THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs GA Fields**

Respondent: **B&Q Plc**

Heard at: **North Shields Hearing Centre** **On:** **Friday 27th September 2019**

Before: **Employment Judge Johnson**

Members: **Mrs A Tarn**
Mr J Adams

Representation:

Claimant: **Mr R Gibson, Solicitor**
Respondent: **Mr D Piddington of Counsel**

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:

1. The claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

2. The claimant's complaint of unlawful discrimination on the grounds of pregnancy and maternity, contrary to Section 18 of the Equality Act 2010 is not well-founded and is dismissed.

3. The claimant's complaint of being subjected to detriment relating to maternity, contrary to Section 47(c) of the Employment Rights Act 1996 is not well-founded and is dismissed.

4. The claimant's complaint of indirect sex discrimination, contrary to Section 19 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1. The claimant was represented by Mr Gibson, who called the claimant to give evidence. The respondent was represented by Mr Piddington, who called to give evidence Mr John Hoskin the respondent's trading manager. Both the claimant and Mr Hoskin had prepared formal, typed and signed witness statements, which were taken "as read", subject to cross examination and questions from the employment tribunal.

2. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 114 pages of documents. Mr Gibson had also helpfully prepared a document headed "Claimant's Submissions", which was marked C1.

3. By a claim form presented on 5th March 2019, the claimant brought the following complaints:-

   (i) unfair constructive dismissal;

   (ii) unlawful sex discrimination, contrary to section 18 of the Equality Act 2010;

   (iii) unlawful sex discrimination, contrary to section 19 of the Equality Act 2019;

   (iv) being subjected to detriment relating to maternity, contrary to section 47(c) of the Employment Rights Act 1996.

   The respondent defended the claims. In essence they arise out of the claimant's return to work following a period of maternity leave in or about November 2018. The claimant's complaints are that upon her return, the work roster/rota included Thursdays and Sundays, which were days when she was unable to work. The claimant alleges that the respondent was aware that she could not work on a Thursday because she was on that day studying for a university degree and further that she was unable to work on a Sunday because of her childcare commitments. Having learned that she had been placed on the rota for those two days, the claimant resigned, alleging that being required to work on those days amounted to unlawful sex discrimination relating to her pregnancy/maternity and also that it amounted to a breach of the implied term of trust and confidence and thus a fundamental breach of contract.

4. The parties had agreed a list of issues which appears at page 34a-d in the bundle.

5. Having heard the evidence of the claimant and Mr Hoskin, having considered the documents to which it was referred and having carefully considered the closing submissions by Mr Gibson and Mr Piddington, the Tribunal made the following findings of fact on a balance of probability.

6. The respondent is a large, well-known company, with numerous retail outlets throughout the country supplying DIY materials. According to the response form ET3, it employees 24,520 people in Great Britain. The claimant worked at the respondent's warehouse in Scotswood Road Newcastle upon Tyne, where some 109 employees work. At the time of her resignation, the claimant worked as a customer advisor in the respondent's "Tradepoint" section. The claimant's

employment with the respondent began on 18th April 2005 and ended when she resigned with effect from 30th October 2018.

7. During her employment with the respondent, the claimant gave birth to three children and took maternity leave on each occasion. The first occasion was from September 2008 until May 2009, the second occasion was from June 2010 until March 2011 and on the third occasion from February 2018 until November 2018. On the first two of those occasions, the claimant returned to work following her maternity leave without any difficulty or concerns. It is what happened on her return to work following her third period of maternity leave, that forms the subject matter of these proceedings.

8. The claimant's hours of work and the days upon which she carried out that work had changed on various occasions throughout her 13 years of employment with the respondent. At page 35 in the bundle is a letter dated 10th April 2005 from the respondent to the claimant, offering her a position as a customer advisor. It states that her hours of work would be 13 hours per week on Saturday and Sunday. The letter goes on to state, "additionally if according to your availability matrix you are available to work at times over and above those just mentioned, you may be asked to work extra hours as might be required to meet the operational needs of the business, particularly at peak trading times. You will always receive appropriate notice as per your availability matrix. The availability matrix forms are included in your starter pack and will be discussed on your first day in store." At pages 38-47 in the bundle are copies of various documents headed "Contract of Employment" or "Employee Details Change Form". The contract of employment at page 38 specifies 13 hours per week on a weekend. The employee details change form at page 41 specifies 30 hours a week over 5 days Monday to Sunday. The one at page 42 specifies 16 hours per week over 2 days Monday to Saturday. The one at page 43 specifies 16 hours per week over 2 days Monday to Saturday. The one at page 44 specifies 16 hours per week over 4 days Monday to Sunday. The one at page 45 specifies 16 hours per week over 2 days Monday to Sunday. The one at page 46 specifies only Monday to Sunday but did not specify hours or days.

9. It is accepted that before she commenced her final period of maternity leave in February 2018, the claimant was working 16 hours per week. Her rota pattern was that one week she would work 8 hours on a Wednesday and 8 hours on a Sunday. The following week she would work 4 hours on a Wednesday, 4 hours on a Friday and 8 hours on a Sunday. The claimant thus honoured her contractual obligation to work 16 hours per week Monday to Sunday. Similarly, the respondent honoured its contractual obligation to provide the claimant with 16 hours of work, Monday to Sunday.

10. The respondent's requirements for employees to work on certain days and at certain times was governed by customer demand. The respondent keeps records and statistics which show the level of turnover for each store on any given day, as a percentage of weekly turnover. The respondent then calculates how many staff it requires on any given day and at any given time, based upon that level of turnover. Sundays are a particularly busy day, even though the stores are only open from 10.00am to 4.00pm. Accordingly, the respondent requires a larger

number of staff to work on Sundays than on any other day. The claimant accepted in her evidence that she had always been prepared to work on a Sunday and indeed preferred to work on a Sunday until the start of her third period of maternity leave. The claimant also said that she agreed with the respondent that she would not be required to work on a Thursday, because on that day she attended a university to study for a degree in Children and Young People. Mr Hoskin for the respondent accepted that the respondent had agreed with the claimant that she would not be required to work on a Thursday for that reason.

11. The claimant accepted in her evidence that the respondent, throughout her period of employment, had always been willing to consider specific requests for certain shift or rota patterns, particularly from those employees who had childcare responsibilities. The weekly rotas were prepared approximately one month in advance and displayed on the staff notice board and were also accessible on the intranet. The rota was prepared based upon an availability matrix which was completed by each employee when their employment began and then updated as and when the employees circumstances changed or when the respondent required updated matrixes to be provided by all employees.

12. The claimant accepted that, once an employee was on a rota to attend for work on a given day at a specified time, then they were effectively required to do so. However, if an employee did not wish to work a particular shift, then he or she would attempt to swap that shift with another employee and if he or she could do so, then the respondent would always agree to that change. Alternatively, the employee could apply to take a day's leave for that particular day and again the respondent would always agree to that. Finally, if the employee could not obtain a swap with another employee and was unable to take a day's leave, the employee would simply approach the manager who prepared the rota and asked to be released from a particular shift. The respondent's evidence was that they would do their very best to accommodate such a request. The claimant's evidence was that she could not recall an occasion when such a request had been refused.

13. The claimant's evidence to the tribunal was that, at the time she began her third period of maternity leave in February 2018, her shift pattern of Wednesday and Sunday one week and Wednesday, Friday and Sunday the next week had become so regular that she was contractually entitled to work that shift pattern when she returned from maternity leave. The respondent's position was that the claimant could contractually be entitled to work 16 hours a week from Monday to Sunday, as per the final "employee details change form" document. The tribunal found that it would be for the claimant to establish that her regular working pattern up to the date when she commenced her third period of maternity leave would effectively become an implied term of her contract of employment. The tribunal found that the claimant had failed to produce any evidence to persuade the tribunal that she had a contractual entitlement to work Wednesdays and Sundays one week and Wednesdays, Fridays and Sundays the following week.

14. The respondent, as a large employer with a dedicated HR department, implements a series of employment policies, including the usual disciplinary policy, grievance policy etc. One of those relates to "flexible working", which

policy appears at page 90-92 in the bundles. Also at pages 88a-88h is the extract from the employee handbook headed "Pay and Hours". At page 88b under section 6.5 "Hours of Work" it states:-

> "Your hours of work are set out in your contract of employment".

At section 6.6 (Varying staff rotas) it states:-

> "Individual store rotas are shown on the notice boards and the opening and closing times of your particular store will be notified to you by your store manager. If you work on a rota your manager may from time to time need to vary the rotas and extend normal store opening/business hours to accommodate business needs, such as delivery cycles, stock replenishment and seasonal changes or to increase the service to our customers. We will ask you as soon as we are aware of the need for any change and will always take into consideration any family or caring responsibilities or previous commitments to assist in people's management of their work-life balance."

Under 6.8 "Sunday Working" it states:-

> "If you are employed as a shop worker you are or can be required under your contract of employment to do the Sunday work your contract provides for. However you can if you wish give notice to the company as described in the next paragraph and you may then have the right not to work in or about a shop on any Sunday on which the shop is open once one month has passed from the date on which you give the notice."

15. All of these policies are said by the respondent to be included in its employee handbook, a copy of which was supposed to have been given to the claimant when she began her employment. Furthermore, all of those policies are accessible by each employee on any computer in the store on the respondent's intranet system. The claimant's evidence to the tribunal was that she did not have and could not recall being given a copy of the company handbook. The claimant also said that she was unaware where to find these policies on the intranet, although she knew how to get onto the intranet. The claimant accepted under cross examination that she had used the intranet many times. The claimant also accepted that there was an HR administrator in the store (Kelly) and that she could have asked Kelly at any time to provide a copy of or to explain the relevant policies. The Tribunal found it unlikely that the claimant was unable to locate any of the relevant policies on the respondent's intranet system. The Tribunal took into account the claimant's age, length of service and in particular the fact that she was undertaking studies at degree level.

16. Mr Hoskin's unchallenged evidence to the Tribunal was that one of the claimant's personal friends had "opted-out" of working on a Sunday for personal reasons and therefore the claimant must have been aware that she could do so upon giving one-month's notice.

17. The claimant elected to take ordinary maternity leave followed by additional maternity leave following the birth of her third child. The claimant was due to return to work at the beginning of November 2018. In accordance with the respondent's practices, it implemented a series of KIT (Keep In Touch) days towards the end of the employee's maternity leave. The purpose of these KIT days was to reacquaint the employee with normal working practices, to update the employee in respect of any recent changes and to undertake an element of retraining if necessary.

18. There was some uncertainty between the claimant and Mr Hoskin as to when her KIT days had taken place. It was agreed that the second took place on 23rd October. The claimant believed the first to have taken place in early October, whereas Mr Hoskin recalled it having taken place on 6th September. Nothing of great significance turned upon the date of the first meeting. It was accepted that there had been a general discussion between the claimant and Mr Hoskin about her return to work in November. The claimant informed Mr Hoskin that she no longer wished to work on a Sunday, as her husband now worked weekends and she would be required at home to look after the children. However, the claimant did inform Mr Hoskin that she would, if possible, continue to work Sundays if that was in the best interest of the company. The claimant's recollection of the meeting was that she left in a positive frame of mind having informed Mr Hoskin that she "preferred not to work Sundays".

19. It is accepted between the claimant and Mr Hoskin that, when the question of Sunday working was raised, Mr Hoskin informed the claimant that if she no longer wished to work on a Sunday then she would have to submit a formal written request for flexible working. Mr Hoskin also informed the claimant that such a request "may take up to 17 weeks for a decision to be made". The claimant accepts that Mr Hoskin did tell her that he would "try his best to accommodate my needs".

20. Mr Hoskin's evidence to the Tribunal was that he did inform the claimant that it may take up to 17 weeks to process a formal application for flexible working. Mr Hoskin also stated that he now accepts that the information he gave to the claimant on that occasion was plainly wrong. The respondent's own policy states that any request for flexible working be dealt with within 6 weeks. The Tribunal accepted Mr Hoskin's explanation that it was no more than a genuine error and misunderstanding on his part.

21. Mr Hoskin also accepted that he failed to inform the claimant that she had a statutory right to refuse to work on a Sunday, which right could be exercised by giving not less than 4 weeks' notice in writing to the respondent. Mr Hoskin informed the Tribunal that it had not occurred to him to inform the claimant about this, but he also insisted that he did not see it as his position to inform the claimant in any event. The Tribunal accepted Mr Hoskin's evidence, firstly that it was a genuine mistake in telling the claimant that it may take up to 17 weeks to process the application for flexible working and secondly that he had not deliberately or with any sinister motive, failed to inform the claimant that she could opt out of Sunday working.

22. It was put to Mr Hoskin that, as the claimant's manager, he was obliged to inform her of the statutory right to opt out of Sunday and also to ensure that any information he gave to the claimant about an application for flexible working was accurate and correct. Mr Hoskin accepted that as a manager he should have been sufficiently well-acquainted with the respondent's policies so as to be able to answer such questions if put to him by the claimant. The tribunal however noted that the claimant has worked for the respondent longer than Mr Hoskin and had equal access to the relevant information about flexible working policy and procedure and right to opt-out of Sunday working. The Tribunal found it more likely than not that the claimant would be aware of her right to opt-out of Sunday working.

23. Towards the end of her maternity leave, the claimant had taken part in an inappropriate exchange of messages on social media, relating to rumours that the respondent was in financial difficulties and that certain managers may be made redundant. Mr Hoskin raised the matter with the claimant at their meeting on 23rd October. Mr Hoskin decided not to invoke the respondent's formal disciplinary procedure, but informed the claimant that he had made a note of their discussion on her personnel file. A copy of that note appears at page 54 in the bundle and states:-

    "I've spoken to Gemma reference the social media use and the guidelines we have as a company. I have printed and attached the relevant screenshots relating to this and logged it with HR. Job number 78897."

24. Immediately following that discussion, the claimant returned to work on her KIT day. Later in the day Mr Hoskin noted that the claimant was not wearing her mandatory safety shoes, so he asked her to go and put them on. Mr Hoskin's evidence to the Tribunal was that the claimant "didn't seem pleased about that". The claimant carried on working but then went to Mr Hoskin to ask if she could leave early. Mr Hoskin agreed as it was the claimant's first shift back after a long time out of the business and she was due to return the following day for another KIT day.

25. The claimant's recollection of her meeting with Mr Hoskin on 23rd October was that he raised the social media point, but accepted her apology for what she accepted were "unwise remarks". The claimant recalls that Mr Hoskin then handed her a form to complete to apply for flexible working. He is then said to have told the claimant that "my proposed shifts were downstairs. He said there might be shifts I was unable to work, but until the form was processed there was nothing he could do and I had to work those shifts."

    Mr Hoskin vehemently denied saying any such thing to the claimant. Mr Hoskins's evidence was that he was not the person who prepared the rotas and that he had simply informed the claimant that the rota for her shifts would be on the notice board. Mr Hoskin did not know which shifts the claimant was due to work. Mr Hoskin could not remember informing Darren (who prepared the rota) that the claimant had asked not be rota'd on a Sunday. The Tribunal found it unlikely that Mr Hoskin had informed Darren that the claimant had asked not

work on a Sunday. Mr Hoskin accepted that in preparing the rota Darren had failed to take into account the claimant's request not to work Sundays because of her childcare responsibilities. The Tribunal found that Mr Hoskin probably failed to inform Darren and that Darren therefore had put the claimant on the rota to work on a Sunday as she had always been prepared to work on a Sunday before commencing her third period of maternity leave.

26. It was put to Mr Hoskin in cross-examination that the respondent has a "maternity leave policy" and "parenting pack". Copies appear at pages 62-66 and 67-88 respectively in the bundle. In particular, the parenting pack at page 69 specifies that 8 weeks before the employee returns to work, she should meet with her line manager "to discuss your thoughts about returning to work". At page 76 under a heading "Before You Start Your Leave" there is a section which deals with "planning your return to work". The relevant section states:-

> "We hope that you decide to return to work following your leave, even though this may feel some way off at the moment! We would encourage you to discuss your plans with your line manager as soon as possible so that we have the maximum amount of time to accommodate your return, particularly if you would like to return on different working arrangements. You should arrange to meet with your line manager at least 8 weeks before you are due to return to work to discuss your plans."

On page 80 under the heading "Recording Your Keep in Touch (KIT) Days" there was a schedule and the dates of the proposed KIT days the purpose of which is listed to be:-

- Keep up to date with business activities/your team
- Attend business meetings or complete training/e-learning
- Spend time with fellow colleagues, mentor, key stakeholders
- Attend internal job interviews/continue with your career development
- Meet with your line manager to discuss your return to work arrangements

27. At page 84 under the heading "Preparing For Your Return to Work" it repeats that the employee should arrange to meet with her line manager at least 8 weeks before her return. There is a section on the document which asks the question, "what are your thoughts as to the hours you would like to work or the type of job/working patters you would like to do? (*refer to our flexible working policy available on the intranet).

28. Mr Hoskin accepted that this form should have been completed. His recollection was that he had the form with him during his discussion with the claimant but did not recall if it had been filled in and given to HR. Certainly no completed copy was in the bundle. The Tribunal found it unlikely that Mr Hoskin had properly completed this form at all.

29. Mr Gibson for the claimant put to Mr Hoskin in cross-examination that he was obliged to inform the employee Darren who prepared the rota, as soon as the claimant had indicated that she was unable to work on a Sunday due to childcare commitments. Mr Hoskin could not recall informing Darren about the claimant's

request not to work on Sundays. The Tribunal found it unlikely that Mr Hoskin had informed Darren about that request. As a result, the claimant was put on the rota to work on a Sunday on the date when she was due to return to work at the beginning of November 2018. The issue of working on a Thursday was not discussed at the meeting, because the claimant had presumed that she would not be required to work on a Thursday, as she had not done so before taking her maternity leave.

30. Darren, who prepared the rotas, was not called to give evidence to the Tribunal. The Tribunal was therefore unable to ascertain precisely why the claimant had been put on the rota to attend work during her first week on both a Thursday and a Sunday. Upon the evidence available to it, the Tribunal found it likely that Darren had simply prepared the rota on the basis that the claimant would be available for work in accordance with her contract, with effect from the beginning of November. There was no reason why Darren would not rota the claimant to work on a Sunday, as that had previously always been her expressed preference. Putting the claimant down on the rota to work on a Thursday was found by the Tribunal to probably be an oversight by Darren, caused by the fact that the claimant had not been working for some 10 months.

31. At paragraph 25 of her statement, the claimant deals with the discovery of the rota immediately following her meeting with Mr Hoskin. The claimant states in her statement:-

> "I went downstairs and saw the rosta for the Tradepoint section pinned to the wall for November 2018. The rosta was 4 sheets pinned on a wall at the back of Tradepoint department. There is a sheet for each week of the month with the sheet for the first week on top. It details the employees who are working and the shifts they are going to work. I saw the top sheet. I remember it showed I was rostered to work for a Thursday shift and a Sunday shift in my first week back. I am not sure of the dates, but quite possibly it was Thursday 1st November and Sunday 4th November 2018. I do not believe I looked at the other sheets. I was too upset and did not go any further. Immediately I rang my husband and burst into tears. I then calmed down before going upstairs to the HR office where I spoke to someone called Kelly. Initially I spoke to her about what training modules I was to do that day. Then I asked her if I handed in my notice, how much did I need to give and if I had any holidays left, could I take them during my notice. She looked at her computer. And she told me I had 2 weeks holiday to take. She said she was unsure if I could take them during my notice and would look into it. I did not mention Avon to her. It was well-known I was an Avon representative and had been for quite a considerable time. I used to take in brochures regularly for staff to purchase products if they wished."

32. At paragraph 31 of her statement the claimant goes on to state:-

> "I know approximately 8 people worked in the Tradepoint department on the rosta. Myself and Darren Burgess were the only two employees with young children aged under 5 years. The remainder either had no

children or grown up children. I believe rostering me on a Thursday and a Sunday on my first two days back at work was done quite deliberately. I was put on two shifts that John Hoskin knew I could not do. He had also told me quite clearly there would be a 17 week period when I had to work allocated shifts until my request could be considered. I have no idea why he made this stipulation. That had never happened in the past when shifts had been varied."

33. Although alleging that the shift rota had been done "deliberately", the claimant does acknowledge that the rota had not been prepared by Mr Hoskin, but had been prepared by Darren. The claimant does not give any explanation as to why Darren would have deliberately rostered her on days when he knew or should have known that she was unable to attend for work. Of particular significance, the claimant does not state anywhere that the reason why she had been put on the rota for those 2 days was because she had been on maternity leave, or was in any way related to the fact that she had been on maternity leave.

34. At paragraph 33 the claimant states:-

> "I had no option but to resign. I did so because I was deliberately allocated shifts which Mr Hoskin knew I could not work. For the Sunday I had childcare responsibilities. For the Thursday I was at university. The next date 24th October 2018 I went into work and handed my written resignation to Darren Burgess with the request he gave it to Mr Hoskin. In my letter I gave no end date, rather I simply resigned. I asked if I could use my holiday alongside my notice. Mr Hoskin rang me the following day 25th October 2018. He accepted my resignation and said I could leave on 30th October 2018. He said I did not need to return to work and I could use by holiday. I was asked to return my uniform and staff discount card. He made no attempt to explore with me what had happened or to try and resolve matters. I had been with the company for more than 13 years and returned to work after 2 previous periods of maternity leave. I had every intention of returning after my 3rd period of maternity leave except for the fact I was rostered quite deliberately on two days Mr Hoskin knew I could not work. Plainly he did not want me there."

35. The claimant's resignation letter appears at page 9 in the bundle and states:-

> "Dear John, I regret to inform you that as of the 24th October 2018 I'm handing my 4 weeks notice to end my contract with B&Q on 20th November 2018. Upon having a discussion with HR I have been notified that I have 2 weeks annual leave left, I would like if possible to take these alongside my notice leaving only 2 weeks to work my notice. Please get back to myself in regards to this matter. Kind regards G Fields."

36. The claimant has not provided any evidence or explanation as to why she did not challenge Mr Hoskin, Darren or Kelly in HR as to why she had been put on the rota to work on days which were no longer suitable for her. The claimant has

accepted throughout these proceedings that whenever she had asked in the past for a rota to be changed, the respondent had accommodated those requests. No reason was given by the claimant as to why she now believed that a request to change the rota would not be accommodated. Mr Hoskin's evidence to the tribunal was that, had the claimant physically asked to work only Wednesdays and Fridays, that request would probably have been accommodated. Mr Hoskin's evidence was that the claimant never complained to him that she was being asked to work days which she could not work because of her university and childcare commitments. His evidence to the Tribunal was,

> "She never asked me for a change. If she had, we would have fixed them. She only said she did not want to work Sundays."

37. Based upon the evidence of Mr Hoskin and of the claimant herself, the Tribunal found it likely that, had the claimant had asked for the rota to be changed, so that she was not to work on Thursdays or Sundays, then that request would probably have been accommodated. That is what had always happened in the past. The claimant failed to provide any explanation whatsoever as to why she had not made that request. The Tribunal did not accept what the claimant says in her evidence that, "I had no option but to resign". The claimant had no reasonable grounds to believe that the rota had been prepared "deliberately" that she was given shifts which Mr Hoskin knew she could not work. Mr Hoskin had not prepared the rota. The claimant clearly did have an option other than to resign. She could have approached Mr Hoskin, Darren or Kelly in HR to request that the rota be changed, so that she was not required to work on a Thursday or a Sunday.

38. Nowhere in any of her evidence does the claimant allege that the reason why she was put on the rota to work Thursdays and Sundays was anything to do with the fact that she had been on maternity leave. No evidence was produced by the claimant which amounted to facts from which the Employment Tribunal could draw an inference that the reason was indeed anything to do with her maternity leave. There was nothing to suggest that the respondent had been in any way irritated or inconvenienced by the claimant's absence on maternity leave. The only matter about which the respondent had complained to the claimant was social media entries. Mr Hoskin did not consider those to be sufficiently serious to warrant any kind of formal disciplinary action. Even if those Facebook entries did cause irritation to the respondent, they could not be in any way regarded as related to the claimant's absence on maternity leave.

39. Mr Gibson for the claimant submitted that the respondent implemented a provision criterion or practice of requiring the claimant to work a particular shift pattern, namely Wednesday, Thursday and Sunday upon her return from additional maternity leave, with effectively one week's notice. Mr Gibson submitted that the imposition of this PCP put the claimant as a female at a particular disadvantage because females generally have the greater burden of childcare responsibilities than men and that the claimant in particular with 3 young children was thus placed at that disadvantage. The Tribunal found that any requirement for the claimant to work on a Thursday could not amount to a PCP which put the clamant at a disadvantage because of her childcare

responsibilities, as the reason why she did not want to work on a Thursday because of her degree studies at university. Similarly, there could be no real requirement for the claimant to work on a Sunday because the claimant had the right to opt-out of working on any Sunday upon giving four weeks' notice and could not have been subjected to any retaliatory action as a result.

THE LAW

40. The statutory provisions engaged by the claims brought by the claimant are set out in the Employment Rights Act 1996 and the Equality Act 2010. The relevant provisions are as follows:

Employment Rights Act 1996

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),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(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.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--

(a) the employer gives notice to the employee to terminate his contract of employment, and
(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Section 98 General

(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.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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,
(ba) ordinary or additional adoption leave,
(c) parental leave,
(ca) ordinary or additional paternity leave, or
(d) time off under section 57A;

and it may also relate to redundancy or other factors.

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,
(aa) time off under section 57ZE,
(ab) time off under section 57ZJ or 57ZL,
(b) ordinary, compulsory or additional maternity leave,
(ba) ordinary or additional adoption leave,
(bb) shared parental leave,
(c) parental leave,
(ca) paternity leave, or
(d) time off under section 57A.

(3) A reason prescribed under this section in relation to parental leave may relate to action which an employee takes, agrees to take or refuses to take under or in respect of a collective or workforce agreement.

(4) Regulations under this section may make different provision for different cases or circumstances.

(5) An agency worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the temporary work agency or the hirer done on the ground that—

(a) being a person entitled to—

(i) time off under section 57ZA, and

(ii) remuneration under section 57ZB in respect of that time off,

the agency worker exercised (or proposed to exercise) that right or received (or sought to receive) that remuneration,

(b) being a person entitled to time off under section 57ZG, the agency worker exercised (or proposed to exercise) that right,

(c) being a person entitled to—

(i) time off under section 57ZN, and

(ii) remuneration under section 57ZO in respect of that time off,

the agency worker exercised (or proposed to exercise) that right or received (or sought to receive) that remuneration, or

(d) being a person entitled to time off under section 57ZP, the agency worker exercised (or proposed to exercise) that right.

(6) Subsection (5) does not apply where the agency worker is an employee.

(7) In this section the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

"agency worker";
"hirer";
"temporary work agency".

Equality Act 2010

Section18 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 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are--

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

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.

UNFAIR CONSTRUCTIVE DISMISSAL

41 **Section 95(1)(c) of the Employment Rights Act 1996** states that the statutory definition of "dismissal" includes when the employee terminates the contract in circumstances in which he is entitled to terminate it by reason of the employer's conduct. Where notice is given, dismissal occurs on the date when the notice expires. The long-accepted definition of unfair constructive dismissal was set out by Lord Denning in *Western Excavating (ECC) Limited v Sharpe [1978 ICR221]*, when he set out the "contract test" as follows:-

> "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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

In *Woods v WM Car Sales Peterborough Limited [1981 ICR670]* it was stated that:-

> "It is clearly established that there is implied in a contract of employment a term that the 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 the employer and the employee. To constitute a breach of this term it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Conduct of the parties has to be looked at as a whole and its cumulative impact assessed."

In *Malik v BCCI [1997 ICR610]* Lord Nichols said:-

> "Conduct must of course impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in the employer. Proof of a subjective loss of confidence in the employer is not an essential element of the breach."

42 Whether the alleged breach is "repudiatory" is a question of fact and degree. It was established in *Morrow v Safeway Stores PLC [2002 IRLR9]* that if the implied term of trust and confidence is broken this will "inevitably" be serious enough to constitute a repudiatory breach. It is however important to identify the repudiatory nature of the breach.

43 Once a repudiatory breach has been established, the employee must resign in response to that breach. The contract is not terminated until the breach is accepted by the employee. The employee's acceptance of the breach must be unequivocal and

either communicated or at least overtly evinced by an overt act inconsistence with the subsistence of the contract (Ogilvy Construction Limited v Brown [UKEAT/0003/16]).

44 The question of whether the employee has accepted a repudiatory breach is a question of fact for the Tribunal. There is no requirement that the employee must state their reason for leaving at the time. However, where no reason is communicated at the time, the Tribunal might more readily conclude that the repudiatory conduct was not the reason for the employee leaving. If there is no evidence that the breach was the reason, the Tribunal is entitled to find that there is no dismissal unless the circumstances are such that it can safely in further reason absent any direct evidence (Wethersfield Limited v Sergeant – 1999 IRLR94). The Employment Tribunal is entitled to draw an inference as to the reason for the resignation if the contract was so "egregiously performed" by the employer that it is obvious what the reasons for leaving were.

45 SECTION 18 EQUALITY ACT 2010

Section 18(3) prohibits a person from discriminating against a woman by treating her unfavourably because she is on or has been on compulsory maternity leave. If the treatment of the woman is in implementation of a decision taken in a protected period, the treatment is to be guarded as occurring in that period, even if the implementation is not until after the period. The claimant's case is that a decision was taken during her maternity leave she would be placed on the rota to work on a Sunday, which was a day she was no longer able to work due to her childcare commitments. The alleged "unfavourable treatment" relied upon by the claimant is:-

(i) being asked to undertake a shift pattern which was different to her normal shift pattern prior to maternity leave, receiving effectively one week's notice;

(ii) being told by John Hoskin that before the shift pattern could be varied she would have to request flexible working, that the request would take up to 17 weeks to process and in the meantime she would have to work the allocated shift.

If the claimant is able to establish that either of those matters amounts to "unfavourable treatment", she would then have to establish that the unfavourable treatment was **because of** either the claimant's pregnancy or her maternity leave.

46 The Tribunal was not satisfied that being asked to work a shift pattern different to that which she worked before she went on maternity leave, amounted to unfavourable treatment. The claimant acknowledges that she was being "asked" to work that shift pattern. Being "asked" implies that the claimant would have the right to decline or refuse or at least object. It has not been argued on the claimant's behalf that it had become an express or implied term of her contract of employment that she would be entitled to work the same shift pattern as before she went on maternity leave. In fact, the claimant objects to being asked to work on a Sunday, which is one of the days which did work before she went on maternity leave. The claimant's clear and unequivocal evidence to the Tribunal was that, throughout her employment with the respondent, they had always been repaired to change her shifts whenever she asked them to do so. As is described above, the accepted practice between the respondent and its employees was that the employees would be asked for their availability and the

rotas would be organised around that availability. The claimant accepted that this had always been done in her case. If the employees availability changed for any reason, then the employee would arrange a swap with another employee, take a day's leave or simply ask their manager to be released from the shift. The claimant accepted there had never been any difficulty in her being released from a shift which she was unable to work. The claimant provided no evidence whatsoever as to why she had not made such a request as soon as she found out that she had been put on the rota to work on a Thursday and a Sunday. There is no evidence before the Employment Tribunal to suggest that the respondent would not have been willing to comply with such a request.

47 Mr Hoskin accepted that he had mistakenly informed the claimant that, should she no longer wish to work on a Sunday, then she would have to make a request for flexible working and that it may take up to 17 weeks for that request to be considered. The Tribunal found that Mr Hoskin, as the claimant's manager, could and should have been aware of the respondent's written policy about flexible working and particularly that such an application would be considered within 6 weeks. Providing the claimant with such inaccurate information was something which the Employment Tribunal found could and did, amount to unfavourable treatment. However, the Tribunal was not satisfied that the imposition of that treatment was because of the claimant's pregnancy or maternity leave. It was quite simply a mistake by Mr Hoskin. The claimant had always worked a Sunday before she went on maternity leave and had informed Mr Hoskin at her first KIT meeting that she would **prefer** not to work on a Sunday when she returned after maternity leave. The Tribunal found that the inaccurate information provided by Mr Hoskin was in no sense whatsoever related to the claimant's pregnancy and/or maternity leave.

DETRIMENT RELATING TO MATERNITY – SECTION 47C EMPLOYMENT RIGHTS ACT 1996

48 It is accepted that upon her return from maternity leave, the claimant was entitled to return to the same job or a suitable alternative job. The claimant did not challenge that she was to return to work doing the same job. What she challenges is the shift pattern. If "the same job" includes the same shift pattern, then the claimant was entitled to return to work in a pattern which involved 8 hours on a Wednesday and 8 hours on a Sunday one week and 4 hours on a Wednesday, 4 hours on a Friday and 8 hours on a Sunday the second week. That is not what the claimant wanted. The claimant did not want to work Thursdays or Sundays. She preferred to work an 8-hour shift on a Wednesday and an 8-hour shift on a Friday. That is what she requested. The Tribunal was not satisfied that being put on the rota to work a Thursday and Sunday amounted to less favourable terms and conditions that the claimant would have enjoyed had she not gone on maternity leave. The status of the rota has been discussed above. The employee would only be required to work the shifts which appear on the rota if no request was made by the employee for a change in the rota. The Tribunal found that had the claimant asked for the rota to be changed, then it would have been. The claimant was asked to work that shift pattern, not required to do so. If was for the claimant to ask not to work on a Thursday, that being the day when she had university commitments. The Tribunal found that, had the claimant done so, then the respondent would have released her from working a Thursday. With regard to Sundays, the Tribunal found that, had the claimant asked to be released from working on a Sunday, then the respondent would have released her. Furthermore, the claimant had the statutory right to give the

respondent 4 weeks' notice to opt out of Sunday working in the knowledge that the respondent could not take any retaliatory action against her for so doing. The claimant has failed to prove any facts from which the Employment Tribunal could draw an inference that the reason why she was on the rota to work on a Thursday and a Sunday was in any sense whatsoever related to her pregnancy or maternity leave.

INDIRECT DISCRIMINATION – SECTION 19 EQUALITY ACT 2010

49 The claimant alleges that the respondent implemented a provision criterion or practice of requiring her to work a particular shift pattern which included Thursday and Sundays upon her return from additional maternity leave. The Tribunal found that the respondent did not apply any such provision criterion or practice. It was clearly the case that the respondent was prepared to release the claimant from working on a Thursday, as it had always done so in the past. Whilst the claimant had always volunteered to work on a Sunday in the past, there was nothing to suggest that the respondent would not have released her from working on a Sunday had she so requested. Furthermore, the claimant again had the statutory right to opt-out of working on a Sunday by giving four weeks' notice to the respondent. The Tribunal found that there was no such provision criterion or practice imposed upon the claimant by the respondent.

50 It is important to note that the claimant's requirement not to work on a Thursday was in no sense whatsoever related to her childcare commitments. The reason why the claimant did not want to work on a Thursday was because she was attending university to undertake studies for her degree. It was only the Sunday working to which the claimant could claim her protection of the statutory provisions relating to indirect discrimination. The Tribunal accepted the claimant's submissions that females are far more likely to bear the burden of childcare responsibilities and thus the imposition of any PCP which had a disparate impact on females, may amount to indirect discrimination. However, that is not the case here. The claimant was not required to work on a Sunday. Had she asked to be released from Sunday working she would probably have been released. Had she exercised her right to opt-out of Sunday working she would not have been required to work on a Sunday.

51 The Tribunal found that the respondent had not committed any breach of any express term in the claimant's contract of employment. The claimant was contractually bound to work a shift pattern from Monday to Sundays and had always done so up until she embarked upon her maternity leave. The Tribunal was not satisfied that the shift pattern worked by the claimant immediately before her maternity leave had become an express or implied term of her contract. The Tribunal was not satisfied that being asked to work Thursdays and Sundays amounted to a breach of contract. It was a request not a instruction. The Tribunal was satisfied that had the claimant asked for her shift pattern to be changed, then it would have been changed. As of the date of her resignation, the claimant had not been "required" to work on either a Thursday or a Sunday, she had simply been requested to do so.

52 The Tribunal found that putting the claimant's name on the rota to work Thursday and Sunday did not amount to a breach of the implied term of trust and confidence. The Tribunal must look at the conduct of the parties "as a whole". In this case, that will include the claimant's ability to ask to be released from working on Thursdays and Sundays. The Tribunal's findings are that had she done so, those requests would in all

likelihood have been granted. Looked at objectively, putting the claimant's name on the rota could not reasonably be described as conduct which the claimant could not reasonably be expected to put up with. For those reasons, the claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

53 Similarly, the claimant's complaints of unfavourable treatment because of pregnancy and maternity, detriment related to maternity or indirect discrimination are not well-founded and are dismissed. The Tribunal was not satisfied that the claimant was subjected to any detriment relating to maternity, or any unfavourable treatment because of her maternity. Mr Hoskin`s comments, whilst potentially capable of amounting to unfavourable treatment, were no more than a genuine mistake and in no sense whatsoever related to the claimant's pregnancy and/or maternity. Those claims are also dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 NOVEMBER 2019

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