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EMPLOYMENT TRIBUNALS

Claimant: **Ms S. Mason**

Respondent: **Virtual PA Solutions Limited**

Heard at: **East London Hearing Centre**

On: **21-23 and 27 October 2020**
28 October 2020 (in chambers)

Before: **Employment Judge Massarella**
Members: **Ms A. Berry**
Ms T. Jansen

Representation
Claimant: Ms A. Rokad (Counsel)
Respondent: Mr R. Myers (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claim of direct sex discrimination is dismissed on withdrawal;**

2. **the claim of automatically unfair discrimination, contrary to S.99 ERA, is dismissed on withdrawal;**

3. **the claim of direct maternity discrimination succeeds in relation to Issue (E) only (the failure to notify the Claimant of the proposed change to her contract);**

4. **all other claims of direct pregnancy and/or maternity discrimination are not well-founded, and are dismissed;**

5. **the claim of unfair (constructive) dismissal is not well-founded, and is dismissed;**

6. **the Respondent shall pay to the Claimant the sum of £900, by way of compensation for injury to feelings in relation to the single act of discrimination, which the Tribunal has found to have occurred;**

7. the Respondent shall pay to the Claimant the sum of £108, by way of interest on the award for injury to feelings.

REASONS

Procedural history

1. By a claim form presented on 6 August 2019, after an ACAS early conciliation procedure between 25 June and 5 August 2019, the Claimant, Mrs Sarah Mason, claimed unfair (constructive) dismissal, automatically unfair dismissal, contrary to S.99 ERA, pregnancy/maternity discrimination, and direct sex discrimination.

2. On 6 December 2019, the Claimant withdrew the complaints of automatically unfair dismissal and direct sex discrimination. They stand dismissed on withdrawal. A preliminary hearing for case management took place on 13 December 2019 before EJ Ross. The issues for determination were clarified at that hearing, and the Judge's list of issues is attached as an appendix to this judgment.

The hearing

3. We heard evidence from the Claimant, and from Ms Louise Baxter, who is her mother-in-law. For the Respondent, we heard from Ms Melanie York (Managing Director, and majority shareholder of the Respondent); Mrs Zara Armstead (Operations Director, and Director and minority shareholder of the Respondent); Ms Eve Oxley (PA to Ms York); and Mr Nigel French (an independent employment law and HR practitioner).

4. We had a bundle of documents, running to 252 pages, which was supplemented, with the Tribunal's permission, by around ten additional documents in the course of the hearing.

5. Although there was a reference in the claim form to a claim for 'other payments', Ms Rokad confirmed that there were no freestanding money claims, and that the compensation sought by the Claimant in relation to her discrimination claim was an award for injury to feelings. She would also be entitled to a basic award, should she succeed in her unfair (constructive) dismissal claim.

6. There was an issue as to whether the Claimant should be allowed to amend her claim to add a claim that the constructive dismissal was itself an act of discrimination. Having heard from both parties, we concluded that she should not: we accepted Mr Myers' submission that the Claimant has been legally represented throughout; the issues were thoroughly explored and clarified by EJ Ross at the preliminary hearing; there was no good explanation as to why the issue was not raised earlier; the Tribunal was also mindful of the fact that a similar claim under s.99 ERA was advanced, and then withdrawn, by the Claimant, and so it seemed to us unlikely, in view of that, that the Claimant always had a claim of discriminatory constructive dismissal in mind, as she contended through her Counsel. We considered that the Respondent would be

prejudiced, if such a substantial late change of position were allowed; it would be deprived of the opportunity to plead to it, and to deal with it in its witness statements. The issues accordingly remained as agreed at the hearing before EJ Ross.

7. Mr Myers made an application for Ms Baxter, the Claimant's mother-in-law, to be excluded from that part of the Claimant's evidence relating to the covert recording of the grievance hearing. The Tribunal has a power under rule 43 to exclude from the hearing 'any person who is to appear as a witness in the proceedings until such time as that person gives evidence, if it considers it in the interests of justice to do so'. We considered that all the points which Mr Myers wished to explore in cross-examination were a matter of record, and could adequately be made against the documents. Moreover, the covert recording was a collateral issue, going to the Claimant's credibility. The Tribunal was not persuaded that it was in the interests of justice to depart from the normal practice of witnesses being able to see and hear each other's evidence.

8. The Tribunal also asked the parties whether there had been disclosure of the documents relating to the Claimant's new employment. There had not. Since we proposed to hear evidence and submissions on remedy, as well as liability, and those documents were potentially relevant to issues of mitigation, as well as the reason for the Claimant's resignation, the Tribunal ordered the Claimant to provide disclosure, which she did at the beginning of the second day of the hearing. The documents included her new contract of employment, and the offer letter from her new employer.

9. We agreed at the beginning of the hearing that the Tribunal would hear evidence and submissions on liability and remedy, so that it could deliberate and give judgment in respect of both. Given the time available, we indicated that the likelihood was that judgment would be reserved.

10. Both Counsel provided helpful written submissions, to which we had regard, and supplemented them with oral submissions. The Tribunal is grateful to them both for the constructive and courteous manner in which they presented their respective cases.

11. The Tribunal apologises to the parties for the delay in promulgating this judgment. This was due to pressure on judicial resources, and the competing demands of other cases.

Findings of fact

<u>The Claimant's role and pay</u>

12. The Respondent is an independent business, located in Colchester (Essex), employing some 22 staff. It provides personal assistant services/administrative support and business planning, remotely to professionals, most (but not all) of whom, work in the financial services industry.

13. The Claimant commenced employment on 30 May 2017, initially in the role of Financial Services Administrator. She was issued with a contract of the same date. In her previous role she was paid a total package of £26,000, consisting

of a salary of £24,000 plus a bonus of £2,000. The Claimant accepted in cross-examination that her salary, when it was increased to £27,000 in September 2017, was comparable to her previous salary. She further accepted that she had led no evidence that her pay was below market rate.

14. The Claimant also alleged for the first time in her witness statement that Ms York had promised her a pay rise of £3,000 at the end of her probation period 'to match her previous employment'. We reject that evidence for several reasons: a pay rise of £3,000 would have exceeded her previous salary and would have taken her above the level of her colleague, who were performing the same role; and there was no reference to this allegation in the internal grievance.

15. The Claimant was notified, by letter dated 6 September 2017, that she had successfully completed her probationary period. From 29 September 2017, and with the Claimant's agreement, her working hours were extended to Monday to Friday, 8 a.m. to 5 p.m. Her salary was increased commensurately.

16. The Claimant acknowledged in her oral evidence that she had a positive, open working relationship with management, including Ms York, before her discovery of the decision not to give her a pay rise in 2019. The Claimant was a valued member of the team; Ms York thought highly of her. The Tribunal has no hesitation in finding that the working environment within the Respondent company was professional, supportive and friendly.

17. On 15 February 2018, Ms York offered the Claimant a role in the Respondent's business processing team. She accepted, and moved into the role on 2 March 2018. Part of her first month in the role was spent handing over clients with whom she had been working in her previous role.

Salary review 2018/2019

18. Ms York carries out an annual salary review of all employees in around March of each year. In the 2018/2019 round the Claimant's salary was increased by 3% to £28,000 with effect from 1 April 2018. Her holiday entitlement was increased by an additional day for each full holiday year that she had worked for the Respondent, for the first three years. This increase put her on the same salary level as the other members of the team, who were doing the same business processing role. We reject the Claimant's evidence that Ms York promised her a further increase, specifically to reflect this change to her responsibilities; this increase already took into account the additional responsibilities.

Qualifications

19. In August 2016, before she began working for the Respondent, the Claimant sat and passed her first online exam, FA7 (Financial Services Products). The Respondent funded the Claimant to sit further financial services exams under the auspices of the Chartered Insurance Institute. In December 2017 she sat and passed RO1 (Financial Services, Regulation and Ethics). The combination of FA7 and RO1 amounted to a certificate in finance planning.

20. On 1 June 2018, she passed RO2 (Investment Principles and Risks), having previously sat, and failed, the exam twice. The Respondent paid for the first

two attempts; the Claimant paid for the third herself. This did not in itself amount to a further qualification; it was merely a module on the way to a Level IV diploma. We accept Ms York's evidence that the Claimant did not obtain any new qualifications in 2018, which might reasonably lead to a pay rise.

Notification of pregnancy and risk assessment (Issue (A))

21. The Claimant informed Ms Melanie York that she was pregnant. Exactly when she did so, the parties did not agree, but nothing turns on it; she told Ms York in around late April or early May 2018.

22. In late 2017, the Respondent had moved to new premises. Ms Oxley conducted a risk assessment on 12 December 2017, which took into account factors relating to staff who were pregnant.

23. The Claimant had been diagnosed with the pregnancy-related condition SPD early in her pregnancy, a condition which causes pain in the pelvic area, and discomfort throughout pregnancy. The Claimant informed Ms York.

24. On 25 May 2018, Ms Oxley wrote to her to tell her that the risk assessment had been carried out:

> 'a general risk assessment has been carried out on our new premises to assess the risk to the health & safety of all employees, including expectant mothers. No serious risks have been identified, but I continue to monitor this situation regularly, but I think it would be worthwhile getting you to fill in a new DSE assessment form to help identify anything we could do to make you more comfortable at work. I have attached it and maybe when you are in you could print off and fill it in and we can go from there!'

25. Attached to that email were a number of documents, including one dealing with specific risks for expectant mothers, and a flowchart relating to pregnant workers. On 29 May 2018, the Claimant completed a display screen equipment assessment ('DSE'), mentioning that she had sore hips and a lower back problem, which was related to her SPD. We accept Ms Oxley's evidence that, on the same day, she and the Claimant went through both the flowchart and the document relating to specific risks to new and expectant mothers and considered whether there were any further risk factors.

26. On 7 June 2018, the Respondent bought a kneeling, ergonomic posture office stool for the Claimant, specifically to address the discomfort she was experiencing as a result of her SPD. On the advice of her midwife, the Claimant also asked if she could work from home. On 6 June 2018, Ms Oxley confirmed by email that Ms York had agreed that she could do so two days a week, if needed. The email also discussed arrangements for providing the Claimant with a laptop to use when working from home. We find that that email was practical, sensitive and supportive.

27. On 21 June 2018, Ms York wrote to the Claimant acknowledging her formal notification of pregnancy and maternity leave. The letter confirmed that the Claimant had chosen to start her maternity leave on 17 September 2018, and that her 52 weeks of maternity leave entitlement would end on 16 September 2019. It included the following passage:

Health and safety

> 'As your employer, we want to make sure that your health and safety is protected while you are working during your pregnancy and that you are not exposed to avoidable risks. I have considered whether there are any risks in our workplace that could impact you whilst pregnant. You should ask assistance if you need help in moving or lifting boxes, stationery or any heavy objects. If you find, at any time, there are any other aspects of your role for which you require assistance, please let me know and we can discuss what action is necessary.'

28. The Claimant made no complaint about a failure to conduct a risk assessment in her grievance. She accepted that she had a good working relationship with Ms Oxley and Ms York, in which she could raise any matters of concern. Her evidence in cross-examination was that she discovered later on that she ought to have had what she described as 'a formal, separate risk assessment'. She accepted that she had never identified any health and safety issues, which had not been addressed by the Respondent.

KIT days (Issue (F))

29. In the event, the Claimant began her maternity leave earlier than she had planned, and her last working day was Monday, 10 September 2018 (it should have been Friday, 14 September 2018). She and Ms York had arranged to meet during that week, but Ms York was not in work on the Monday, and so the meeting could not take place then. The Claimant accepted that it was always open to her to raise any queries she wished to about her maternity leave.

30. The letter of 21 June 2018 from Ms York to the Claimant also specifically referred to KIT days:

> 'whilst you are on maternity leave you may agree with me to work for up to ten "keeping in touch" days without bringing your maternity leave or pay to an end.'

31. The Claimant knew about her ability to arrange a KIT day, and accepted that she did not ask for one. Later on, in both the grievance and appeal meetings, she was offered KIT days, but she declined them.

Changes to employees' contracts of employment (Issue (E))

32. During the Claimant's maternity leave, a minor change was made to all employees' contracts, relating to a restrictive covenant: there was a reduction from 12 to 6 months of the period from termination during which employees were prevented from working for a St James Place Partner. A meeting took place to consult affected employees about the change.

33. The Claimant was not invited to that meeting, and no change was made to her contract. Ms York's evidence was that she believed it would be inappropriate to discuss the issue while the Claimant was on maternity leave, and better to address it with her when she returned. The Claimant considered that she should have been informed about it, and given the opportunity to discuss it, at the same time as other staff.

34. The Claimant was invited to a face-to-face meeting about the contract change when she raised her grievance, but she declined to attend it.

Company events during the Claimant's maternity leave, including 'Going for Gold' (Issue (G))

35. On 26 March 2019, the Respondent sent information to staff about a team challenge called Escape Colchester. It was a team-building exercise which took place at work, and involved solving clues. On 8 April 2019, staff were notified of the Going for Gold competition. Staff were divided into teams, and they were informed how they could gain points for their teams.

36. Although there were some elements of the competition which were purely for fun (for example, a baking challenge), the main part of the Going for Gold challenge involved workplace tasks and targets. The Claimant simply could not have scored against them, given that she was on maternity leave. The Claimant was asked whether she thought there would have been any point in her participating; she replied: 'no I suppose not'.

37. As regards the 'fun' activities, we are satisfied that even these were still essentially aspects of a teambuilding exercise. In the Tribunal's view, it would not have been appropriate, and certainly was not necessary, for the employer to include an employee who was on maternity leave in teambuilding activities of this sort.

Alleged marginalisation/ignoring during maternity (Issue (H))

38. The Claimant alleges that she was marginalised and ignored during her maternity leave.

39. She was invited to the Christmas party in 2018 and 2019. She also came into the office while on maternity leave on four occasions, bringing her baby with her. She was warmly welcomed. Over her maternity leave, Ms York arranged for her to be sent a Christmas present, a birthday present, and a present for her new-born son.

40. The Claimant alleged in her witness statement that she received no correspondence from Ms York or any other managers during her leave. The Claimant accepted in cross-examination that that was factually wrong, given the correspondence from Ms York dated 4 April 2019 (referred to below). The Claimant also received text messages and emails from Ms Oxley, Ms York's PA, which were always both professional and friendly in tone. By way of example only, we record the following exchange [*original format retained*]:

> Claimant: 'Hey Eve! How're you? I might bring baby into the office one day this week to meet everyone if that's alright?? Can I come on any day?? I'll come during the lunch breaks xxxx'
>
> Eve Oxley: 'Hi Hun, how are you all? Arhh that would be lovely!! Yes come in, whatever day you want Xxx
>
> […]

> Just come in whatever day you feel like it Hun, I know what it's like just see how you go! Won't be long before the little man sleeps through, but you never sleep quite as deeply again!! X is xx'

41. The Claimant accepted that Ms Oxley was not a friend outside work; we find that she was communicating with the Claimant, in a friendly manner, but in a work capacity, as Ms York's PA.

42. The Claimant also complained that she was not sent the internal newsletter. She accepted that she did not ask to receive it, and that when she mentioned it, she was sent all the back copies.

43. We find that this conduct did not occur as alleged; the Respondent did keep in touch with the Claimant in an appropriate manner throughout her maternity leave; she was not marginalised or ignored; the Respondent was appropriately respectful of the fact that she was on maternity leave.

<u>The allegation that the Respondent removed the Claimant's desk during her maternity leave (Issue (I))</u>

44. During the Claimant's maternity leave, the Respondent used the Claimant's desk from time to time for training purposes. The Respondent has small premises, and we find that it was entirely reasonable for them to use the desk for other purposes while she was on maternity leave.

45. The Claimant accepted in cross-examination that her desk was not removed, and she withdrew this allegation.

<u>Salary review 2019/2020 (Issues (B) and (C))</u>

46. On 20 March 2019, Ms Oxley wrote to the Claimant to inform her that Ms York and Ms Armistead would be conducting salary reviews at the beginning of April, and asking whether she would like to come into the office to have a meeting to receive her salary review, or whether she would prefer that it be sent to her in the post. The Claimant replied on the same day:

> 'I'm happy to come into the office but would most likely have Jimmy with me so if that's not convenient a letter will be fine'.

47. On 21 March 2019, Ms Oxley replied that she had spoken to Ms York, who suggested that they post the review to her at the beginning of April, and if she then wanted to come into talk anything through, she would be more than welcome to do so. On 24 March 2019, the Claimant confirmed that this was agreeable. The Claimant agreed that there was no suggestion that bringing her baby in with her would be a problem.

48. By email dated 4 April 2019, Ms York wrote to the Claimant, providing her with the information about the salary review. The Claimant was not given a pay rise. She was given an additional day's holiday, which reflected her length of service, and which was a standard enhancement. Ms York stated that it would be good to meet with the Claimant when she had time, to talk through her employment package, and to have a catch-up. She asked her to let her know when she would be available.

49. Ms York set out her reasoning as to why she did not give the Claimant a pay rise in a detailed document, which was before the Tribunal. It was not a contemporaneous document, but was created and disclosed after the event. However, we accept that it reflects her reasoning at the time. In that document she recorded, and we accept, that the Claimant's salary was the same as that of her colleague, Ms Jade Clark, who was more experienced than she was, and her other colleague, Mr Evans, who was fully qualified.

50. Ms York had regard to the Claimant's self-assessment for the job. In it, the Claimant indicated that considered that she had a 'student understanding' of many aspects of the role, a 'novice,' understanding of some, and a 'working' knowledge of the rest. By contrast Ms Clark, who was performing the same role, indicated in her self-assessment that she had an expert knowledge of every field. The Claimant did not substantially challenge that assessment, other than to suggest that she might be more self-deprecating than Ms Clark. The Claimant accepted that Ms Clark had significantly more experience in the role they both performed than she did. She also accepted that Ms Clark was bringing more money into the business. In cross-examination she suggested for the first time that she, the Claimant, was not given the opportunity to do the more lucrative work, either by way of having those cases assigned to her, or by being trained to do them. We reject that suggestion: it was not made in the course of her grievance, nor in her witness statement. There is no evidence to support it.

51. We are satisfied that the Claimant was both less experienced, and less skilled at that stage in her development, and generated less income for the Respondent, than Ms Clark, and it was for that reason that Ms York could not justify paying the Claimant more than the Respondent paid Ms Clark.

52. Ms York also had regard to the fact that that the Claimant had not gained any additional qualifications during the material period, as well as to the fact that there was no evidence that the Claimant went above and beyond her duties, in such a way as to justify a pay rise. The only matter to which the Claimant pointed was the fact that she had trained a member of staff in some software. Ms York did not regard that as sufficient justification in itself.

53. The Claimant placed considerable reliance on the language used by Ms York in an email exchange with her. On 15 April 2019, the Claimant wrote to Ms York, expressing her disappointment that she did not receive a pay rise, and asking Ms York to explain why. Ms York replied on 16 April 2019:

> 'The assessment used in the salary reviews is the same for all staff and the same that you will have experience previously, so you will know it is based on performance in the role against your job description and the performance review process of the business.
>
> The last salary review was 1st April, and at that time your salary was increased by 3%. This was in recognition of your role as a PA and your move to the BP team.
>
> It is sometimes the case that I have a short period of time in which to make an assessment of performance, and in such circumstances I aim to be consistent in my approach to all, and often therefore, this can result in

> no change to salaries. In your case I had insufficient evidence regarding your performance to make a change salary.'

54. The Claimant alleged that the reference to 'a short period of time' and 'insufficient evidence' demonstrated that the reason why Ms York had not given her a pay rise was because she was on maternity leave, and that therefore the decision was discriminatory. We deal with that contention in our conclusions below. At this stage, we confine ourselves to finding that the reasons given by Ms York were not 'false' as the Claimant contended in the pleaded allegation. On the contrary, the reasons cited for the Claimant not being entitled to a pay rise (insufficient evidence/a short period of time to assess the Claimant) were true: the Claimant had not demonstrated during her time in the new role, whether through performance, ability to generate revenue, increased qualifications, or any other factor, that her pay should rise above that of her colleague, Ms Clark.

55. The Claimant accepted that there was no evidence of her not getting a pay increase, when someone else did, in a role comparable to hers. Nor did she lead any evidence that her pay was below the market rate. The Tribunal is satisfied that the Claimant's pay fairly reflected the role she was performing, at the level she was performing it.

<u>The Claimant's grievance</u>

56. By email dated 17 April 2019 to Ms York, the Claimant raised a grievance. The grounds of the grievance were outlined in two numbered paragraphs:

> '1. Pay award – no uplift to my salary. In your email you state that the criteria used to assess pay awards refers to performance and having time to assess employees against a job description. You stated that you had insufficient evidence to make a change to my salary. I have been on maternity leave since 12 September 2018 and I should therefore not be treated unfavourably because I have not been in the workplace for the second half of the 2018/2019 financial year for you to assess me or gain sufficient evidence. I am totally committed to my job as well as my personal and professional development. I have undertaken and passed financial exams to benefit both myself and the company (RO1, RO2, and currently undertaking RO3). Whilst at work I have always completed my work to the highest standards and there have been no complaints about my performance. I therefore do not agree with your assessment of my performance.
>
> 2. You have not contacted me for any Keeping in Touch days or kept me up to date with changes within the business (i.e. the monthly newsletter). In addition I was not invited to the recent staff event and have not been included in the Going for Gold challenge. I also note that there is no desk available for me in the BP office and that the annual review process and employment contracts have changed however I have not been notified of such changes. These actions have led me to conclude that I am no longer valued in my role and that I have no work area to return to. I feel marginalised and excluded and this is directly impacted on my mental health causing anxiety about my return to work.'

57. Ms York acknowledged receipt of the grievance by an email dated 18 April 2019.

58. By email dated 23 April 2019, the Claimant was invited to a grievance investigation meeting on 1 May 2019; she was told that she could be accompanied by a trade union representative or work colleague. In a reply dated 23 April 2019, she asked that she be allowed to be accompanied by a family member, which was agreed. She also asked to be allowed to record the meeting, which was not agreed. The Respondent set out its position in the email of 24 April 2019:

> 'Please be advised recording equipment is not acceptable at such meetings. The minutes taken will take accurate notes of the meeting, and may I suggest that your family member makes notes too. […] The minutes will then be circulated and agreed jointly prior to a final version being produced.'

59. The meeting was subsequently rescheduled at the Claimant's request. In the event, it took place on 22 May 2019.

60. By email dated 3 May 2019, the Claimant objected to Ms York being a participant in the grievance hearing, citing the fact that her allegations of discrimination were made against Ms York. Ms York arranged for the hearing to be chaired by Ms Armstead, who is the only other Director of the Respondent.

<u>The grievance hearing (Issue (K))</u>

61. The Claimant was accompanied to the grievance hearing on 22 May 2019 by Ms Baxter. Ms Baxter is the manager of a care home. Although she had started an HR course, she was not an HR professional.

62. Despite the explicit prohibition on recording the meeting, the meeting was recorded, either on the Claimant's phone, or on Ms Baxter's. In the grievance appeal hearing the Claimant was asked about the recording of the grievance hearing and accepted that:

> 'We recorded the meeting. They hadn't agreed to us recording it. But we did. Quite frankly we didn't trust them.'

63. We reject the Claimant's evidence that Ms Baxter recorded the meeting without her knowledge. We found that to be implausible. It is clear from this language used at the appeal meeting that the decision to record the meeting was a joint one, taken for a specific reason before the grievance meeting. Moreover, it was not in dispute that neither the Claimant nor Ms Baxter took notes at the meeting; we find that was because they both knew that they would have access to a recording. The lack of candour on the part of both witnesses as to this issue affected our assessment of their credibility more generally.

64. Ms Armstead accepts that, in the course of the meeting, she told Ms Baxter that her role was to support the Claimant, not to ask questions on her behalf. Ms Armstead accepts that, in saying that, she was wrong. We find that that that statement had no inhibiting effect at all on Ms Baxter's willingness to ask

questions on the Claimant's behalf; she continued to represent the Claimant confidently and robustly.

65. The Claimant accepted in cross-examination that there was nothing in the conduct of the grievance hearing which was either aggressive or unfair. Having regard to the notes of the meeting, which were particularly detailed because of the unauthorised, covert recording made of it, that concession was plainly sensible.

66. The Claimant referred to the fact that she had taken legal advice before this meeting from a solicitor, Mr R. Lloyd of Birkett Long LLP.

67. During the meeting the Claimant stated that the decision not to give her a pay rise was unfair and discriminatory, as all employees received a pay rise, apart from her, which was factually incorrect. We accept Ms York's evidence that 50% of employees received no pay rise.

68. The Claimant also made the following statement:

> 'To be honest I don't feel I can return, the relationship has broken. I don't trust the company and I don't feel I have been treated well. I don't want to work for an organisation that has discriminated against me whilst I am on maternity leave. I have had a lot of stress and anxiety because of this and I have needed to seek medical attention for this.'

69. It was put to the Claimant in cross-examination that the reason that she did not resign at this point was that she was eight days short of the two-year qualifying period for bringing a claim of unfair dismissal. The Claimant denied this; indeed, she denied knowing about the two-year qualifying period. We are satisfied that she did know about it; she had already taken advice from a solicitor, and we have no doubt that the issue would have been discussed.

70. In the course of cross-examination, it was also put to the Claimant that the only thing she was looking for from the grievance process was a financial settlement. She agreed. We find, on the balance of probabilities, that the Claimant had already made the decision to resign by this point, but that she delayed doing so - notwithstanding the fact that she was representing to the Respondent that her trust in it had been destroyed - in part in order to gain unfair dismissal rights, and in part to seek to put pressure on the Respondent to agree a financial settlement with her.

<u>The grievance outcome</u>

71. The draft notes of the grievance meeting were sent to the Claimant under cover of a letter dated 23 May 2019. By an email of the same date, the Claimant listed some points of disagreement. On 6 June 2019, Ms Armstead notified the Claimant that she had issued her outcome letter by post. On the same date, the Claimant replied saying that she was away, and asking for it to be sent by email. By email dated 10 June 2019, Ms Armstead attached her detailed grievance outcome letter.

72. Ms Armstead did not uphold the grievance, and set out her reasons. She advised the Claimant of her right to appeal. She stated that, if there was to be

an appeal, the Respondent proposed that an HR professional with no previous involvement in the case and should be appointed to chair it.

73. The Tribunal finds that the Respondent's conduct of the grievance was not in breach of its own policy, nor had Ms Armstead failed adequately to deal with the grievance: she had conducted a thorough and conscientious meeting, and produced a thoughtful and detailed outcome, which properly addressed the issues raised by the Claimant.

The grievance appeal

74. By email dated 11 June 2019 to Ms York, the Claimant lodged an appeal against the grievance outcome. She set out her grounds of appeal in some detail. In the last paragraph of that letter she wrote:

> 'Lastly, can I request you look again at the initial compromise agreement in the hope of an early resolution as I would like to resolve this grievance without a Tribunal hearing. I am sure as a business you will be advised of the potential risks, as I am, and I therefore ask that we try to resolve this as soon as possible.'

75. By email dated 13 June 2019, Ms York notified the Claimant that Mr French would be conducting the appeal. On 14 June 2019, he wrote to the Claimant setting out details of how the appeal would be conducted. The hearing took place on 24 June 2019.

76. In his oral evidence, Mr French said that he had spoken to Ms Oxley and made enquiries of her about the substance of the Claimant's grievance. However, after his evidence had been completed and the following day, the Respondent disclosed a document, which consisted of questions in writing, to which Ms York had given replies. It was regrettable that this document only came to light late in the day. Nonetheless, we observe that Ms York's replies in that document were consistent with the evidence that she gave to the Tribunal.

The Claimant's new employment

77. In her sworn witness statement, the Claimant gave the following evidence as to her new employment:

> 'I started to apply for new jobs in July 2019 and accepted a new position with Case Wealth Management Ltd, which I started on 5th August 2019. The new job pays more than my job at Virtual PA Solutions.'

78. At the beginning of the hearing, the Tribunal raised with the parties the fact that it was the Respondent's case that the Claimant had resigned to take up new employment, yet there were no documents in the bundle, confirming when the Claimant applied for, and was offered, the new employment. On the Tribunal's direction, further documents were disclosed by the Claimant on the second day of the hearing, from which it emerged that the account given by the Claimant in her sworn witness statement, was inaccurate.

79. On 17 June 2019, she had had an interview with Mr Robb of St James's Place, as a result of which he wrote to her on 4 July 2019, offering her a part-

time position with Case Wealth Management Ltd as a para-planner, working two days a week, on a salary of £13,200 (full-time equivalent £33,000) a year, increasing to £14,000 (full-time equivalent £35,000) upon successful completion of her Diploma Exams. The Claimant accepted in cross-examination that, by applying for and accepting this role, she was in breach of the restrictive covenants in her contract of employment with the Respondent.

80. The Claimant's evidence was that she was approached by Mr Robb, who saw her CV either on LinkedIn or Reed. The Claimant stated that she had received the 'formal offer' on 4 July 2019. It was put to her that an informal offer was probably made earlier. The Claimant said that she could not remember when that was. She denied that she had been offered the new job before she resigned.

81. On the balance of probabilities, we find that the Claimant was offered, and accepted, the new employment on, or soon after, what she described as an 'informal chat'. We note that there was no formal interview thereafter. We find that it is more likely than not that she had accepted the job before the appeal hearing took place. We further find that the evidence given by her in her statement was not merely erroneous, it was misleading: it sought to give the impression that the process of seeking alternative employment began only after her resignation on 2 July 2018. On any analysis, that was untrue.

<u>The grievance appeal hearing</u>

82. The Claimant was invited to a grievance appeal meeting, which took place on 24 June 2019. Given the size of the Respondent organisation, the Respondent instructed an independent HR representative, Mr Nigel French of Nigel French and Associates Ltd, to conduct the appeal. Mr French is a Legal Executive.

83. In the course of the appeal meeting, the Claimant again said that she would not be prepared to return to work at the end of her maternity leave. Mr French asked her: 'what needs to happen you to return?' She replied: 'I can't see anything that could. I think the relationship is broken down irrevocably.'

84. The Claimant alleged that Mr French was 'quite intimidating' at the meeting and that she felt like she was being cross-examined. Ms Baxter's evidence was that Mr French 'controlled, intimidated and dominated the meeting from the start' and constantly interrupted the Claimant. Ms Baxter alleges that at one point Mr French pointed his finger at her and told her that she should 'know her place'. She described his questioning style as 'interrogation'.

85. It was put to the Claimant that there was nothing in the notes which suggested hostility or unfairness; the Claimant alleged that points she had raised not been included in the minutes. The Tribunal is not satisfied that there is any evidence that Mr French conducted himself in an aggressive manner during the appeal hearing. We concluded that the account given by the Claimant and Ms Baxter as to his conduct of the hearing was exaggerated. We reject their evidence that he told Ms Baxter to 'know her place'. We think it more likely that he simply reminded Ms Baxter at one point of her role as a representative, and emphasise that he needed to hear directly from the Claimant, and that Ms Baxter took exception to that.

86. However, it emerged in the course of cross-examination of Mr French, that his approach to the investigation into the matters raised by the Claimant in her appeal was seriously lacking. He did not ask the Respondent for any documents in relation to the matters raised by the Claimant in her appeal. We find (indeed Mr French accepted) that he made no independent enquiries into her complaints, but simply asked Ms Oxley and Ms York for their views, and accepted their evidence uncritically. He did not record those discussions, nor did he disclose the fact of them to the Claimant. We find that he did not approach his task thoroughly or impartially, and his investigation was inadequate.

The application to ACAS

87. The Claimant submitted her application to ACAS for early conciliation on 25 June 2019, six days before the outcome of grievance appeal hearing was communicated to her.

88. By letter dated 1 July 2019, Mr French wrote to the Claimant, confirming the outcome of grievance appeal hearing. He did not uphold any of the Claimant's grievances.

The termination of the Claimant's employment

89. By email of 2 July 2019 to Ms York, the Claimant resigned with immediate effect:

> 'I write to acknowledge receipt of the appeal outcome letter dated 1st July 2019. Not only has the Company failed to fairly address my grievance complaints it is clear from the appeal outcome letter that I was treated less favourably because I was on maternity leave and the company has discriminated against me in breach of the Equality Act. The appeal outcome letter was the final straw. The discriminatory conduct and the failure to adequately address my grievance breached the term of mutual trust and confidence and I hereby resign my position with immediate effect and regard myself as having been constructively dismissed.'

90. By email dated 10 July 2019 Ms York wrote the Claimant accepting her resignation. The Claimant took up employment with Case Wealth Management, Ipswich with effect from 5 August 2019.

The law

Time Limits

91. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

92. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS and ending one month after the day of the ACAS

certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

93. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period.

94. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA, where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

95. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Morgan* at [25]). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at [17]).

The burden of proof

96. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

97. The provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

98. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **"56. … 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.**
>
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

Direct discrimination because of pregnancy/maternity

99. The EqA prohibits employers from treating an employee unfavourably (as opposed to less favourably) because of her pregnancy (s.18(2) EA 2010) or because she is exercising, is seeking to exercise or has exercised the right to maternity leave (s.18(4) EA 2010). There is no requirement to compare the position of the pregnant employee with a man.

100. S.18 EqA provides:

> **18. Pregnancy and maternity discrimination: work cases**
>
> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).**
>
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
>
> **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
>
> **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**

...

101. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). In order for a discrimination claim to succeed under s.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave'. The meaning of this expression was considered in this context in *Indigo Design Build and Management Ltd. V Martinez* (UKEAT/0020/14/DM). HHJ Richardson referred to *Onu v Akwiwu* [2014] ICR 571, in which Lord Justice Underhill said:

> **'What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind… so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice.'**

102. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36). A distinction must be made between motivation (which is relevant) and motive (which is not). The subject of the inquiry in a discrimination case is the ground of the putative discriminator's action, not his motive; a benign motive is irrelevant (*Ahmed v Amnesty International* [2009] ICR 1450.

103. Regulation 3 of the Management of Health and Safety at Work Regulations 1999 provides that every employer must make a 'suitable and sufficient' assessment of the risks to the health and safety of its employees to which they are exposed while they are at work, for the purpose of identifying the measures it needs to take to comply with its statutory health and safety duties. Regulation 16 of the Regulations further states that were women of childbearing age working and undertaking and the work is of a kind which could, by reason of her condition, involve risk to the health and safety of a new or expectant mother or to that of her baby, the risk assessment must include an assessment of that risk.

104. The EAT held in *Indigo* that a failure to complete a pregnancy risk assessment, is not automatically discriminatory:

> **'Failure to provide a notification or a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, "because of" pregnancy or maternity leave. It may, for example, be a simple administrative error. The same process of reasoning is required in such a case as is required in any other discrimination case.'**

105. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a

detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment': see per Lord Hope of Craighead in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* (at para 35). An unjustified sense of grievance does not fall into that category.

106. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. In a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

Injury to feelings

107. In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102, the Court of Appeal gave guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

108. The bands were increased by the 2019 Second Addendum to Joint Presidential Guidance for claims presented on or after 6 April 2019:

108.1. lower band: £900 to £8,800;

108.2. middle band: £8,800 to £26,300;

108.3. top band: £26,300 to £44,000.

109. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation: society has condemned discrimination, and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT

at [27]). The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned (*Essa v Lang* [2004] IRLR 313).

110. A *Polkey*-type deduction should not be applied to an award for injury to feelings (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615).

Interest on compensation under the Equality Act 2010

111. The Tribunal must consider whether to award interest on awards in discrimination claims, without the need for any application by a party, but an award of interest is not mandatory: reg. 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[2]

112. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[3] The interest rate now to be applied is 8%.

113. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs).

Unfair (constructive) dismissal

114. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer. S.95(1) ERA provides that she is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

115. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that she was entitled to regard herself as discharged from her obligations under the contract. The Claimant relies primarily on a breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **14. 'The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the 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: see, for example,**

[2] SI 1006/2803

[3] SI 1996/2803

Malik v Bank of Credit and Commerce International SA **[1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

116. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?'

117. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 at [29].

118. An employer's discriminatory act will not always amount to a breach of the implied term of trust and confidence. In *Amnesty International v Ahmed* [2009] ICR 1450, EAT, although the EAT upheld the Tribunal's decision that the Claimant had suffered direct race discrimination, it dismissed the Tribunal's finding that the employer had also breached the implied term of trust and confidence. It held that an employer's unlawful discrimination did not automatically give rise to a breach of the implied term (although it will in most cases). In that case, the Respondent had reached its decision after a thorough and reasoned process, motivated by no racial prejudice.

119. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract, if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

120. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

121. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

Conclusions: direct pregnancy/maternity discrimination

122. All the allegations come within the protected period, either at a time when the Claimant was pregnant, or before the end of her period of additional maternity leave (the Claimant never returned to work from maternity leave).

<u>Issue (A): 'The Respondent failed to complete a pregnancy risk assessment on the Claimant's behalf'</u>

123. The Tribunal is satisfied that, by a combination of the general risk assessment which included factors relating to pregnant workers, asking the Claimant to complete a DSE, Ms Oxley's going through with her both the flowchart relating

to pregnant workers and the document dealing with specific risks for expectant mothers, and Ms York's letter of 21 June 2018, the Respondent made a suitable and sufficient assessment of the potential risks to the Claimant, by reason of her pregnancy, and put in place all necessary precautions. The Claimant was unable to identify anything that she should have been provided with, which had not been provided. The alleged conduct did not occur; alternatively, the Claimant was not subjected to a detriment.

Issue (F): The Respondent failed to invite and/or inform the Claimant about a meeting regarding "KIT days", despite confirming that it would do

124. This issue is specifically pleaded as a failure to invite the Claimant to a meeting to discuss KIT days. The Tribunal notes that in her witness statement (at para 14), the Claimant merely alleges that Ms York 'did not contact me about KIT days'. In the light of the letter of 21 June 2018, which specifically references KIT days, that is factually incorrect. It is right, however, that the Claimant was not invited to a meeting to discuss KIT days, and there was some suggestion in the same letter that the Respondent would do so.

125. In the light of our findings above, we are satisfied that a meeting was arranged, but did not take place for the sole reason that it was overlooked, and not because of pregnancy or maternity leave. It is right that the fact that the Claimant had started her maternity leave unexpectedly early is part of the background to that omission. However, we are satisfied that it is not the 'reason why' a further meeting was not arranged. The 'reason why' was simply that Ms York forgot, as apparently did the Claimant.

126. Further, we conclude that there was no detriment to the Claimant in the failure to arrange a meeting to discuss KIT days. She already knew that she could ask for KIT days, if she wanted them. We infer from the fact that she did not do so, and indeed rejected the offer of KIT days at the grievance hearing, that she would not have accepted them, if they had been offered.

127. Accordingly, this claim fails.

Issue (E): The Respondent failed to invite and/or inform the Claimant about a meeting informing members of the Respondent's staff of changes to their contract, which included the Claimant

128. Ms York did not consult the Claimant about the contractual change at the same time as other employees were consulted. We are satisfied that that was unfavourable treatment: the Claimant was entitled to be informed of the change promptly.

129. It was also a detriment: the Claimant was deprived of the opportunity of being consulted about a significant, proposed change to her contract of employment at same time as her colleagues. The Tribunal does not consider that disadvantage to be great, especially as the contractual change was beneficial to her, but it was not insubstantial.

130. We accept Ms York's explanation that she was trying to be sensitive to the fact that the Claimant was on maternity leave, and did not want to trouble her with a contractual matter during that time. However, it follows inevitably from Ms York's own evidence that the 'reason why' she did not consult the Claimant at

the same time as the others was because the Claimant was on maternity leave. The fact that her motive was benign does not assist the Respondent (see *Ahmet*, referred to above).

131. Accordingly, we conclude that the necessary elements of this claim are made out, and that it is well-founded, subject to considerations of time limits, which we deal with below.

Issue (G) - The Respondent failed to invite and/or inform the Claimant about company events during her maternity leave, including a business initiative called "Going for Gold"

132. It is accepted that the Claimant was not involved in these events because she was on maternity leave. The Tribunal is satisfied that the failure to involve the Claimant did not subject her to any detriment. She accepted that there was 'no point' in seeking to involve her in activities designed to incentivise employees in their work, at a time when she was not attending work. The Tribunal agrees. Indeed, we conclude that it would have been inappropriate for the Respondent to seek to do so, as it might have been perceived as putting pressure on an employee on leave.

133. Absent any detriment, this claim fails and is dismissed.

Issue (H): The Respondent failed to contact the Claimant and/or keep the Claimant informed about workplace matters, throughout her maternity leave, at all or as much as it should have; Issue (I): The Respondent removed the Claimant's desk from the Respondent's office

134. We have found that this conduct did not occur.

Issue (B): The Respondent failed to properly assess the Claimant's entitlement to a pay rise

135. We have found as a fact that there was no failure on the part of the Respondent properly to assess the Claimant's entitlement to a pay rise. Insofar as there was a flaw in the process, it was a failure on Ms York's part to record her conclusions, not a failure to make a proper assessment.

136. The alleged conduct did not occur, and the claim fails.

Issue 9(C) - By failing to give the Claimant a pay rise in April 2019. The Respondent contends that the Claimant's pay was no lower than market rates, it was comparable with work colleagues, and the decision not to award a pay rise was made for non-discriminatory reasons. The Claimant contends that she should have been awarded a pay rise due to work performance and qualifications

Issue (D) - The Respondent cited a false reason for the Claimant not being entitled to a pay rise, namely: insufficient evidence due to a short period of time to assess the Claimant

137. We are satisfied that the 'reason why' Ms York decided not to give the Claimant a pay rise was because the Claimant was both less experienced and less skilled than her colleagues Ms Clark and Mr Evans, who were doing the same role, and she considered it would be inappropriate to pay the Claimant

more than they were paid. We have concluded that this was a complete, and non-discriminatory, explanation for her decision.

138. We reject the Claimant's argument that she was treated unfavourably because she was on maternity leave. Ms York made a fair assessment of the Claimant's performance, which reflected her relative inexperience in her new role at that stage of her development. She had regard to the fact that the Claimant had not yet achieved any additional qualifications, nor demonstrated that she had not yet demonstrated exceptional achievement. In reaching that conclusion, she was not being unfairly critical of the Claimant (as the Claimant perceived it), she was merely making an honest assessment - and one which, we note, was reasonably consistent with the Claimant's own self-assessment. There was no obligation on Ms York to perform an entirely speculative exercise, in an attempt to assess how the Claimant might have progressed, had she not been on maternity leave. Even if such an exercise were possible, we conclude that it would not have led Ms York to the conclusion that the Claimant would have progressed to such a degree that she ought to be paid more than her more experienced colleagues, performing the same role. There would have been no evidential basis for such a conclusion; certainly, none was advanced by Claimant before us.

139. As for the allegation that Ms York gave a 'false' reason for the Claimant not being given a pay rise, we have already found, as a matter of fact, that she did not do so.

140. We are satisfied that the Claimant's pregnancy/maternity played no part whatsoever in Ms York's decision not to award her a pay rise and, accordingly, these claims of direct discrimination fail.

Issue 9(J): The Respondent responded to the Claimant's submitted grievance and/or subsequent appeal in an unnecessarily aggressive manner and/or dealt with it in breach of their own policy

Issue 9(K): The Respondent failed to adequately consider the Claimant's representations in her submitted grievance and/or subsequent appeal.

141. As we have recorded above, the allegation that the conduct of the grievance hearing was aggressive was withdrawn. We have found, as a matter of fact, that the appeal was not conducted in an aggressive manner. We have further found that the grievance process was not in breach of the Respondent's policy, nor had Ms Armstead failed adequately to deal with the Claimant's representations. Those aspects of these two allegations did not occur as alleged.

142. By contrast, we have found that Mr French failed to deal with the appeal in an impartial manner. We have considered whether the Claimant has proved facts from which we could reasonably conclude that his failure was because of pregnancy or maternity; we have concluded that she has not. We record that Ms Rokad ended her cross examination of Mr French without having put to him that his conduct was discriminatory. She was asked by the Judge whether she proposed to do so and, although she formally put her client's case in a single sentence, there was no further exploration by her of the issue. We find that that approach was consistent with the fact that there was simply no

evidential basis on which she could properly do so. Consequently, the burden of proof does not pass to the Respondent to show that Mr French's conduct was not discriminatory, and the claims fail at the first stage.

Conclusion: time limits in relation to Issue (E)

143. There is some lack of clarity as to precisely when the act took place: the Respondent did not provide a date for the consultation with other employees about the contractual change; the Claimant did not identify precisely when she became aware of it; it must have been before 17 April 2019, when she mentioned it in her grievance. If the act was after 26 March 2019, the claim was brought in time.

144. We reject the Claimant's evidence that she was unaware of the applicable time limits when she issued her grievance, and did not learn about them until the appeal stage. We note that the grievance itself makes reference to aspects of equality and discrimination law. By the time she brought her grievance, the Claimant had consulted a solicitor, who practised in employment law. To that extent, the Claimant's explanation for the delay claim was unsatisfactory.

145. However, it seems to us plain that the Claimant issued her claim so that it would be in time by reference to the effective date of termination. That was a rational approach in a case where she was alleging that her dismissal was itself a response to earlier alleged act of discrimination, although it left her vulnerable to arguments about time limits in relation to the earlier matters, in the event that the central complaint of constructive dismissal did not succeed.

146. We went on to consider the balance of prejudice, if, as seems likely, an extension of time is required. If time were not extended, the prejudice to the Claimant would be substantial, since she would be deprived of a remedy in respect of a claim which Tribunal has found was meritorious; if time were extended, the only prejudice to the Respondent would be its exposure to liability. There was no suggestion that the cogency of the evidence was affected by any delay; on the contrary, Ms York was able to give a clear and cogent account of why she acted as she did.

147. In all the circumstances, and even taking into account the unsatisfactory nature of the Claimant's explanation for the delay, we concluded that the fact that the balance of prejudice favours the Claimant outweighed that consideration, and led us to the conclusion that it was just and equitable to extend time.

Constructive dismissal

<u>Elements of the alleged breach of the implied term</u>

148. We have found that the following conduct, relied on by the Claimant as elements of a breach of the implied term of trust and confidence, did not occur as alleged:

    148.1. the alleged failure to conduct a pregnancy risk assessment (Issue is (A);

148.2. the alleged ignoring/marginalisation of the Claimant during her maternity leave (Issue (H));

148.3. the allegation that her desk was 'removed' during her maternity leave (withdrawn by the Claimant) (Issue (I));

148.4. the alleged failure properly to assess the Claimant's entitlement to a pay rise (Issue (B));

148.5. the allegedly 'false' reason given for the Claimant's not being entitled to a pay rise (Issue (D));

148.6. the alleged failure properly to deal with the grievance, and the alleged aggressive conduct of the grievance and appeal (parts of Issues (J) and (K)).

149. We have found that the conduct set out under the italicised subheadings below, and relied on by the Claimant as elements of a breach of the implied term of trust and confidence, did occur.

Not involving the Claimant in workplace events during maternity leave (Issue (G))

150. As for the failure to involve the Claimant in incentive-based work activities during her maternity leave, it follows from our conclusions above, that we have concluded that the Respondent had reasonable and proper cause for its conduct. Accordingly, this can play no part in any breach of the implied term.

Failing to give the Claimant a pay rise of April 2019 (Issue (C))

151. Ms York did not give the Claimant a pay rise because she was both less experienced and less skilled than her colleagues, Ms Clark and Mr Evans, who were performing the same role. For that reason, the Tribunal concludes that the Respondent had reasonable and proper cause for not giving the Claimant a pay rise, and this matter can play no part in any breach of the implied term.

152. We then went on to consider whether the other conduct which occurred, and for which there was no reasonable or proper cause, was so serious as to amount to a breach of the implied term.

Not inviting the Claimant to attend a meeting to discuss KIT days (Issue 9(F))

153. We conclude that the failure to invite the Claimant to attend the meeting to discuss KIT days (Issue 9(F)) was not conduct which, viewed objectively, was likely seriously to damage the relationship of trust and confidence, or to contribute to such damage. It was a minor slip, which did not disadvantage the Claimant, who knew that she could ask for a KIT day, if she wanted to have one.

Not consulting the Claimant about a proposed contractual change during her maternity leave (Issue (E))

154. We have found that the failure to consult the Claimant about her contractual change (Issue(E)) was an act of direct maternity discrimination. However, it is clear from the authorities that it does not follow automatically that discriminatory conduct will always amount to a breach of the implied term. We

have already found that Ms York acted with good intentions, that she always intended to discuss the change with the Claimant on her return, and that the proposed change to the contract was beneficial to the Claimant. The only detriment to the Claimant was minor: a short delay in learning about a proposal, which her colleagues were informed about earlier. We are satisfied that this was no more than an error of judgment on Ms York's part. Viewed objectively, we are satisfied that it does not pass the threshold of being likely seriously to damage the relationship of trust and confidence; in no sense did it amount to repudiatory conduct by the Respondent.

Failing properly to consider the Claimant's representations at the appeal (part of Issue (K))

155. By contrast, we are satisfied that Mr French's failure to conduct an adequate, and properly impartial, appeal was conduct which, viewed objectively, was likely seriously to damage the relationship of trust and confidence.

The reason for the resignation

156. If we are wrong in our conclusion that the failure to notify the Claimant about the contract change was not a breach of the implied term, we are satisfied, on the balance of probabilities, that it played no part whatsoever in the Claimant's decision to resign. We reached that conclusion, notwithstanding the fact that the Claimant's evidence was that it did contribute to her decision to resign. We disbelieved her on this issue, a conclusion which was informed in part by our assessment of her credibility more generally, in particular having regard to her misleading evidence about the circumstances of her new employment, and her denial that she knew about the covert recording of the grievance hearing.

157. We further find that the Claimant did not resign because of the appeal outcome: even if she had not already been offered and accepted new employment by the time she received it (which we have found she had), she had already indicated twice, at the grievance hearing and at the appeal hearing, that she had no intention of returning to work, and had contacted ACAS the day after the grievance appeal hearing. The conduct and outcome of the appeal were entirely irrelevant to her decision to resign.

158. We find that she resigned solely in response to the decision not to award her a pay rise; we were not persuaded, by her evidence that any other factor played a material part in that decision.

159. Consequently, the claim of unfair (constructive) dismissal fails, and is dismissed.

Would the employment has continued in any event?

160. If we are wrong that there was no unfair (constructive) dismissal, we went on to consider whether the employment relationship would have continued, had the acts identified above not occurred. We concluded that the Claimant's dissatisfaction with the lack of a pay rise prompted her to seek alternative employment; she was offered another job at a higher salary, which she accepted. We conclude that there was no chance at all that she would have taken a different decision, had the discriminatory act not occurred, or had the

appeal been conducted differently. She would have resigned at precisely the same point.

Remedy

161. The Claimant is entitled to an award for injury to feelings in respect of the single act of discrimination, which the Tribunal has found occurred. We conclude that the award must fall into the lower category: it was a one-off act. We find that the Claimant experienced some hurt feelings, in that she felt that she was being treated differently in this respect, and she found that mildly upsetting, but no more. Accordingly, we conclude that an award of £900, at the bottom of the lower band, is appropriate compensation in the circumstances.

162. Absent a precise date for the discriminatory act, we have used the date of the Claimant's grievance, 17 April 2019, as the starting-point for the period for calculating interest; the calculation date was 28 October 2020. That is a period of just over 1 year and six months at 8%, which produces a figure of £108.

Employment Judge Massarella

16 February 2021

APPENDIX: PARTIES' AGREED LIST OF ISSUES

The issues

The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Constructive unfair dismissal

9.1. Did the Respondent do the following acts or omissions:

a) The Respondent failed to complete a pregnancy risk assessment on the Claimant's behalf;

b) The Respondent failed to properly assess the Claimant's entitlement to a pay rise;

c) The Respondent failed to give the Claimant a pay rise despite the Claimant's work performance and qualifications;

d) The Respondent cited a false reason for the Claimant not being entitled to a pay rise, namely: insufficient evidence due to a short period of time to assess the Claimant;

e) The Respondent failed to invite and/or inform the Claimant about a meeting informing members of the Respondent's staff of changes to their contract, which included the Claimant;

f) The Respondent failed to invite and/or inform the Claimant about a meeting regarding "KIT days", despite confirming that it would do;

g) The Respondent failed to invite and/or inform the Claimant about company events during her maternity leave, including a business initiative called "Going for Gold";

h) The Respondent failed to contact the Claimant and/or keep the Claimant informed about workplace matters, throughout her maternity leave, at all or as much as it should have;

i) The Respondent removed the Claimant's desk from the Respondent's office;

j) The Respondent responded to the Claimant's submitted grievance and/or subsequent appeal in an unnecessary aggressive manner and/or dealt with it in breach of their own policy;

k) The Respondent failed to adequately consider the Claimant's representations in her submitted grievance and/or subsequent appeal.

9.2. Do those matters proved amount to a course of conduct amounting to a breach of the implied term of mutual trust and confidence which entitled the Claimant to resign? The Claimant contends that the last straw was the grievance and grievance appeal, and the manner in which they were conducted.

9.3. If so, did the Claimant waive or affirm the said breach?

9.4. Did the Claimant resign as a result of the alleged breach (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? The Respondent's case is that the Claimant resigned to take up alternative employment.

9.5. If the Claimant was entitled to resign by reason of the Respondent's conduct, can the Respondent show a potentially fair reason for the dismissal?

9.6. If so, was the dismissal fair within section 98(4) Employment Rights Act 1996?

Pregnancy or maternity discrimination

9.7. Were each of the Claimant's discrimination complaints presented within the three month time limit set out in section 123(1)(a) EQA? If not, was each complaint presented within such further time as was just and equitable? Dealing with this issue may involve consideration of whether there was an act extending over a period.

9.8. Did the Respondent treat the Claimant unfavourably as follows:

a) The Respondent failed to complete a pregnancy risk assessment on the Claimant's behalf;

b) The Respondent failed to properly assess the Claimant's entitlement to a pay rise;

c) By failing to give the Claimant a pay rise in April 2019. The Respondent contends that the Claimant's pay was no lower than market rates, it was comparable with work colleagues, and the decision not to award a pay rise was made for non-discriminatory reasons. The Claimant contends that she should have been awarded a pay rise due to work performance and qualifications.

d) The Respondent cited a false reason for the Claimant not being entitled to a pay rise, namely: insufficient evidence due to a short period of time to assess the Claimant;

e) The Respondent failed to invite and/or inform the Claimant about a meeting informing members of the Respondent's staff of changes to their contract, which included the Claimant;

f) The Respondent failed to invite and/or inform the Claimant about a meeting regarding "KIT days", despite confirming that it would do;

g) The Respondent failed to invite and/or inform the Claimant about company events during her maternity leave, including a business initiative called "Going for Gold";

h) The Respondent failed to contact the Claimant and/or keep the Claimant informed about workplace matters, throughout her maternity leave, at all or as much as it should have;

i) The Respondent removed the Claimant's desk from the Respondent's office;

j) The Respondent responded to the Claimant's submitted grievance and/or subsequent appeal in an unnecessary aggressive manner and/or dealt with it in breach of their own policy;

k) The Respondent failed to adequately consider the Claimant's representations in her submitted grievance and/or subsequent appeal.

9.9. Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?

9.10. Was any unfavourable treatment: because of the pregnancy or because the Claimant was on compulsory maternity leave; or because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Remedy

9.11. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise include:

9.11.1. if it is possible that the Claimant would still have been dismissed at some relevant stage even if there had been no discrimination or unfair dismissal, what reduction, if any, should be made to any award as a result?

9.11.2. would it be just and equitable to reduce the amount of the Claimant's basic or contributory award because of any blameworthy or culpable conduct before the dismissal; and if so to what extent?