respondent accepted she had been doing really well. The Respondent said that the company had had a slow year but that they never attributed this to the claimant or the fact that a database had not been kept. Mr Eden (R4) said during evidence that this was not a crisis for the company and that the next order could make up any difference. He said that this was the way the business work and that it was a forward-looking business. The Tribunal accepted this evidence.

34. The claimant's performance has never been questioned and the Respondents had access to her computer and systems. The Claimant gave evidence that if information was requested this was always provided and the spreadsheet was never requested by the Respondent until the meeting on 15 November 2017. The Respondent also confirmed that the Claimant's performance in doing her role was not in question and that she had significant experience of the industry and would mention the number of new contact contacts he had acquired from time to time. Paragraphs 32 and 33 of Mr Eden (R4)'s statement.

35. In October 2017 The Respondent's business was performing below the levels it had historically and its turnover had dropped by around 50% during the period January to October 2017. The Respondent had discussed this with the Claimant and asked for a list of all her customers which Mr Eden (R4) and the Claimant worked on together to ensuring that the company maximised the list of customers she made offers to. The Respondent also wanted to look at the supplier side to get a better understanding of where they were with the supplier database and to ensure they were maximising the potential and quality of the goods they purchased.

36. Mr Eden (R4) said that at this stage he 'made a few cursory searches in the obvious places such as on our servers and in the Claimant's emails but was unable to find any trace of the supplier database'. At the time Mr Eden said this did not concern him because he was confident in the claimant's ability and knew that she needed her database to do her job properly.

37. On 16 November 2017 the Claimant was invited to a meeting with Mr Eden and Mr Winburn. The Tribunal had the benefit of the tape recording and transcript in respect of this meeting. The meeting started with Mr Eden informing the Claimant that he thought it would be a good idea to meet because they were 'putting a lot of thought into Price Hunter and what we can be doing moving forward'. Mr Eden then raised concerns about the Claimant's attitude and that she appeared 'pissed off'. He refers to the claimant 'not being herself' and that they all need to be on the same page moving forward and be happy.

38. Mr Eden then raised concerns over the claimant's time keeping and that concerns had been raised over her timekeeping and discussions around employing another person to work with the Claimant. There is then a discussion about the Claimant 'hiding' things and about the Claimant being 'cloak and dagger with where things come from' and not responding to an email. Mr Eden goes on to say that if the company wanted her out, they would be giving her an official warning for not responding to the email. Mr Eden refers to her work on the Aldi contract and says how beautifully she had everything set up. There then is a discussion around the claimant not socialising with other staff and that she should come to the 'Christmas do'. The Claimant confirms that she is.

39. At the end of the meeting Mr Eden says 'Right fine so look let's start a fresh from now let's get everyone get some you know erm let's get enthusiasm back – we've still got to catch up from last year. Mr Eden says that he was going to set up a

Price Hunter folder and that the Claimant would be able to put everything in the folder.

40. The Claimant explained that she had not had time to put all the information on the spreadsheet and that it was saved in various formats on her computer.

41. The conversation is varied and does not deal with any one issue in detail. It is clear from the transcript that the reference to the supplier database is a very small part of the meeting. At page 150 Mr Eden says that he does not need to see it but talks about transparency in connection with emails and claimant states that she has started some folders. There are no time limits and no conditions. Mr Eden states that he wants a fresh start and that he is going to facilitate the better start by setting up the folders for the Claimant to use. The Claimant took these comments on board and responds to this meeting at page 272 regarding her change in hours to avoid coming into work late.

42. Mr Eden emails the Claimant on 16th November with instructions as to where the new folder is to be kept and where he wants information storing and says ‘I want this to be the master file’ (page 280) and that he is ‘excited’ to see it. The Claimant responds by informing Mr Eden that she needs to collate the information first. The respondent did not question the claimant’s response and neither did Mr Eden set a time scale to complete the task.

43. On 19th November Claimant (a Sunday) the claimant emails Mr Eden with concerns over the meeting of 16 November 2017. The Claimant had felt upset after the meeting and wanted to raise her concerns. Interestingly in this email the Claimant sets out very clearly where all the contacts are, stating that they are ‘available through Navision, the contacts in Outlook or via physical business cards that are neatly labelled and located in a ring binder to my desk’. She says that she is very stressed and would like a meeting with Mr Eden along with her union rep.

44. On 21 November Mr Eden replies to the email and sets out a framework of the complaint and asks for more details. He says he is unsure whether the claimant intends raising a formal grievance or be used in potential disciplinary proceedings. This is a shock to the Claimant and she responds by saying that she is not aware the Respondent was considering disciplinary proceedings.

45. Mr Eden does not reply to this email until 30 November 2017. Mr Eden states that he had raised a number of concerns during the meeting and that disciplinary proceedings were still being considered although not specifically related to the master spreadsheet. Further email communications between the Claimant take place and on 4 December 2017 a further email from Mr Eden says he ‘just wants to clear the air and sort everything out’ page 348. The Claimant sends quite a detailed response set out at page 347 and ends with the same sentiment that she wants to clear the air and sort things out.

46. The Tribunal finds that at this time the Respondent is not considering pursuing disciplinary action in respect of the alleged master spreadsheet. There is certainly no indication that the claimant is required to produce such a spreadsheet or any indication that there is a time limit on when this information is to be supplied.

47. No further communication take place until the Claimant notifies the Respondents of her pregnancy on 14th December 2017 (page 320) and that she would be under specialist care after two traumatic pregnancies. The claimant advised that she felt 'zapped of energy' and was experiencing nausea. The respondents respond to her email and congratulate the Claimant but do not refer to the further information supplied in the email.

48. Mr Eden stated that he felt that he needed additional support and engaged HR support. At some point Mr Eden has a discussion with his HR consultant Debbie Mosely about the data base and his evidence was that she had suggested that he should send a 'management instruction' to the claimant requesting that the information was sent.

49. On 20 December 2017 the Respondent sends an email with the 'management instruction asking that they are given access to the supplier data base by 5 pm the following day, failing which the formal disciplinary process would be invoked.

50. The claimant responds to this email and tells Mr Eden again where the information is saved. She and asks why she has not received a response to her detailed email dated 5 December 2017. As a result Debbie Mosely arranges a grievance meeting for 10 January 2018. (Page 325)

51. In responding to the Management instruction, the Claimant repeats how she has kept the contacts and asks if he requires it in a different format to let her know. He replies with 'I am specifically after the master spreadsheet'. The Claimant confirms that there is no master spreadsheet but that she can compile one in the New Year. The Respondent then states that the spreadsheet is required by 3 January 2018.

52. The office was close from 23 December 2017 until 2 January 2018 due to the Christmas holidays. On 4 January she is informed that the Respondents are carrying out an investigation because she has failed to provide the master spreadsheet. This email says that she will be invited to an investigatory meeting – in fact she never receives an invite to an investigatory meeting.

53. At this stage the respondent did not have in place a generic risk assessment and has not made arrangements to carry out either a standard or individual risk assessment despite the Claimant informing them that she had a high-risk pregnancy. The claimant was unable to travel for long distances, either by car or plane and this would obviously affect her ability to carry out her role by attending trade fairs or exhibitions. Also as part of the claimant's role she would have the lift large sample boxes and she was concerned that the risk assessment had not been completed. In

addition, the grievance procedure was running in tandem with the disciplinary proceedings.

54. The Claimant attended a grievance meeting on 15 January 2018. The Claimant also raised the failure of the Respondent to carry out a risk assessment. The Claimant was informed that an assessment would be done and that one of her colleagues would carry it out. The claimant's grievance was not upheld, and she was informed of the outcome on 2 February in writing. No minutes of grievance meeting were taken although as a result of the claimant union representative raising the issue a risk assessment was planned for 19 January 2018.

55. Shortly after the grievance meeting concluded the claimant was invited to a disciplinary hearing on 19 January 2018. The letter set out allegations of gross misconduct based on:

a) Continued refusal to comply with a legitimate and reasonable management instruction;

b) Loss of company information and property; and

c) Breach of the implied term of trust and confidence.

56. The Claimant had not attended an investigatory meeting at this point.
The evidence showed that Mr Jonathan Alexander had already conducted the investigation and he had emailed the claimant on 10 January saying there was no need to meet with her as part of the investigation and if it was deemed necessary she would be invited to a formal disciplinary hearing and given an opportunity to answer the case against her at that point. (Page 446)

57. The investigation appears to have comprised of taking four witness statements from Mr Doyle, Warehouse Manager who said that he had seen a spreadsheet; Elaine Cameron who said that she had assisted the claimant with uploading contact details onto a blank spreadsheet and referred to seeing another spreadsheet on the claimant's computer; Tim Rookes an IT consultant who concluded the claimant could not have lost any contacts unless she had deliberately deleted them and a statement from Mr Eden who referred to a master spreadsheet being in existence and that the claimant could not have done her job without it. There were also copies of emails between the claimant and Mr Eden. The investigation report is set out at pages 429-446 of the bundle. The investigation was carried out at the beginning of January, but the Claimant had not been invited to participate.

58. The Claimant was upset that the investigation had taken place without her involvement and that her grievance had not been upheld. She decided that she would meet with Mr Eden to see if she was able to resolve the issues and to prevent matters from escalating further. The Claimant recorded this meeting and the Tribunal had a transcript of the discussion.

59. Essentially the Claimant again explained to Mr Eden that she did not have a master spreadsheet and that if he wanted it she would have to compile it and that

she did not understand why he did not give her a date to complete this by. Mr Eden said that he believed there was a master spreadsheet and that he had lost trust in her and only wanted people working for him who he trusted.

60. The Claimant felt very upset and felt stressed. She felt that the Respondent did not trust her and was not listening to her explanations. She was not given time to collate the information, she was being required to attend a disciplinary hearing and this was all contributing to her stress. She was concerned about the effect this may have on her unborn child particularly in view of her previous pregnancies and therefore visited her GP who recommended that she took time off work.

61. The claimant was not in work on 19 January 2018 due to stress and the risk assessment and disciplinary were therefore postponed. The disciplinary hearing was eventually rescheduled for 9 February 2018.

62. The Claimant prepared a statement (page 448) for use at the disciplinary hearing. The Claimant set out clearly that there was no master spreadsheet and that she held the information in various formats but that she was willing to put it all together into a master spreadsheet.

63. The Claimant attended the disciplinary hearing which was conducted by Mr Winburn with Mr Eden and Elaine Cameron also in attendance. The Claimant was represented by her union rep. The Claimant explained that there was no master spreadsheet but that she was prepared to create one. She also had an opportunity to ask questions of the witnesses. Elaine Cameron also confirmed that she had not seen a master spreadsheet. Notes of the meeting were taken but the parties were unable to confirm who had taken the notes. (Page 452)

64. Mr Winburn was unhappy with the quality of the advice he had received from Debbie Mosely and therefore decided after the disciplinary hearing had concluded the Respondent terminated the service of Debbie Moseley and engaged Mr Zatman a friend who specialist in HR and who both Mr Eden and Mr Winburn had known for many years.

65. Mr Zatman gave evidence that after the disciplinary meeting he met with Mr Winburn on 14 February 2017. Mr Winburn told Mr Zatman about the issues with the supplier database and where they were up to with the proceedings but that he did not know how to come to a conclusion.

66. Mr Winburn said that he was confused by the number of different explanations and did not know how to resolve the contradictions in the evidence. Mr Zatman took the view that it would be better if he took over and concluded matters.

67. Mr Zatman reviewed the investigation documents and the minutes of the disciplinary hearing. His view was that at the heart of the matter was the supplier database and what it was and what had happened to it. Interestingly, Mr Zatman's states at para 11 of his witness statement that his view was, that the Respondent wanted the spreadsheet and that the Claimant had it or something akin to it and that the claimant should have the opportunity to produce the information/documentation in the format she desired so that he (Mr Zatman) could take a view about whether or not this was sufficient and/or could be considered a database of suppliers.

68. Mr Zatman goes on at para 12 of his witness statement to say that he had understood that this had been asked for at the disciplinary hearing but that it had not been produced on the grounds that it would take the claimant too long to collate the information. In his view (Mr Zatman) this was not an adequate reason and he was of the opinion that any time spent bringing the supplier information into a data base would be time well spent. The Tribunal agreed to some extent with Mr Zatman's reasoning. It was clear to this Tribunal and Mr Zatman that the information the Respondent was seeking was available albeit in a different format/s to a 'master spreadsheet'. Indeed the Tribunal was provided with copies of supplier spreadsheets; outlook contacts and copies of business cards showing that the Claimant had the information but not in the format the Respondent was asking for. Mr Zatman's view that it would have been time well spent compiling this information seemed to this Tribunal to be a sensible view.

69. However, Mr Zatman concluded that the only way to resolve matters was to reconvene a further disciplinary hearing. Mr Zatman was unable to provide any explanation as to why he considered it appropriate to reconvene a disciplinary hearing rather than, say, restart the process or revert to the investigatory stage of the process or stop the process while the claimant gathered the information.

70. Mr Zatman contacted the claimant to inform her that he intended reconvening the disciplinary hearing and states that 'She seemed a little taken aback but did not say much other than she would need to speak to her union rep'.

71. The Claimant spoke to her union rep who contacted Mr Zatman and objected to the hearing being reconvened, however Mr Zatman informed the claimant's union rep that the hearing would be reconvened on 23 February 2018 and that the date of the hearing would be 1 March 2018.

72. At this point the claimant considered that her position with the Respondent was no longer tenable due to the stress and anxiety of the disciplinary process, the fact that the respondent appeared to still be requesting information that she did not have and was determined to press ahead with disciplinary action and that no risk assessment had been carried out. The claimant was concerned about the adverse impact this was having on her health generally and the impact the stress and anxiety was having on her unborn child. The claimant took advice from her union rep and submitted her resignation by email on 1 March 2018.

73. The Claimant commenced early conciliation on 9 March 2018. On 30 March 2018 the claimant received her final salary along with her pay slips. The Claimant was not paid for any commission payments that were due.

74. Mr Zatman's evidence was that he spoke to Mr Eden sometime after 1 March regarding commission payments and what was due to the claimant. He stated that the payment of commission was discretionary; that no one previously had had payments after employment had ended and that it was standard practice across the industry. The Respondent provided no evidence to support this. The claimant did not have a contract of employment, there was no evidence to show that the claimant had ever been informed that commission payments were discretionary either during her employment or upon termination.

75. Mr Zatman's witness evidence was that he informed Mr Eden that 'it was possible' that no commission payments were due but that the claimant was entitled to accrued but untaken holiday.

76. The evidence before the Tribunal was that the claimant sent an email setting out what she believed her termination payment should be in respect of commission. This was sent on 2 March 2018 addressed to Mr Eden. Mr Eden seeks advice from Mr Zatman who says to 'hold back' and suggests that they *could argue* it is discretionary. Payroll is notified that the claimant had left and to make payments of accrued holiday pay but to 'hold back' on commission payments. Ruth Senior (from payroll) chases Mr Eden on 14 March because she is preparing the payroll. The evidence shows that this was forwarded to Mr Zatman. The payment is processed at some point after that and the claimant does not receive her commission payment.

77. We can conclude that Ruth Senior was informed not to make commission payment sometime after 14th March. The Respondent argued that the decision was made on 7 March 2018. The evidence does not support this and it is clear that a decision had not been made on 14 March 2018. The Tribunal notes that the ET3 states that the Respondent made a decision 14 March 2018. The Respondent's evidence was vague on this point and Mr Zatman was unable to say when he was contacted by ACAS.

78. The Tribunal finds that the decision to withhold commission payments was made after the Respondent was contacted by ACAS. ACAS were notified of the potential claim for unfair dismissal and pregnancy discrimination on 9 March 2018 and Mr Zatman confirms that he was contacted by telephone. The Tribunal finds that the respondent was vague about when they were contacted and had given different dates regarding when they made the decision. The Respondent did not have a contractual provision allowing them to withhold payments after employment ceased. Further we do not accept that the Respondent had a discretionary commission scheme.

The Law

Pregnancy/Maternity Discrimination

79. Section 18 Equality Act 2010 (set out below) provides that a person discriminates against a woman, if in the protected period a person (A) treats a woman unfavourably because of her pregnancy.

Section 18

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

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

(a) because of the pregnancy, or

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

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the

treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

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

…….

Detriment in employment – section 47C Employment Rights Act 1996 and regulation 19 Maternity and Parental Leave Etc Regulations 1999

Protection from detriment

80. Section 19

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or by deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee —
(a) is pregnant;
……….

81. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment. **Shamoon v Chief Constable of the RUC [2013] ICR 337**.

Risk Assessment

82. The obligation to conduct a risk assessment is found in regulation 3 of the Management of Health and Safety at Work Regulations 1999: "(1) every employer shall make a suitable and sufficient assessment of– (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work… (b) ……,

83. The obligation under regulation 3 is extended to risks for new and expectant mothers by regulation 16(1):

"(1) Where –

1. the persons working in an undertaking include women of child-bearing age; and
2. the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, the assessment required by regulation 3(1) shall also include an assessment of such risk.
3. Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

4. If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.

5. In paragraphs (1) to (3) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace."

84. In **Page v Gala Leisure and ors EAT 1398/99** the EAT recognised that there are two types of risk assessment. The first is a generic assessment of the risks for pregnant employees required by regulation 3 when read with regulation 16(1). The second is a specific consideration for an individual implicitly required by regulation 16(2) and (3). The employer must consider whether the action it proposes to take under the generic risk assessment will avoid the risk for the individual, and, if not, further action must be considered, such as altering working conditions or hours of work. If that is not sufficient to avoid the risk, the employee can be suspended.

85. These provisions were considered by the EAT in **O'Neill v Buckinghamshire County Council [2010] IRLR 384**. The EAT set out three preconditions that would have to be met before the obligation to assess the risk for an individual would arise. They were:

(a) that the employee notifies the employer that she is pregnant in writing (clearly satisfied in this case),

(b) the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her baby,

(c) the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-exhaustive list at Annexes I and II of Directive 92/85/EEC."

86. If a risk assessment is required by regulation 16, failure to conduct one would amount to unfavourable treatment because of pregnancy contrary to section 18 Equality Act 2010, irrespective of the mental processes of the decision-maker: **Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516**. This is because of the special protection afforded to pregnancy under the Directive.

<u>The Reason Why</u>

87. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see for example the decision of the **Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.**

88. This exercise must be approached in accordance with the burden of proof provision applying to Equality Act claims. That is found in section 136 as follows: "If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must

hold that the contravention occurred. (3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

Constructive Dismissal

89. The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) ltd v Sharp [1978] QB 761.** The Tribunal should ask itself the following questions (agreed between the parties)

a. Did the Claimants resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?

b. If so, what was the repudiatory breach that entitled the Claimants to resign?

c. Was there a series of breaches which entitled the Claimants to resign and, if so, what was the last straw in such a series?

d. Did the Claimant's resign in response to this breach?

e. Did the Claimants delay in resigning and reaffirm the contract?

90. In order to be successful in a claim for constructive unfair dismissal, the Claimant must show that there has been a repudiatory or fundamental breach of contract going to the root of the contract and it is not enough to show that an employer has merely acted unreasonably. Further in cases where an employee is relying upon the implied term of mutual trust and confidence the Tribunal must consider the House of Lords decision **Mahmud v BCCI SA, Malik BCCI SA (In Liquidation) [1998] AC 20, [1997] 3 All ER 1,** where it sets out that an employer shall not 'without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.

91. A course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident. Guidance is provided to the Tribunal in the Court of Appeal case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** as set out para 55**:**

a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b) Has he or she affirmed the contract since that act?

c) If not, was that act (or omission) by itself a repudiatory breach of contract?

d) If not, was it nevertheless a part of a course of conduct comprising of several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

e) Did the employee resign in response (or partly in response) to that breach?

92. Therefore an employee claiming constructive dismissal on the basis of a "last straw" is entitled to rely on the totality of the employer's acts as a continuing cumulative breach of the implied duty of trust and confidence notwithstanding a prior affirmation of the contract, provided that the last straw formed part of the series. Thus, a "last straw" can revive the right to terminate the contract.

93. The Tribunals is further assisted by the case of **Wood v WM Car Services (PETERBOROUGH) LTD: EAT 1981,** where it states that the function of the Tribunal is to look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly is such that an employee cannot be expected to put up with it.

94. The Tribunal, when considering whether an employer's conduct has destroyed the relationship of trust and confidence is an objective test and the burden of proof rests with the Claimant.

Victimisation

95. Section 27 of the Equality Act 2010 (set out below) provides that a person (A) victimises another person (B) if they subject (B) to a detriment because (B) has done a protected act. For a claimant to succeed with a claim under Section 27, he/she needs to prove that they did a protected act and that he or she was treated less favourably and that the less favourable treatment was because they did the protected act. The final causal link has proved to be difficult to establish. In **Nagarajan v London Regional Transport and Swiggs [1999] IRLR 572, HL** the House of Lords held that if the protected act was an important factor leading to the less favourable treatment, then a victimisation claim exists even if the protected act was only one reason for the treatment and not the main reason.

96. Section 27 of the Equality Act 2010

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

Statement of Main Terms and conditions

97. Section 1 Employment Rights Act 1996 – Statement of initial employment particulars:

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.
……..

Conclusions

Unfair Dismissal

98. The Tribunal has found when considering the facts in this case, that the Respondent did conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence entitling the claimant to resign and claim constructive unfair dismissal.

99. From the evidence before the Tribunal the respondent raised the issue of the alleged missing spreadsheet at an informal meeting in November 2017. The meeting in November was a general meeting and covered quite a few issues that the respondent had with the claimant such as time keeping and her relationships with colleagues. The spreadsheet issue formed a small part of the conversation and the respondent did not set any timescale for when the spreadsheet needed to be completed. We have found that the claimant was completely open and honest about the fact that there was no master spreadsheet during her employment and at this hearing and that she would need to compile the information because she held it in different formats. It is clear from the evidence that Mr Eden knew there was no master spreadsheet; he emailed the claimant on 16 November 2017 and states that the folder he created on the server should be the 'master file'.

100. The relationship between the parties appears to have started to deteriorate further after the claimant raised her concerns regarding the meeting on 16 November. However, no further specific communications regarding the master spreadsheet were raised until after the claimant informed the respondent that she was pregnant. It was only after this that the respondent sent the management instruction on 20 December 2017 setting a timescale that was likely to be impossible for the claimant to meet knowing that she did not have all the information in one place. Whilst the Respondent agreed to an extension over the Christmas holidays the second 'deadline' was also extremely difficult for the claimant to meet. The Tribunal finds that this was unreasonable and undermined the relationship of trust and confidence between the parties. This behaviour is likely to have caused the claimant stress and anxiety.

101. After the claimant informed the respondent that she was pregnant the respondent completely closed its mind to resolving the issue amicably and was set on a path of pursuing disciplinary action. Indeed the Tribunal find that the Respondent was so set on pursuing the matter to a disciplinary hearing that a conscious decision was made not to include the claimant in the investigatory process

and thereby giving her no opportunity to state her case prior to any disciplinary action being instigated.

102. The Respondent had the benefit of HR support and yet chose not to fully investigate the matter which would likely have avoided the need for disciplinary action. Mr Zatman correctly identified in his evidence that time spent in collating the information would be time well spent and he identified that the information in the format requested by the respondent did not exist.

103. What this Tribunal finds troubling is that despite correctly identifying that the master spreadsheet did not exist and that the claimant had something 'akin' to it but that time would needed for it to be compiled, Mr Zatman's response was to reconvene the disciplinary meeting and not restart the process or give the claimant the opportunity to collate the information. The Tribunal finds that this indicates that the respondent was intent on disciplinary action. We accept that this was a last straw for the claimant.

104. During evidence at this hearing, Mr Eden said several times that he believed there was a master spreadsheet with the implication that the claimant was withholding it; still had it and was refusing to pass it to him. Conversely he said on several occasions that 'we would not be here today if she had given them (the respondent) what she had'.

105. The Tribunal noted that 'what she had' was set out at pages 460-488 of the bundle and that this documentation therefore contradicted what Mr Eden had said and in fact they already had what she had. Mr Zatman was unable to explain this in submissions.

106. The Respondent spent a lot of time in cross examination asking the claimant for the whereabouts of the master spreadsheet and yet also said on numerous occasions said that we would not be here (in the tribunal) if she had sent them something. It is clear to this tribunal that they had in their possession the information she had.

107. The tribunal has found that the respondent in conducting the disciplinary process failed to include the claimant in the investigatory process. She was never given an opportunity to have a meeting and state her case and or provide the information prior to disciplinary action being considered. She did not receive evidence prior to the invitation to the disciplinary hearing.

108. The claimant had taken all reasonable steps to engage with the process – she had been clear in her evidence to this tribunal and to the respondents throughout the process that there was no master spreadsheet and even tried to discuss the issue with Mr Eden in January in order to resolve the issues.

109. Whereas the Respondents' evidence has been contradictory appearing to be holding a view that a master spread sheet is in existence and even at this hearing saying they believed it was still in existence and yet agreeing that there was likely to be three spreadsheets and that if the claimant had sent something then they would not be here today.

110. The Respondents were only interested in looking for evidence that supported their case and had no intention of looking at any evidence that supported the claimant's version of events. Mr Eden had made his mind up that she had a master spreadsheet and that she was withholding it and that he therefore did not trust her.

111. We accept that the Respondent may well have held a genuine belief in November that she had a master spreadsheet, but we do not consider that it was reasonable for them to continue to hold that belief when the claimant was very clear that one did not exist. It was clear to Mr Zatman when he reviewed all the information albeit that it continued to pursue the disciplinary. The Respondents took no steps to ask the claimant to show them the information she had or sat with her to go through the information she had prior to inviting her to a disciplinary meeting.

112. We find that the conduct of the Respondent as a whole amounts to a breach of the implied duty of trust and confidence. The Respondent embarked on a course of behaviour that was likely to destroy the employment relationship.

113. The claimant had no contract of employment and no job description and the respondent conceded that she performed well in her role and achieved good results. The respondent argued that she would not have been able to do her job without a master spreadsheet and yet agreed she was performing well.

114. We do not accept the respondents' argument that reconvening a further hearing was a reasonable and or appropriate response to accepting that the master spreadsheet did not exist and that she required time to compile the information.

115. The Tribunal considers that this act alone amounts to a fundamental breach entitling the claimant to resign and claim constructive dismissal. However, the Tribunal has found that the respondent engaged in a course of conduct that viewed cumulatively amounts to a breach.

116. We find that the claimant resigned in a timely manner and that it was entirely reasonable for her to seek advice before resigning particularly due to the stress and anxiety she was suffering as a result of the disciplinary process.

117. Looked at objectively we find that the Respondent destroyed the relationship of trust and confidence. Tribunal has found when considering the facts in this case, that the Respondent did conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence entitling the claimant to resign and claim constructive unfair dismissal.

118. The tribunal finds that the respondent has failed to show a potentially fair reason for the dismissal.

Pregnancy discrimination and Detriment in employment

119. The Tribunal finds that there are facts from which the Tribunal can conclude that the respondents treated the claimant less favourably because of her pregnancy. The Tribunal finds that the proximity of the management instruction to

announcement of her pregnancy and the unrealistic timeframe in which to comply amounts to less favourable treatment on the grounds of her pregnancy.

120. The Tribunal finds that the respondent whilst having raised concerns about the master spreadsheet prior to the claimant informing them she was pregnant did not pursue the issue of the spreadsheet as a disciplinary matter and the issuing of a management instruction was precipitated by the announcement of the claimant's pregnancy.

121. Considering the evidence the Respondents and in particular Mr Eden completely ignored the Claimant's explanations once he had issued the management instruction. The failure to include the claimant in the investigatory part of the disciplinary process demonstrated a completely closed mind and determination to ensure the matter progressed to a disciplinary hearing.

122. The respondents' evidence was that the claimant performed well. They did not offer a potentially fair reason for the dismissal and did not raise any issues in respect of her performance. Indeed the respondent conceded that the claimant performed well. Whilst the Tribunal accepts that the respondent raised some areas of concern at the meeting on 16 November 2017 it was clear that the respondent wanted a fresh start and it was only when the claimant informed them of her pregnancy that the disciplinary process was started.

123. The dismissal was clearly unfavourable treatment. The question is not whether pregnancy was the principal reason but whether it had a material influence on the decision. It follows inevitably from our finding as to the reason for the dismissal that the claimant's pregnancy did have a material influence on the decision. The dismissal amounted to unfavourable treatment because of pregnancy.

124. The respondent was fully aware that it did not have a generic risk assessment and that the claimant had had previous traumatic pregnancies. The claimant informed the respondents in a timely manner and it is entirely reasonable that she should expect them to take action. We note that the respondent was informed by Debbie Mosely on 20th Dec that a risk assessment was required and yet no action is taken until the grievance hearing when union representative raises the issue.

125. Set out below are the Tribunals conclusions in respect of the specific allegations not dealt with otherwise in this judgment:

i) Failing to carry out a risk assessment.

There is a duty on the employer to have a risk assessment in place; in this case no evidence was produced that the Respondent had such an assessment. Once notified of the pregnancy and in particular in this case where it was clear that this was a high risk pregnancy the respondent failed to implement a risk assessment or set a date for one to be carry out in a timely manner and therefore the claimant was put to a disadvantage because of her pregnancy. Further the tribunal found that the claimant was subject to intrusive questions during cross examination and the respondent attempted to put the onus on the claimant to have made her own adjustments and that the risk was not great. Whilst the tribunal accepts that this was not a high risk role the claimant had clearly identified that adjustments in respect of lifting and travelling were required.

ii) Failing to suspend the claimant on full pay

The claimant argued that she should have been suspended on full pay until a risk assessment had been carried out. In view of the fact that the respondent did not have any risk assessment in place at all we accept the claimant's argument that unless and until a risk assessment had been carried out the respondent cannot argue that the claimant was not at risk. We therefore accept by failing to suspend the claimant on full pay that this amounted to a detriment.

iii) Appointing someone without relevant experience to carry out the risk assessment.

The Claimant argued that by failing to appoint someone with relevant experience the respondent discriminated against the claimant on the grounds of her pregnancy by treating her less favourably and that the claimant was subjected to a detriment. The tribunal finds that the respondent employed Stephanie Boyle who was a health and safety representative and consider that it was quite reasonable for the respondent to suggest she did the assessment and indeed the claimant accepted in the end. The Tribunal does not find that this amounts to unfavourable treatment or that the claimant was subjected to a detriment.

iv) Continually sending the claimant emails.

The claimant argued that the sending of emails from 14 December 2017 amounted unfavourable treatment and or a detriment. The Tribunal finds that the respondent did email the claimant after 14 December 2017 (the notification of her pregnancy) regarding the master spreadsheet and in particular sending the management instruction on 20 December 2017 but that some of the emails were in response to her grievance. The Tribunal finds that 'continually emailing the claimant' is overstating the situation and that the email of 20 December with the management instruction amounts to unfavourable treatment and a detriment. The Tribunal has found that there is a causal link between the claimant informing the respondent that she was pregnant and the issuing of the management instruction.

v) Setting unrealistic deadlines

The Claimant argued that by setting unrealistic deadlines amounted to less favourable treatment and or a detriment. The Tribunal finds that the Respondent knew that the claimant did not have a master spreadsheet and that the deadline was therefore unreasonable. The Tribunal has also found that the management instruction was as a result of the claimant informing them that she was pregnant and therefore the Tribunal finds that the act of setting the unrealistic deadline also amounts to unfavourable treatment and a detriment.

vi) Conducting an investigation without new evidence

The claimant argued that by not allowing the claimant to participate in the investigation process amounted to less favourable treatment and or a detriment. The Tribunal has found that by not allowing the claimant to participate in the investigation indicates that the Respondent had a closed mind and considered any input from the claimant unnecessary. As the reason or part of the reason for the

disciplinary action was due to the fact that the claimant was pregnant we find that not being able to participate in the investigation was clearly a detriment and we have found that the respondents discriminated against her on grounds of pregnancy unconsciously based on objective fact of conducting an investigation without including her in the investigation.

vii) Commencing disciplinary action

The Tribunal has found that the decision to proceed to a disciplinary hearing was conduct likely to destroy the employment relationship. Further the Tribunal has found that a reason for commencing disciplinary action was a reason related to her pregnancy.

viii) Reconvening the disciplinary hearing

The tribunal finds that the reason the disciplinary hearing was reconvened was because the respondents had set a course to proceed down the disciplinary route. The respondent did not include the claimant in the investigatory part of the process and despite finding that the claimant had the information in different formats, continued with the disciplinary process. The Tribunals has found that the reason why the claimant was subject to the treatment is because she was pregnant and that that reason continued when the decision to reconvene the hearing took place. Not being able to participate in the investigation was clearly a detriment and we have found that the respondents discriminated against her on grounds of pregnancy.

<u>Victimisation - Commission Payments</u>

126. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the “reason why”.

127. The Tribunal finds that the reason the respondent withheld commission payments to the claimant was because she had commenced early conciliation through ACAS in respect of her claim for discrimination on the grounds of pregnancy (a protected act).

128. The Tribunal has found that the respondent did not have in place a discretionary commission scheme and that the decision to withhold the payment was made after the date the claimant contact ACAS.

129. The Respondent evidence was vague and was inconsistent. The evidence also showed that Mr Zatman confirms payment of accrued holiday is due but that she may be entitled commission but ‘hold back’ and suggests that they can ‘argue’ discretionary.

130. We find that in the absence of any evidence to the contrary that the claimant was entitled to payment of commission already earned to date of termination.

<u>Written Statement of particulars of employment</u>

131. Where another complaint succeeds, section 38 of the Employment Act 2002 requires a Tribunal to award either two or four weeks’ pay to an employee if at the

date of presentation of the claim form the employer was in breach of the obligation under section 1 Employment Rights Act 1996 to give a written statement of the main terms of employment. That duty does not apply if there are exceptional circumstances which would make it inequitable to make such an award.

132. Respondent conceded that the claimant had not received a statement of main terms and conditions and the Tribunal having found that the claimant was unfairly dismissed will make an award in respect of this failure. The Tribunal will invite submissions as to the amount of this award at the remedy hearing to be listed.

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Employment Judge Hill

Date: 2 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

4 July 2019

FOR THE TRIBUNAL OFFICE

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