EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Burrows		**(1) Tropical Tan** **(2) F & C Finnegan Limited** **(3) Mrs V Finnegan** **(4) F & C Finnegan t/a Tropical tan**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Newcastle-under-Lyme **ON** 10 & 12 July 2019

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Mrs IR Fox
Mr G Bagnall

Representation
For the Claimant: **In Person**
For Respondent: **Mr D Bunting (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claim against the fourth respondent, F & C Finnegan t/a Tropical tan, is dismissed upon being withdrawn by the claimant.

2 The second and third respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints against those respondents of discrimination on the grounds of pregnancy or maternity, pursuant to Section 120 of that Act are dismissed.

3 The claimant's claim pursuant to Section 49A of the Employment Rights Act 1996 to have suffered detriment contrary to Section 47C of that Act is not well-founded and is dismissed.

4 The claimant was not dismissed by the respondent: her claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 Full reasons for the judgement were given orally at the conclusion of the hearing on 12 July 2019. These written reasons are provided pursuant to an immediate request made by the claimant.

2 The claimant in this case is Ms Louise Burrows who was employed by the second named respondent in the case, F & C Finnegan Limited, as a Receptionist, from March 2016 until the 16 May 2018 when she resigned. The third named respondent, Mrs Vedwatee Finnegan, is a Director of F & C Finnegan Limited: and she was effectively the claimant's manager, responsible for decisions relating to the claimant's employment.

3 There were two other respondents when the claim was originally presented: the case against the first respondent, Tropical tan, was dismissed following a Preliminary Hearing conducted by me on the 4 January 2019. The case against the fourth Respondent will be dismissed by consent following this Hearing, the claimant having conceded on the basis of the information supplied since the Preliminary Hearing, that the correct respondents are F & C Finnegan Limited and Mrs Finnegan only.

4 Following her resignation in May 2018, the claimant presented a claim form, this was presented on the 16 July 2018, it followed a period of early conciliation through ACAS, ACAS were consulted on the 5 June 2018 and issued the Early Conciliation Certificate on the 22 June 2018.

5 The claimant claims unlawful discrimination on the grounds of pregnancy and/or maternity, contrary to Section 18 of the Equality Act 2010; she claims detriment because of maternity leave contrary to Section 47C of the Employment Rights Act 1996 (ERA); she claims that she was constructively dismissed; and implicit is a claim that that dismissal was automatically unfair by pursuant to Regulation 20 of the Maternity and Parental Leave Regulations 1999.

The Evidence

6 The tribunal heard evidence from three witnesses, firstly we heard from the claimant on her own account and then for the Respondent we heard from Mrs Finnegan and then from Mrs Clare Wall who is the Company's Bookkeeper having been appointed to that role in June 2017. Mrs Wall's evidence was largely uncontroversial dealing with the facts, but there is one important element to it, namely that on the basis of what Mrs Wall tells us, it appears that until Mrs Wall made enquiries of the respondent's Accountants, the respondents were unaware of the implications for the claimant's entitlement to Statutory Maternity

Pay of her working more or less than 16 hours per week in the period prior to the commencement of maternity leave. There were significant discrepancies between the evidence given by the claimant and that given by Mrs Finnegan. Although the basic chronology is not in dispute, there were certainly differences as to what was agreed and what was said and at various meetings.

7 We have considered the claimant's evidence and Mrs Finnegan's evidence and where there is a discrepancy between the two, we prefer the evidence of Mrs Finnegan. We reach this conclusion on the basis that her evidence is consistent with what actually happened at the time whereas in our Judgment, the claimant's evidence as she now presents it is not. For example, it is the claimant's case that it was agreed that she would work a minimum of 16 hours per week as this was necessary for her to continue to receive certain benefits. It is her case that in the period from February to July 2017, she was working less than 16 hours per week and that this was a breach of what was agreed and indeed says she, this reduction in hours was an act of discrimination. What Mrs Finnegan says is that the agreed hours were 15 hours per week, which was 3 x 5-hour shifts and this is consistent with the claimant's time sheets as being what we would describe as her "core hours". It is clear that the claimant often worked more than 15 hours per week but there were also a significant number of weeks where she worked less it is also clear that the claimants hours were reduced after February 2017 compared with what they were in the period before then. Mrs Finnegan's case is that the claimant fully understood the circumstances in which this happened and that it was wholly unrelated to the claimant's recently announced pregnancy. We find this evidence to be more credible than the claimant's evidence because, if the reduction in her hours was a surprise to her and was unexplained, in our judgement, she would certainly have complained about it at the time. She did not do so; and she has been unable to provide any explanation to us as to why not.

8 We also find that Mrs Finnegan's account of what transpired at a meeting is more consistent with events than that given by the claimant. If it were the case that the claimant had been told that she was required, in the future, to work on a Saturday mornings having said she was unable to work on Saturdays, we would have expected that the claimant would at least have emailed Mrs Finnegan or written to her about this, but she did not do so.

9 We find that Mrs Finnegan's evidence is the more reliable: and it is on the basis of her evidence; and on the basis of our assessment of the evidence of the two witnesses; that we have made our findings of fact.

The Facts

10 The facts can be very simply stated. The respondent runs a Tanning Salon in Sandbach; the claimant was employed as the Receptionist; she also undertook

some training to do work on nails; there is a dispute as to whether the claimant worked for the respondent when doing nail care, or worked her own account; we find that to be a point which it is not necessary for us to adjudicate upon; it is not relevant to the issues we have to decide. Mrs Finnegan was the de-facto Manager of the Salon and also worked there. When the claimant was first employed Mrs Finnegan's late Husband dealt with all of the business' financial affairs.

11 The claimant started work in March 2016: her contract of employment is silent as to the hours to be worked; she says there was an agreement made with Mr Finnegan that she would work 16 hours per week minimum. The timesheets, rotas and payslips that we have been able to examine indicate that she worked rather more than 16 hours per week most of the time; but that it sometimes fell below that; the contract says that her hours could vary; and they clearly did; they would vary to meet the changing needs of the business.

12 It was around March 2016, when the claimant commenced her appointment, that Mr Finnegan first became ill. In July 2016, he was diagnosed with Interstitial Lung Disease from which he was eventually to die in January 2017. A key question in this case is why the claimant's working hours were reduced from February 2017; the claimant herself accepts that in the period of Mr Finnegan's illness she was working more hours than she otherwise would have done, because she was covering for Mrs Finnegan's time attending hospital with, and nursing and caring for, her Husband until his death.

13 Two very significant things happened in January 2017: the claimant became aware that she was pregnant and announced this shortly afterwards; much more significant for Mrs Finnegan was the death of her Husband.

14 When the claimant informed Mrs Finnegan of her pregnancy it was quickly identified that she would be commencing her maternity leave in July 2017. On average, between February 2017 and July 2017 the claimant worked fewer hours than she previously had, and this coincided with additional employees being taken on. The claimant puts her case on the basis that the reduction in hours coming immediately after the announcement of her pregnancy must, says she, be related to the pregnancy and on the basis of information she later received, she maintains that this was done in a deliberate attempt to avoid any liability on the respondent's part for Statutory Maternity Pay.

15 We have looked at the complete picture: there were two significant events which occurred immediately before the reduction in the claimant's working hours. There was the announcement of the claimant's pregnancy; and there was the death of Mr Finnegan. It is the respondent's case that the business was experiencing financial difficulty: the claimant disputes this. Whatever the actual position as to financial viability, we accept Mrs Finnegan's evidence that she was

very uncertain of her financial position following her husband's death; she did not understand the finances of the business; she was experiencing a period of turmoil. We further accept Mrs Finnegan's evidence that new staff were taken on because Mrs Finnegan herself was finding it difficult to cope with her grief and could not herself work the hours that she previously had.

16 All of these changes were fully discussed and agreed with the claimant who by now was a major source of support to Mrs Finnegan. There was no adverse comment, criticism or complaint from the claimant and certainly nothing to indicate that the claimant herself could cover all of Mrs Finnegan's hours. The decisions taken provided sufficient hours to new staff to make employment with the respondent attractive whilst maintaining the claimant's core hours, namely three 5-hour shifts per week.

17 In June 2017, Mrs Wall had been retained: the very involvement of Mrs Wall was evidence of Mrs Finnegan's struggle to cope, particularly with the financial affairs of the business. Mrs Wall was introduced through the company's accountant as being someone Mrs Finnegan would be able to rely on to keep the books in order. Mrs Wall made an enquiry of the accountants as to the claimant's entitlement to Statutory Maternity Pay - it was Mrs Wall who established, and informed Mrs Finnegan, that the claimant was not so entitled because she was, during the reference period earning less than £116 per week. The claimant would be entitled to Maternity Allowance instead. We accept that Mrs Finnegan had no idea at all as to the claimant's entitlement or otherwise, or as to the criteria for entitlement, until June 2017.

18 On the 12 July 2017, the claimant commenced maternity leave; her son Connor was born on the 6 October 2017. In October 2017, Mrs Finnegan contacted the claimant inviting her to participate in some Spray-Tan training, clearly in anticipation of the claimant's ultimate return to the business. In January 2018, there were discussions between them as to when the claimant would return: the date identified was 12 April 2018. On 2 February 2018, Mrs Finnegan and the claimant met at the salon to discuss what the claimant's hours and duties would be upon her return. What was proposed to be different was that the claimant would be working her three afternoon shifts per week, but that Mrs Finnegan was proposing to trial extended opening hours until 8pm in the evening rather than 7pm. The claimant made clear that she could not work until 8pm three times per week; that she could do that once each week only. Mrs Finnegan promptly looked into how she could adjust the claimant's hours, so that she only had the one evening a week and two day-time or morning shifts, one of which was a Saturday. The claimant had worked Saturdays in the past and there is no evidence anywhere of the claimant informing Mrs Finnegan that she was not available to work Saturdays in the future. If Saturday working had been a major obstacle for the claimant, then after the meeting of the 20 August, we would have expected the claimant to have pointed that out. Had she done so, we have no

doubt that Mrs Finnegan would have looked again at how the hours could be rearranged to mutual satisfaction.

19 Two significant events occurred after the meeting on the 2 February 2018:-

(a) The first was on the 16 March 2018, when another employee, Sarah Louise Jones, an employee contacted the claimant and apparently informed her that the reduction in her hours prior to the commencement of her maternity leave had been done deliberately so as to prevent her receiving Statutory Maternity Pay. This is an allegation which is wholly unsupported: it is made in a text message; by an individual who has not made a witness statement and has not attended the tribunal. Mrs Finnegan has had no opportunity to challenge that assertion. We cannot rely on that evidence as being evidence of the truth: we find that it cannot be true because we have already found that Mrs Finnegan was unaware of the impact of the hours on the claimant's entitlement or otherwise to Statutory Maternity Pay. We do however accept that the claimant received the message and we can see how it may have undermined her confidence in Mrs Finnegan. Having regard to the nature of their relationship however, we would have expected the claimant to discuss this with Mrs Finnegan.
(b) The other significant factor in our analysis is that, after the 2 February 2018, but three months before her resignation, the claimant asked to extend her period maternity leave. The act of requesting an extension carries with it a clear statement of an intention to return to work at the end of the extended period. In our judgement it is highly significant that this request was made after the last of the incidents which the claimant alleges amounted to a fundamental breach of her employment contract leading to her resignation and claimed constructive dismissal.

The Law

20 **The Equality Act 2010 (EqA)**

Section 18: Pregnancy and Maternity Discrimination: Work Cases

(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.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

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

(5) 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—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

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

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

Section 123: Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

21 **Employment Rights Act 1996 (ERA)**

Section 47C: Leave for family and domestic reasons

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave,

Section 48: Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44, 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

(2) On a complaint under subsection (1), it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the “date of the act” means the last day of that period.

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(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 - *Constructive dismissal.*

Section 98 - General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 99: Leave for family reasons

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

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave.

22 **Maternity and Parental Leave Etc Regulations 1999 (MAPLE)**

Regulation 18: Right to return after maternity or parental leave

(1) An employee who returns to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less……..

is entitled to return to the job in which she was employed before her absence.

(2) An employee who returns to work after—

(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or
(b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above,

is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

Regulation 18A: Incidents of the right to return

(1) An employee's right to return under regulation 18(1) or (2) is a right to return—

(a) with her seniority, pension rights and similar rights as they would have been if she had not been absent, and
(b) on terms and conditions not less favourable than those which would have applied if she had not been absent.

Regulation 19: Protection from detriment

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any 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;
(b) has given birth to a child;
(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

Regulation 20: Unfair dismissal

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

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

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

(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

23 **Decided Cases: Pregnancy/Maternity Discrimination**

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the "reasons why" approach; it is not a "criterion" test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Johal -v- Commission for Equality and Human Rights **[2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Fecitt -v- NHS Manchester **[2012] IRLR 64 (CA)**

If detriment is identified the burden of proof is on the respondent to prove on the balance of probabilities that the detriment complained of did not arise because of the protected characteristic of maternity leave.

Raithatha -v- Addleshaw Goddard **ET/2406019/05 (ET)**

The ET held that a complete restructure of the business during a claimant's additional maternity leave rendered it not reasonably practicable for the claimant to return to her previous role.

Blundell -v- St Andrews Catholic Primary School **[2007] ICR 1451 (EAT)**

"*The job*" as referred to in Regulations 18 and 18A MAPLE means "*the nature of the work which the claimant is employed to do*" and "*the capacity and place in which she is so employed*". The are three elements to consider "*nature" "capacity"* and *"place".*

24 **Decided Cases: Constructive Dismissal**

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**

An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**

Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**

It is clearly established that there is implied in a contract of employment a term that employers will 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. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any

repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**

The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**

The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**

The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**

Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**

The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**

The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach but it is not a legal requirement.

Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Fereday –v- South Staffordshire Primary Care Trust **UKEAT/0513/10/ZT**

The claimant considered she was treated in a way which was in fundamental breach of the contract of employment. She invoked grievance procedure, which resulted in a decision adverse to her on 13 February 2009, but she only resigned by a letter dated 24 March 2009. The employment tribunal was entitled to hold that the claimant had affirmed the contract. The six-week delay between 13 February 2009 and 24 March 2009 was evidence of such affirmation.

Cartwright & Others -v- Tetrad Limited **[2015] UKEAT/0262/14**
Dixon & Others -v- London General Transport Services Limited **UKEAT/1265/98**

Claimants were held to have affirmed contracts after breach following delays of six and twelve months respectively.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others **[2011] IRLR 420 (CA)**

A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of

the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Hadji -v- St Lukes Plymouth **(2013) UKEAT 0095/12**

This case provides a recent re-statement of the law on affirmation:-

(a) The employee must make up his/her mind whether or not to resign soon after the conduct of which he/she complains. If he/she does not do so he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.
(b) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay.
(c) If the employee calls on the employer to perform its obligations under the contract or otherwise initiates an intention to continue the contract; the Employment Tribunal may conclude that there has been affirmation.
(d) there is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts.

The Claimant's Case

25 The claimant's case relates to the events occurring in two distinct time periods. Firstly, the reduction in her hours (and therefore her earnings) in the period from February to July 2017. The claimant asserts that this was done because she was pregnant and to avoid paying Statutory Maternity Pay. Secondly at the meeting on the 2 February 2018 when she claims that she was told that she was required to return to work on the basis of working until 8pm rather that 7pm, and then, as an alternative to that, required to work on a Saturday morning when Mrs Finnegan knew she was unavailable.

26 For the reasons she has articulated, it is the claimant's case that the events of February - July 2017 amounted to direct discrimination on the grounds of her pregnancy; or alternatively, was detrimental treatment contrary to Section 47C ERA. She seeks an inference to that effect because it was following the announcement of her pregnancy that her hours and earnings were reduced.

27 The claimant claims that to require her to return to work on the basis of an 8pm finish, or alternatively working on Saturday mornings was to refuse to allow her to return to her previous job or to impose less favourable terms and conditions upon her. In the alternative, she claims that this too amounts to detrimental treatment. The claimant's case is that the treatment amounted to a fundamental breach of her employment contract in response to which she

resigned. Further, as this conduct by the respondent was because of her pregnancy/maternity leave her constructive dismissal was automatically unfair.

Discussion & Conclusions

Discrimination & Detriment

28 So far as the period from February to July 2017 is concerned, as we have made clear in our findings, we accept Mrs Finnegan's case that she had absolutely no idea that there would be an impact on the claimant's right to Statutory Maternity Pay by reason of her working 15 hours rather than 16 or more hours per week. Therefore, it must follow that the claimant's pregnancy and her entitlement to Statutory Maternity Pay cannot be the reasons for the reduction in the claimant's working hours. Furthermore, the competing reasons we have identified seem to much more powerfully explained what happened in that period. The business was in turmoil; Mrs Finnegan was grieving; she was in turmoil; she did not know precisely which way to go with the business - whether to try and expand it or close it down. Crucially, the claimant was involved in the decisions which were made, the claimant knew what her hours were each week between February and July and never once queried the position or complained.

29 In our judgment, what happened in that period was not unfavourable treatment, it was not detrimental treatment. But, in any event, it was unrelated to the fact of the claimant's pregnancy, it was related to Mrs Finnegan's bereavement and the problems she had in stabilising and regularising the business thereafter.

30 As to the meeting on 2 February 2018, our finding is that the claimant was not given any ultimatum. She attended the meeting to discuss options; mutually convenient options. She was told was that the intention to open later, until 8pm, for a trial period. For all Mrs Finnegan knew, that might have suited the claimant, start a bit later in the day, finish later. There was a discussion: nothing was imposed on the claimant; when she made clear that she had a problem with the later evening opening time, an alternative was suggested, which the claimant did not object to. Those discussions were not concluded; they were to be continued; they did not continue because the claimant then extended her period of maternity leave; no doubt the discussion would have continued shortly before the 12 July 2018 had the claimant not resigned in the meantime.

31 Having regard to Regulations 18 and 18A MAPLE, we are satisfied that, as at 2 February 2018, the claimant was being given the opportunity to return to her previous job: there was to be no change in the nature, capacity or place of her employment; there was nothing more than a suggestion of a slight change of working hours. Whether the suggested change of working hours meant that the terms and conditions were now less favourable would depend on individual

circumstances: some would regard this change as advantageous. The most important point however is that such a change was not imposed on the claimant.

32 Accordingly, in our judgement, the claimant did not suffer unfavourable treatment as required by Section 18 EqA; nor did she suffer detriment for the purposes of Section 47C ERA; nor was there any breach of MAPLE. We have considered the provisions of Section 136 EqA: in our judgement, the claimant has not established facts from which this tribunal could properly conclude that she had suffered discrimination; accordingly, the burden of proof does not shift to the respondent. But, even if it did, the respondent has provided coherent and clear explanations for the reduction in the claimant's working hours in 2017 and for the suggested change in working times in 2018. These explanations are such that we are perfectly satisfied that any decisions or actions on the respondents' part were wholly unrelated to the claimant's pregnancy/maternity and unlawful discrimination was never in play.

33 For these reasons, the claimant's claims for discrimination and detriment are not established and are dismissed.

Time Issues

34 We have dismissed the claimant's discrimination and detriment claims on their merits. But, for the sake of completeness, we have also considered the question of jurisdiction as raised by the respondent. The first period of alleged discrimination/detriment ended in July 2017; the later incident arose on 2 February 2018; even if all of these complaints can properly be said to be a linked series of events, applying the provisions of Section 123 EqA and Section 48(3) ERA, the latest day upon which the claimant should have consulted ACAS to commence Early Conciliation was 1 May 2018. The claimant did not consult ACAS until 5 June 2018 more than one month out of time.

35 So far as the 2 February 2018 incident is concerned, the claimant has advanced no explanation for failing to bring her claim within time and there is no basis on the evidence before us to conclude that it would be just and equitable to extend time – further, to the extent that this is claimed as a detriment, there is no basis for us to find that it was not reasonably practicable to present the claim within time.

36 With regard to the February - July 2017 period, the claimant relies upon the fact that she received what she regards as crucial information when she received a text message from Sarah Louise Jones on 16 March 2018. But the effect of the receipt of such information would not be to re-start the clock. Under EqA we have to be satisfied that it is just and equitable to extend time; under ERA that the claim was presented within a reasonable period after the expiry of the initial three-month limitation period. In our judgement, it is neither just and

equitable, nor was it reasonable for the claimant to wait until 5 June 2018 before approaching ACAS.

37 Accordingly, even if we had not dismissed the discrimination/detriment claims on their merits, we would have found that there was no jurisdiction to consider these claims and would have dismissed them for want of jurisdiction.

Constructive Dismissal

38 We must firstly consider whether or not the claimant was dismissed. Did the respondent act in a way which was in serious breach of the employment contract and/or which fundamentally undermined the implied term of mutual trust and confidence? If there was no breach of contract, there can be no constructive dismissal. If we find that the respondent did act in fundamental breach of the employment contract, it is be necessary for us to consider the reason for the respondent's actions in order to determine whether such dismissal was fair or unfair.

39 Our judgement is that the respondent did not at any time act in breach of the claimant's employment contract. We reject the claimant's assertion that her contractual hours were 16 hours per week; it is clear that her hours varied but her core hours were 15 hours per week across three five-hour shifts. When the claimant's hours were reduced in February 2017, this was not a breach of her employment contract; the claimant understood and agreed Mrs Finnegan's decisions at that time; if this were not the case in the claimant would have complained. Likewise, there was no breach of the employment contract in the discussions on 2 February 2018; as soon as the claimant indicated that working until 8pm would be difficult for her, Mrs Finnegan came up with alternative possibilities; nothing was concluded; nothing was imposed on the claimant; and the discussions could and would have continued.

Waiver

40 Even if the reduction in the claimant's hours July 2017 was in breach of the employment contract, clearly the claimant did not resign in response to such breach. She continued working throughout that period; she took maternity leave; and, in February 2018, she entered into discussions around her return to work.

41 The claimant relies on the combination of the February - July 2017 events and what was said at the meeting on 2 February 2018. But, she did not resign until 16 May 2018 - more than three months after the last alleged contractual breach. In the meantime, the claimant had requested an extension to her period of maternity leave which had been agreed. We have considered the case law to the effect that delay alone does not necessarily establish waiver of any breach. In this case, during the period of the delay, the claimant acted in a way which

affirmed the continuation of the contract – because, after the meeting on 2 February 2018, she extended her maternity leave. This clearly carries with it the implication that it remains her intention to return to work when that period of leave expired.

42 We have dismissed the constructive dismissal claim on its merits. But, even if we were to have found that the respondent acted in breach of the employment contract, our judgement is, that the claimant affirmed the contract and waived any such breach.

43 Finally, in our judgement, the claimant did not resign in response to any of the matters which she now alleges were repudiatory breaches. She made her decision that she did not wish to return to work at the end of her extended period of maternity leave. Significant factors in this decision were the breakup of her relationship; the estrangement of her ex-partner's parents; and difficulties which these factors caused in her securing satisfactory childcare.

44 Accordingly, and for the reasons stated above, all of the claimant's claims are dismissed.

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Employment Judge Gaskell

Dated: 16 August 2019