Case Number: 3201883/2019 A

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Bethan Loots**

Respondent: **The Governing Body of St Elizabeth Catholic Primary School**

Heard: **East London Hearing Centre (by cloud video platform)**
On: **10, 11, 12 & 13 November 2020**

Before: **Employment Judge G Tobin**
Members: **Ms A Berry**
Ms M Daniels

Representation:
Claimant: In person
Respondent: Mr G Sims (counsel)

JUDGMENT having been sent to the parties on 14 December 2020 and reasons having been given at the hearing and having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The hearing

1. This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through the cloud video platform ("CVP") of HM Courts & Tribunal Service. All participants were remote (i.e., no one was physically hearing Centre). A face-to-face hearing was not held because it is not practical in the light of the coronavirus pandemic and the governments ensuing restrictions.

The case

2. The case was summarised by Employment Judge Crosfill following the case management hearing of 2 December 2019. The claimant contended that she was employed as a "Class Teacher". The claimant became pregnant and took a period of maternity leave which included some weeks of additional maternity leave. The claimant complained that on her return to work she was not allocated a class to

teach but was expected to teach a class jointly for 3 days and provide support for other teachers for the other 2 days of the week. The claimant worked for a short period and took some sickness absence and then resigned in circumstances where she says she was entitled to treat herself as constructively dismissed. The respondent denied pregnancy and maternity detriment and discrimination and also that they fundamentally breached the claimant's contract of employment. There was a list of issues in the hearing bundle at page 64 to 66 drafted by EJ Crosfill.

The relevant law

3. The relevant applicable law for the claims which we considered is as follows.

4. Section 18 of the Equality Act 2010 ("EqA") reads:

> (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).

5. S18 EqA makes it unlawful during the protected period to treat a woman unfavourably on the grounds of her pregnancy, or on the grounds that she is exercising or seeking to exercise a statutory right to maternity leave. No comparator is needed, and no justification defence is available. Pregnancy or maternity leave must be a substantial reason for the treatment, see *O'Neill v Governors of St Thomas More [1996] 372*. Once the protected period has ended a comparator will be needed. Following *Brown v Rentokill [1998] IRLR 445 ECJ*, the protected period referred to in s18 EqA is defined as beginning with the woman's pregnancy and ending at the end of the maternity leave or when the claimant returned to work, although in the circumstances of this case it is relevant to note the provisions of s18(5).

6. According to regulation 18(1) and regulation 18A(1)(a) and (b) of the Maternity and Parental Leave etc Regulations 1999 ("MPLR"), a woman who takes ordinary maternity leave is entitled to return to the job in which she was employed before her absence with her seniority, pensions and similar rights as they would have been had she not been absence, and on terms and conditions no less favourable than they would have been had she not been absent. The statutory right to return to work after additional maternity leave is slightly different. The woman's right is to return to the job in which she was employed before her absence, *or, if not reasonably practical for the employer to allow her to return to that job, for a reason other than redundancy, to a suitable and appropriate job*:

   a. on no less favourable terms and conditions as to renumeration; and
   b. with her seniority, pension and similar rights preserved as they would have been if the period of employment prior to additional maternity leave were continuous with the employment following her return to work.

7. "Job" for the purposes of additional maternity leave, is defined as the nature of the work which the claimant is employed to do in accordance with the contract and the capacity and place in which she is employed: regulation 2(1) MPLR. In *Blundell v Governing Body of St Andrew's Catholic Primary School [2007] IRLR 652*, the Employment Appeal Tribunal gave guidance on what the *same job* is, saying that a returner should come back to a work situation as near as possible to that which she left, but held that a teacher could not insist on returning to teach the same class after her leave. The EAT went on to say that in determining the appropriate level of specificity - nature, capacity and place - the Tribunal should have in mind both the purpose of the legislation – to ensure that there is as little dislocation as reasonably possible in the employees working life – and the fact that the MPLR themselves provide for exceptional cases where it is not reasonably practical for the employer to permit the employee to return to her previous job, in which case the employer may provide a job which is not the same job, but is nonetheless suitable and appropriate

8. When the protected period ends, i.e. when the claimant returned to work, then (subject to s18(5) EqA) any unfavourable treatment because of her pregnancy or maternity leave could only amount to direct sex discrimination under s13 EqA, rather than pregnancy or maternity discrimination. Under s13 EqA, there is the usual requirement for a comparator (namely a man or non-pregnant woman) as direct discrimination precludes less favourable treatment (and s18 EqA precludes unfavourable treatment).

9. Because there is potential for overlap between pregnancy and maternity discrimination and sex discrimination, s18(7) EqA specifically precludes claims being based on the direct sex discrimination provision in s13 when it can be based on the pregnancy and maternity discrimination provisions in S18.

10. Before considering whether the new job on offer is suitable and appropriate the employer must first show that it was not reasonably practical to reinstate the employee in her old job, see *Stelfox v Westco Building Components Limited ET Case No: 15083/95*. Only once it is shown that it was not reasonably practical to allow an employee to return to her old job, she must be allowed to return to another job which is both "suitable for her and appropriate for her to do in the circumstances": regulation 18(2) MPLR.

11. The question of whether the new job on offer is suitable and appropriate cannot be decided simply by reference to the employee's job title, see *Kelly v Secretary of State for Justice UKEAT/0227/13*.

12. S13(1) EqA precludes direct discrimination:

> *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.*

13. Under s4 EqA a protected characteristic for the claimant includes her sex.

14. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

The burden of proof and the standard of proof

15. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

16. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

17. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that the discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the difference of sex and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

18. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an

unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. sex) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

19. S47C Employment Rights Act 1996 ("ERA") says:

> (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,
> …

20. Under s47C ERA employees are entitled not to be subject to any detriment by an act, or any deliberate failure to act, by their employer for any reason specified in regulation 19(2) Maternity and Parental Leave etc Regulations 1999. The reason relevant here is that the employee sought to take or avail herself of the benefits of any of the terms and conditions of her employment preserved by s73 ERA and regulation 9 MPLR during her additional maternity leave.

21. Regulation 18 MPLR deals with the right to return to work after additional maternity leave and although were refer to it above it is germane to set it out in full:

> (1) An employee who takes parental leave for a period of four weeks or less, other than immediately after taking additional maternity leave, is entitled to return from leave to the job in which she was employed before her absence.
>
> (2) An employee who takes additional maternity leave, or parental leave for a period of more than four weeks, is entitled to return from leave to the job in which she was employed before her absence, or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.
>
> (3) An employee who takes parental leave for a period of four weeks or less immediately after additional maternity leave is entitled to return from leave to the job in which she was employed before her absence unless—
>
> (a) it would not have been reasonably practicable for her to return to that job if she had returned at the end of her additional maternity leave period, and
> (b) it is not reasonably practicable for the employer to permit her to return to that job at the end of her period of parental leave;
> otherwise, she is entitled to return to another job which is both suitable for her and appropriate for her to do in the circumstances.
>
> (4) Paragraphs (2) and (3) do not apply where regulation 10 applies.
>
> (5) An employee's right to return under paragraph (1), (2) or (3) is to return—
>
> (a) on terms and conditions as to remuneration not less favourable than those which would have been applicable to her had she not been absent from work at any time since—

> (i) in the case of an employee returning from additional maternity leave (or parental leave taken immediately after additional maternity leave), the commencement of the ordinary maternity leave period which preceded her additional maternity leave period, or
> (ii) in the case of an employee returning from parental leave (other than parental leave taken immediately after additional maternity leave), the commencement of the period of parental leave;
> (b) with her seniority, pension rights and similar rights as they would have been if the period or periods of her employment prior to her additional maternity leave period, or (as the case may be) her period of parental leave, were continuous with her employment following her return to work (but subject, in the case of an employee returning from additional maternity leave, to the requirements of paragraph 5 of Schedule 5 to the Social Security Act 1989(**1**) (equal treatment under pension schemes: maternity)), and
> (c) otherwise on terms and conditions not less favourable than those which would have been applicable to her had she not been absent from work after the end of her ordinary maternity leave period or (as the case may be) during her period of parental leave.

22. Regulation 19(6) and (7) make provision for determining when a continuing act or a failure to act is done for the purposes of regulation 19(5), i.e. during the employee's ordinary or additional leave period. Where a detrimental act extends over a period, the last day of that is the date on which the act is taken to be done: regulation 19(6)(a). Unless there is evidence to the contrary, an employer will be taken to have decided not to act either when it does something which is inconsistent with doing the failed act or, failing that, at the end of the period within which it might reasonably have been expected to have done it: regulation 19(7).

23. S95(1) ERA provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

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

24. An employee may only terminate his contract of employment without notice if the employee has committed a fundamental breach of contract. According to Lord Denning MR:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

25. In *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84* the EAT held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

26. Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

27. *Western Excavating* established that a *serious* breach is required. *In Brown v Merchant Ferries [1998] IRLR 682*, the Court of Appeal accepted that if the employer's conduct is seriously unreasonable, this may provide evidence that there has been a repudiatory breach of contract, but, on the facts, held that the conduct in

question fell far short of a repudiatory breach by the employer. Mere unreasonable behaviour is not enough.

28. In *Hilton v Shiner [2001] IRLR 727* the EAT confirmed that the employer's conduct must be without reasonable and proper cause. *Shaw v CCL Ltd UKEAT/0512/06* dealt with a case of a woman resigning solely because her employer rejected her flexible working application. This rejection amounted to sex discrimination and the EAT held that the discrimination amounted to a breach of the implied duty of trust and confidence. Indeed, discriminating against an employee will usually amount to an repudiatory breach of contract. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

29. If an employee contends that a particular matter amounted to a "last straw" entitling her to resign, the "last straw" must not be entirely innocuous. It need not be, in itself, a breach of contract, but it must contribute to the series of events alleged to amount to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

30. The employee must accept or rely upon the breach within a reasonable period following the fundamental breach of contract to avoid being taken as having affirmed the contract and waved the breach. In *Bunning v GT Bunning & Sons Ltd [2005] EWCA Civ 293* the employer had breached the claimant's contract when it failed to carry out adequate risk assessments when the claimant said she was pregnant. However, the Court of Appeal held that she waived the breach when she accepted another job with the employer. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. In *Fereday v South Staffordshire NHS PCT UKEAT/0513/10* the claimant invoked the grievance procedure, which resulted in a decision adverse to her on 13 February 2009, nevertheless she resigned, by letter dated 24 March 2009. The EAT upheld the Employment Tribunal's decision that the respondent had repudiated her contract of employment, but that the claimant had affirmed the contract by her delay. A prolonged delay of nearly 6 weeks between the last breach of contract (the grievance decision) and the claimant's resignation was an implied affirmation, bearing in mind that the claimant was expecting or requiring the respondent (the employer) to perform its part of the contract of employment by paying her sick pay.

31. Delay is one of many factors to which the Tribunal may have regard to when deciding whether the contract has been affirmed. Other relevant factors might be illness (see *Chindove v Morrisons Supermarkets plc UKEAT/0201/13 and UKEAT/0043/14*), whether a grievance has been raised, whether there are ongoing discussions as to whether or not some accommodation might be reached, etc. The ultimate question is: whether in all the circumstances, the employees conduct had demonstrated an intention to continue the contract; see *Adjei-Frempong v Howard Frank Ltd EAT/ 0044/15*.

The evidence

32. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the statements and some documents that had been identified for preliminary reading. We were presented with a hearing bundle in excess of 400 pages as well as some additional documents, most notably a flowchart in respect of the sickness absence procedure.

33. The Employment Judge advised the parties at the commencement of the hearing that we may not read any document that had not specifically been referred to us either in the witness statements or at the hearing. So, if a document had particular relevance, it needed to be brought to our attention.

34. In making our findings of fact, we regarded the contemporaneous evidence as key. Contemporaneous documents are letters, emails, notes of meetings, etc prepared at the relevant time. We also took into account a lack of contemporaneous documentation, where we expected to see complaints or clarification.

35. We also took some account of a lack of witness evidence or a lack of detail in the witness evidence in circumstances where (with no adequate explanation proffered) we expect to see the relevant witnesses give evidence or where generalised assertions have been made without any explanation.

36. We heard evidence from the claimant who provided a detailed 17-page witness statement. The claimant confirmed her statement and was cross-examined by the respondent's barrister and she answered questions from the Tribunal. Ms Angelina John, Head Teacher, provided a 16-page statement, and gave evidence for the respondent. She similarly confirmed her statement and was asked questioned by the claimant and the Tribunal.

37. We approached witness statements with a degree of caution. Witness statements are, of course, central; they are important to explaining the surrounding context of the contemporaneous documents. However, the witness statements were written many months after the events in question and they were written through the prism of either advancing or defending the claims or allegations. We reminded ourselves that it is often the case that where evidence is contradictory. It does not necessarily mean that one party has lied, as this can arise from an incorrect recollection of events or interpreting events through a particular perception.

38. We regarded the claimant as giving credible evidence. She was clear and did not appear to over embellish her account. The claimant grew suspicious of the respondent's motives and actions, and in particular, Ms John's response, as matters progressed. This is understandable when there was a lack of clear communication in respect of the claimant's risk assessment, the respondent's cancellation of the claimant's keeping in touch ("KIT") days and the respondent's purported confusion about the claimant's return to work date. We did not accept that the claimant's unwillingness to ascribe more innocuous motives for the respondent's application of the sick policy did not undermine the accuracy or truthfulness of her evidence.

39. Ms John's statement does not set out her decision-making processes in circumstances where this should be explained in detail and underpinned by

reference to documents and/or meetings. At various stages she attempted to give evidence for a key witness, Stephanie Neal, who the respondent did not call to give evidence. Ms John sought to minimise the distinction between a "teacher" and a "class teacher" as a key part of her evidence, which was clearly an after-the-event justification and motivated by defending this claim. Indeed, in a key letter to the claimant on 26 November 2018, Ms Johns sought to reassure the claimant that she was a "class teacher". So, Ms John recognised this status, and the distinction, and the importance of this to the claimant at the time. This undermined the credibility of her account. When pressed, Ms John gave clear and reasonably consistent evidence. However, these answers were only in response to the Tribunal's request for clarification and not particularly helpful to her case. Where there was a conflict in the evidence, and particularly where there were no corroborative documents, we preferred the evidence of the claimant.

Our findings of fact

40. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not decided upon all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where this is not obvious or is otherwise appropriate, we have set out why we have made these findings.

<u>The claimant's pre-maternity role</u>

41. The claimant commenced work with the respondent on 1 September 2014.

42. A Teacher is a generic job description as there are different types of Teachers reflecting different experiences, seniority, and status. The claimant strove to be a Class Teacher. A teacher that provides planning for other teachers and/or pupil(s) interventions is no less valuable and will have largely interchangeable teaching skills. However, in the claimant's perception and in her assessment of the perception of others status mattered and being a Class Teacher mattered.

43. A primary school Class Teacher has more wide-ranging responsibilities and reporting requirements than a Teacher who is in a more supporting role. All Teachers should have time for planning, preparation and assessment ("PPA") for their lesson plans and marking. According to the claimant should comprise around 10% (or slightly more) of the Class Teacher's timetable.

44. Prior to her departure for maternity leave, the claimant was a Class Teacher with additional responsibility for her year group. The claimant was a reasonably senior teacher and she had achieved a reasonably high status. This mattered for the claimant and seemingly job titles were also significant for Ms John, who styled herself "*Head Teacher*" in correspondence.

45. Ms John sought to minimise the distinction between Teacher and Class Teacher, but she accepted the claimant's evidence that this distinction mattered. We accept the claimant's evidence that she applied for the post of Class Teacher. She was offered the post of Class Teacher by Ms John on 9 May 2014:

> Dear Miss Evans
>
> **ST ELIZABETH CATHOLIC PRIMARY SCHOOL CONDITIONAL OFFER OF APPOINTMENT FOR THE POST OF CLASS TEACHER**
>
> I write with regard to your recent interview for the post of Class Teacher and, on behalf of the governors, I am pleased to offer you the appointment subject to receipt of satisfactory clearance…

46. The School Business Manager referred to the claimant as having "*been offered the post of Class Teacher*" when s/he wrote to the claimant's previous Head Teacher for a reference on 13 May 2014. The form enclosed identified: "*Post applied for – Class Teacher*". Indeed, the referee used to same designation stating: "*Miss Evans has been a class teacher here since 2008*…"

47. The contract of employment itself refers to the more generic "Teacher" role or post on the header page. However, surprisingly, the contract did not identify the role under section 1 "*THE POST*". Instead, this referred to the claimant's job description. We were not given a job description, although we were told that there was one in existence, and it was clearly relevant to these proceedings. A contract of employment is not defined in one single document. The contract of employment can be made up of a number of different sources, notably the advert, the job description and surrounding letters as well as to contract. However, within the contract in ascertaining the nature of an employee's role, the job description is key and that has not been provided to us.

48. On 26 November 2018 Ms John wrote to the claimant to reassure her: *"… You are employed as a class teacher at the School and this will not change upon your return to work…*"

49. Therefore, as a matter of fact, we determine that the claimant was employed as a Class Teacher.

Risk assessment

50. The claimant said in evidence that she told Ms John of her pregnancy around late October 2017, which we accept. The claimant wrote to Ms John formally confirming her pregnancy on 18 December 2017. In this letter, the claimant specifically requested that the respondent undertake a health and safety risk assessment [Hearing Bundle 110].

51. It is quite clear that there was a risk assessment undertaken because one has been provided to us in the hearing bundle at pages 116 to 123. This is not dated.

52. There was an obligation on the respondent to undertake a risk assessment, specifically under Regulation 3(1) Management of Health and Safety at Work Regulations 1999. The claimant asserts, and it was obvious to the Tribunal, that as a pregnant Class Teacher she would encounter specific risks in terms of lifting, possible infections, etc so it was important that a risk assessment be undertaken and that any generic risk assessment would be insufficient.

53. We accept Ms John's evidence that she passed this task to her colleague, Miss Stephanie Neal, the human resources administrator. The risk assessment was not done promptly or even timely. On 16 January 2018, the claimant raised concerns

with Ms John about her volume of work. These concerns were not addressed, and the claimant then went sick for 7½ days. At this point no proper risk assessment had been undertaken. This was almost 3 months after the claimant formally told Ms John that she was pregnant and almost 1 month after she had asked for a risk assessment.

54. The claimant chased Miss Neal in respect of her risk assessment, which Miss Neal acknowledged [HB111] but nothing seems to have come of this. The claimant was unsettled enough to approach the local authority in respect of the risk assessment. The failure to undertake a risk assessment was a clear detriment at this time because the claimant was anxious about her playground duties, school trips and her work in the medical room.

55. Following yet another prompt, it was not until 27 April 2018 that the claimant first saw a risk assessment. The claimant was about 7 months pregnant at that stage. This was over 4 months after asking for a risk assessment. Although a risk assessment was eventually done, it was perfunctory and not fit the purpose. It did not address the claimant's concerns in any meaningful way, notwithstanding that the respondent noted that by that late stage the claimant's playground and medical room duties had been reduced to 1. The claimant disputed this. Whilst Ms Johns said that the claimant was only on 1 playground duty, we preferred the clear evidence to the contrary of the claimant. We accept the claimant's evidence that, for example, she undertook playground duties, which could be variable but that was mostly between 2 and 4 times per week in accordance with the playground rota. There were no clear actions indicated and no reviews built into the risk assessment.

The claimant's maternity leave

56. The claimant went on maternity leave in June 2018. Her last working day was 22 June 2018. The claimant's son was born on 25 June 2018.

57. The respondent set out the claimant's maternity leave and pay entitlement in an undated note which is copied at page 130 of the hearing bundle. The bundle index dates this document as 22 June 2018, which appears accurate from the text and from the claimant's contention that she discussed her return date with Miss Neal just before she left on maternity leave. The claimant said, and we accept, that Miss Neal recorded the claimant's intention to return to work on 4 February 2019. The claimant said Miss Neal emphasised to her, and kept repeating, that she did not have to commit to a return date at that stage, which accounts for the reference to 25 March 2019 as a possible return dated, but we determined that the claimant was clear at this point that she intended to return to work on 4 February 2019.

58. The governing body met on 12 July 2018. Ms John (incorrectly) reported that the claimant was due back from maternity leave in March 2019 [HB134-135]. We determine that this was 2 days before we can identify Ms John preparing the document in which she finalised her teaching allocation for the academic year 2018/2019 [HB138].

59. This document showed 2 classes for Year 3. 1 class was allocated to Mr Paul Lubwama (a Class Teacher) and the other class was allocated on a 50:50 split (i.e.

2.5 days each) to Ms Tracy Jennings (the deputy headteacher) and Mr Frankie Asante (another Class Teacher).

60. We determine that this document reflected the plan for the allocation of Class Teachers and other teachers for the next academic year. We reject Ms John's evidence that this was a working draft document, as we have not been presented with any other later allocation document or draft document. Whilst we determine that this document was the plan for class allocation and teaching assignments for the next academic year, it also records the respondent's intentions as of July 2018.

61. The plan shows that the claimant (and Ms Brenda Smith) was solely allocated PPA, which is puzzling as PPA is usually the time teachers utilise for their lesson plans and marking. The claimant said, and we accept, that this document demonstrates the respondent's intention to allocate the claimant (and Ms Smith) to cover the other Class Teachers for their PPA. Given that neither of these 2 teachers were allocated a class, there would not be significant need for planning and marking work. We make this finding because the claimant is on the same line as Ms Smith (who had not been assigned a class to teach) and the only difference appears to be that Ms Smith is noted in brackets is working 3 days per week and the claimant is noted as being on maternity leave. So, at this stage we find that it was Ms John's intention to allocate the claimant in some form of PPA cover role or supernumerary role. Significantly, another member of staff (Ms Jannalene Morris) was on maternity leave and was allocated to a year group – nursery – although her return was set for October 2018.

62. Ms John did not enter the claimant's maternity leave return on the proposed Class Teacher allocation for the next year. Mr John said in evidence that she took into account in her allocation certain variables: the claimant might not return to work following her maternity leave; or that she might want to pursue part-time or flexible working; or that she might want to return to work full-time. Ms John said she did not know at this time which option the claimant would want to pursue when her maternity leave ended. This is in clear contrast to the claimant's indication that she intended to return to work full-time on 4 February 2019, which we accept she made and was clear about. Ms John's attitude was to deal with the claimant's return when this presented as an immediate matter to be dealt with, i.e. there was little regard for the claimant's indication and no forward or contingency planning surrounding the claimant's maternity leave and her return to her pre-maternity leave job.

63. The claimant was clear that she informed Miss Neal of her intended return date 4 months in advance of her return to work. The claimant said this at various occasions during her evidence and made the point in her witness statement. We believe her and make this finding of fact.

64. Miss Neal wrote to the claimant on 19 October 2018 in respect of her KIT ("keeping-in-touch") days and apparently seeking clarification in respect of her intention to return to work in February 2019 [HB140]. Miss Neal's letter mooted whether this would be before or after the half-term break, which was 18 to 22 February 2018. Miss Neal was not available to clarify this matter and the claimant said that she spoke to Miss Neal at this time who conveyed that it might be easier for the school if the claimant was to return after the half term break. The claimant declined to reschedule her return to work as she wanted to return as previously arranged, particularly as she needed to resume her full wages. We accept the claimant's

evidence, supported by Miss Neal's written confirmatory note [HB130], that following 19 October 2018, the claimant identified again that she would return to work on 4 February 2019.

65. On 19 October 2018 the claimant chased her employer in respect of KIT dates. Indeed, that was the purpose of the telephone call. The claimant gave some dates of her availability and we are satisfied with her evidence that she arranged with her husband for him to take some holiday leave to look after their small son to facilitate the claimant's KIT return to school.

66. Miss Neal wrote to the client, suggesting a timeframe. She asked the claimant to give this some thought, which is odd, because that is why the claimant had called her. Miss Neal did state in the letter that KIT dates could be taken as full days or ½-days.

67. The claimant said that Ms Johns cancelled her KIT days. Ms John said she only cancelled the end of October/early November inset date, which is documented at page 141 of the Hearing Bundle. We are not satisfied that there was a good reason to cancel this KIT date as Ms Johns could not provide a convincing explanation as to why the claimant could not attend the inset date or the well-being session in the afternoon. The well-being session could clearly apply to the claimant irrespective of her maternity leave absence and we note that KIT dates were specifically highlighted to be either ½-day or full day.

68. Mr John said that she regarded it as the responsibility of the claimant to contact the respondent to arrange her KIT days. This is indicative of Ms John's dismissive attitude towards the claimant. The claimant had chased the school in respect of her KIT days. Instead of setting dates Ms John had bounced this back to the claimant by merely indicating an acceptable time frame and when Ms John arbitrarily cancelled these dates and she expected the claimant to start the prolonged process again. The claimant's husband had used up all his holidays available to accommodate Ms John's initial preference so we can understand why the claimant did not follow this up, when her available dates were cancelled belatedly. It is inexplicable why the respondent did not revert to the claimant to try to set appropriate KIT dates given the previous cancellations. We regard this as indicative of an indifferent attitude shown by the respondent in respect of this important maternity contact provision and also in respect of the claimant's maternity leave generally.

69. In any event, on 6 November 2018, the claimant reaffirmed that she wanted to return to work on 4 February 2019, during her telephone conversation with Ms John. The claimant said, which we accept, that she wanted to return to work full-time. There does not appear to be much dispute between the claimant and Ms John on this point; although, Ms John said that the claimant had said during this telephone call that she has not thought about full-time working or flexible work. At the hearing, Ms John when into some detail to explain her thinking that the claimant might belatedly want to pursue part-time working. This was not credible, and we reject Ms John's assertion. The claimant's age, her experience and her working environment make such a contention not credible and seemingly condescending. We are satisfied with the claimant's account that she did not consider part-time or flexible working to be an option for her family circumstances and that she had rejected this option before her conversation with Miss Neal of 22 June 2018, some considerable time before this

conversation with Ms John. It was always the claimant's intention to return to work full time around the end of the claimant's ordinary maternity leave.

70. On 26 November 2018 Ms John wrote to the claimant as follows:

> Firstly, I must state that you do have a job to return to once your maternity leave ends. You are employed as a class teacher at the school and this will not change upon your return to work. It is it may be unlikely [sic] that I will be able to place you back in Year 3 mid-way through an academic year as the pupils are currently settled with their current teachers, but you will be able to come back to work without any change to your terms and conditions of employment. I hope that reassures you.
>
> During our phone call on the 6th November 2018 you raised the topic of childcare. I propose that you consider whether you wanted to vary your days or hours of work for the school to consider, which you seemed unaware of. By this, I mean that you could put in a flexible working request if you felt it necessary to do so. If you wish to do this, then please can I request but you put this in writing as soon as possible, so that full consideration can be given to your request in good time prior to your return to work.
>
> At the point of writing, I am unsure as to your intended date of return to work. I would be grateful if you could also confirm this in writing as per requirements outlined in your Maternity Leave documentation. Once I have your intended date, I will be able to strategically plan forward to ensure the best scenario for pupils and staff…

71. Ms John's letter was disingenuous as the claimant had not raised childcare issues. We reject Ms Johns evidence that she wanted to give the claimant the option of part-time working. We find that Mr Johns motive was to attempt to steer the claimant into a part-time role to accommodate her poor strategic planning in respect of her teaching allocations for the academic year 2018/2019. The claimant rejected such a manoeuvre. As stated above, there was no reason for Ms John to be unsure of the claimant's intended return to work date as the claimant had made this quite clear as early as 22 June 2018.

72. The claimant met with Ms John on 5 December 2018 with her trade union representative. On 11 December 2018 Ms John wrote to the claimant about her arrangements to return to work [HB173]. Ms John proposed a phased return to work. The claimant did not have a disability, nor had she had any significant or relevant illness during her maternity leave. The claimant's KIT days were specifically to accommodate her smooth return to work, so it is unsurprising that the claimant was upset and unsettled by the notion of being subjected to a 2-week phased return to work from 4 February 2019. This was particularly as the letter indicated that such a phased return to work was the outcome of discussions with the present Year 3 Class Teachers and the Leadership Team.

73. The letter set out that the claimant would return to work as a "classroom teacher" for 3-days and then undertake streaming or group work or interventions. The claimant wrote to her trade union representative the next day [HB174] saying that much of the work proposed was largely undertaken by teaching assistants and this was a demotion from her pre-maternity role. We accept that this letter was not sent to the respondent; nevertheless, it provides a contemporaneous note of the claimant's perception at that time. The letter from Ms Johns also set out that the claimant would do 1-day PPA cover – which effectively put the claimant into a supernumerary or peripatetic-type role – i.e. this was not the role of a Class Teacher. We determine that Ms John, in her letter of 11 December 2011 informed the claimant that she would return to her pre-maternity role for 3-days instead of her pre-existing 5-days.

The claimant's return to work

74. The claimant role was not resolved prior to her return to work on 4 February 2019.

75. At a meeting on the first morning of her return, Ms John instructed the claimant to fit into her (ie Ms John's) pre-determined arrangements. The Class Teacher allocation plan for 2018/2019 [HB138] put Mr Asante teaching one Year 3 class with Ms Jennings on 2½-days each. Ms John redeployed Ms Jennings to Year 6 to cover another Class Teacher's sickness absence and the claimant was slotted into Ms Jennings 'position for 2½-days. This left some confusion about Mr Asante's role in the classroom. Mr Asante was less qualified and less experienced than the claimant and the claimant had previously supervised Mr Asante as part of his teacher training. However, the claimant said, which we accept, that Ms John indicated that Mr Asante was to be the lead Class Teacher, which was reinforced by Ms John's instruction to the claimant that she should observe Mr Asante, follow his lead and learn his ways [of teaching]. We accept this noticeably clear account from the claimant, which is corroborated by contemporaneous documents. However, most significantly this was corroborated by the teaching timetable at page 212.

76. This was the nub of the claimant's complaint. The claimant was a Class Teacher pre-maternity leave. However, on her return she was relegated to a job share role with a male and less experienced teacher, under his direction, for at least 2-days per week.

77. The claimant set out her first 2 weeks return to work in her diary notes at page 247 of the hearing bundle, which we regard as an accurate portrayal. She had not been granted access to the Integris computer system and she was effectively on a job share – as a junior partner. Mr Asante and Mr Lubwama planned the streaming sessions, and the claimant was allocated the work that these 2 male Class Teachers deemed appropriate which was the group-work Mr Lubwama and Mr Asante preferred not to do. The claimant was not given any allocated classroom space and she was not provided with teaching equipment. This was behaviour the respondent should not have permitted.

78. On 12 February 2019 Ms John wrote to the claimant about her return to work

> I know there has been some discussion about your role and I understand that you have had concerns about returning to work, in particular, but you thought you would be coming back to how things were before you left, which was that you were the permanent class teacher for 3L.
>
> Unfortunately, since you left full leave in June, the school has had to consider how best to utilise existing staff to cover your absence and how best to support pupils in the class. A decision was taken to cover your absence by using two teachers and this has worked very well for the pupils who are becoming more settled and stable. For this reason, I'm going to leave Mr Asante in class on Wednesday mornings, Thursdays and Fridays, to allowed pupils a degree of continuity and consistency. You will be reintroduced as the class teacher overtime. This means that you will work with Mr Asante on these days. For the sake of clarity, you will both be Class Teachers/Teachers. The class name will be 3EL: this will change after the half term.
>
> I appreciate that this is not exactly the same arrangement as was in place when you left go on Maternity Leave, but change happens and it is part of my role to manage such change as and when it arises. The working arrangement will just be until September 2019 when you will be placed in sole charge of a class…

Ms John then set out the respondent's understanding of the law and proceeded to say:

> I would argue that you have returned to work in the same position, ie that of a Teacher. However even if you do not feel that this is the case. I do not think that you can reasonably dispute that you have returned to a position on terms and conditions that are less favourable, as they are exactly the same. The role is still that of a Teacher. Therefore, it is 'suitable and appropriate'. You have not been demoted or treated less favourably. The requirement of the class and school have meant that it is not reasonably practical for you to return to the exact same class, but you will still employed on the same terms as a Teacher.

79. The claimant said, which we accept, that there was some confusion and discord over her role and that of Mr Asante's. This was predictable as Ms John had not clarified the position with Mr Asante and also with the other class teacher, Mr Lubwama. It took Ms Macleod's involvement to try to reconcile this dispute. We accept the claimant's contention that Mr Asante did not understand the arrangements, particularly as for ½-day per week when together, the claimant was supposed to be the lead Class Teacher according to the timetable, which contrasted with Ms John's direction and her assertion of Mr Asante's priority.

80. The claimant was not relegated to a teaching assistant role as contended, but we find that she was relegated from her sole Class Teacher's role. She was a Class Teacher for 2-days per week when Mr Asante, a man with significantly less experience, was not at school but for 2½-days she was in a subordinate position and for ½-day relations were strained, and the position was not clear.

Sick leave

81. The claimant was signed off sick with work related stress on 22 February 2019, which was during the half time break. The claimant did not return to work thereafter.

82. After 4 working days absence, Ms John wrote to the claimant, on 28 February 2019, asking for completion of a stress risk self-assessment and mooting an occupational health referral [HB307]. This was surprisingly hasty; although we could not assess how this accorded with the respondent's sickness policy, because inexplicitly the respondent did not include in the hearing bundle the full sickness policy (or as Ms John referred to in correspondence the Absence Policy).

83. The claimant provided a 1-month sicknote on 9 March 2019 [HB313] and another work-related stress and anxiety sicknote on 5 April 2019 [HB367].

84. On 18 March 2019 the claimant wrote to the Chair of Governors with a formal grievance in respect of a number of specific matters most notably discrimination whilst on maternity leave, bullying, being treated differently to other staff both in school and in respect of the implementation of the sickness policy, being harassed whilst off sick, Ms John misleading the claimant about the circumstances of a child with behavioural problems and irregularities in providing a job reference [HB328-338].

85. On 21 March 2019, Ms John wrote to the claimant setting a formal absence review meeting for 29 March 2019 [HB349-351]. The claimant perceived Ms John's implementation of a formal process against her as the start of a process aimed at her dismissal. We accept Ms John's account that at this stage she did not know about grievance against her. The claimant Informed Ms John that she would not attend her meeting and that until her grievance was concluded she would not be attending the

school premises and would not be attending any meetings conducted by her [HB353].

86. On 25 March 2019 Miss Neal wrote to the claimant to advise her that her Sickness absence would be managed by Father David Evans, the Vice Chair of Governors [HB356]. This was appropriate in the circumstances.

87. On 29 March 2019 Miss Neal wrote to the claimant to advise her that if she did not confirm she would attend an occupational health assessment, the respondent would withhold sick pay [HB358]. Miss Neal referred to the Burgundy Book (which sets out teachers' national terms and conditions of service). This was the same day that the Headteacher of Fleecefield Primary School wrote to the claimant withdrawing her job offer for the claimant, citing an unsatisfactory reference from the respondent [HB359].

The claimant's resignation

88. The claimant resigned her employment on 3 April 2019. She resigned on notice which took effect on 6 May 2019 [HB364-365]. The claimant stated that her resignation arose as a result of Ms John's failure to return her to her position as a Class Teacher following her maternity leave. The claimant contended that this was both a breach of the EqA and also a fundamental breach of contract. She complained of being undermined by her colleagues and marginalised in her role. The claimant complained that Ms John made contradictory and false statements as to why she could not return to her original role and contended that Ms John was not committed to let the claimant return to her original position because of the absence of direct maternity cover. The claimant complained of harassment by the threat of an occupational health referral allied to the threat to withhold her wages. The claimant complained of the acceleration of the respondent's sickness policy from 4 weeks to 2 weeks and said that this was the final straw.

89. On 8 April 2019 Ms John wrote to the claimant refusing to accept her resignation [HB370-370]. She asked that the claimant attend a meeting to discuss this issue further. Ms John recommended that the claimant seek support from her GP before she took such a step. The claimant's solicitor thereafter corresponded with the respondent and its representatives.

90. The claimant was signed off by her GP with work related stress and anxiety until the end of the claimant's employment.

Our determination

91. In respect of the list of issues. The claimant withdrew 1.4 as an allegation of discrimination at the start of the hearing instead relying on this contention as background information. The claimant's maternity and/or discrimination complaints were in respect of: her request for a risk assessment; her treatment during her maternity leave and the ensuing return to work; her employer's response to her sick leave and her constructive dismissal. In respect of issues 1.2, 1.3, 1.5 1.6 – these will clearly indicate that the claimant asserted that she was undermined and marginalised in the changes implemented during her maternity leave and the failure

to accommodate her in her pre-maternity role when she came back to work on 4 February 2019.

92. Ms John neglected to chase Miss Neal about the risk assessment. This epitomised her indifferent attitude towards the claimant's maternity leave. If the risk assessment had been properly completed, then, from December 2017, at least, it should have addressed the claimant's concerns about her workflow, her playground duties and her first aid duties, in particular her contact with pupils during the early stages of her pregnancy.

93. We accept that there is a detriment in that the risk assessment was supposed to provide a structure in addressing the claimant's health and safety risks throughout her pregnancy. On 16 January 2018 the claimant raised concerns about her volume of work. Had the risk assessment been done at this stage then the claimant may not have gone sick for 7½ days. Our findings of fact note the upset and worry caused to the claimant by the respondent's failures in this regard. Indeed, she was so concerned that she took up the matter with the local authority, although no to any great assistance. When the risk assessment was eventually undertaken, over 4 months late, it was not done properly, it was finalised too late and it was not properly implemented, and this caused the claimant some further anxiety.

94. We assess that the risk assessment should have been undertaken within a week or so of the claimant's formal request (excluding the Christmas holiday shutdown). So, this means that the risk assessment should have been completed by early January 2018 at the latest and before the claimant chased this on 16 January 2018. We shall address the application of the statutory time limits subsequently.

95. The claimant complained of being taken off "the grid" as a Class Teacher (issue 1.2). She said that this referred to Ms John's teaching allocations for the 2018-2019 academic year and the document at page 138 of the hearing bundle. Ms John did not inform the claimant of her intentions in July 2018 and the claimant did not see the allocation plan until after her employment had ended. The document is evidence of Ms John's approach and her intentions, as set out in our finding of fact above. However, this document does not in itself provide a detriment as the claimant did not know of it until after she left work. The staff plan of July 2018 was modified in any event when the claimant returned to work. So, this document merely demonstrated Ms John's intentions and also her unmindful approach to the claimant's maternity leave. The actual detriment did not take place until the claimant returned to work.

96. The conversation between the claimant and Ms John on 6 November 2018 was obviously strained (see issue 1.3). The claimant had previously made her intentions clear about her return-to-work date of 4 February 2019 and that this would be in a full-time capacity. Nevertheless, Ms John was aware that the claimant was free to change her mind about returning to work later and to pursue possible part-time or flexible working. Ms John was responsible for managing the respondent's teaching resources and she did not pay proper regard to the claimant's declared intentions. She had allocated her Class Teachers based on who she knew to be available and the claimant was not available until around halfway through the academic year. Ms John raised the issue of possible part-time working and the claimant indicated that she was not interested in this option. It was inappropriate, perhaps condescending, and pushy in the circumstances for Ms John to press the claimant in this regard, but

she did so to try to manage the difficult situation that she had created, i.e. it proved to be easier to accommodate the claimant's return to work as a Class Teacher on a part-time basis as opposed to a full-time basis. The claimant said that she felt pressurised; however, Ms John's approach fell short of insisting that the claimant return part-time. The claimant rejected part-time working and Ms John did not pursue this after her letter of 26 November 2018.

97. Ms John did not tell the claimant that she could not return to her previous role during the telephone conversation of 6 November 2018, although we find that she indicated that there may not be a suitable full-time Class Teacher role available for her. This was consistent with her letter of 26 November 2018. The claimant thereafter sought assistance from her trade union and her return-to-work arrangements where further clarified on 11 December 2018.

98. The list of issues raises no allegations in respect of events after 6 November 2018 until the claimant returned to work. That said, it was not until the claimant met with Ms John on her first morning back at work that her role was more fully resolved. This is when the detriment as set out above arose. The claimant was formerly a Class Teacher. She was slotted back into Year 3 upon her return from maternity leave, yet her role was much diminished. She was relegated to a job share role with Mr Asante and because of her maternity leave Ms John placed the claimant in a role subordinate to Mr Asante, a male less experienced teacher.

99. The claimant commenced her maternity leave on 25 June 2018, and returned to work after 32 weeks, according to Miss Neal's calculations at page 130 of the hearing bundle. This was 6 weeks into her period of additional maternity leave. The detriment complained of by the claimant is in respect of her return-to-work arrangements, particularly the job that she was expected to undertake. The claimant argued that she should have returned to work as a Year 3 Class Teacher, but we reject her argument that she could be so narrowly prescriptive about the year that she taught, see *Blundell v Governing Body of St Andrew's Catholic Primary School*. Nothing particularly turns on this because, as a matter of fact, the claimant returned to Year 3 in any event.

100. The claimant's place of work had not changed and her pay and other conditions of service remained unchanged. The nature of the claimant's work under regulation 2(1) MPLR places emphasis upon her job description in accordance with her *contract or terms of employment*. The respondent has not made a job description available to us and in this instance, we have determined, as a matter of fact, that the claimant was employed as a Class Teacher as opposed to a more generic Teacher. Even if we are wrong on that interpretative point, then the claimant was certainly employed in the *capacity* of a Class Teacher. Prior to her maternity leave she had sole responsibility for her class which she taught 5-days per week. Upon her return, for at least 2-days, Mr Asante was the lead Class Teacher. For the other ½-day that Mr Asante was in school was there was considerable tension and uncertainty, which had been caused by the uncertainties that Ms John created. The claimant's role had been relegated to a subordinate position to that of Mr Asante, a male teacher who had not been on maternity leave. The claimant was expected to follow Mr Asante's direction and that of Mr Lubwama. Ms John treated the claimant in a manner similar to a newly qualified teacher and did not accord the claimant the respect of an

established and senior Class Teacher and this was also reflected in the manner that both Mr Asante and Mr Lubwama approached her.

101. Ms John undertook no assessment to show that it was not reasonably practical to re-instate the claimant to her former full-time role, as envisaged by *Stelfox V Westco Building Components Limited*. Her letter of 12 February 2019 said pupils were becoming more settled and stable with 2 part-time Class Teachers, but we were not presented with any corroborative evidence in this regard. Indeed, we find there is no evaluation (structured or otherwise), merely some makeshift attempt at an after-the-event justification. In the absence of evidence to the contrary, we do not accept that the return of an experienced Class Teacher following her maternity leave could be regarded as unsettling and destabilising for the children. If ensuring continuity and consistency really was a priority for Ms John, then she should have been more cooperative and proactive with the claimant's attempts to set her KIT days. The claimant's qualified entitlement to return to a role substantially the same as before was a fetter on Ms John's management discretion and she did not exercise such discretion with proper regard for the claimant's statutory maternity rights. Consequently, the respondent did not offer the claimant a suitable and appropriate role in the circumstances and thereby subjected the claimant to the detriment under s47C ERA and MPLR.

102. As the claimant had returned from maternity leave at this point, this could not be a detriment under s18 EqA. So, in this regard, the claimant brings her complaint as one of direct sex discrimination s13 EqA. The respondent subjected the claimant to a detriment in her role following her return to work. This detriment arose from the claimant exercising her right to maternity leave. It has long been established that this should amount to unfavourable treatment, in that no comparator is necessary following *Webb v EMO Air Cargo (UK) Limited 1994 ICR 770* and *Equal Opportunities Commission v Secretary of State for Trade and Industry 2007 ICR 1234 QBD*. So, we find direct discrimination proven without the need for a comparator. However, if we are wrong on this point and a comparator is necessary, then the claimant was subjected to less favourable treatment in comparison with Mr Asante (a male Class Teacher with less teaching experience than the claimant). The burden of proof has shifted under this alternative analysis because the detriments could only be attributed to the fact that the claimant had taken maternity leave (for which only a pregnant woman can take). Had the claimant not taken maternity leave then we determine that she would be allocated a sole Class Teacher's role in same way as Mr Lubwama. There is simply no basis to determine otherwise. Once the burden of proof has shifted, the responded cannot show that the treatment afforded to the claimant upon her return to work was in no sense whatsoever due to her maternity leave.

103. Any claim presented before 6 March 2019, which is 3 months before the date of receipt by ACAS of Early Conciliation notification is, on the face of it, out of time pursuant to s123(1)(a) EqA, as extended by s18A Employment Tribunal Act 1996. However, we are satisfied that the failure to provide a timely risk assessment forms part of a pattern of continuous discriminatory conduct by the respondent against the claimant. This pattern was illustrated by the respondent's and Ms John's conduct and approach in the event's leading to the claimant's return to work and the discriminatory consequences of the failure to permit the claimant to return to work as a full-time Class Teacher.

104. In any event, we determine that it would be just and equitable to provide for a remedy as well as a determination in respect of the discrimination complained of pursuant to s123(1)(b) ERA. The claimant was made ill by the discriminatory treatment of her and she went sick from 22 February 2019 until after her employment ended. We accept the events, which ultimately caused her to give up her job and significantly lessen her career aspirations was so destressing that she could not work or fully engage with her employer and her claim. It would be wholly unjust and disproportionate having determined that the claimant was subject to such discrimination to then deny her a remedy on the basis that she did not issue proceedings sooner. In view of our determination in respect of the claimant's ill health we do not regard it as reasonably practical that the claimant issue proceeding within the statutory time limit under s48(3) ERA. The claimant commenced early conciliation on 5 June 2019 which lasted until 18 July 2019 and then issued proceeding on 9 August 2019, which was reasonable in the circumstances.

105. The respondent did not discriminate against the claimant in the application of its sickness policy. The claimant was off ill, which we accept was entirely genuine. However, the claimant did not engage fully with the respondent; she did not give details of the stressor that she was experiencing. Although the respondent may have been hasty in its occupational health referral, and this unsettled the claimant, it was not so swift as to amount to untoward conduct. The respondent's advice in respect of possibly withdrawing occupational sick pay was within the scope of the claimant's contract and a possible consequence of the insurer's requirement for an occupational health report not being met.

106. In respect of the constructive dismissal claim, the failure to conduct a risk assessment for a pregnant woman (issue 15.1,1) amounted to a fundamental breach of contract according to *Shaw v CCL Limited*. The respondents did not rectify that breach by the late provision of a perfunctory risk assessment. The 2018/2019 Class Teacher allocations of July 2018 (issue 15.1.3) could not have amounted to a breach of contract or formed a significant component in respect of the claimant's fundamental breach of contract because the claimant did not know of Ms John's intentions at that time and the document only came to light after the claimant had left her employment.

107. The claimant contended that failing to discuss the takeover of her class (issue 15.1.2) amounted to a fundamental breach contract as did Ms John's behaviour in cancelling the claimant's KIT days (issue 15.1.2). Neither of these acts demonstrated behaviour indicating that the respondent, or Ms John in particular, intended no longer to be bound by the contract of employment. So, whilst we find that these were not repudiatory breaches of contract in themselves, both demonstrated along with the factors raised by the claimant in Ms John's management of her maternity leave (issues 15.1.4 and 15.1.6) the rude and dismissive attitude of Ms John towards the claimant which formed a significant factor in contributing to her constructive dismissal. We do not accept the claimant was relegated to the role of a teaching assistant (issue 15.1.8), we accept her evidence that she was afforded little courtesy by Mr Asante and Mr Lubwama, including not having anything significant to do which relegated the claimant, at times, to sharpening pencils. For the reasons that we state above, the management of the claimant's sickness absence did not amount to a fundamental breach of contract.

108. The claimant returned to work and attempted to make a go of things, which was to her credit. however, the claimant's return to work lasted for 2 weeks only. She found the whole situation distressing and was subsequently signed off by her GP for stress and anxiety. The claimant remained ill and resigned her employment, on notice, on 3 April 2019 which was almost 2 months following her return to work and 6 or 7 weeks after starting sick leave. The claimant's resignation letter placed particular emphasis on not being allowed to return to her pre-maternity leave role, which we have found to be discriminatory. There maybe some circumstances were discrimination does not represent a fundamental breach of contract but this is not one of them. The respondent had discriminated against the claimant following her return to work. Such discrimination repudiated the claimant's contract of employment in itself. The conduct of Ms John through the claimant's maternity leave and upon her return to work was of the type that, according to Brown-Wilkinson J above, the claimant could not be expected to put up with. The respondent fundamentally breached the implied terms of trust and confidence and the claimant accepted (i.e. relied upon) this breach. The claimant was constructively dismissed.

109. The claimant was concerned that she might need to repay some of her maternity pay which caused some delay as she sought guidance from the local authority. The respondent was keen to advance an occupational health referral as that was a requirement from the insurers in respect of the claimant's occupational sick pay. The claimant perceived that respondent's haste to provide an occupational health referral, allied with the threat to withhold her wages, was part of a formal process which was ultimately aimed at her dismissal. This was understandable and was not an unreasonable perception given the respondent's treatment of the claimant throughout her maternity leave. The claimant had sought new jobs, but she had just been told that she had not been appointed because of the reference given by the respondent. Although the claimant had raised a grievance, she was unsettled that this was to be heard by the vice-chair, who held the respondent's authority to dismiss. The claimant resigned fairly promptly and, other than sending the respondent her grievance complaint, following her abortive 2-week effort to resolve matters, she did nothing that we determined affirmed the respondent's repudiatory breaches of contract. Consequently, we determine the claimant did not wave the breach of contract. It follows from above that as the claimant was constructively dismissed, the dismissal was unfair, pursuant to s95(1)(c) ERA. The dismissal also amounted to a (constructive) automatic unfair dismissal under s99(3)(b).

Employment Judge Tobin

11 February 2021