EMPLOYMENT TRIBUNALS

Claimant: Miss E Millet

Respondent: Edward Hands and Lewis Limited (1)
Mr J L Hathaway (2)
Mr P S Stubbs (3)

Heard at: **Nottingham** **On: 5 – 20 August 2019**

Before: **Employment Judge Victoria Butler**
Ms F French
Mr WJ Dawson

Representation
Claimant: Miss R Wedderspoon (Counsel)
Respondent: Mr J Arnold (Counsel)

JUDGMENT having been sent to the parties on 5 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The unanimous Judgment of the Tribunal is that:

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

2. The Claimant's claim of automatically unfair dismissal under s 99 Employment Rights Act 1996 and Reg 20 of the Maternity & Parental leave etc Regs 1999 is not well-founded and is dismissed.

3. The Claimant's claim of direct sex discrimination is not well-founded and is dismissed.

4. The Claimant's claim of maternity and pregnancy discrimination is not well-founded and is dismissed.

5. The Claimant's claim of victimisation is not well-founded and is dismissed.

6. The Claimant's claim of direct disability discrimination is not well-founded and is dismissed.

7. The Claimant's claim of discrimination arising from disability is not well-founded and is dismissed.

8. The Claimant's claim of unlawful deduction from wages (holiday pay and contractual sick pay) is not well-founded and is dismissed.

9. The Claimant's claim that she suffered a detriment for family reasons is not well-founded and is dismissed.

10. The Claimant's claim of breach of contract (notice pay) succeeds and the Respondent is ordered to pay damages to the Claimant in the sum of £6,534.97 net (which includes interest).

11. There is no order for costs.

REASONS

Background

1. The Claimant submitted her claim on 5 June 2018 and was represented by solicitors who lodged it on her behalf. She notified ACAS on 28 February 2018 under the early conciliation procedure and ACAS issued the early conciliation certificate on 11 April 2018. The Claimant was employed by the 1st Respondent as a solicitor until she resigned in February 2018. Prior to this, she was employed as a solicitor at Sheltons until her employment transferred under the Transfer of Undertakings (Protection of Employment Regulations) 2006 ("TUPE") on 1 October 2016.

2. Prior to this hearing, a Preliminary Hearing ("the Preliminary Hearing") took place on 18 June 2019 before Employment Judge Blackwell to determine whether the Claimant was an employee, worker or self-employed during her time at Sheltons solicitors, prior to the transfer. He concluded that the Claimant had the status of employee throughout her period with Sheltons and, therefore, her employment transferred under TUPE.

His decision meant that she had sufficient continuous employment to pursue a claim of constructive dismissal against the 1st Respondent.

3. The Respondents conceded prior to the hearing that the Claimant was disabled for the purposes of the Equality Act 2010 ("EQA") by reason of her ulcerative colitis at the relevant time.

4. The claims before us were as follows:

- Constructive dismissal – s. 94 Employment Rights Act 1996 ("ERA")
- Automatically unfair dismissal under s.99 ERA and Regulation 20 of the Maternity & Parental Leave etc Regs 1999 (MPL Regs)
- Direct sex discrimination – s13 Equality Act 2010 ("EQA")
- Maternity and pregnancy discrimination – s.18 EQA
- Victimisation – s. 27 EQA
- Direct disability discrimination – s. 13 EQA
- Discrimination arising from disability – s.15 EQA
- Unlawful deduction from wages (holiday pay and contractual sick pay) s.13 ERA
- Breach of contract (notice pay)
- Suffering a detriment for family reasons (ss 47 & 48 ERA and Reg 19 of the MPL Regs

5. The Claimant relied on the following detriments:

- Detriment 1 – the Respondents disputing her maternity pay entitlement (Respondents 1, 2 and 3)
- Detriment 2 – a failure to provide a pay increase (Respondents 1, 2 and 3)
- Detriment 3 – a failure to renew her practicing certificate whilst on maternity leave (Respondents 1 and 3)

- Detriment 4 – demoting the Claimant from the position of Branch Manager (Respondents 1 and 3)

- Detriment 5 – speaking to the Claimant's colleagues about her not returning from maternity leave (Respondents 1 and 3)

- Detriment 6 – cancellation of a Keeping-In-Touch ("KIT") day on 17 January 2018 (Respondent 1)

- Detriment 7 – a failure to have a workplace meeting on 17 January 2018 (Respondents 1, 2 and 3)

- Detriment 8 – quizzing the Claimant's secretaries on 17 January 2018 about her contacts/referees (Respondents 1, 2 and 3)

- Detriment 9 – a failure to include the Claimant in redundancy discussions between 17-26 January 2018 (Respondents 1 and 3)

- Detriment 10 – a file note dated 24 August 2017 placed on the Claimant's file (Respondent 3)

- Detriment 11 – a change in the Claimant's start date from 14 February 2012 to 1 October 2016 (Respondents 1 and 2)

- Detriment 12 – a failure to pay sick pay (Respondents 1 and 2)

- Detriment 13 – a failure to pay correct notice pay (Respondents 1 and 2)

- Detriment 14 – referrals to the Solicitors Regulatory Authority (Respondent 1)

The issues

6. The issues agreed between the parties were as follows:

Limitation in respect of the detriment claims

Whether any alleged detriment occurring before 23 January 2018 is out of time?

In particular, whether:

Any alleged detriment occurring before 23 January 2018 forms part of a continuing act with any alleged detriment in time; and

For allegations out of time, is it just and equitable to extend time?

Automatic unfair dismissal – leave for family reasons (s.99 ERA and Regulation 20 of the MPL Regs)

Did the Claimant resign or was she dismissed?

If she was dismissed, was the reason or principal reason for her dismissal her pregnancy or that she took or availed herself of the benefits of maternity leave?

Constructive unfair dismissal (s.95(1)(c)

Did the Claimant resign or was she dismissed?

Whether there was an express term of the Claimant's contract of employment that she cannot be demoted by removing her partnership duties?

If so, was she demoted in breach of that express term, such that the same amounted to a fundamental breach of contract entitling her to resign?

Did the Respondents breach the term of trust and confidence implied into the Claimant's contract of employment by detriments 1, 2, 3, 6, 7, 8, 9, 10, 11 and 12?

In particular:

Did the Respondents act with reasonable and proper cause at all material times; and

Whether the alleged error in her sick pay formed the final straw causing her to resign?

If the Claimant was dismissed, was the reason for dismissal conduct and/or some other substantial reason, namely a loss of trust and confidence in the Claimant or an irretrievable breakdown in the working relationship between the Respondents and the Claimant?

It is accepted by the 1st Respondent that no procedure to dismiss the Claimant was followed, other than it will assert it dealt with the Claimant's grievances in a meaningful way.

Pregnancy and maternity discrimination – s.18 EQA

It is agreed that the Claimant's protected period ended on 14 February 2018.

Was the Claimant treated unfavourably during the protected period or by a decision taken in the protected period, because of her pregnancy or she exercised her right to maternity by detriments 1 - 13?

Direct pregnancy or maternity leave (and sex post the protected period) discrimination – s.13 EQA

Whether the Claimant was less favourably treated than her comparator was, or a hypothetical character would have been, in circumstances with no material difference by detriments 12 – 13 because of her pregnancy and/or maternity leave, or (for detriments 12 – 13) her sex?

Leave for family and domestic reasons – s.47c ERA/Reg 19 MPL Regs

Whether the Claimant was subjected to detriments 1 – 13 done for a reason relating to her pregnancy or maternity leave?

Victimisation – s.27 EQA

Protected acts

The Respondents accept that the following were protected acts:

The Claimant's grievance of 10 January 2018 (Protected Act 1);

The Claimant's grievance of 24 January 2018 (Protected Act 2); and

The Claimant's appeal of 14 February 2018 (Protected Act 3).

Alleged acts of victimisation

Whether the Respondents subjected the Claimant to detriments 6, 8 – 11, 13 and 14 because she had done the Protected Acts or any of them?

Direct disability discrimination

Disability

The Respondents accept that the Claimant was disabled within the meaning of section 6 EQA by her ulcerative colitis at the material time.

The effects of that disability, and knowledge of the disability and/or its effects remain in issue.

Direct disability discrimination – s.13 EQA

Whether the Claimant was less favourably treated than a hypothetical comparator would have been in circumstances with no material difference by not receiving sick pay (detriment 12) when she was off work?

If so, with this because she was disabled?

Discrimination arising from disability – s.15 EQA

Whether the Claimant was treated unfavourably because of something arising in consequence of her disability, namely she was not paid her sick pay (detriment 12)?

The something arising in consequence of her disability was her sickness absence?

The first Respondent accepts that it cannot show that not paying the Claimant her sick pay because of sickness absence arising in consequence of the disability is justified as a proportionate means of achieving a legitimate aim.

Unlawful deduction of wages – holiday/sick pay

By reference to detriments 12 and/or 13, whether there has been any unauthorised deduction from the Claimant's wages or that anything less than the total amount of wages properly payable has been paid to the Claimant on any occasion within the meaning of section 13 ERA?

ACAS

Did the first Respondent fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

If so, should any awarded compensation be reduced and if so, by how much?

Chagger/Polkey

Pending medical disclosure (particularly regarding steroid–induced psychosis), the Respondent reserves the right to argue Chagger and/or Polkey.

Contribution

Whether the Claimant contributed to her dismissal by the following acts and/or omissions:

Her failure to accept the offered role of branch partner (despite wanting the same);

Her failure to conciliate at the initial grievance meeting and/or her closed mind at the same; and

Any medication which she was aware could have an adverse impact on her behaviour and that could be withdrawn but that she did not choose to do so?

The hearing

7. The hearing was listed over the period 6 – 20 August 2019. The Tribunal met on 5 and 6 August 2019 to read the relevant documents and witness statements. We heard evidence and submissions from 7 – 15 August 2019 and gave an oral judgment on 20 August 2019. The Respondents made an application for their costs, but we declined to make such an order.

8. Prior to the hearing the parties helpfully presented:

- An agreed list of issues
- A chronology
- A reading list
- A cast list
- Skelton arguments

9. The Claimant suffers from ulcerative colitis. The Tribunal agreed to take regular breaks and, if the Claimant required any additional breaks, these were accommodated.

10. References to page numbers in these Reasons are references to the page numbers in the agreed bundles.

The evidence

11. The Tribunal heard evidence from:

On behalf of the Claimant:

- the Claimant
- Marie Harrison (former Legal Secretary at the 1st Respondent)

On behalf of the Respondents:

- Hayley McAllister (Head of Operations and Compliance Manager)

- Jason Hathaway (Managing Director and the 2nd Respondent)
- Leanne Hathaway (Director)
- Paul Stubbs (Director and 3rd Respondent)
- Denise Archer (Practice Manager)

12. The Respondents also relied on a witness statement from Jamie Skeen who was not present at the hearing.

13. We heard evidence from the Claimant first. At times her evidence was contradictory or simply not reliable. By way of example, in relation to detriment 10, the Claimant gave evidence on the first day of the hearing that she would only place a note on an employee's file if the employee knew about it. However, the following day, the Claimant's own witness gave evidence that she was not aware of a note that the Claimant had placed on her file.

14. Conversely, we found Mr and Mrs Hathaway to be genuine and both gave consistent evidence. In the main, their oral evidence was supported by documents in the bundle where they existed.

15. Mr Stubbs was clearly distressed when giving evidence. It was apparent that he was still genuinely shocked, not only at the allegations, but to be named as a Respondent and was very distressed about the impact it had had on his family. He had considered the Claimant to be a friend and they had enjoyed a good working relationship. In this regard, he is no different from any other witness, but we believed that his distress was genuine which meant at times that his evidence came across as quite defensive. Regardless, we still found him to be credible and honest.

16. We found Marie Harrison, Hayley McAllister and Denise Archer to be honest witnesses, but we were also mindful that Ms Harrison was a friend of the Claimant.

17. Where was a conflict in the evidence, we have preferred that of the Respondents.

The facts

18. The Tribunal made its findings of fact based on the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We resolved conflicts of evidence that arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

19. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. We have not simply considered each particular allegation but have also stood back to look at the

totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

20. The Tribunal has made findings of fact and set them out under the headings of each detriment complained of in chronological order, where we can. The findings of fact relevant to the issues which have been determined are as follows:

Background

21. The 1st Respondent is a firm of solicitors with offices throughout the UK. Legal practice is highly regulated by the Solicitors Regulation Authority ("SRA") which sets the standards for all solicitors and practices in the UK. Solicitors and firms are required to abide by established principles and a Code of Conduct, and are monitored by the SRA. Law firms are obligated to report matters of concern, non-compliance and misconduct, amongst other things, to the SRA.

22. The Claimant commenced employment with Sheltons solicitors on 14 February 2012. In early 2013, she approached the existing partners to talk about becoming a partner herself and became a salaried partner in May 2013 (p244). Her colleague, Ms Harpreet Grewal, was also made a partner at the same time. The terms of the original partnership agreement dated 1 January were said by Clive Smith, former partner, to be extended to the Claimant (p.232, 245). However, Judge Blackwell noted in his Judgment on employment status that he did not "think that Mr Smith and Ms Millet were even ad idem as to what the agreement in 2013 meant".

23. We were satisfied that the terms contained in the partnership agreement did not transfer to the 1st Respondent. Even if they had, the notice period relied on by the Claimant in that agreement (which we come to later) relates to leaving the *partnership* and is not a period of notice required by either employee or employer to terminate an employment relationship.

24. The Claimant did not have a contract of employment with Sheltons so there was no document in existence to record the terms and condition of employment applicable to her at the point of transfer.

25. The Claimant was based primarily in Bulwell, Nottingham and she was considered highly skilled by the Respondents and "the future". She got on with clients and staff and it was the Respondents' view that she would ultimately make it to director level, if that was what she wanted.

The transfer

26. Prior to the transfer, Mr Stubbs met with the Claimant and Harpreet Grewal. They had a detailed discussion and Mr Stubbs took notes of the Claimant's terms and conditions, although did not recall making them or what he did with them thereafter. Mr Stubbs' involvement in the transfer was no more than operational. His initial understanding was that Mr Hathaway (Managing Director of the 1st Respondent) wanted him to talk to the Claimant and Ms Grewal about employment terms, but was subsequently advised that Andrew Robinson, the 1st Respondent's employment lawyer, would deal with that side of things. As part of the pre-transfer process, it was agreed that the Claimant's enhanced maternity terms would transfer to the 1st Respondent.

27. In September 2016, the Claimant was elected as an employee representative and her employment transferred from Sheltons to the 1st Respondent on 1 October 2016. She transferred on the understanding that she was an employee and was assured by the 1st Respondent that she would receive no less favourable terms of employment (p.385).

28. However, because there were no specific employment terms recorded for the Claimant at that time, Mr Robinson drafted a contract of employment. Ultimately, it was never presented to the Claimant before she resigned, although it did appear in the bundle (p.1167-1169). Mr Stubbs was the go-between between the Claimant and Mr Robinson in terms of chasing Mr Robinson for the contract (p.841 & 398). He was not, however, instrumental in deciding what contractual terms would be applicable to the Claimant.

29. In October 2016, the 1st Respondent paid the Claimant an equivalent amount to her basic salary and car allowance at Sheltons, which was £41,000. At this point, no element to reflect a loss of profit share was paid to the Claimant because it was not subject to TUPE. The Claimant challenged the position and the 1st Respondent agreed to pay her an additional £2,500 (p.410). This payment was not specifically described as a 'pay rise', but it was certainly an increase to her salary. After negotiation, the Claimant's salary was ultimately agreed at £45,500, incorporating a further £2,000 and representing some £4,500 more than she earned at Sheltons. This was not a 'rectification' of the Claimant's pay as she claimed, it was in fact a pay rise.

<u>Detriment 1 – disputing the Claimant's maternity entitlement</u>

30. In December 2016, the Claimant advised the Respondents that she was three months' pregnant.

31. On 9 February 2017, the Claimant wrote to Sian Phillips, an employment law consultant at the 1st Respondent, requesting confirmation of her holiday entitlement and maternity pay in writing. At some point prior to 3 March 2018, the Claimant

chased Ms Phillips and Ms Phillips asked the Claimant to contact Mr Hathaway, presumably because she had no authority to confirm the enhanced maternity provisions and this was a question for the business owner. Ms Philips did not ask the Claimant to do this in an 'awkward manner'.

32. The Claimant phoned Mr Hathaway on 3 March 2017. He was at home on annual leave decorating and his children were around - the Claimant herself heard them in the background. She asked Mr Hathaway to confirm that the enhanced maternity provisions she had enjoyed at Sheltons would continue to apply. He told her that he could not confirm either way about the policy off the top of his head, but he would check the terms when he was back in the office. He did not tell the Claimant that the terms had applied to Ms Grewal because she was pregnant at the point of transfer, but that they would not apply to her. The Claimant attended a client event with Mr Hathaway that same evening and she made no mention of it.

33. The next morning (Saturday 4 March 2017), the Claimant e-mailed Mr Hathaway from the office before she commenced a week's annual leave (p.724). The contents of the e-mail were initially friendly. She said that the conversation the day before (about the maternity policy) had caused her some anxiety and that "I would put money on it that George simply forwarded this onto you so you should have been aware of the terms that applied to Harpreet and me". She asked for an urgent meeting on her return from annual leave, although said that her diary was very busy but 'would endeavour' to fit around him and Mr Stubbs where she could.

34. Mr Hathaway replied that same morning saying that he would prefer to sit down and talk rather than e-mail and "as I said the purpose of the discussion was to seek clarity not push back on anything. Let's work together we are all on the same side" (p.724). The Claimant e-mailed Clive Smith on 7 March 2017 asking him to attend the meeting with Mr Hathaway. This e-mail does not mention that Mr Hathaway allegedly told her that the terms applied to Ms Grewal but not her (p.426).

35. Within the first week of the Claimant's return from annual leave, Mr Hathaway met with her and confirmed that the enhanced provisions would apply. At no point were any of the Respondents intending to withhold the enhanced terms.

<u>Detriment 2 – failure to provide a pay increase</u>

36. In Summer 2017, the 1st Respondent's Board took the decision to apply pay increases to its staff. It agreed two objective criterion that would be applied to everyone which would avoid those 'who shouted the loudest' getting a pay rise and others from falling under the radar. It was effectively a desktop exercise that could not be influenced subjectively. There were two elements to the pay review:

i. Pay increases to those who were below their grade salary band (discretionary element); and

ii. An inflationary increase for those who were within the grade salary band but who had not received a pay increase in the previous twelve months.

37. At the material time, the Claimant was a grade 6 in the 1st Respondent's scale and was paid within the pay band of £30k - £60k. As such, she did not qualify for a discretionary pay rise.

38. She had also received the increase to her pay in November 2016 (see paragraph 29 above) which had been recorded on Staff Squared (the Respondent's HR/pay system) (p.1022). Accordingly, she was not entitled to an inflationary increase.

39. The above criteria were objectively applied, and the Claimant did not qualify for a pay increase under either element.

Detriment 3 - Practicing certificate

40. There was no contractual obligation on the part of the 1st Respondent to renew practicing certificates, simply an obligation to pay on renewal (p.355).

41. The Claimant's certificate was not renewed as part of the bulk renewal process in October 2017. This was because there was no requirement for her to have one whilst she was on maternity leave. The 1st Respondent does not include employees in the bulk renewal if they do not require a certificate at that point in time e.g. if they are on long-term sick, jury service or sabbaticals. On their return to work, it reimburses the employee for the cost of renewing their certificate for the balance of the practicing year.

42. The Claimant undertook her first Keeping-In-Touch ("KIT") day on 28 November 2017, and she was advised that her certificate had not been renewed, and that she should complete the 'notification of non-renewal form' on 30 November which she duly did (p.1033). The Claimant was fully aware that she did not have a certificate and that she was unable to carry out regulated work without it. She did not complain about it to the Respondents and continued to complete further KIT days. The Claimant renewed her certificate on 15 February 2018 in anticipation of her return to work and the 1st Respondent reimbursed her accordingly.

Detriment 4 - Branch Partner

43. The role of Branch Partner was a newly created role within the 1st Respondent that was announced in December 2016 at a 'Manager's training day'. The Claimant was

not invited to this training. The role itself encompassed the overall responsibility for a Branch, including its financial success or failure. A formal job description was produced, and individuals are appointed to the role. The job title appears in their e-mail footers and on Staff Squared. Branch Partners receive an additional £1,500 per annum and 15% of profits over target.

44. The Branch Partner for the Bulwell branch at the material time was Mr Stubbs. The Claimant carried out managerial duties in the Bulwell office, which she had done previously at Sheltons, and which included elements of the Branch Partner job description such as:

- Managing a team
- Chairing weekly meetings
- Providing financial information (but this was resultant of the fact that Mr Stubbs did not have access to 'Galaxy', the financial system used by Sheltons)
- She was also on the Branch Partner mailing list (p.1014).

45. The Claimant was what the Respondents call a 'point person' at Bulwell - someone who they consider a key contact. However, the Claimant did not have responsibility for matters such as the dismissal of staff or accountability for the overall profitability of the Bulwell branch, which was a key element of the Branch Partner role. In the words of Mr Stubbs, "if the branch failed, it was on his head and not hers". He was accountable to the board for the success, or otherwise, of the branch, not the Claimant.

46. The Claimant was never appointed to the role of Branch Partner. She did not transfer into the role in October 2016 because it did not exist, albeit she continued to carry on the managerial tasks, and this did not change. She was copied in to e-mails to Branch Partners but that was in the capacity as the 'point person', rather than a Branch Partner. The Respondent always envisaged that the Claimant would move into the role, but she was not ready for it at the relevant time. In light of the fact that the Claimant was never appointed to the role of Branch Partner, it follows she could not have been demoted from it.

47. When the Claimant raised a grievance in January 2018 complaining that her job title had been changed, the 1st Respondent happily offered her the role. This was not a demeaning offer.

48. During the hearing the Claimant asserted that the roles of 'Branch Manager' and 'Branch Partner' were 'interchangeable', but the role of Branch Manager was not a formal role in existence at the material time. Therefore, the two roles could not be interchangeable.

Detriment 5 - Comments about the Claimant not returning to work

49. Mr Stubbs did not 'allude' to the fact that Claimant would not be returning from maternity leave in a discussion with Ms Jamie Skeen. The backdrop to this conversation was concern about Ms Skeen's billing in comparison to the Claimant's before she left for maternity leave. During this conversation, Mr Stubbs told Ms Skeen not to 'pin her hopes' on Claimant's return, but this was in the context Ms Skeen's billing not the Claimant's maternity leave or return.

50. Ms Skeen was interviewed as part of the investigation into the Claimant's grievance and her recollection was that Mr Stubbs confirmed that the Claimant was coming back in March but 'people don't always return to work after maternity leave, their circumstances can change at home, so don't pin your hopes on it, if she doesn't return to work". Ms Skeen confirmed that Mr Stubbs was not saying that the Claimant was not returning to work, just that she might change her mind. Ms Skeen also confirmed that Mr Stubbs only 'sang [the Claimant's] praises'.

Detriments 6/7/8 – 17 January 2018 KIT day

51. The Claimant was scheduled to attend a KIT day on 17 January 2018 which had been pre-booked on 18 December 2017 (p.750) and confirmed on 20 December 2017 by Mr Stubbs (p.751).

52. On or around 9 January 2018, the Claimant contacted her secretary, Marie Harrison. She asked her to enquire with Hayley McAllister, one of the 1st Respondent's Compliance Managers, if she could undertake an out-of-office meeting for a will signing (p.762). The Claimant was aware that she did not have a practicing certificate and that there may be restrictions on what work she could undertake, hence the query via her secretary. Ms Harrison e-mailed Ms McAllister accordingly (p.762). The same day at 8.58pm the Claimant confirmed that she would be returning to work on 2 March 2018 (p.759).

53. Ms McAllister replied to Ms Harrison the following day, 10 January 2018, confirming that the Claimant could not attend a will signing without a practicing certificate (p.761). Accordingly, the appointment was passed to Ms Skeen.

54. On 10 January 2018, Mr Stubbs, Ms Hathaway and Mr Robinson had a discussion via e-mail about the Claimant's ability to work without a practicing certificate and the payment of KIT days (p. 777–781). Mr Stubbs confirmed in one e-mail that the Respondent didn't 'need' the Claimant in the offices for any KIT days, but that 'she can either stay at home or assist with the structure of the department as she has been. Nothing legal'. Mr Stubbs commented on the cost of the KIT days but there was nothing improper in these internal discussions, nor was it the Respondent's view

that the Claimant should not undertake KIT days. These discussions took place before the Claimant submitted her grievance on 10 January 2018 at 16.58 (p.776).

55. The Claimant attended the office on 10 January 2018 and submitted her grievance before close of play that day (p.1042). The Claimant was aware on 28 November 2017, and certainly on 10 January 2018, that she could not carry out regulated work without a practicing certificate (p.765) but she did not complain about its non-renewal in this grievance.

17 January KIT day

56. In the afternoon of 16 January 2018, Mr Stubbs became aware that Ms Skeen was not going to be in the office the following day. Consequently, the Claimant would not be able to carry out regulated work without another solicitor present otherwise she would be committing a criminal offence. He contacted Mr Robinson by phone (because he was in the car) and asked him to vacate the KIT day. Mr Robinson checked if Mr Stubbs would be able to facilitate the KIT day, but he was unable to (p.769). Accordingly, Mr Robinson e-mailed the Claimant and advised her that the KIT day would have to be vacated and explained why.

57. The Claimant replied to Mr Robinson saying that she thought it was 'odd' as she had been assisting with client work on her KIT days to date (p.767). Mr Robinson attempted to contact Ms McAllister to confirm the position, but it was outside office hours so he did not receive a response that day (p.766). He confirmed that the KIT day would still have to be vacated (p.766).

58. The Claimant e-mailed Mr Robinson again at 9.43 am on 17 January 2018, saying that she had been made aware that meetings were taking place with staff at the Bulwell and Hucknall offices and queried why she had not been invited (p.765).

59. Mr Robinson made enquiries and responded to her within an hour (p.764). He confirmed that she could not work without a practicing certificate at either Bulwell or Hucknall. He also explained that Mr Hathaway was attending the offices with Mr Stubbs and catching up with staff, but there were no scheduled meetings or formal matters being discussed and, as such, a brief catch-up meeting would not justify a KIT day. He also stated that they were 'not treating her less favourably ……'

60. Mr Stubbs and Mr Hathaway visited the Bulwell and Hucknall offices on 17 January 2018 as planned. Mr Hathaway was visiting both branches because the leases were due for renewal and Bulwell was not performing well in the Claimant's absence. He wanted to get a feel for both offices and the locality to decide whether to renew the leases, move offices or merge the two. As part of his decision-making, Mr Hathaway also wanted to understand the level of referral work and walk-in work for each office,

which he was entitled to do. He asked the secretaries about referral work, not just for the Claimant, but for the office generally as they were well informed to answer his questions. There was no link between the visit and the Claimant's KIT day being vacated. The Claimant was not excluded as other members of staff such as Ms Skeen and Nicola Bradley were not in the office that day either. Further, a brief meeting was not sufficient to justify a KIT day.

61. There was nothing sinister in the Claimant not being able to work from Hucknall that day either. Ms Grewal, who could have facilitated the KIT day, was engaged in a meeting about her own personal terms and conditions of employment during that day.

Claimant's grievance – 10 January 2018

62. On 10 January 2018 at 16.58, the Claimant submitted a letter detailing 'matters of concern' (p.1042–1045).

63. Her concerns related to:

- Her belief that her job title had been changed in that she was not referred to as 'Branch Partner';
- A failure to award a pay rise in August 2017; and
- Payment for KIT days – her belief was that she was entitled to full pay, in addition to her enhanced maternity pay for these days

64. The Claimant linked her treatment to the issue relating to her maternity terms in March 2017.

65. On 17 January 2018, Mr Robinson wrote to the Claimant acknowledging her letter, attaching the grievance procedure and confirming that her concerns would be dealt with informally, unless she would rather have them dealt with under the formal procedure (p.1046).

66. On 18 January 2018, he replied in detail to the Claimant's letter of concern providing full explanations (p.1055-1058):

67. In respect of her job title, Mr Robinson confirmed that she was not a Branch Partner. He acknowledged that there had been discussions about her taking up the role, but it was never formalised. However, he confirmed that she could undertake the role if she wanted to – "Paul and the firm are supportive of you taking up a role as a Branch Partner, if this is a role you would like to fulfil. Your job title would then be Senior Associate Solicitor & Branch Partner."

68. Mr Robinson explained why the Claimant had not been eligible for a pay rise and how her KIT payments had been calculated, in that her enhanced maternity pay had been offset against her normal pay for those days.

69. He also explained again why the KIT day on 17 January 2018 had been vacated and confirmed that whilst the issue of payment for KIT days was not finalised, "it would not have been prudent to carry out the KIT day without certainty on both sides".

70. On 20 January 2018, the Claimant e-mailed Mr Robinson stating that she wished to cancel the rest of her KIT days because her ulcerative colitis had flared up, and that she would be raising a grievance. She also confirmed that she was in the process of instructing a solicitor (p.1135).

71. On 24 January 2018, the Claimant submitted a further grievance, albeit she treated it as an appeal (p.1058a-e). In addition to the matters raised in her grievance, she also complained about the non-renewal of her practicing certificate. She alleged that she was a victim of a "bullying campaign and discrimination following my pregnancy and maternity leave".

72. Mr Robinson replied to the Claimant and, after an exchange of e-mails about whether her letter was to be treated as a formal grievance or an appeal, a hearing was arranged for 30 January 2018 (p.1059–1081). Mr Robinson reassured the Claimant that the Board wished to resolve her concerns.

73. Prior to the hearing, the Claimant had sight of her personnel file and became aware of a file note dated 24 August 2017 regarding her visit to the office that day. We will move onto that later. The Claimant alleged that the file was incomplete and that the file note was 'further evidence of bullying and unfavourable treatment contrary to ss18 (2)(a) and/or s18(4) of the EqA" (p.1073). By the time the appeal hearing took place, the Claimant had already closed her mind to the possibility of resolving her concerns.

74. The hearing took place on 30 January 2018 and two sets of notes were produced – one set written by the Claimant's companion, Ms Grewal (p.1081a–c), and one set by Ms McAllister (p.1081d–i).

75. The hearing was chaired by Ms Hathaway and, to summarise, all the issues raised by the Claimant were discussed and Ms Hathaway committed to investigate. It was during her investigation into the Claimant's terms and conditions pre-transfer that her employment status arose, but we deal with the consequence of that later.

76. During the hearing, the Claimant also alleged that there was money being held on a client matter in the 1st Respondent's client account. Ms Hathaway assured the Claimant that she would investigate as this had not been highlighted to her before.

77. Ms Hathaway wrote to the Claimant on 6 February 2018 with her findings and did not uphold her grievances (p. 1082–1087). However, in her investigations, she had explored the Claimant's status at Sheltons. She had spoken with Ms Denise Archer, Practice Manager, who confirmed that the Claimant had not been on Sheltons' payroll since 2013 because she had been a self-employed partner. There was no employee file for her either. Ms Hathaway subsequently took legal advice and the advice was that the Claimant had not in fact been an employee. Rather, she had been self-employed and did not enjoy protection under TUPE. Accordingly, Ms Hathaway confirmed to the Claimant that the Respondent would be issuing her with a statement of terms and conditions of employment and confirmed a start date of employment of 1 October 2016.

78. The Claimant wrote to Ms Hathaway on 14 February 2018, giving the Respondent 'one last attempt to rectify my serious grievances against the firm' (p. 1099–1106). She attached thirteen exhibits to the letter. To all intents and purposes, this was an appeal against Ms Hathaway's findings on 6 February 2018. She asked the Respondent to reply by 5pm on 23 February 2018. Ian Morris, Group Commercial Director, was appointed to investigate the appeal and he was an appropriate independent person to do so.

79. On 16 February 2018, the Claimant e-mailed Ms Archer, copying in Ms Hathaway and Mr Robinson, accusing her of theft – namely the theft of her cardigan and a prize at the Christmas party (p.1146). It was an unpleasant e-mail and its tone and purpose was malicious. Mr Robinson asked the Claimant if she wished to raise this as a grievance but also asked her not to include Ms Archer in any further correspondence in this regard (p.1145).

80. The Claimant confirmed that she did not wish to raise it as a grievance, but that the matters were 'of a disciplinary nature, potentially gross misconduct ……. I thought you should be aware of these points as it may affect her credibility as a witness to the events documented on the 24th August" (p.1145). Mr Robinson replied that the 1st Respondent was treating the allegations as a formal complaint (p.1143). The Claimant was concerned that this would delay the response to her appeal but confirmed that she could provide witness statements regarding the 'attempted theft' (p.1143).

81. Mr Robinson asked the Claimant if there was anyone that the Respondent should speak to about the allegations (p1142). Ultimately however, having spoken with Ms Archer, both Mr Robinson and Ms Hathaway were satisfied that there had been no theft or dishonesty on her part and did not feel the need to speak to any further witnesses. The allegations were very distressing for Ms Archer.

82. On 20 February 2018, Ms Hathaway wrote to the Claimant in respect of the appeal and explained that the Respondent was seeking advice from senior employment counsel and, because of their existing commitments, would not be able to provide a full response to her appeal by 23 February 2018. She expected the 1st Respondent to be able to respond by 2 March 2018 and said that 'it was important that the points you have raised are given the full and proper consideration they deserve' (p.1150).

83. The Claimant responded saying that she was prepared to give the Firm until 5pm on 27 February 2018 and no longer (p.1155). The Respondent was not able to meet the deadline imposed by the Claimant and she resigned on 27 February 2018, citing the following reasons for her resignation:

- It was unreasonable to expect her to wait any longer for the appeal outcome
- The revised start date of 1 October 2016 was a breach of contract (detriment 11)
- The alleged demotion from the position of Branch Partner (detriment 4)
- She also alleged that the reason for her absence could be viewed by all staff on Staff Squared, which she considered disability related harassment under the Equality Act (p.1245 – 1246).

84. The Claimant resigned with 'full contractual notice' but did not state what length it was, or what her effective date of termination would be. The Claimant subsequently queried her entitlement to sick pay/full pay during her period of notice (p.1232 – 1233) and asked Ms Hathaway to confirm the length of notice she was required to give (p.1239c). The Claimant was of the view that she was entitled to full pay while absent due to sickness. She also threatened to report the 1st Respondent to the Solicitors Regulatory Authority due to 'serious concerns' she alleged she had about the Respondent's cashflow but failed to provide any substance to the allegation (p.1237). Ms Hathaway responded and confirmed that Mr Robinson was double-checking the position on sick pay and her notice period.

85. Mr Robinson contacted the Claimant on 1 March 2018 with a breakdown of her entitlement to SSP in accordance with the Respondent's absence policy (p.123–6). He confirmed that a deduction had been made from her pay in error and she was to let him know if she was not reimbursed. In response, the Claimant lashed out at Mr Robinson doubting that he was a qualified lawyer, calling him incompetent, saying that he should be ashamed of his behaviour and that he was a disgrace to the profession (p.1235). She subsequently apologised and said that she was not well and that steroids she was taking (for her ulcerative colitis) had an impact on her causing a psychosis. Mr Robinson accepted her apology (p.1234).

86. On 1 March 2018, Ms Hathaway took advice from counsel on the Claimant's notice period in the absence of employment terms. The advice was that there was nothing

in the partnership agreement about notice, other than a 6-month absence leading to expulsion (p1238). The 1st Respondent decided that in the absence of terms, they should look at the notice period of others in the same position. They concluded that a one-month notice period was reasonable as all other employees, bar one, transferred to the Respondent on that term.

87. On 2 March 2018, the Respondent provided its response to the Claimant's appeal but did not uphold it (p.1187).

88. On 6 March 2018, Mr Robinson formally acknowledged the Claimant's resignation, advised that her effective date of termination was 6 March 2018 and also that her outstanding annual leave would need to be taken during the notice period in accordance with the 1st Respondent's policy (p.1259).

89. The Claimant replied to Mr Robinson disputing the requirement to take holiday in the notice period. She asked that her holiday be paid in addition to her notice period, otherwise she would name Mr Robinson as an individual Respondent in this claim (p. 1262). Mr Robinson replied confirming that "he could not, in good conscience, seek to overturn a policy of the firm, that is in no way discriminatory, in an attempt to counter an onerous threat to bring proceedings against me" (p.1261). The Claimant wrote to Mr Robinson again on 7 March 2018 confirming her disagreement at the position (p.1265).

Detriment 9 - redundancy matrix

90. On or around 17 January 2018, the Respondent commenced redundancy consultations with two administrative staff. The Claimant was on maternity leave at the time and there was no obligation on the Respondent to include her. The secretaries in question were employed by the 1st Respondent, not the Claimant.

91. Mr Stubbs asked Ms Skeen to complete a redundancy matrix for the staff as she had the day-to-day contact with them. However, she had been finding the whole situation very stressful and was unable to provide the information he required. Accordingly, he contacted the Claimant on 25 January 2018 and asked if she wanted to take part in the matrix assessment but confirmed that she was not obligated to (p.1024). The Claimant willingly completed and returned the assessments that same day (p.1208). She was not excluded from the process. The Claimant was given the opportunity to be involved, if she so chose, and was offered a KIT day in return (p.1203/4) which she declined (p.1210).

92. That same day, Ms Skeen e-mailed Mr Stubbs about the redundancies, acknowledging that she had not been able to get her view on the matter across to him as well as she could have done. She also said that because the Claimant had not

'had a voice' in the process, she felt that she needed to 'speak up on her behalf' (p.1124). This e-mail was not a request that the Claimant be contacted and involved in the process. Regardless, Mr Stubbs had already contacted the Claimant prior to receiving this e-mail.

93. The Claimant did not complain that she had not been consulted and Mr Stubbs made proactive contact after realising that Ms Skeen could not help in the way he had hoped.

Detriment 10 - file note

94. The Claimant visited the office on 24 August 2018 with her new baby. During this visit, the Claimant went to an upstairs room with other members of staff. Ms Archer overheard the Claimant asking them if they were coping with the Respondent, telling them 'not to worry' and suggesting that she might be leaving to start her own firm. Ms Archer felt that her comments had 'brought a further negative mood to an already low office'. After overhearing this, Ms Archer informed Mr Stubbs and he felt it necessary to make a note and place it on her file.

95. There was a genuine friendship between Mr Stubbs and the Claimant, and he held her in high esteem. However, he was still her line manager and his note simply reflected what Ms Archer told him after her visit. In the back of his mind he recalled similar behaviour from the Claimant in the past (although he could not recollect exactly what, and when) and felt that it was worth noting and something that he could not ignore. The note was not false or fabricated, nor was it to be used as 'ammunition' to get her to leave. The Claimant herself had placed notes on other employees' files so this was not uncommon practice (p.1040).

Detriment 11 - Change in start date

96. The Respondent changed the Claimant's start date after receiving Counsel's advice that she was not an employee at Sheltons (p.1082). As such, after the transfer the 1st Respondent was of the view that her start date for employment purposes was 1 October 2016. At the time of the transfer, it was also the Claimant's understanding that she was self-employed pre-transfer (e.g. p.256).

Detriments 12 & 13 - Sick pay and notice pay

97. The application of the 1st Respondent's sick pay policy flowed from Counsel's advice that the Claimant was not an employee prior to the transfer in October 2016. As such, she was paid on the basis that her employment began on 1 October 2016, rather than including her prior service at Sheltons.

98. The application of a one-month notice period also flowed from this advice. In the absence of contractual terms for the Claimant, the Respondent felt that one month was a reasonable notice period and was in accordance with other transferring employees, bar one.

Detriment 14 - SRA reporting

99. The first call to the SRA was by Ms Hathaway on 22 February 2018 about the Claimant's employment status/tax position (p.1357) - she was completing her tax returns on a self-employed basis but was also asserting to the 1st Respondent that she was an employee. The Claimant was not named in the call, and Ms Hathaway was seeking guidance on her concerns and what steps she ought to take, the Claimant was either self-employed or not. She could not have it both ways and one had to be incorrect. No formal report was made at that time.

100. Ms Hathaway sought further guidance on 5 March 2018 (p.1358). By then, the Claimant had accused Ms Archer of theft, been abusive in an e-mail to Mr Robinson and had contacted a client whist she was on maternity leave from her personal e-mail account. This was in addition to her tax status and the Respondents now believed that the Claimant had undertaken client work on her KIT day without a practicing certificate. At this point, no formal report had been made, but Ms Hathaway had to consider the guidance received from the SRA, which was that they had an obligation to report the Claimant's conduct.

101. Ms Hathaway e-mailed Mr Stubbs on 5 March 2018 to update him on the advice received (p.1267). Both Ms Hathaway and Mr Stubbs were reluctant to report the Claimant, particularly considering her admission about the steroid induced psychosis. However, it was not their decision to make any more and they were obligated to make a report. Accordingly, Ms Hathaway made her formal report by way of e-mail to the SRA on 7 March 2018 (p.1270). It set out the concerns about the Claimant's conduct and made it clear that the Claimant was unwell.

102. Ms Hathaway contacted the SRA again on 13 March 2018 to advise that the Claimant had issued her claim (p.1269).

103. It subsequently came to the Respondents' attention that the Claimant had set up her own practice, Ella Millet Legal, but they could not see that it was a registered. Ms Hathaway was concerned about the implication of transferring client files from the 1st Respondent to the Claimant when her practice was not regulated. She updated the SRA on 14 August 2018 confirming that the matter had been left (in part) because the Claimant was not in practice, but she now understood that the Claimant had set up Ella Millet Legal (p.1278). She reiterated that the Respondent held the same

concerns and wanted to understand any issues in relation to transferring files to the Claimant's new practice.

104. Ms Hathaway also e-mailed Ms McAllister later that day to enquire if any additional measures should be put in place in relation to the transfer of files to the Claimant's new practice (p.1273). The Respondent was naturally concerned about any exposure in sending files to an unregistered practice. This was a warranted concern, rather than a desire to get the Claimant 'into trouble'.

105. Ms Hathaway had not received a response from the SRA, so she chased a reply on 10 September 2018 and was asked to send her e-mail again (p.1277). Whilst Ms Hathaway was mindful that her report may lead to a further allegation of victimisation by the Claimant, she accepted that her obligations to the SRA outweighed any resultant legal claim. The Respondent raised genuine concerns in the context of a highly regulated profession.

106. The SRA wrote to Ms Hathaway on 11 September 2018 confirming that it would look into the matter (p.1293). Ms Hathaway forwarded this letter to Ms McAllister and on 12 September 2018 the offices were asked to pass any file requests to Compliance (p.1297 & 298a). The Respondent put protective measures in place and there was nothing untoward in its actions.

107. On 17 September 2018, Ms Hathaway asked the SRA if the 1st Respondent could release files to the Claimant whilst its enquiries were ongoing. The SRA recommended that she call the ethics line (p.1299) which Ms McAllister duly did. The SRA also confirmed that it would be contacting the Claimant to ask questions about the work she was undertaking (p.1300). The SRA promptly investigated the matter resulting in a phone call to the Claimant. Following this call, the SRA determined that no action needed to be taken and this brought the matter to an end (p.1301b).

108. The 1st Respondent subsequently became aware that the SRA had disclosed the contents of its report to the Claimant. This was concerning because it had understood that it would not be disclosed, rather it would be used as the basis for any investigation by the SRA. This was an understandable concern in light of the litigation by the Claimant against the Respondents.

The law

Constructive dismissal

109. Section 95(1)(c) which provides that an employee is dismissed by his employer if:

"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."

110. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

(ii) that the breach caused the employee to resign – or was the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position). The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI; .and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

111. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

112. We have also had regard to Buckland v Bournemouth University Higher Education Committee [2010] IRLR 445, CA; Kaur Teaching Hospital NHS Trust [2018] EWCA Civ; Omilaju v Waltham Forest London Borough Council [2005] 1 ICR 481, CA; and RDF Media Group v Clements [2008] IRLR207, HCQBD.

Discrimination

Direct discrimination

113. Section 13(1) states:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

114. Section 23(1) states:

"(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

115. It is not necessary for a Claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person, as long as the circumstances are not materially different.

Pregnancy and Maternity Discrimination

116. Section 18 EQA provides:

"(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)."

Automatically unfair dismissal: pregnancy and maternity

117. Section 99 ERA: Leave for family reasons provides:

(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.

118. Regulation 20 MPL Regs provides:

"(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;"

Victimisation

119. Section 27 of the EQA provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a

protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

Discrimination arising from disability

120. Section 15 of the EQA states:

"(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arises in consequences of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B
had the disability."

Suffering a detriment for family reasons:

121. Section 47(c) of the ERA provides:

"(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,"

122. Regulation 19 of the MPL Regs provides:

"(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;
(e) took or sought to take—
(i) additional maternity leave;

(3) For the purposes of paragraph (2)(d), a woman avails herself of the benefits of ordinary maternity leave if, during her ordinary maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by section 71 of the 1996 Act during that period.

Case Law - discrimination

123. We have had regard to the following cases:

Bahl v Law Society [2004] IRLR 799, CA; and Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN.

Nagarajan v London Regional Transport [1999] IRLR 572, HL; Chief Constable of West Yorkshire v Khan [2001] ICR 1065, HL; Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS & Others [2010] IRLR 136, SC; Glasgow City Council v Zafar [1998] ICR 120; Quereshi-v- London Borough of Newham

Burden of proof

124. Section 136 EQA provides:

"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".

125. We have had regard to the following cases: Igen Limited v Wong [2005] IRLR 258,; Madarassy v Nomura International PLC [2007] ICR 867Fraser v University of Leicester UKEAT/0155/13/DM; Hewage v Grampian Health Board [2012] IRLR 870, SC and Amnesty International v Ahmed [2009] ICR 450 EAT.

Unauthorised deductions from wages

126. Section 13 ERA states:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the

making of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

Breach of contract

127. Article 3 of The Employment Tribunals Extension of Jurisdiction Order 1994 ("the Order") provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

128. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.

Submissions

129. The Tribunal had the benefit of written submissions from Ms Wedderspoon and Mr Arnold, together with further oral submissions which were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

130. Ms Wedderspoon submitted that the Claimant had been subjected to discrimination continuing over a period, such discrimination being detriments 1 – 14 and culminating in her constructive dismissal. Mr Arnold submitted that all heads of claim must fail.

Conclusions

Detriment 1 – disputing the Claimant's maternity entitlement

131. The Claimant alleged that when she contacted Ms Phillips to enquire about her maternity pay, Ms Phillips asked her talk to Mr Hathaway in an 'awkward manner'. We were satisfied, in the circumstances, that it quite natural that Ms Phillips would ask the Claimant to speak to Mr Hathaway directly, in light of the fact that it was an enhanced

policy and she would not likely have authority to confirm its terms. We were not persuaded that this was done in an awkward manner.

132. When the Claimant phoned Mr Hathaway, he was at home decorating with his children around. We found his version of that call to be entirely credible in that he could not recall the maternity provisions off the top of his head and suggested that they meet when he was back in the office. We did not accept the Claimant's evidence that Mr Hathaway said that the provisions had applied to Ms Grewal because she was on maternity leave at the time of the transfer, but not to the Claimant. Mr Hathaway's evidence was supported by the Claimant's e-mail to him the next morning on saying "*I would put money on it that George simply forwarded this onto you so you should have been aware of the terms*" (p.724)

133. We did not doubt that the Claimant was anxious when Mr Hathaway was not in a position confirm the position to her on the call, particularly when she was going on annual leave the following week. This prompted the e-mail the next morning. We were surprised that, if the Claimant was as anxious as she subsequently claimed, that she did not mention it all that same evening when they were both attending a client event. We were satisfied that there was no intention on Mr Hathaway's behalf to deprive the Claimant of her maternity payment, or that he said on the call that she was not entitled to it. The contemporaneous e-mails simply do not support this allegation.

134. We agreed with Mr Arnold's submission that the Claimant caught Mr Hathaway off guard, and he could not recall what had been agreed off the top of his head – this was the reason why he could not put her mind at rest there and then. There was no real sense of urgency from the Claimant thereafter and the Respondent/s held a meeting with her in the first week after her return from annual leave. It confirmed that the Claimant would have the benefit of the enhanced terms and the matter was resolved amicably and quickly.

135. Viewed objectively, there was no reason for the Claimant to have felt side-lined and worried about what was going to happen during or after her maternity leave as she alleged. Accordingly, we were satisfied that there had been no detriment, discrimination or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 2 – failure to provide a pay increase

136. When the Respondent took the decision to make pay increases in the summer of 2017, it came up with objective criteria to be applied across the board. We were satisfied that the criteria were applied objectively and there was no link between their application and the Claimant's pregnancy or maternity leave. On the desktop exercise, the Claimant was within the pay scale for her grade and had received an increase in

pay in November 2016 which had been recorded on Staff Squared. The Claimant argued that the pay increase was a 'rectification' of her pay in that the Respondent had underpaid her in comparison to her salary at Sheltons. However, we were satisfied that she was paid more by the Respondent than by Sheltons after her salary was reviewed. There was no failure to provide a pay increase and the criteria were applied fairly. We were satisfied with the Respondent's evidence on this point and that there had been no detriment, discrimination or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 3

137. The Claimant commenced her maternity leave on 30 June 2017. The bulk renewal of practicing certificates takes place in October of each year. The Claimant was on maternity leave in October 2017. We were satisfied that the Claimant was not included in the bulk renewal process because she was not working – the Claimant conceded in evidence that she did not intend to work whilst she was on leave. Whilst the reason for her not working was because she was on maternity leave, the 'failure' to renew her certificate was not because she was on maternity leave. The fact that the Claimant was on maternity leave was simply the occasion for the non-renewal, not the cause. We were satisfied with the Respondent's evidence that other solicitors who were not working were also excluded from the process, examples being solicitors who were on long-term jury service and long-term sickness absence.

138. The Claimant was not unable to work KIT days without a practicing certificate, she was only unable to undertake regulated work. She successfully worked a number of KIT days and 17th January 2018 KIT was simply postponed. The Claimant cancelled the remaining KIT days thereafter herself. Accordingly, we were satisfied that there had been no detriment, discrimination or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 4 – branch partner

139. The Claimant's claim that she was demoted from the role of Branch Partner was muddled. In her grievance and ET1 she alleged that she had been demoted from the role of Branch Partner, but this was subsequently referred to as a demotion from the role of Branch Manager. At the hearing, the Claimant said that the two roles were 'interchangeable' but there was no evidence that a role of Branch Manager existed whilst she was employed by the Respondent. We were satisfied that the role of Branch Partner was not introduced until December 2016. It was a formal job title with specific responsibilities, above and beyond the Claimant's existing responsibilities, and carried additional remuneration. We were satisfied that she was not demoted from the role of Branch Manager because she was not appointed to the role in the first place. It follows, therefore, that she was not demoted as a result of going on maternity leave.

At no point did her existing managerial duties change, nor was there any action on the part of the Respondent that could lead the Claimant to believe that they had, or that they would. On the contrary, when the Claimant raised her grievance, the Respondent offered her the opportunity to take the role of Branch Partner. The Claimant said was degrading but this made no sense – it was an affirmation that the Respondent held her in high regard. Viewed objectively, we were satisfied that there was any reduction in the Claimant's status, or that there was any reason for to feel that she was demeaned in the eyes of her colleagues as she alleged.

140. Accordingly, we were satisfied that there had been no detriment, discrimination or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 5 – speaking to the Claimant's colleagues about her not returning from maternity leave

141. We noted that the Claimant's case was that the 3rd Respondent 'alluded' to the fact that she might not return from maternity leave. There was simply no evidence that the he spoke about her in the way she alleged.

142. This allegation arose from the conversation between Mr Stubbs and Ms Skeen. Ms Skeen's billing had become a matter of concern and we were satisfied that any comments that Mr Stubbs made were in the context of Ms Skeen's billing, in that she should not pin her hopes on the Claimant's return. We were satisfied that the Claimant was not demeaned or made to feel uncomfortable in her colleagues' eyes. Further, we did not believe that this showed a stereotypical view. We were satisfied that firstly, Mr Stubbs did not 'allude' to the fact that the Claimant might not return from maternity leave and, secondly, the his conversation with Ms Skeen was not in any way linked to the Claimant's grievance. As such, these comments were not 'unfavourable comments', nor were they made because the Claimant was on maternity leave.

143. Accordingly, we were satisfied that there had been no detriment, discrimination or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 6 – cancelling KIT day

144. The discussions about the Claimant's lack of practicing certificate and the commerciality of KIT days had taken place before the Claimant submitted her grievance on 10 January 2018, so we were satisfied that they were not linked.

145. We were also satisfied that the KIT day being vacated was not because the Claimant had been pregnant or taken maternity leave. The Claimant had already undertaken KIT days on 28 November 2017, 30 November 2017, 5 December 2017, 7 December 2017 and 10 January 2018. It was only on 16 January 2018 that the Respondent/s

realised Ms Skeen was not going to be in the office, meaning the Claimant would not have been able to undertake regulated work in the absence of a practicing certificate. If she had done, she would have committed a criminal offence. Any regulated work could not be facilitated by Mr Stubbs or in the Hucknall office that day and the KIT day was simply postponed, not cancelled. The reason for vacating the KIT day was a regulatory issue and not because the Claimant had been pregnant, taken maternity leave or raised a grievance. The Claimant had already done several KIT days and, viewed objectively, we did not find that the Claimant was unable to work or get orientated to work whilst on maternity leave.

146. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 7 – failure to have workplace meetings

147. We were satisfied that the Claimant was not excluded from workplace meetings on 17 January 2018 because there were no meetings to be excluded from. Mr Hathaway and Mr Stubbs carried out fact finding visits to the Bulwell and Hucknall branches in their capacity of senior management to make decisions on their future. There was no obligation or need to involve the Claimant whist she was on maternity leave. Other solicitors were also out of the office on that day.

148. We were further satisfied that it was not in Mr Robinson's mind to prevent Claimant from seeing Mr Hathaway and Mr Stubbs. There was no evidence to support the assertion that there was a deliberate attempt to keep her out of the office for any reason, or that the Claimant was unable to work and get orientated to work whilst on maternity leave.

149. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 8 – asking the Claimant's secretaries about the Claimant's contacts/referrers

150. The Claimant alleged that the 2nd and 3rd Respondents 'quizzed' her secretaries about who referred work to her and the name of her referrers. In her view, this was in order to side-line her in the hope that she would leave, and the Respondents could contact those referrers for work. We were satisfied that Mr Hathaway was perfectly entitled to question the secretaries on sources of work as they were well placed to assist. The information he was seeking was not the Claimant's information – he was asking

standard business questions that a business owner would ask when visiting their premises, particularly in the context of considering the renewal of leases or a merger.

151. We agreed with Mr Arnold's submission that this part of her claim made no sense. Even the Claimant accepted that it would not make sense to get rid of her and hire someone else to do the work. The Respondents considered the Claimant integral to the success of the Bulwell branch. Viewed objectively, there was no reason for the Claimant to feel demeaned in the eyes of her colleagues, feel side-lined or be worried that work would be removed from her. We were satisfied that there was no link with the Claimant being pregnant, taking maternity leave or to her raising a grievance.

152. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 9 – failure to include the Claimant in redundancy consultation

153. The chronology in the Claimant's pleaded case was not supported by the documents. We reminded ourselves that the secretaries were employed by the 1st Respondent, not the Claimant. We agreed with Mr Arnold's submission that the right to be consulted belonged to those secretaries, not their managers. Ms Skeen had been working with them for the previous seven/eight months and should have been well placed to assist Mr Stubbs. However, Mr Stubbs realised that Ms Skeen could not provide the insight he needed so he contacted the Claimant and asked for her input if she was willing, mindful that she was on maternity leave.

154. Viewed objectively, there was no reason for the Claimant to feel demeaned in the eyes of her colleagues or that there had been a reduction in her status. We were satisfied that there was no link to her raising a grievance.

155. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 10 – file note

156. It was the Claimant's case that the file note dated 24 August 2017 was 'completely false and fabricated'. We accepted that the Claimant was upset when she saw it but were satisfied that Mr Stubbs acted properly in recording Ms Archer's reflections on her visit to the office. There was a practice of notes being placed on files and the Claimant had done this herself. She gave evidence that she would tell employees when she placed a note on an employee's file, but this was contradicted by her own

witness, Ms Harrison. Ms Archer also gave evidence that the Claimant told her about a note on her file but would not let her see the contents.

157. We found no evidence to support the assertion that the note was completely false and fabricated, and it follows, therefore, that it was not an exaggerated and distorted complaint, nor did it provide an inaccurate impression of the Claimant. There was no consequence of the file note and no action was taken.

158. We were satisfied that there was no link between the file note the Claimant's grievance and that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise

Detriment 11 – changing the Claimant's start date

159. We were satisfied that the Claimant's start date was amended following advice from Counsel in the course of the grievance investigations. It was not because the Claimant had been pregnant, taken maternity leave or because she had raised a grievance. We were also satisfied that it was not done to prevent the Claimant from having the requisite service to bring an unfair dismissal claim.

160. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

Detriment 12 – failure to pay sick pay

161. As above, we were satisfied that the Claimant's start date was amended following advice from Counsel in the course of the grievance investigations. Consequently, the Respondent applied the sick pay policy in line with the start date. It was not because the Claimant had been pregnant, was on maternity leave or because she had raised a grievance. We were also satisfied that it was not because of her disability or something arising in consequence of her disability.

162. Accordingly, we were satisfied that there had been no detriment, discrimination, victimisation or any act that could amount to a breach of contract - fundamental, or otherwise.

163. For completeness, the Respondent satisfied payment of outstanding sick pay prior to this hearing.

Detriment 13 – failure to pay notice pay

164. After the Claimant resigned, the Respondent paid the Claimant for one month's notice which incorporated her entitlement to outstanding holiday pay. In the absence of any recorded employment terms at Sheltons, the Respondents decided that a one-month notice period was reasonable because other solicitors had transferred on this term. The Respondent applied its policy of requiring employees to take accrued but untaken annual leave during the notice period.

165. We accepted Mr Arnold's argument that a reasonable notice period should be construed in the absence of any express term. We address our findings on what we believed to be a reasonable notice period below.

166. However, we were satisfied that the decision to pay one month's notice was made in consequence of the absence of employment terms, rather than because of the Claimant's pregnancy or maternity leave.

167. Accordingly, we did not find that there had been any detriment, discrimination, victimisation or any act that could amount to a breach of contract fundamental, or otherwise.

Detriment 14 – referring the Claimant to the SRA

168. We were satisfied that the 1st Respondent acted properly in accordance with its regulatory obligations in reporting the Claimant to the SRA. It carefully considered the situation and took advice initially before deciding whether to report. It held genuine concerns about the Claimant's behaviour which ultimately, it was duty-bound to report. The 1st Respondent was aware that the reports would expose it to further litigation, but its regulatory obligations outweighed the consequence of litigation.

169. In the initial report, Ms Hathaway stressed that Claimant was unwell which demonstrated a level of care in what was at that point a strained relationship. It was factual and measured and we were satisfied that the reports and resulting investigation did not amount to victimisation.

Summary of discrimination claims

Pregnancy and maternity discrimination. s18 EQA

170. We were satisfied that the Claimant was not treated unfavourably during the protected period or by a decision taken in the protected period, because of her pregnancy or because she exercised her right to maternity leave by detriments 1-13.

Direct pregnancy or maternity leave (and sex post the protected period) discrimination – s.13 EQA

171. We were satisfied that the Claimant was not less favourably treated than a relevant comparator by detriments 12-13 because of her pregnancy and/or maternity leave or her sex

Leave for family and domestic reasons (s.47c ERA)/Reg 19 MPLR 1996

172. We were satisfied that the Claimant was not subject to detriments 6 -14 done for a reason relating to her pregnancy and maternity leave.

Victimisation – s27

173. We were satisfied that the Respondent did not subject the Claimant to detriments 6 - 14 because she had done a protected act.

Direct disability discrimination

174. We were satisfied that the Claimant was not treated less favourably than a relevant hypothetical comparator by not receiving sick pay whilst she was off work (detriment 12)

Discrimination arising from disability – s.15

175. We were satisfied that the Claimant was not treated unfavourably because of something arising in consequence of her disability, namely that she was not paid sick pay (detriment 12)

Breach of contract – notice pay

176. In reaching our conclusion in this element of the claim we considered the following:

- We were satisfied that a six-month notice period was not applicable to the Claimant, nor was it reasonable;

- The Claimant was considered an integral part of the rationale for acquiring the trade of Sheltons;

- She was considered an integral part of the future of the Bulwell branch and the 1st Respondent generally;

- She was held in high regard by the Respondents and its three key witnesses were vociferous in just how highly they regarded her;

- Ms Grewal negotiated a three-month notice period;

- There was no documentary evidence before us that other employees who transferred to the Respondent were all, bar one, on a one-month notice period. The only document in the bundle was a sample Sheltons' contact containing a mutual three- month notice period; and

- Our own knowledge.

177. In light of these considerations, we concluded that a three-month notice period was a reasonable one. As such, there has been a breach of contract on the part of the Respondent to the extent that a further two months' notice pay was due to the Claimant. We were, however, satisfied that the Respondent was entitled to require the Claimant to take any outstanding untaken holiday during her notice period, so she is not entitled to any additional recovery in this regard.

Breach of contract/unauthorised deductions of wages - holiday pay and sick pay

178. We were satisfied that the Respondent has a lawful policy of requiring employees who had served notice to take any outstanding leave during the notice period. Accordingly, there was no breach of contract or unauthorised deduction from the Claimant's wages in respect of holiday pay.

179. The Claimant's claim in respect of outstanding sick pay was satisfied before the start of the hearing.

Constructive dismissal

180. The Claimant's case in this regard was contradictory. In her in ET1, she claimed that the last straw was the failure to pay sick pay. However, she had not been paid at this point, so we agreed with Mr Arnold that it could not have been the last straw. The Claimant gave evidence that a friend drafted the ET1, but it obviously had the benefit of legal input and was submitted on her behalf by solicitors.

181. The final straw subsequently relied on by the Claimant was the Respondent failing to deal with her grievance appeal within the timeframe imposed by her. We were satisfied that her imposed deadline was unreasonable but, in any event, the Respondent kept her updated on the delay which was reasonable behaviour on its behalf. Further, Ian Morris was genuinely independent, and they were treating her concerns seriously.

182. We also noted that the Claimant's resignation letter only mentioned detriments 4 and 11 and not any of the other events subsequently relied on. There was no mention of

the KIT day on 17 January 2018, Mr Hathaway's visit to the offices on the same date or the redundancy consultation. These matters featured heavily in this hearing and we would have expected to see these mentioned in the resignation letter, even if only briefly, if the Claimant considered them to be fundamental breaches of her contract of employment. The Claimant is very articulate and had no issue voicing her concerns with the Respondent.

183. We were satisfied that the Respondents were genuinely concerned to resolve the Claimant's concerns, regardless of their merit. However, the Claimant had closed her mind to resolution as early as January 2018.

184. Conversely, there were several examples of unreasonable behaviour on the Claimant's part where she would act in a manner calculated to cause to distress. We saw this in the accusation that Ms Archer had committed theft, lashing out at Mr Robinson threatening to name him as a Respondent if he failed to make the payment she wanted and threatening to report the Respondent/s to the SRA.

185. We were satisfied that none of the acts relied on by the Claimant, either singularly, collectively or cumulatively amounted to a breach of an express or implied term of the Claimant's contract of employment entitling her to resign and claim constructive dismissal. Accordingly, she was not dismissed and her constructive dismissal claim fails.

186. It follows from this that because she was not dismissed, she was not dismissed for the purposes of s.99 ERA

Limitation

187. Our findings on limitation were academic considering our findings on liability. However, for completeness we would have found that the acts relied on by the Claimant amounted to a series of distinct acts, rather than continuing discrimination extending over a period. We agreed that any acts occurring on or before 23 January 2018 were, in principle, out of time.

188. We considered the chronology and noted that in relation to detriment 1, the Claimant had taken legal advice and set out the possible claims she may have to the 1st Respondent (p.426). The Claimant was not suffering ill health to the extent that she was post-maternity leave, she was also able to correspond with and meet the Respondent to discuss her issues. As such, we would not have found that it was just and equitable to extend time in relation to this element of her claim.

189. In deciding whether it would have been just and equitable to extend time in relation to the other acts complained of, we were mindful that the Claimant had a period of

maternity leave and subsequent ill health and, as such, we would have found it just and equitable to extend time.

Application for costs

190. At the conclusion of the hearing the Respondents made an application for their costs. They asserted that:

- The Claimant had behaved unreasonably in bringing the proceedings and/or conducting the proceedings within the meaning of Rule 76(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"); and

- Such claims had no reasonable prospects of success within the meaning of Rule 76(1)(b).

191. In summary, Mr Arnold submitted that the Claimant should have stood back from the case and assessed its merits. If she had, she would not have pursued it. He confirmed that no offers or counter-offers were made by either side in open or 'without prejudice save as to costs' correspondence, or through ACAS He also submitted that the Claimant's schedule of loss was unreasonably high, without being tempered by a sum in mitigation.

192. Ms Wedderspoon reminded us that costs are the exception rather than the rule. She submitted that the Tribunal had simply preferred the Respondent's evidence and that we had not made any findings of dishonesty. The Claimant was not in good mental health after she left the 1st Respondent's employment and she genuinely believed in the merits of her case. Further, the Respondents had previously made an application to strike out the claim, or that the Claimant should be required to pay a deposit as a condition of continuing with the claim, at the Preliminary Hearing but Employment Judge Blackwell declined to do either.

The law

193. Rule 76 of the Rules provide:

"(1) A Tribunal may make a costs order……., and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

194. Mr Arnold referred us to the following cases:

Gee v Shell (UK) Limited [2002] EWCA Civ 1479; Npower Yorkshire Ltd v Daly EAT/0842/04; Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT: Barnsley Metropolitan Council v Yerrakalva [2012] IRLR 78, CA; and Power v Panasonic UKEAT/0439/04/RN.

195. When dealing with an application for costs the Tribunal must apply a two-stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.

Conclusions

196. We were not satisfied that the Claimant's claims had no reasonable prospect of success or that she had behaved unreasonably in pursuing the claim. Firstly, the Claimant succeeded in her wrongful dismissal claim. Secondly, the Respondents' previous application that her claim had no reasonable prospect of success had failed. Employment Judge Blackwell acknowledged that the documentary evidence was overwhelmingly in the Respondent's favour, but it was a case where the evidence needed to be heard in context and by a full Tribunal. Accordingly, he did not consider that the claim had no reasonable prospect, or little reasonable prospect, of success.

197. Thirdly, in our conclusions on liability, we preferred the Respondents' evidence but made no findings of dishonesty on the Claimant's part. Finally, we were mindful that the Claimant had suffered increased anxiety after leaving the 1st Respondent which was reflected in her medical notes, and for which she was receiving medical help. This may well have impaired her perception of events.

198. It considering the above, we were satisfied that the circumstances in Rule 76(1) (a) and (b) did not apply so were not required to move to the second stage of the test.

199. Accordingly, no order for costs was made.

Employment Judge **Victoria Butler**

Date 20 November 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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