EMPLOYMENT TRIBUNALS

Claimant: **Miss H Webster**

Respondent: **University of Lincoln**

Heard at: **Lincoln** **On:** **18, 20, 21, 25 March 2019**

Before: **Employment Judge R Clark**
Mrs J Bonser
Mr C Goldson

Representation
Claimant: **Mr Gordon of Counsel**
Respondent: **Ms Barrett of Counsel**

JUDGMENT having been sent to the parties on 25 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The unanimous decision of the Employment Tribunal is:-

1. The claimant's claims for a redundancy payment, notice pay and holiday pay are **dismissed upon withdrawal**.

2. The claimant's claim of unfair dismissal **fails and is dismissed**.

3. The claimant's claim of discrimination because of pregnancy or maternity **fails and is dismissed**.

4. The claimant's claims of direct and indirect sex discrimination **fail and are dismissed.**

REASONS

1. Introduction

1.1 This is principally a claim about maternity discrimination (or alternatively sex discrimination) and constructive unfair dismissal. If there was a dismissal arising in law, the provisions of the maternity and parental leave regulations will then also fall to be considered. The Respondent denies discrimination and that there was a dismissal but pleads redundancy or some other substantial reason in the alternative.

2. Preliminary matters

2.1 There was dispute concerning our jurisdiction in respect of time limits. We calculate the earliest date in time is 3 July 2017, which means the significant event of the confirmation of the claimant's new hours for the 2017/18 academic year took place after that and was therefore in time. There may be issues in the background which we have not felt necessary to resolve about whether the process that started earlier, in May, but it was nonetheless clearly a continuing act through to its confirmation in July. The case was originally put on a last straw basis but it seems that that single event, the reduction in hours is the crux of the case.

2.2 The case has been developed in further and better particulars and an amended ET3 produced in response. It is that which has informed the draft list of issues agreed between the parties, which we adopted, subject to our determination of Mr Gordon's various applications to amend the claimant's claim made at the outset of proceedings.

2.3 The first amendment application related to the basis of the constructive dismissal claim which was said to be based on a breach of an express terms going to contracted hours. This related to the total annual hours. Paragraph 26 of the list of issues stated 354.5 hours. That was said to be wrong and should have read 155. The three elements that made up that figure were 114 lecturing hours (instead of 228.5), 36 hours demonstrating hours (instead of 121) and the same 5 hours remaining for meetings. We granted the amendment as it went only to the numbers, and not the principal, and was not opposed.

2.4 The second amendment application was that the resignation was said to be in response to a last straw event of receiving the letter from Mr Pearce dated 25 September 2017. That was withdrawn, as it frankly had to be, due to the illogicality of its timing occurring after the resignation. The claimant substituted this with an earlier "last straw" of a letter dated 21 July 2017. That is a letter which confirmed her total hours for 2017/18. There was no issue taken with that amendment and we granted it.

2.5 The third amendment application related to the claim of indirect discrimination. It had not previously been articulated with precision. Mr Gordon sought to advance what we determined was a completely new indirect discrimination claim relying on a new PCP that the selection for redundancy allegedly preferred part time employees over full time employees.

Even then, the disadvantage was not further articulated. In pursuing the amendment, the claimant did not want the hearing to be adjourned. The respondent objected on the grounds principally that this was a new claim, was not the case that it had prepared to meet, that there was no explanation for the late application, the claimant had been represented by solicitors throughout who had had ample opportunity to advance the real claim she wanted to bring.

2.6 We refused the application. Exercising our discretion in accordance with the principles in ***Selkent Bus Company v Moore 1996] ICR 836*** we noted there had been ample opportunity for the professionals instructed to particularise the claim. After first failing to do so in the original pleadings, they had been given time and opportunity to do so almost a year ago. This application was made on the first day of a 5 day hearing. It raised different points for which evidence and witnesses had not been secured, indeed we noted in passing that the claimant herself did not appear to have adduced the necessary evidence to develop this proposed claim. There was no convincing explanation for the failure to raise this claim in a timely manner and why it was not done until day 1. Even if there was some force in the need for an amendment, we could not do justice to both parties by allowing it without an adjournment, and possibly costs, which was a course we were not asked to take by the claimant.

3. Issues

3.1 The amended list of issues was agreed and adopted. We set it out in full here, save in respect of the notice claim which was abandoned.

Unfair dismissal issues

1. Was C constructively dismissed?
    a. Did R commit a fundamental breach of C's employment contract?
        i. Did R breach an express contractual term giving C the contractual right to work 155 hours per annum?
        ii. Did R breach the implied term of trust and confidence by reducing C's hours?
    b. Did C resign in response to that fundamental breach?
        i. Did the letter of 21.07.17 amount to a 'last straw'?
        ii. Did C resign in response to the 21.07.17 letter?
    c. Did C affirm her employment contract before she resigned?
2. If C was constructively dismissed, was the dismissal automatically unfair (s.99 ERA & reg.20 MAPLE)?
    a. Pursuant to reg.20(1)(a) MAPLE, was the reason or principal reason for C's dismissal a reason connected with:
        i. C's pregnancy;
        ii. The fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave?
    b. Alternatively, pursuant to reg.20(2) MAPLE:
        i. Was the reason or principal reason for the dismissal that C was redundant?
        ii. Did the circumstances constituting the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by C and who have not been dismissed by R?

iii. Was the reason or principal reason why C was selected for redundancy a reason connected with:

1. C's pregnancy;
2. The fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave?

3. If C was constructively dismissed, was the dismissal unfair for the purposes of s.98 ERA?
   a. Was the reason for dismissal a genuine redundancy situation or some other substantial reason?
   b. If so, did R act reasonably or unreasonably in all the circumstances by treating the reason as sufficient reason to dismiss?
4. If the Tribunal should conclude that C was unfairly dismissed, would C have been fairly dismissed for redundancy in any event? (*Polkey v AE Dayton Services Ltd* [1987] ICR 142).

Discrimination issues

5. Does the Tribunal have jurisdiction to determine C's discrimination claims?
   a. Did C bring her discrimination claims within the 3 month time limit at s.123(1)(a) EqA, as extended by the early conciliation provisions?
   b. If not, would it be just and equitable to extend time to hear C's discrimination claims?
6. Did R subject C to pregnancy / maternity discrimination contrary to s.18 EqA?
   a. Did R treat C unfavourably by reducing her working hours?
   b. Was the unfavourable treatment done because:
      i. Of C's pregnancy;
      ii. Of an illness suffered by C as a result of her pregnancy;
      iii. C exercised or sought to exercise, the right to ordinary or additional maternity leave?
   c. Did the unfavourable treatment take place during the 'protected period' of on or around 10 weeks before 18 November 2015 when C fell pregnant to 22.05.17?
7. Did R subject C to direct sex discrimination contrary to s.13 EqA?
   a. Did R treat C less favourably by selecting her for redundancy than R treated or would treat a man in materially similar circumstances?
   b. If so, was the reason for the less favourable treatment C's sex?
8. Did R subject C to indirect sex discrimination contrary to s.19 EqA?
   a. Did R apply a provision, criterion or practice ('PCP') in its policy by which employees are selected for redundancy?
   b. Did or would R apply the PCP to men as well as women?
   c. Does or would the PCP disadvantage women in comparison with men?
   d. Was C put at that disadvantage?
   e. Is the PCP a proportionate means of achieving a legitimate aim, namely to ensure R's staffing was at an appropriate level to the number of students attending relevant course modules and to run its operation efficiently?

4. EVIDENCE

4.1 We heard from the claimant in support of her own case.

4.2 For the respondent, we heard from Dr David Cobham, now Associate pro-vice chancellor and dean for transnational education but until 2016 the head of school of computer science and the claimant's line manager to that time; Professor Luc Bidaut, now Head of School of Computer Science and Stefan Pearce, HR Business Partner. All adopted written statements on oath and were questioned.

4.3 We were taken to a bundle running to 513 pages and a supplementary bundle. We allowed further late disclosure to be relied upon. We considered those documents we were taken to.

4.4 Both parties made closing submissions speaking to written submissions.

5. Facts

5.1 We stress at the outset that it is not our role to determine each and every last dispute between the parties but to make sufficient findings to resolve the issues and to put them in their proper context. On that basis and on the balance of probabilities we make the following findings of fact.

5.2 The Respondent is a University and, specifically, the events in this case take place within the school of Computer Science. Its academic lecturing staff is made up of both salaried staff, who may be either full time or part time in varying degrees of fractional appointments, and also a small, and reducing, number of hourly paid staff undertaking either or both lecturing and demonstrator roles. We have to say at the outset we have not been provided with evidence of the breakdown in the numbers between full time and part time staff, male or female within each category and we don't feel this is a case in which we can make any assumptions about that. The only sense of numbers that we have is in respect of Dr Cobham's ten-year tenure as head of the school where he described the ratio of hourly paid lecturers to salaried lecturers being something like forty salaried lecturers to two hourly paid lecturers.

5.3 We find the reason for the hourly paid lecturing role was originally to provide some flexibility to cover the ups and downs of demand created by various factors engaged in this case, particularly fluctuating student numbers. In recent years, we accept that the school has had less need for what we might now call the old style hourly paid lecturing role as it has for some time moved towards the use of fractional salaried positions within its higher academic salaried workforce as a better means of achieving the aims of the more academic degree programmes offered. The Claimant was therefore one of the last such hourly paid lecturers.

The contractual position as an hourly paid lecturer

5.4 The claimant was always, and only, employed on hourly paid terms. The contractual relationship is complicated by the fact it exists across 2 concurrent contracts. Indeed, one of those has 2 further discrete elements within it.

5.5 The first contract is that of an hourly paid lecturer, that is based on teaching time and is paid at a higher composite hourly rate, recognising the fact that each hour of lecturing will also come with time for preparation and time for marking.

5.6 The second contract is that of a demonstrator paid at something in the region of about a third of the lecturing rate. This role, in very rough terms, is an assistant to the delivery of workshops supporting another lecturer. This contract was also used to remunerate incidental time spent in department meetings at what seems to be a slightly lower rate still and this was usually between 5 and 10 hours per year.

5.7 We find the number of hours available in each year and under each contract were entirely dependent on demand and were set by reference to the need for teaching time or demonstrators in the forthcoming delivery plan for the next academic year. This happens through an annual workload allocation review which commences every year in early spring and concludes around July, after consultation with the staff side and the individuals affected.

5.8 We find modules on degree programmes are deliberately split between two or more lecturers to provide a safeguard against sickness absence or resignation mid-year or other such staffing issues that might affect continuity of delivery. Consequently, a lecturer such as the Claimant would always have a proportion of the available lecturing and workshop hours in each module typically at 50% although there could be a reason in any one year to skew that ratio. If there were more than 2 lecturers, clearly there would be a commensurately smaller fraction of the whole available time. There may be reasons, as there have been on odd occasions, why an individual might take more than 50%. We find it is unusual for an hourly paid lecturer to lead a module as this is more appropriately delivered through the senior academic staff. We did find that in one year the Claimant did take a role in her own specialist area albeit it remained under the supervision of one of the members of the senior academic staff.

5.9 Additional hours may then be available as a demonstrator to assist in the delivery of workshops only, not lectures. We understood the way they operate to be this. There would often be 2 lecturers splitting a module 50/50 and it would often happen that each undertook the demonstrator role for the workshops led by the other lecturer but that is not always the case and certainly not set in stone for a number of reasons. The nature of the module may not need a demonstrator. The hourly paid lecturer concerned may not wish to undertake demonstrator roles, particularly with the rate being as it was and the possibility that the time table potentially meant there would be only one or two hours available on any day such that it might not be financially viable to travel any great distance to come to work. (In fact, we do find that was indeed part of what Dr Cobham had had in mind during one annual review where the Claimant's hours had been deliberately skewed away from demonstration hours because of the financial effect on her travelling something like a 50 miles each way to get to work.) There may also be a fluctuating need for the number of demonstrator hours depending on the type of workshop and the type of group and indeed even the new physical environment of the new school buildings had some effect on the workshop group sizes with the consequent reduction in the number of available hours for demonstrators. For those

reasons, we find the assumption does not exist that demonstrator hours follow as a secondary to the teaching hours available. That is then compounded further by the fact that there is a ready-made workforce of demonstrators amongst the higher level PhD students who undertake the work either as a means of funding their studies indirectly or, in certain specific arrangements, actually in order to directly fund their studies.

5.10 We find hourly paid lecturing is offered on a year by year basis. For that reason, it starts as a 12 month fixed term contract. This evolves into a permanent contract if the individual renews each successive year and acquires, at the time of a renewal, 4 years continual service. We find that is not so much a policy choice as an attempt to comply with the Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Although the relationship then becomes permanent, we find the total hours of work thereafter remain subject to annual review in exactly the same way and we find the permanent contract sets that out explicitly.

5.11 During the life of the initial fixed term contract the annual hours set are, by definition, only to last during that particular academic year and there can be no assumption of continuation or a renewal of a contract the following year. That is so whether or not the nature of the work continued to be needed or not. The relevant offer letter stated explicitly that the hours of work were conditional on sufficient numbers of students enrolling in the relevant course and may be varied in accordance with the terms of employment. Those terms at clause 11.1 specifically deal with the prospects of a change during the year itself.

5.12 At the fourth year, when the relationship becomes one of a permanent contract, the difference from the point of view of the employee is that they enjoy a regularised annual monthly salary as opposed to making a variable claim each month which in the past would have meant some months would generate a nil claim. There is also relative certainty of the employment relationship continuing in the following and subsequent years. which contrasts with the fixed term contract. Under the permanent hourly paid contract, the employee is guaranteed a number of core hours for that year without the prospect of reductions happening *within the year* which also contrasts with the earlier contract. Those hours remain, however, subject to being adjusted when set each year in the annual review. The new permanent contract deals with hours at clause 13 and sets out how the time tabling may vary from year to year. Any increases to core hours *within year* will be remunerated by a separate fixed term contract. If there was a decrease within the year the employee would be found alternative duties which is a significant contrast to the previous fixed term contract where reductions could be made within the year and the hours are subject to an annual review.

5.13 That annual review is a significant element of the issues in this case. Every year we find there is a review of teaching needs for the following year. It starts around February/March time. It involves what must be an exceptionally complicated process of coordinating a great number of variables, some of which need to be estimated and planned, some of which might be relatively fixed but nonetheless a necessary task to coordinate all of the different elements for the following academic year. The variables that influence the process can include factors such as the university not running a particular degree course or running additional courses. It

may be affected by previous years' course programming decisions take effect as various cohorts of students complete their 3 year degrees. There may be changes in the individual modules within degree programmes and all of those factors can be affected again by the prospect numbers either reducing or increasing in any particular year. Within that there may be all the usual workforce planning issues such as dealing with other absences or colleagues unexpected ill health. Some of those factors can be planned for and set the programme for the following year. Some of those factors arise within the year and may give rise to additional hours becoming available within year. Where there are additional hours they are not part of core hours but would be offered as additional fixed term contracts specific to the particular issues in question.

5.14 We were faced with a dispute in terms of the earlier fixed term contracts in particular in one year as to whether or not the Claimant's hours were in the region of 700 hours or so. We have come to the conclusion that is not something we need to resolve. We note that various claim forms were submitted which, if simply added up, do seem to confirm those hours but equally there were elements identified by Dr Cobham in the short time that he had to review those lately disclosed claim forms which left some doubt as to whether there was duplication or the extent to which it was appropriate to simply add up the hours. As we say, we have come to the conclusion we do not need to make a finding one way or the other. We note it is not in dispute that the hours both change from year to year and indeed could change within the year. If the claimant did or did not work those excessive hours in one particular year some years earlier, it does not assist us resolve this claim one way or the other.

The Annual Review Process

5.15 We return to the annual review process in a little more detail. Whether it is the original fixed term contract or the permanent hourly paid contract, both face the same reality that hours will change from year to year and the Claimant's experience of her various contracts was no different. Some years there would be increase, some years an underlying reduction in the principle areas of specialism but for one reason or another alternative duties had in the past been found and for some years there was simply a reduction.

5.16 The Respondent has a process for dealing with those reductions and we have adopted the phrase used in the case before us that it is effectively treated as a "quasi-redundancy" albeit the effect is to continue the employment relationship between the parties. Such a situation starts with the strategic plan, which is the foundation and justification for why those changes are happening, and the annual workload which is the in-year assessment of the actual hours needed. Where the annual workload review process looks like it will result in a reduction in hours, a number of things happen. First, there is an informal notification around the springtime to the individual affected of their likely hours in the following academic year. Those proposals are then put into a formal collective consultation process with the recognised trade unions. The outcome of that process could lead to provisional notice being given of those hours being at risk. That in itself leads to an invitation for engagement with individuals on the consultation process. If no alternatives can be found in the course of that consultation process, the decision is then confirmed with the right of appeal against that decision and if the

decision stands, the individual employee will then be paid compensation under the auspices of this "quasi-redundancy" process which is a sum which happens to equate to the statutory redundancy payments based on the hours affected. Similarly, a quasi-notice payment is paid for the hours affected.

5.17 We noted how the recognised trade unions are very much engaged with the development of this process and also its application each year.

5.18 We find the individual consultation process is a significant step because even when one area of the university's activities is diminishing, others may be increasing. In the context of hourly paid lecturers, and particularly demonstrators, there is some scope to fill up the hours in other areas or to look at alternatives or in some cases it might even be significant for the individual to move from one school, where their particular skills may be reducing in demand, to another, where they might be growing in demand. This was particularly so in the Claimant's areas relating to media technology. We find her specialisms sat across different schools within the university and we have heard and accepted evidence of others in similar situations who have found growing demand in other schools for essentially the same or very similar areas of input and that must be simply because of the different strategic directions each of the schools is taking their degree programmes in. This is phenomena engages directly with the claimant's skill set. 10 or 20 years ago, web design and media may well have been the cutting edge of computer science courses, now they are basic expectations of a level of skill to get onto the computer science course. That is not to say they are not still important skills but as taught modules, they are seen more in the field of media technology related courses, than computer science the focus of which has shifted significantly.

5.19 We are satisfied that having looked at the process of this planning and consultation in the years that have gone in previous reviews, the respondent has demonstrated a genuine attempt each year to try and structure what had become an inevitable reduction in the Claimant's main skills area so as to try and minimise the effect on her working hours. Sometimes there was opportunity to find hours elsewhere, and sometimes this was even after the academic year had started, to take on additional stand-alone duties. We have heard about engagement in interview skills on the professional practice module, the one off involvement in supervising the project module (albeit that we find that that particular year was very much out of line with the usual run of project courses because of its generic approach for which the Claimant could legitimately contribute) and there are other projects that might generate additional hours. We heard about the Prince's Trust which generated 50 additional hours work for the Claimant in one particular year.

5.20 Albeit a "quasi-redundancy" process, we were taken to the University's actual redundancy and redeployment policy [61]. It contains content dealing with the types of issues one might expect in a large employer's redundancy and redeployment policy. The only area we were taken to in respect of any challenge by the claimant was Section 10 which is headed "compulsory selection criteria". We find it is an indicative statement of the factors it might be relevant to apply when a choice has to be made between 2 or more individuals both facing potential selection for dismissal on grounds of redundancy. It doesn't actually set down the

selection process because it recognises that that will be developed on a case by case basis and inform the collective consultation. It sets out simply various policy objectives such as achieving a non-discriminatory outcome and it reinforces from the employer's point of view the ultimate objective which was to ensure that the outcome of any redundancy selection criteria leaves the university in a viable position to continue to deliver its courses with the appropriate skills set amongst its workforce.

5.21 That was the only aspect of the policy we were taken to by the claimant. Its significance to her case may have been limited in any event but it seems to have become even more limited as the Claimant concedes she was in a pool of one so far as her particular skills and reduction in hours was concerned.

The context of the School of Computer Science

5.22 We then need to say something more about the context in which the school of computer science operates. It has an evolving curriculum against a strategic direction which was set sometime ago, over the last 10 years or so, with a deliberate plan to change its focus. The Respondent is a relatively young university and it seems that, initially, a large part of the content of the original computer science degree programmes was skewed towards a skills based curriculum. Students learned to do things, in the context of this case that included skills in the fields of web design, business computing, games design and multi-media. We find, and it seemed to be common ground, that the study was at a practical or vocational level where those areas of study were directly related to acquiring skills which may be transferred directly to the work environment.

5.23 We accept the Respondent's evidence that the new strategy, implemented over the last decade, has amounted to a fundamental shift in the focus of the University away from that vocational, skills focus and towards the theoretical and academic areas of computer science. It doesn't teach students to do things in the current world of computers, it seeks to develop their approach to the underlying first principles. This aligns with the University's own growing status, or at least it's aspirations, as to where it seeks to position itself in the university market place. It seems to be the case that the skills base curriculum is seen as being the domain of the bottom third of universities. Its new direction is to lift itself beyond that and to focus on academic research, theoretical thinking and innovative applications.

5.24 This strategic shift is important also to a second significant theme in this case because it alters the requirements for its academic staff. Individual skills and technical competencies are taken as a given, for both the staff and the student body. They are no longer the measure of competence which is more recently replaced with a requirement for doctorate level academic achievement and demonstrable specialist research interests. The effect of this strategic shift has seen a reduction in the number and types of computer studies programmes that have been offered and, indeed, the modules they contain. The number of programmes has reduced more recently to only two. As we have already said, that is not to say that the opportunity to study in those technical areas is no longer relevant. Skills such as multi-media

and web authoring still exist in other schools or degree programmes away from computer science, but are simply no longer part of the direction of this particular degree programme.

5.25 Those without a doctorate, like the claimant, are increasingly likely to find the opportunities to work in the school of computer science have been reducing year on year. That has not been lost on the respondent and we find that the Claimant was identified as somebody likely to suffer this squeeze some years ago. We find the Respondent attempted to engage with the Claimant to avoid what was, even then, seen as the inevitable direction of travel. As early as 2010 it was known there would be an end point where the claimant's specialist skills were no longer needed, at least as far as the particular computer science programmes were concerned. In 2010, she was still an hourly paid, fixed term contract lecturer and she applied for a lecturing post for which she was unsuccessful. Dr Cobham wrote to tell her the news that she had not been shortlisted. We found he did so in a supportive way. The terms of his e-mail are entirely consistent with this planned strategic direction of travel. He made reference to the applications becoming increasingly competitive, many with PhD's, many already with a bank of research publications and he explained how he could see this trend continuing into the future. He made two statements of fundamental significance to the underlying issues in this case. The first was that the media production degree programmes had a much greater emphasis on practitioner focused skills and there may be an opportunity for the Claimant to move into that field which was much closer to the type of work she had been doing. Secondly, he said how if she wanted to pursue a PhD, to discuss things with him and it would be supported.

5.26 The Claimant did do so and did enrol on a PhD programme. This was supported by the school and her fees were waived. Whilst she enrolled, she did not continue or conclude the programme. In the first instance, it seems there was a perfectly legitimate deferment during her first pregnancy but, on return, she decided against it on practical and economical grounds. She had explored various grants such as through WISE (women in science and engineering) which was something independent from the university. To the extent we need to make any findings in this area, we reject the contention that there was any aspect of her decision which was based on her having to work as a lecturer or as a demonstrator for free. If that is what her understanding was then she was wrong. We find she withdrew principally due to the cost of travelling to Lincoln from her home to undergo the necessary PhD supervision sessions. We make no criticism of her for that choice. That was a decision she was entitled to make and there was no obligation on her to continue that programme, nor was there any sanction imposed for her not doing so. We recognise that a PhD is a major commitment and the Claimant was simply not prepared to make the personal investment notwithstanding the advantageous position she was in financially compared to others seeking to do so.

5.27 However, the reality was in the absence of a PhD or even the fact of working towards one rendered her substantially behind the minimum academic criteria for shortlisting in any future vacancies and substantially out of line with the strategy for academic teaching in the school.

5.28 That summarises the school's strategic direction of travel as we find it and we also conclude that this was something that was well known to the Claimant. In 2014, if not long before, this strategic direction had been reduced to a series of documents. These were discussed at a school meeting to which the Claimant was invited but did not attend. We have seen the documents [295.2] which set out those aims. They set targets for measuring the progress towards that vision including the number of academics employed with PhD's being at least at 95% and 100% working towards a PhD and also targeted seeking improvements in research and income generation.

The claimant's skills & qualification

5.29 Having set out the school's strategic aims, we turn now to the Claimant's skills and qualifications.

5.30 A number of times in the case we were presented with evidence from both parties for the purpose of inviting us to reach conclusions on whether the Claimant could or could not have done something else on the computer science degree. We find her undergraduate degree was in media technology, not computer science. In the context of a skills based vocational teaching, there is an obvious overlap between her background and the course originally provided in the school of computer science which were over time increasingly more suited to the modules being run in media based degree programmes and, as we have already said, Dr Cobham made that link as long ago as November 2010.

5.31 The notion of the school setting a target for its academics holding a PhD and the Claimant's withdrawal from her PhD programme should not be taken as any criticism of her capacity to obtain such an academic standard. We make no findings in respect of that and, as the Respondent has said in its own case, it is not the case that there was any sense of a lack of confidence in her ability to deliver that which she was asked to deliver, nor is it the case that there was any view she would not have been able to acquire other higher qualifications. The fact is, however, that she didn't. We have not found it necessary or appropriate to review those areas of the new computer science programmes that have modules that the Claimant believe would have been within her skill set. To the extent that we need to express any finding, we preferred Dr Cobham's evidence of his assessment of her suitability and the most we can say is that the basis on which he came to his conclusions appeared to us to be entirely reasonable and genuine.

The Chronology of the Contracting Relationship

5.32 We turn to what has in fact happened with the contracts between the parties.

5.33 The period between 2008 and 2012 were annual fixed term contracts. A significant finding within that 4 year period is that each year the Claimant experienced the annual review process and, indeed, the at risk process that followed where the annual workforce review concluded there would need to be reductions and how that affected her terms.

5.34 In 2012 the contractual relationship became a permanent hourly paid post. As we have said, this was made up of one lecturing and one demonstrator contract, the material terms of each being identical. We have already referred to our conclusions on core hours. This is the foundation for the permanent part of the hourly paid lecture as a lecturer's contract is based on the total annual hours which are then divided equally across 12 months to create a consistent monthly salary. This is not necessarily the total hours that will be worked as there may well be additional hours agreed within year and subject to a separate fixed term contract. We do accept the notion of core hours amounts to a minimum hours, but only in respect of that academic year. It remains subject to the next annual review. That first year had a total of 155 hours. In the second half of that academic year the annual review process started again. There was no surprise about this the Claimant's part, it was what was expected and she knew this process would happen. Dr Cobham wrote again with the outline for the following academic year. Proposals were set out [281]. Even at that time there were changes because the university was no longer running certain modules and other modules had been downgraded to level one. All the evidence we have from the module plans and throughout the bundle are consistent with this general direction of travel and curriculum change.

5.35 We also find that this is the year that Dr Cobham was led to believe the Claimant was looking to increase income, rather than travel for the lower paid demonstrator hours, and there is an adjustment this year which increased her teaching from 114 to 150 and the 36 hours demonstrator hours were lost. We note that in that respect, as the contracts were identical the effect of this change reduced her core hours under the demonstrator contract from 41 to 5. There was no complaint raised at the time, as is now advanced before us, that such a reduction was a breach of the minimum hours in the contract. The reason for that is because we find it happens naturally within the annual review. The Claimant acknowledged in the course of her evidence it was not a breach and, indeed, that her hours could be reduced from year to year as a result of this review process as long as it was done fairly.

5.36 Those changes were implemented in the 2013 academic year. During the year, a further 50 hours became available in year and she would become at risk of losing them at the end of that year as well as the 36 hours of her increased lecturing hours. In fact, we find she was paid a quasi- redundancy payment at the end of that year as well as notice in respect of those at risk hours lost.

5.37 In 2014, she started the new academic year on her reduced contract but there had been some changes and some further hours identified. It seems they were in excess of the hours reflected in the permanent hourly paid lecturer contract. For one reason or another those do not find their way to a revised contract and HR writes to the Claimant to confirm those additional hours will be paid as separate fixed term hours but if they were to continue into the next year's plan they would be rolled up into her permanent hourly paid lecturer contract for next year. By February 2015 there were still some gaps between what the Claimant believed she was actually teaching and what her various contracts provided for in that year. She expressed her concern to Dr Cobham in March 2015 about the calculation of her pay for the

work she was doing. If there was any sense that Dr Cobham was not immediately in line with her concern we find that was because most, if not all, of the reason for that mismatch was the discovery during the course of the year that a salaried colleague, Amir, had unilaterally delegated his workload on a particular module to the Claimant. Whilst everybody excepted she had taken it on in good faith, there hadn't been any official recognition of that change in her contractual position. We find Dr Cobham resolved this in her favour and to her satisfaction. Indeed, Amir was reprimanded for his actions in the way he offloaded his responsibilities. This is part of the reason for this year's hours being something of a unique year.

5.38 There were some further exchanges concerning the pay elements of the Claimant's contract and indeed whether she should get certain uplifts where the student cohort was in excess of 20 students and this appears to form the basis of what would later become the claimant's grievance.

5.39 The only further matter we need to address at this stage, so far as the claimant complained about the calculation of her hours, is that Dr Cobham's responses were supportive of the fact the Claimant should have whatever uplifts she was entitled to and there is nothing in his response to her concerns at all to suggest he would do anything other than ensure she was paid what she should be paid.

5.40 There was another reason for this year being slightly unusual because of a bulge in student numbers which had an effect on the Claimant's pay calculations.

5.41 As always, within the early months of the new year, the workload allocation review started again. The Claimant was given her initial allocation on 30 April for the following academic year. It seems the planned hours were published and, as far as we can see, there was no obvious response from the Claimant during the remainder of that academic year.

5.42 Come September 2015, when that plan was due to start the Claimant did not attend for work. On 10 September, she e-mailed Dr Cohbam. It was in reply to an email from sometime earlier headed "quick catch-up (plus provisional hours)". She said *"I am afraid with the cost of childcare and commuting it is economically unviable for me to continue. I feel for the past 3 years my pay has significantly declined and I am still undertaking work that is classified as academic leadership management, administration and delivery".* She went on to list other factors that led her to the conclusion that she could not attend work under those terms.

5.43 There is an immediate response from Dr Cobham. He set out how he appreciated how the hours have reduced over the years and, again, we see reference to the process of transitioning from multi-media subjects towards the new computer science curriculum. He proposes a meeting as a way forward. He then proposes alternative dates for a way forward.

5.44 On 28 September, the Claimant e-mailed HR alleging breaches of her legal rights and informing them that she was taking legal advice. She set out how she would not return to work until this matter was suitably resolved. We find the Claimant continued to be paid her full pay during this period in which she was refusing to attend work, notwithstanding that Dr

Cobham had written again on 3 October in conciliatory tones in an attempt to reach out to engage with her and to make proposals for resolution. Although there is, by any analysis, a continued reduction in the number of modules and the time devoted to the modules that the Claimant teaches, we are clear he was still seeking to find alternatives in ways that might creatively increase the hours the Claimant had available to her. He was, we find, going to great lengths to seek to engage constructively with the Claimant. We find the Claimant, on the other hand, was not engaging. Within all of these exchanges, there were repeated acknowledgments of the nature of the changes in the departmental strategic direction which are directly linked to the diminution of the areas of the claimant's particular technical specialism.

5.45 On 5 November, the Claimant was invited to a meeting to discuss her concerns. Again, we find this was an attempt at an informal resolution of what would effectively become her formal grievance. The Respondent had to chase her to engage. On 11 November, the Claimant contacted HR and Dr Cobham to say that she would not be attending the meeting. It is a lengthy e-mail which again refers to curriculum restructure as a background to the issues affecting her reduced teaching hours.

5.46 This state of affairs continued for a period of time approaching 2 months. It is treated by the Respondent as authorised absence. We have to say, we all found that response somewhat odd and not at all what we might expect to see in our experience of other sectors of employment. As odd as it may, it is nonetheless very much indicative of a generous and positive response from the Respondent whose officers were behaving both genuinely and extremely fairly to the Claimant in response to what amounted to a unilateral withdrawal of her labour. In fact, it was one of a number of points in the chronology where we have found the Respondent's response to be generous in circumstances where we would have not at all have been surprised to have seen a much stricter response. In fact, in evidence the Claimant was unable to articulate to us on any convincing basis why it was she felt she was entitled to refuse to work but why, when the employer was repeatedly seeking to engage her in a legitimate discussion, she still felt entitled to absent herself from the workplace in circumstances that could well have been reasonably expected to have been met with a disciplinary response.

5.47 In any event, that patience was not limitless and by 13 November 2015, it ran out. The Respondent wrote to the Claimant indicating that she must return to work by 18 November 2015 or any further absence will be treated as unauthorised and subject to the disciplinary process. She therefore has a period of 5 days to receive that letter and respond to it. 18 November was a Wednesday and it was not until 8:12 am on that day, that she contacted her employer, by e-mail, to say that she will not be resuming her duties. She was 10 weeks pregnant and suffering from morning sickness. In fact, the Claimant would thereafter not return to work at all during the 2015 or indeed 2016/17 academic years.

5.48 She commenced her maternity leave on 23 May 2016 after giving formal notification through her MAT1 form in March 2016. We understand her baby was born on 19 June 2016 and her maternity leave ended on 22 May 2017.

5.49 During the period of her sickness absence prior to commencing maternity leave, the Respondent sought to engage the Claimant in respect of her sickness absence and in doing so, sought to obtain occupational health reports. The Claimant refused to engage in that process and refused to engage in an absence review meeting. Indeed, she insisted on recording any calls that were made between her and her employer. There is some force in her concession that around this time her view was such that there was a serious breakdown in the relationship so far as it appears to us that is the conclusion she had come to. Her grievance was put on a formal basis albeit that she would not complete the grievance forms usually necessary under the employer's grievance process. Nevertheless, the Respondent accepted her grievance and appointed a fact finding investigator, a Mr Vicars, who arranged to meet with the Claimant in December. The Claimant was unable to attend and a second meeting was arranged for 4 January 2016.

5.50 We have seen the notes of that meeting. We find Mr Vicars sought to thoroughly and properly understand the issues that the Claimant had. There were elements where we found some sense of contrariness in the Claimant's attitude for example whether or not she should attend meetings but at the same time whether things could be dealt with by way of e-mail correspondence but our overall conclusion was that Mr Vicars undertook a thorough and relatively swift examination of the pay history of the Claimant. He reported on 18 January 2016 and made a series of key conclusions.

5.51 We find his attempts to resolve it locally had been frustrated by the Claimant declining to attend meetings. He had accepted the noncompliant grievance as set out across 5 separate e-mails from the Claimant. He gave a detailed analysis of the local discussions about resolving pay and the actual calculations. He concluded that the reason for a reduction in hours was not the change from hourly paid lecturer to permanent hourly paid lecturer but because of the curriculum restructure. He concluded that his analysis was not helped by the fact that the Claimant herself could not state how many hours she had worked or what pay she should have received. But within the process of examining all of that, we are satisfied Mr Vicars undertook a thorough examination of pay and, in so doing, he identified an error in the payroll calculation. He identified how the Claimant had been paid for the correct hours but at the wrong rate which led to an adjustment of £1,113.30. There was also a separate allegation concerning the claimant's payment in respect of attendance at a particular meeting. There was no record of the Claimant attending that meeting but nevertheless her claim that she had was accepted and an attendance payment authorised in the sum of £81.92. Beyond those two matters the grievance was essentially rejected. Particularly, so far as is relevant to the case before us, that there was no systematic reduction in hours linked to her status or contract. Various recommendations were made to HR and payroll.

5.52 The Claimant appealed against that outcome. That appeal was dealt with by Dr Libby Johns in March and, again, we have seen the notes of that appeal hearing. It seems to be the essence of the Claimant's appeals that things were still not clear to her why she was apparently suffering this change in hours and she set this out over 15 discrete challenges. We are satisfied Dr Johns considered the appeal with a thorough and genuine analysis of the

points being raised. A succinct response was set out in the outcome letter dated 20 April 2016 which deals with all 15 of the points identified in the appeal. We are satisfied there was a clear basis for the appeal hearing coming to the conclusion it did and again we are satisfied of the fine level of detail to which the actual effects on pay were scrutinised and this can be seen in the one area in particular where there appears to be a practical outcome in the Claimant's favour at point 14 where her pay for November 2013/14 was reviewed and she was found to be owing the sum of £6.41. Although the Claimant may well harbour some nagging uncertainty about the outcome of that process, we find that this dealt with that issue and she put the matter behind her.

5.53 We return to the general chronology for the year 2015/16. We have seen how the working hours were initially estimated for the year in the annual review programme. The actual amount that is paid to the claimant for that year ends up being 365.5 hours. In his evidence Dr Cobham believed that was potentially an error and he may well be right. We have certainly seen a number of examples in the course of this chronology where payroll errors have arisen in the calculations that lead to the individual's pay. In any event it is to the Respondent's credit that it maintained that figure, even if there was an underlying error, and the Claimant was paid on that basis. Her pay is set at that level not just whilst she is refusing to work, and then subsequently off sick, but it is the pay reference which forms the basis on which her maternity pay is then subsequently calculated.

5.54 That year, for one reason or another, the Claimant did not contribute to the delivery of any of her modules. Nevertheless, the same annual review of workload allocation took place in early 2016 for planning the following academic year and it did so in the areas that the Claimant would be teaching. We are satisfied that the school's continuation along the same strategic direction meant there were still further changes to take effect in those areas that the Claimant taught. There were also the effects of earlier changes materialising in the phasing out of decisions taken over the previous 2 or 3 years as the older students completed their 3 year degrees. Dr Cobham drafted an e-mail to send to the Claimant in exactly the same way as he would each year with the purpose of setting out the plan for the following academic year 2016/17.

5.55 We have no reason to suspect that its contents are anything other than the true basis on which the workforce allocation review would have unfolded for that year, had the claimant been at work. It is clear to us that one of the modules had reduced to a single semester and the other one was disappearing from the curriculum altogether. There was a proposal for various changes to the previous workload and some suggestions for new areas such as social data analysis modules which might allow for additional hours. That e-mail was not sent to the Claimant on the advice of HR. The reason was principally the Claimant commencing her maternity leave and it being known that she would be on maternity leave during the time that change would take effect. This is another example of a favourable response to the Claimant's circumstances. Were it not for the fact that she was about to commence maternity leave, we see no reason why that change would not have been implemented then. This point

in the evidence shows there was a positive, favourable consequence to the Claimant of her maternity.

5.56 The claimant was still on maternity leave as the 2016/17 academic year began. In April 2017, in anticipation of concluding her maternity leave, she e-mailed the Respondent to enquire about the proposed hours upon her return. At this time, we are satisfied a number of facts would have been known to her. Firstly, that by then, the respondent would have begun to settle the next year's annual workload allocation. Secondly, the timing of her return to work at the end of her maternity leave would be such that the students for that year would have completed all of their contact hours. There would be no lecturing for her to do and whilst she would be expected to engage with her employer generally, and specifically in respect of any planning for the next academic year, there would be no requirement for her to attend at the university for the remainder of the 2016/17 academic year. That state of affairs would be the same for any hourly paid lecturer in any year; it had nothing to do with her maternity leave, simply the timing of her return.

5.57 There are two further significant facts we need to record about the 17/18 annual workload allocation taking place around that time. The first significant fact is that Dr Cobham, with whom the Claimant had worked for the last 9 years or so, had moved on. We can see that he had approached workload allocation in his particular way each year looking not just at what was required but also looking at alternatives for the lecturers affected by reductions. Secondly, he clearly had a level of knowledge of the Claimant and her circumstances. This year, the review was undertaken by a Mr Jacques and the new Head of School, Professor Bidaut. They approached matters starting from and focusing on the basic requirements for lecturing hours. That is not to say the process would not have adopted essentially the same approach that Dr Cobham would have taken, but we cannot be satisfied that that either of them had the same experience and knowledge of the Claimant as he had. Nor can we be satisfied that, even if they did, there was any wider scope for additional hours. Any individual consultation would therefore have been of even greater significance.

5.58 The second thing to note is, as anticipated, there had been the continued decline in the Claimant's areas of specialism as were previously taught on the degree programmes. The strategic change, so far as it affected those areas, had by now all but reached the ultimate conclusion. It seems there was now only one half of a semester of input to web authoring and her meeting allocation which resulted only 36 hours lecturing and 5 hours meeting. That is a substantial reduction. It is a substantial reduction that looks all the more drastic due to the artificially high starting point. The starting point was artificially high on two grounds. One was due to the hours having been maintained over the last 2 years. Those hours were effectively based on a two year old assessment and the intervening reduction that would have taken place in the previous year had not taken effect due to her maternity leave. Secondly, the possibility that that allocation was itself higher than it ought to have been due to some error in the allocation as feared by Dr Cobham.

5.59 On 15 May, Helen Rice e-mailed the Claimant in response to her query to provide those hours and in doing so, she recognised that these changes would trigger the at-risk provisions

and that the formal consultation with the staff side would commence in due course. The Claimant was invited to contact her. She did so on 24 May and sought further explanation and clarification on what was happening with some other modules such as the project module. On 26 May, Ms Rice replied. Her reply set out two main areas. One was about module sharing and how that was organised between staff, The other related to capability and her status. There was a challenge to the reasoning applied in this second point in the email so far as it expressed a reasoning as between the capability of the individual and her status, apparently not being full time. The e-mail does refer to full time staff and it does refer to the workload allocation being focussed towards allocating to those staff before attention is turned to hourly paid lecturers. Notwithstanding the wording used, we are satisfied this is a question relating to her status as an HPL, rather than her time allocation as a part time worker. We are equally satisfied that this paragraph has to be read in the context of the module that it refers to, that is the web authoring module which is explicitly referred to in the body of the paragraph. We therefore find the reference to full time is a misnomer. Rather like in this Tribunal, fee paid Employment Judges are still often defined by way of contrast to full time Employment Judges. The reality is a large number of those so called full time Judges are, in fact, employed on various fractional part time contracts. A better phrase is that of salaried. And so it is in the university that there is a distinction between hourly paid lecturers and what is described here as “full time” lecturers but, in reality, that is a reference to salaried academic staff. That is why we conclude it is an issue going to contract status the time over which one works or, indeed, any suggestion of competency.

5.60 The result of this allocation is that the Claimant is placed at risk of the quasi-redundancy process and we have seen the documents [437.1 and 437.9] were prepared for consideration by the staff side as part of the collective consultation process, or the “at risk” process as it is described. There are two submissions, one each in respect of the two parts of her employment, the lecturing and the demonstrator roles.

5.61 Within the information provided to the staff side there is also information relating to a colleague of the Claimant’s, Mel Chapman. He is the other last remaining permanent hourly paid lecturer who taught on the entrepreneurship module in the same degree programme. Unlike the Claimant, who was facing a reduction in her hours, the effect of the strategic plan on his areas of specialism was more profound. He faced a reduction of 100% of his previous hours. Faced with that, he chose to leave. He doesn’t therefore feature thereafter as part of the at risk consultation because he has already indicated his intention, but we find his circumstances are materially similar to the Claimant’s so far as the effect of hourly paid lecturing hours is concerned. The at risk process therefore confirms that the 41 hours are the proposal for the claimant.

5.62 Significantly, the Claimant declined to engage in any consultation. We are satisfied she would have known there would have been scope to discuss any further support and also to consider any other areas that she could demonstrate competency for, albeit they might be dwindling within the school of computer science, they nonetheless potentially existed across the wider university community. A significant option for the Claimant to consider may well

have been that which we know others had taken previously, that is in refocussing the delivery of their particular skill set to another school or curriculum where her knowledge and skills may have been positively in demand. Her choice not to engage in the consultation meant she did not explore this

5.63 The proposed 41 hours was confirmed in a letter dated 21 July 2017 as the plan for the forthcoming year although it does not alter the original proposal. The effective date of change would be 31 August. This letter set out how there was a right of appeal against this decision. The claimant did not appeal.

5.64 There was a period between this notice and 31 August of a little over 5 weeks. The Claimant was ultimately paid her normal monthly salary together with her quasi-redundancy payment for the hours lost and her 9 weeks' notice, 5 of which was given to her, 4 of which was paid in lieu.

5.65 We find the Claimant did receive this letter but did not make any further response to the employer. She continued to receive her monthly salary for the remainder of July and August, including payments in respect of that quasi-redundancy and quasi notice payment. During that time she was not off sick or otherwise incapacitated. She explained her lack of response as partly being due to advice of some description that she had obtained and partly because it was the summer and, frankly, she was spending time with her family. We need to emphasis this period, that is from July/August and into September, where the Claimant was not engaged in any teaching is nothing unusual and was part of the usual cycle of the working year for an hourly paid lecturer in any event. She was well aware of this cycle and where she was in the annual timetable. However much her hours had reduced, the Claimant would have been well aware that the university was by now planning the delivery of those 41 hours within the next year's student intake and that it would be delivered by her. It is also the case that during this summer down time, there would always be some input during summer to a pre-academic year planning meeting or planning day that the Claimant would be expected to attend. One did take place but the Claimant did not attend.

5.66 We understand the Claimant was time tabled to begin delivering her remaining modules from end of September 2017. On 25 September she wrote to the respondent tendering her resignation. The actual resignation sent [443] and is a slightly more fleshed out version of the draft [442] which has been referred to in this hearing purely for the purpose of the illegibility of the other. We find the stated reason in that letter to be the reduction in hours for the coming academic year which the Claimant asserts was discriminatory following her maternity leave.

5.67 There then followed a series of exchanges in respect of further letters from payroll of the same date with we don't need to say anything more about other than to find that these crossed in the post. Contrary to how the reason for the resignation was originally put in the pleadings, it is not now the Claimant's contention that the letter from Stephan Pierce on 25 September was the last straw. That much had to be abandoned due to the timing. It begs to question however, if that was not the reason for the resignation, something else must have been.

6. Discussion and Conclusions

Constructive Dismissal

6.1 The first issue for the Tribunal is to determine whether there was a dismissal. Only then do we need to consider the alternative response that any dismissal in law was, nonetheless, fair. It is for the Claimant to prove she was dismissed. Section 95(1)(c) of the Employment Rights Act 1996 provides that the employee is dismissed by her employer if-

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

6.2 It is well settled that in order to bring a claim within this provision the employee must prove a) that the employer has breached a term of the contract of employment; b) that the breach of that term is fundamental to the contract; c) that the employee resigns in response to that breach and not for some other reason and, d) the employee does not delay or otherwise affirm the breach so as to deprive her of the right to resign in response. (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***).

6.3 The claimant relies on an alleged express term as to minimum hours and, alternatively, the implied term of trust and confidence. This was stated in ***Mahmud v BCCI [1998] AC 240*** as being–

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

6.4 We have been directed by both Counsel to the various legal elements of constructive dismissal. We have had regard to the cases of ***Waltham Forest London Borough v Folu Omilaju [2004] EWCA Civ 1493*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, CA*** so far as they inform the approach to last straw constructive unfair dismissals although they seem to have less relevance now to the circumstances of this case which seems has been put entirely on the decision communicated to the Claimant in the summer of 2017.

6.5 The first alleged breach is that there is a breach of an express term which is said to give rise to a minimum number of hours in any one year of 155 hours. The basis of this is resolved by our finding of the meaning of core hours. The contract does set core hours. Whilst that determines the minimum hours during that particular academic year, it does not in our judgment set any fundamental and ongoing minimum level of hours in future years. The core hours are simply to be contrasted to any additional hours that may be acquired during that particular academic year and provide a minimum during the year, should the anticipated requirement be reduced. Its reach does not extend beyond the particular academic year. There is explicitly a provision in the contract [288] where the hours are subject to an annual review. That can only mean that the numbers set out in the contract will be reviewed and may go up or may go down. That is entirely consistent in the underlying purpose of the

contract and can be seen in practice in the previous contractual history between the parties. We are bound in any event to accept the Claimant's own evidence that she knew her hours could go down subject only to the reduction happening in a fair way. If further justification is required, we note how there was a change between this contract and the previous fixed term contract insofar as what will happen if there were reductions occurring within the year. Previously, any reductions within the year would take effect subject only to 2 weeks' notice. Thereafter the hours would be lost. Under this contract, they would be maintained throughout the year and extra duties found but this protection is explicitly only in respect of that year and it follows from our analysis that there is no contractual term entitling the Claimant to a minimum period of hours at any one time. As a result, a reduction from one year to the other cannot amount to a breach of an express term of the contract.

6.6 The next question is whether, notwithstanding the lack of an express term as to hours, the changes nevertheless breached the implied term of trust and confidence. The conclusion we have reached is that it does not. Firstly, it was known for many years that the strategic direction of travel for the computer science degree programs would result in a reduction in the need for the Claimant's particular skill set. There was a long-term reduction in the need for or a reduction for the skills based media modules. Even though a reduction was planned and known in advance, we have considered whether there could still be a point when the scale of any reduction in any year, as opposed to the fact of some reduction, offended the implied term. That term of course has to be considered against the other relevant express terms of the contract. On balance, we have accepted the Respondent's submissions on this point. There are express terms. The fundamental principle of contract law is an implied term cannot override and express term although there are examples where the performance of an express term may itself offend the implied term by virtue of the manner in which it is performed. (see for example ***United Bank Ltd v Akhtar [1989] IRLR 507, EAT***). That is different in nature and quality from the quantification of the change that a contractual term entitles as long as that quantification can be justified. There is no contractual basis for implying any restriction on the quantum of change in hours from one year to the next, beyond the fact of that change being justified and not capricious or otherwise disingenuous. Consequently, we do not see the reasonable and justified application of the settled contractual basis for the annual review of HPL hours engaging the principle that performance of an express term has nonetheless offended the implied term.

6.7 If we are wrong, and even if there was nevertheless conduct by the employer which undermined trust and confidence, we have to come to the conclusion that there was reasonable and proper cause. That arises from the background of this long history of strategic direction; the repeated annual reviews reinforcing that direction year on year and our satisfaction of the basic facts underlying the change to the curriculum and module structure. The significance of this year's hours was that it marked the point where that strategic aim was all but reaching its conclusion.

6.8 It follows that we are not satisfied that there was a breach of a fundamental term of the contract. Without that, there is no dismissal in law. Strictly speaking, therefore, it is not

necessary to further address the remaining elements of constructive dismissal but in case we are wrong about any of the conclusions we have come to already, we do. The next question is whether, if there was a breach of either term, the Claimant resigned in response to that.

6.9 We did spend some time considering the Respondent's contention that the Claimant had set her mind against returning to work long, long before this particular annual workload review and, potentially, even before she announced her pregnancy in 2015. We also know how the initial draft of the following year's review of hours set out in May 2017 did not prompt her to resign, nor did the confirmation of those hours in July. We also have in mind the fact that there was the previous breakdown in the relationship, as she described it from her perspective, and her blunt refusal to attend work in 2015. Those matters are potentially consistent with what could well be seen as an uncooperative attitude. Indeed, the timing of the Claimant's engagement has the look and feel of being calculated to cause disruption. That can be seen when she did not return to work in 2015 and in the timing of her resignation, both being given immediately before a date when she was otherwise required to do something one way or another. Resigning a day or two before she was due to be teaching students must have been something the Claimant knew would inconvenience both the Respondent and, indeed, the students. Despite that, we have come to the conclusion that when we look at the nature of the Claimant's dispute with the employer and how she has expressed the content of her letter of resignation, we accept that the reduction in hours, following as it did a general trend in that direction, is the reason for resignation.

6.10 Whilst we have rejected the letter 21 July amounted to a breach or a last straw event contributing to a breach, if there was a breach arising from that communication we do need to consider whether the Claimant nonetheless affirmed her employment contract before she eventually did resign. We have come to the conclusion that there was affirmation. We have had regard to the law on affirmation, in particular ***W E Cox Toner (International) LTD V Crook [1981] IRLR 443***

6.11 There was a significant period of time between it and the resignation. During that time, there were further events significant to the continuation of the contract. The claimant continued to draw salary over 2 months. One of those salary payments included the payments made in in recognition of the changes referred to as the quasi-redundancy and quasi-notice payments. Whilst the claimant was not actively lecturing, she was not off sick or otherwise incapacitated. The period of delay marked a normal period in the annual cycle during which there was nothing inconsistent with the continuation of the employment relationship as it was intended to be performed. She knew what the plan was for the following year and had chosen not to engage in the consultation process and did not appeal the outcome. The claimant has explained her reasons for not resigning sooner. We are satisfied those reasons do not provide a good reason for not responding sooner. We note it wasn't even said to be a case of weighing up her options and there was certainly no protest of the decision in any appeal. We have concluded the events are better described as her simply sitting on her hands. Her continued employment is entirely consistent with the continued employment relationship particularly faced with what each must know the other was fully

aware of. The Claimant must have known students were enrolling and the expectation of being taught the remaining module she was listed to teach and the Respondent had invited a right to appeal which hadn't been exercised. We are satisfied that by that delay the claimant did affirm the contract of employment.

6.12 Our conclusion is for the reasons set out that this resignation does not constitute a dismissal for the purpose of Section 95(1)(c) of the Employment Rights Act. It was a resignation.

6.13 Nevertheless, we have briefly considered the further alternatives. The first of which is whether, if there was a constructive dismissal, whether it automatically unfair under Section 99 of the Employment Rights Act 1996?

6.14 We are entirely satisfied that nothing that happened in the course of the period between the start of the 2015 academic year and 2017 year was in any way because of the Claimant's pregnancy related sickness absence, her childbirth or, indeed, any other reasons whether they are relied on or not by the Claimant. Not only is it clear to us that the events that unfolded were a continuation of the strategic path that started some years earlier and before the pregnancy, we are also influenced by the fact that the Claimant was one of two affected by the changes in 2017. The other was a male colleague who suffered a similar, if not greater, effect in the reduction of his hours. When we have examined the questions posed of us under the Maternity and Parental Leave Regulations, in each case we can say with confidence that we are satisfied the reasons if there was a dismissal were in no way connected to pregnancy.

6.15 We have then looked at the second argument under the Maternity and Parental Leave Regulations. This relates to a dismissal by reason of redundancy. As a foundation to that analysis, we are satisfied that the circumstances giving rise to the reduction, if there was a dismissal, would have satisfied the statutory definition of redundancy set out in s.139 of the 1996 Act. Any dismissal would therefore have engaged the potentially fair reason of redundancy. The underlying circumstances clearly demonstrate diminution in the requirements of this employer for employees to perform work of a particular kind.

6.16 However, for the purpose of the regulations, this is not a case where the Claimant was one of a number of people in this undertaking or holding similar positions who were affected by the review process. Indeed, to be fair Mr Gordon readily accepted that this part of the MAPLE Regulations was not engaged. In any event, we have to ask whether any selection for redundancy was connected with any of the prohibited circumstances. We have concluded that is not the case and the result is that if there was a dismissal, it would not have been an automatic unfair dismissal.

6.17 That conclusion, however, would not mean to say it could not necessarily be an unfair dismissal by virtue of its ordinary provisions under Section 98 of the 1996 Act. Whilst it remains a legitimate claim in theory, we have concluded that in this case the ordinary test of fairness was not offended. In so deciding, we considered, first and foremost, the test in the

statute as it has been informed by guidance in cases such as ***Williams v Compair Maxam Ltd [1982] ICR 156.***

6.18 The significant elements of our findings so far as ordinary unfair dismissal is concerned are these. Firstly, as we have already said, we are satisfied a redundancy situation by definition existed and that that was the reason for the Claimant finding herself in the at risk review process for 2017. The Claimant was in her own pool, so far as the need for employees to provide web authoring, is concerned. The respondent's policy, so far as we need to go to the policy, does nothing more than to set out the foundation for how the situation will be handled in a redundancy situation where a selection is to be undertaken between two or more individuals at risk. That does not engage here. We are satisfied that the policy, in the abstract, set out a process that, if applied, would fall within that range of reasonable responses of a reasonable employer in this setting. More specifically, the actual application of the policy throughout the at risk process seems to us to engage all of the elements necessarily seen in a fair redundancy selection process. We can see that notice of the possible changes has been given well in advance of the effective date. We can see there is a process of collective consultation which we feel should be given due weight because of the continued involvement of the staff side in the process. Significantly, when we come to the opportunity for individual consultation we know from previous year's this is genuine and gives a route for meaningful changes to the following year's plan, so far as the individual is concerned which opens up the scope for alternative employment. In this case the Claimant declined to engage in that process or any wider redeployment process. That was her choice. All the other factors typically seen in a fair redundancy process are present, including a right to appeal. That may or may not have made any difference but the fact is the employer gave an opportunity and it was not taken up. That cannot be laid at their door so as to have given rise to any unfairness in this claim.

6.19 It follows that even if we are wrong about our conclusion that there was no dismissal, we are satisfied it would have been an unfair dismissal.

6.20 We then turn to the discrimination claims under the Equality Act 2010.

6.21 The claimant relies on both s.18 and s.13 in the alternative. The essence of both claims is the same, namely the reason why her hours reduced as they did being related respectively either to her maternity or pregnancy, or uniquely her sex by virtue of her pregnancy or maternity. The fundamental issue in most claims of discrimination, and these are no different, is the answer to the reason why question.

6.22 We start with the question of jurisdiction in relation to time limits. We are satisfied that jurisdiction is engaged one way or another under either of the claims advanced as, in part, we dealt with at the outset. So far as the events relied on take place in July to advance the s.13 claim, that date is within the 3 months immediately before the presentation of the claim. So far as Section 18 is concerned, the July date is that is outside the protected period which ended on 22 May 2017 and there is therefore a question as to whether s.18 is engaged. However, the process which leads to the decision on the claimant's hours commences within

the protected period and continues afterwards. Section 18(5) of the 2010 Act applies where a decision made during the protected period, but implemented afterwards, is treated as being done within the protected period. Our only doubt is that the start of a "proposal" within the protected period is arguably not the same as a "decision" within the period. Nevertheless, in view of the findings that we have otherwise come to on the merits, which are identical whether it is framed as a claim under s.18 or s.13, it is something that we do not need determine one way or the other. The Claimant's case is the same in both cases. If the decision falls within the protected period (but implemented later when it is in time) it is a section 18 claim. If it is without the protected period (and implemented as before) it is a section 13 claim. Whatever the wider consideration of those two respective statutory forms of discrimination, the question remains one of the necessary causal link, either to pregnancy or to her sex because of pregnancy. Whichever route is taken through the 2010 Act, we are satisfied that everything that the employer concluded in respect of the working hours was done only in relation to the needs of the following year's workforce in accordance with the long standing strategic plan. We are satisfied that if it does fall to be considered under Section 13, that an appropriate male comparator would be treated in exactly the same way to the extent that one is ever required in the case of pregnancy related discrimination. We suspect for that reason, there is no actual comparator advanced by the claimant but, as we have already alluded to, we do have a reference point in the evidential landscape in the case by way of Mel Chapman, who was in fact treated in materially the same way. In pregnancy related cases, it is not appropriate to engage with comparators to answer the "less favourable" or "unfavourable" treatment part of the test. But it does, nevertheless, stand as a useful check on our conclusion on the "reason why" part of it which we are satisfied is not on any of the prohibited grounds. For those reasons, we would dismiss the claim brought under both Section 18 or 30.

6.23 The final part of the claim relates to indirect discrimination. In respect of that, we directed ourselves as follows. First and foremost, we had regard to the terms of Section 19 of the 2010 Act itself. By that, we must be satisfied that the alleged PCP was in fact applied. If it was, whether it puts those with whom the claimant shares the characteristic at a particular disadvantage (At this stage, there is no legal burden on the claimant to explain why any disadvantage exists. It is enough that it does). It seems to us, however, that some disadvantage has to be identified for any analysis then to take place. If there is a group disadvantage, we then must be satisfied whether the claimant is in fact put to that disadvantage. If the answers at that stage of the analysis establish a prima facie case, it is then for the respondent to satisfy us that applying that PCP was a proportionate means of achieving a legitimate aim. It is not until all four parts of the statutory tort are made out that unlawful discrimination is established. **(Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27).**

6.24 In determining group disadvantage, is usually necessary to consider the appropriate pool of individuals exposed to the PCP. Such a comparison falls within the requirement of s.23 of the 2010 Act in that it is an exercise of comparison in which the circumstances of the individuals in one group must not be materially different to those in the other group. The key

is to ensure a comparison which logically tests the particular discrimination complained of (**Eweida v British Airways [2009] IRLR 78**). A pool so narrow that no comparison can be made at all is unlikely to serve this end nor is a pool so large that the comparison is no longer one of like with like (see **British Airways v Grundy [2008] EWCA Civ 1020, [2008] IRLR 74**).

6.25 Turning to the circumstances of the case before us, this is as set out in the further and better particulars. The PCP relied on is the Respondent's redundancy policy. The particular issue within that policy has not been articulated in the pleadings nor was it developed in the course of the examination of witnesses or, indeed, the submissions. The best we can glean arises from the extent to which section 10 of that policy was challenged in the course of the examination of witnesses. In the abstract, we are satisfied that in determining whether the redundancy policy is capable of amounting to a PCP, it does and it is a PCP which is on the face of it applied to men as well as to women. It is not the case, however, that section 10 was engaged in the circumstances of this case as the respondent did not engage in a selection process between two or more employees, as the claimant accepted.

6.26 Nevertheless, we then turn to the question of the particular disadvantage that this PCP is said to put women to over men. In order to examine that, it is usually necessary to apply an appropriate pool so as to reach a conclusion of fact that the particular disadvantage exists. That is necessary before going on to consider whether the Claimant herself is in fact subject to that same disadvantage.

6.27 In this case, there has been no articulation by the claimant of what the disadvantage is said to be. We therefore do not know what it is about the policy or section 10 in particular that is said to disadvantage women over men. It is not enough, in our judgment, to say everything can be resolved by judicial notice. It is not clear what we are expected to take notice of. In this case, everything was advanced in the abstract. We know that there are both men and women employed. We know that there are full time and part time people employed, although that is not the issue in this part of the claim, and we know that, until recently, there have been both salaried and hourly paid lecturers. What has not been adduced before us, even in vague terms, is how many of which gender are in each of those categories. Still less can we see or understand why it is that the terms of this policy, particularly paragraph of Section 10 should create a group disadvantage to one over the other. This is not a case of taking judicial notice as it might be in other cases. Judicial notice applies where there is a clear basis for a particular proposition and where the truth of the proposition can be accepted without strict evidence. For example, it may well still be the case that women make up the majority of workers with primary child care responsibilities. If that was the issue, that notice might be applied if it was relevant to the alleged disadvantage. But it is not. We don't know why the policy generally, or section 10 particularly, is said to disadvantage women. We don't know whether the claimant was so disadvantaged. We are therefore left in a position where we have to reach a conclusion the Claimant has not established the necessary initial elements of a claim for indirect sex discrimination in order to then require us to call on the Respondent to explain in evidence the proportionality of its stated legitimate aim of ensuring staffing was at

an appropriate level to the number of students on the various modules being offered. We suspect that there could well be some force in the justification in this case in any event but because we never get that far in the analysis under Section 19, and have no disadvantage against which to test the proportionality or the PCP, it remains a question that we cannot properly answer. The claim of indirect discrimination is not, therefore, made out.

EMPLOYMENT JUDGE R Clark

DATE 5 May 2019

JUDGMENT SENT TO THE PARTIES ON

……...……..

AND ENTERED IN THE REGISTER

……...……..
FOR SECRETARY OF THE TRIBUNALS