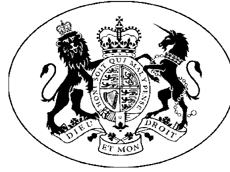

EMPLOYMENT TRIBUNALS

Claimant: Miss M Spratt

Respondent: Global Baggage Solutions Limited

Heard at: Manchester Employment Tribunal (by CVP) **On: 3, 4, 5 March 2021**

11 March 2021 (in chambers)

Before: Employment Judge Dunlop
Mr A Murphy
Dr H Vahramian

Representation

Claimant: In person/Mr Goodchild (partner)
Respondent: Mr D Soanes (Solicitor)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal fails and is dismissed.

2. The claimant's claim of indirect discrimination on the grounds of sex fails and is dismissed.

3. The claimant's claim of discrimination on the grounds of pregnancy and maternity fails and is dismissed.

REASONS

Introduction

1. This is a claim for constructive unfair dismissal, indirect discrimination on the grounds of sex and discrimination on the grounds of maternity.

The Hearing

Background

2. Although the events giving rise to this case entirely pre-date the Covid-19 pandemic, the conduct of the hearing itself was very different to what it would have been in pre-pandemic times. The events of the last year have also had a significant effect on the preparation of the case, giving rise to some of the issues which we outline below.

3. The respondent company offers baggage handling services to airlines. Specifically, it holds contracts to trace and reunite lost baggage with passengers. We are told, and accept, that the travel restrictions resulting from the pandemic have put the business into crisis and that at one point during the last year it appeared it would not survive. Since then, the business has entered into a CVA and it is hoped that this will enable it to weather the crisis and scale up its operations again when conditions permit.

4. Against this background, the respondent failed to comply with a direction to send its witness statements to the claimant on 30 October 2020. (The claimant did send her statement to the respondent's solicitors on that date.) The claimant raised the matter with the Tribunal, copying the respondent, and asking for the response to be struck out. The respondent did not reply. As a result, on 2 December 2020 the Tribunal wrote to the respondent, noting that under the terms of the case management orders it was now barred from relying on witness evidence without permission from the Tribunal. It was noted that any further delay in serving statements and seeking permission would count against the respondent.

5. The respondent's solicitors wrote to the Tribunal on 3 December 2020, apologising and referring to the circumstances outlined above. It was stated that witness statements were in the process of being prepared and that the firm undertook not to open the claimant's witness statement, nor pass it on to the respondent, until it had served its own. Following this, the statements were served on Miss Spratt on 21 January 2021 (almost six weeks before this hearing) and an email applying for permission to rely on them was sent to the Tribunal on 25 January 2021.

6. On 27 January 2021 a member of administrative staff at the Tribunal wrote to the parties encouraging them to agree the matter between themselves as referrals of applications to judges were taking up to two months. The claimant made clear in several subsequent emails that she was not prepared to agree to the statements being admitted into evidence, nor (understandably) did she wish for the case to be postponed. It is very unfortunate that (as predicted by the administration) the huge backlog of referral work in Manchester meant that this correspondence did not receive the attention of a Judge before this hearing. (That backlog is also in some part a consequence of the pandemic.) We should also note at this point that correspondence around this time also included arguments about disclosure of certain documents. The claimant had provided a large number of documents to be added to the bundle, which resulted in some delays in agreeing the final bundle pagination, but also sought some further

documents, which the respondent contended either did not exist or were not relevant.

7. Separately, in a letter to the Tribunal the day before the hearing, Miss Spratt explained that she would be joining the hearing (which was to be held by CVP) from her home, where her partner, Mr Goodchild, and their two-year-old daughter would also be present. Miss Spratt was concerned that her daughter (whom I will not name in this Judgment) found it very hard to be separated from her as they had spent almost an entire year in each other's constant company during the pandemic. She was likely to be noisy and otherwise disruptive if Mr Goodchild attempted to keep her outside the room where her mother was. Miss Spratt also mentioned that her daughter was still breastfeeding.

Hearing by CVP

8. That is the background against which this hearing commenced. All parties were initially able to join the hearing successfully. For the initial discussion, Mr Goodchild spoke for Miss Spratt, whilst she listened to the hearing and entertained the child off-camera. For later parts of the hearing, including Miss Spratt's evidence, her daughter was asleep, or Mr Goodchild was able to entertain her in another room. We took breaks, often at short notice, at times which would facilitate Miss Spratt attending to her when needed. From time to time, she sat with her daughter on her knee.

9. On the second day of the hearing, there was a problem with Mr Soanes' connection, which meant that all of the other participants were unable to hear him (although he was not 'on mute'). This was managed during the evidence of one of the respondent's witnesses by the Employment Judge taking the witness through the process of confirming their statement, before cross-examination by Miss Spratt. Mr Soanes then asked a small number of re-examination questions using the chat box facility. Later, the hearing day was re-scheduled to allow an early extended lunch in order for Mr Soanes to reconnect using another device.

10. Despite these irregularities, all of the participants took the proceedings seriously and played their part with courtesy and respect to everyone else involved. The Tribunal expresses its appreciation to them for that. It is sometimes lamented that Employment Tribunals no longer offer the quick, informal and accessible forum for determining employment disputes that was envisaged when the Industrial Tribunals were created. This hearing was not quick, partly as a result of the issues identified, but it is worth reflecting that it represented access to justice which was informal and accessible in ways which could scarcely have been imagined one year ago, let alone fifty years ago.

Preliminary Issues

11. The first issue that we had to determine was whether to accede to the respondent's outstanding application to rely on its late-served statements. We heard from both parties on this and gave an oral decision after a short adjournment. The claimant emphasised that it had been difficult for her to prepare her statement on time but that she had prioritised doing so in order

to comply with the orders, she felt the respondent ought to have done the same. She also complained that the respondent was able to refer to material which had been added to the bundle after the 30 October 2020, whereas she had not. She explained that she had not prepared a supplemental statement to address this point because she felt that that was not permitted by the case management orders, although she accepted Mr Soanes had suggested this. She also explained that she had not prepared cross-examination for the respondent's witnesses as she was working on the basis that the statements would not be admitted.

12. For his part, Mr Soanes relied on the matters that had been set out in correspondence. The failure to comply was regrettable, but there was an explanation for it. Most importantly, it would be a draconian step to prevent the respondent from relying on statements which had, ultimately, been served six weeks in advance. There was no prejudice to the claimant as her statement had not been used to influence the respondent's statements (Miss Spratt did not seem to dispute this, although she was suspicious about the undertaking), she could have prepared a supplemental statement but had not done so.

13. The Tribunal expressed its dissatisfaction with the respondent's failure to comply with the deadline and its failure to communicate with the claimant clearly about this. However, we decided that, in all the circumstances, it was appropriate to allow the respondent to rely on the evidence. It is likely that the Tribunal would have been sympathetic to a postponement application by Miss Spratt (particularly in view of the difficulties in conducting the hearing under lockdown conditions which made it impracticable for her daughter to be cared for elsewhere). However, Miss Spratt was adamant that she wanted the matter determined without further delay, and the Tribunal can equally understand that position. As a result, and in an effort to ensure fairness between the parties, we allowed Miss Spratt to delay giving her evidence until the start of the second day, so that she could produce a document (in effect, a supplemental statement) commenting on the documents in the bundle which she had been unable to comment on in her initial statement. We then further delayed the start of the respondent's evidence to enable her and Mr Goodchild to prepare cross examination questions. These adjustments (along with the need for breaks and technical difficulties mentioned above) meant that we could not adhere to the timetable agreed between at the preliminary hearing. The parties completed the evidence and submissions within the three days listed for the hearing, but the Tribunal then had to arrange a fourth day (in chambers only) to reach its decision.

14. There was a further preliminary issue in that the claimant sought specific disclosure of various documents. Some of these dated back to events in 2016. The respondent's position was that it had not searched for these documents as it did not consider them relevant to the issues identified at the case management hearing. The Tribunal agreed. The claimant sought other documents, for example a risk assessment relating to her return to work, which would have been relevant to the claim. However, the respondent's position was that the documents identified by the claimant did not exist and those which did exist had been disclosed. Having heard from both parties and discussed the list of documents set out in the claimant's

emails in some detail, the Tribunal did not make any order for further disclosure.

15. During the hearing, we therefore had regard to an agreed bundle of documents which ran to 314 numbered pages (including many late-inserted documents numbered in the format '63A' etc). We read those documents referred to in the witness statements and by the parties during the course of the hearing.

16. The claimant gave evidence on her own behalf. On behalf of the respondent we heard evidence from:

    Milicia Chi, the respondent's Planning Manager
    Laura Bamber, the respondent's General Manager
    Albert Chi, the respondent's founder and principal director

The Issues

17. The issues in this case were discussed at a preliminary hearing before EJ Leach on 31 March 2020 and a List of Issues was appended to the Case Management Summary sent to parties. At the outset of this hearing, the Employment Judge noted that the List of Issues omitted the question of whether any indirect discrimination which may be found by the Tribunal was justified. A justification defence had been raised by the Respondent in its amended response (indeed, the defence of the indirect discrimination claim relies entirely on this point) and we agreed that this would be incorporated into the List of Issues, which I have done below. Otherwise, the parties agreed that the List of Issues prepared by EJ Leach properly reflected all the issues to be determined, and, in particular, that references to events in 2016 and earlier made in the claimant's claim form and witness statement were given by way of background only.

18. The issues to be determined by the Tribunal were, accordingly, these:

Constructive Unfair Dismissal

1. Was the claimant dismissed i.e. –

(1) Was the conduct noted in paragraph 2 below a fundamental breach of the contract of employment and/or did the respondent breach the so-called trust and confidence term i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

(2) If so, did the claimant affirm the contract of employment before resigning?

(3) If not, did the claimant resign in response to the respondent's conduct? (To put it another way, was it a reason for the claimant's resignation, it need not be the reason for the resignation?

2. The conduct the claimant relies on as breaching the trust and confidence term is the treatment of her over the period April 2017 up to date of termination of employment, in relation to 3 matters:

(1) The respondent's treatment of the claimant's pension as set out at paragraphs 8 to 12 of the claimant's "Claim Statement" attached to her claim form, including:

(i) errors in relation to pension payments/contributions;

(ii) The failure on the part of the respondent to adequately address those errors;

(iii) Requiring the claimant to address the errors herself, including with the pensions ombudsman;

(iv) Failing to deal with the claimant's grievance in relation to pension errors, which was submitted in October 2018.

(2) The claimant's pay during her maternity leave – as set out in paragraphs 13 and 14 of the Claim Statement. It is the claimant's case that the so-called errors in payments made to her and the failure to promptly address these was not simply by way of mistake on the part of the respondent or those instructed by the respondent. Rather it was a deliberate attempt to cause hardship to the claimant because she had raised a grievance in relation to the pension issues noted above. In support of this allegation the claimant notes that other employees who were or had been on maternity leave did not have the same difficulties as the claimant in relation to payments.

(3) The respondent's refusal to provide the claimant with working hours on her return from maternity leave which would enable the claimant to work and also address breastfeeding and ongoing childcare requirements. Prior to her maternity leave the claimant was working 11.5 hour shifts as a supervisor at the respondent's call centre. The respondent refused to allow the claimant to return to her post as supervisor in the call centre on hours that would provide for shorter working days and more regular hours. Whilst the respondent offered the claimant alternative work in an airport terminal, the claimant claims:

(i) That the minimum working day required was still 8.5 hours (she had asked for 6 hour working days);

(ii) That the hours to be actually worked were unpredictable in that 8.5 hours could be different hours on different days;

(iii) It required the claimant to work on the basis of two days on, four days off;

(iv) It required the claimant to return to a working environment that the respondent had moved the claimant from some years earlier because the respondent deemed the working environment as unsuitable for the claimant.

Indirect Discrimination contrary to section 19 Equality Act 2010

3. This claim relates to the claimant's request for different working hours as noted above.

4. The claimant claims that the respondent applied to her a provision criterion or practice ("PCP") of 11.5 hour days on a rotating shift pattern in order that the claimant could continue in employment as a supervisor in the claimant's call centre.

5. **Additionally the claimant claims that the respondent applied a PCP of minimum working days of 8.5 hours on a rotating shift pattern in order that the claimant could continue in any employment at all with the respondent other than on a casual/zero hours basis.**

6. **The issues are:-**

   a. **Did the respondent apply the PCPs noted above to the claimant at any relevant time?**
   b. **Did the respondents apply or would the respondent have applied the PCPs to persons with whom the claimant does not share the protected characteristic – eg men?**
   c. **Did the PCPs put women at one or more particular disadvantage when compared with men in that (1) only women breastfeed and (2) many more women than men have primary responsibilities for childcare?**
   d. **Can the respondent show that applying the PCP was a proportionate means of achieving a legitimate aim?**

Pregnancy and Maternity Discrimination contrary to section 18 Equality Act 2010

7. **The claimant was on maternity leave when she requested a change to her working hours (as noted above). The request was therefore made during the "protected period" as defined at s18(6) EqA.**

8. **The claimant claims that her request was refused because:-**
   a. **she made it at a time when she and other employees were on maternity leave as, had it been agreed to, the respondent would have been obliged to agree flexible working requests made by the other employees on maternity leave**
   b. **it provided the respondent with an opportunity to make cutbacks to their workforce without incurring redundancy related costs as they knew that the claimant would be unable to return to work in the light of the refusal to agree to the changes in hours requested.**

Findings of Fact

Background

19. As noted above, the respondent provides baggage handling services to airlines. It has operations at Manchester, Heathrow and Gatwick and, more reccently, has taken on some work at JFK airport in New York. The business was started by Mr Chi in May 2002 and remains privately owned by him. Mrs Chi is his wife. Miss Spratt commenced employment as a baggage facilities supervisor in July 2002 and was one of the first employees. At that time the business only operated in Manchester.

20. The business had a period of considerable success and expansion, expanding into Heathrow in 2006 and Gatwick in 2007. Employee numbers reached around 120 by that point, which is where they remained up to the period we are concerned with (things have changed since March 2020). Between 2006/7 to approximately 2015, the respondent's management structure included station managers and assistant managers at each airport, and a dedicated finance manager and HR manager. From 2015 it was subject to increasing pressure to cut costs and the management structure became leaner. The HR manager left in 2014 or 2015 and was not replaced. During the period we are concerned with, all the management functions were undertaken by Mr Chi, Mrs Chi and Miss Bamber. Further,

Mr Chi was trying to expand the business abroad and was often away, leaving much of the day-to-day running to just Mrs Chi and Miss Bamber. We find that they were all very busy and that they no longer had the capacity to run the business in the way they would ideally have liked to, in terms of responding promptly to employee concerns and ensuring that nothing was missed.

21. Miss Spratt had initially been employed as a supervisor in Terminal 1 at Manchester. She complains that she was overlooked for promotion when station manager/assistant station manager roles came up, but those are not matters about which we make any determination. Similarly, at one point prior to 2016 there was a grievance against Miss Spratt which resulted in a six-month warning being placed on her personnel file. We make no determinations about rights or wrong of that warning. It is, however, clear from Miss Spratt's statement that, at least to some extent, she blamed Miss Bamber (who had been a friend) for the warning and also felt that Miss Bamber had exercised her power as a manager unfairly. We find there was a degree of bad feeling between them.

22. In 2016 Miss Spratt had a period of sickness absence due to stress arising from non-work-related issues. On her return, she was moved to work in Terminal 3. There was some dispute about the exact reason for the move. We find that it suited the respondent's operational needs but was also seen as being supportive for Miss Spratt at this time as it would allow her to work in a less busy environment than Terminal 1 and work more closely with Mrs Chi.

23. In 2017, Miss Spratt was moved again, this time to take up a role as a supervisor in the call centre, which the respondent runs at Manchester airport. This is separate to the terminal operations and deals with calls arising from all of the respondent's contracts. The call centre role had been advertised and Miss Spratt chose not to apply for it, so she was not initially happy to be moved there. Ultimately, however, she found that it suited her well.

24. In contrast to the relationship with Miss Bamber, we find that the relationship between Miss Spratt and Mr Chi was very amicable. For example, Mr Chi had loaned Miss Spratt money on an interest-free basis when she had financial difficulties. She paid this off over three years between 2014 and 2017. They exchanged friendly text messages and bought each other gifts for birthdays etc. Although this relationship remained friendly, regarding the post-2015 period, Mr Chi said this in his witness statement:

    > *"it is fair to say we are a lot more stretched than we used to be as a management team and that some of those personal touches which we had when we first started out have fallen away. Michelle would have seen that over the course of her employment and I think she found that hard to accept."*

    The tribunal finds tis to be an astute assessment, which accurately reflects the changing relationship between Miss Spratt and the business managers.

25. The respondent's Manchester operation runs on a strict and complex rota, reflecting that fact that its services as required, to a greater or lesser extent, on a 24/7 basis. The busiest times, at least at Manchester, were early

mornings when the first flights arrived into the terminals between 6am-8am. We were shown details of the rota over several months. Within the call centre role, Miss Spratt worked a rotating shift pattern of four-days-on/four-days-off. Each shift was from 8am to 7.30pm. There was another supervisor, Mr Mottram, who worked the opposite shifts. Between them, they provided supervisor coverage throughout the operating hours of the call centre, Beneath them were agents working various shifts which fitted into the rotating pattern. The shift pattern was designed to provide coverage for the respondent's operating needs – for example by ensuring that more staff were at work during the times of the day that tended to be busy, and for providing specific cover e.g. a 'C1/T1' shift was a call centre shift which could also be used to provide additional staffing in terminal 1 if required. If Miss Spratt or Mr Mottram were on leave or sickness absence then an experienced agent would be allocated to the supervisor shift in their place. The agent's own shift may or may not be 'back-filled' depending on how busy the shift was expected to be and the availability or staff.

26. Each of the terminals had its own specific shift pattern, again designed to meet the respondent's operational need within that terminal. The respondent employs a mix of permanent staff, who will work fixed shifts (although this can be changed at the respondent's discretion, as with Miss Spratt's moves to terminal 3 and then to the call centre) and ad hoc staff. Ad hoc staff will be offered shifts when there is availability (e.g. through staff absence). There is no obligation on the respondent to offer shifts and no obligation on the ad hoc staff to accept them. The respondent prefers to cover shifts using ad hoc staff than to offer them as overtime to permanent staff, as this comes with an additional cost. Generally, the shifts offered to ad hoc staff will be those pre-determined by the roster, although there were exceptions to this discussed below.

27. Prior to June 2018 there had been an employee called Janette who had worked fixed shifts Monday to Friday 7.45am to 2.20pm in the call centre. She had a specific role, which was to run reports for all the airlines. She did some call handling if she was able to complete that work. In June 2018 she left and the respondent decided not to replace her but instead to incorporate the report-running into the work of the other agents, which proved to work better for various reasons.

28. Some of the ad hoc staff members are students. These are generally young people who have family connections to the business. The roster demonstrates that they will sometimes work regular shifts on a set day of the week for lengthy periods – for example for a period of time Mr Chi's son, Alex, was working a short shift every Friday. This was a 'C3' shift and it was not shift that appeared to be undertaken by anyone else. We find that this was a shift that was created for Alex. This enabled him to work in the business at a time that fitted in around his studies. He was particularly skilled in IT and we accept Mr Chi's evidence that he primarily used this time to assist the business with its IT systems, as well as acting as an agent in the call centre or terminal. This coincided with a period where the respondent was changing its IT provider. When the change was complete and extra support was not needed, it came to an end. We find that other students may, from time to time, have been given specific shifts which suited their availability even when those were not shifts which would otherwise

have featured on the rota. We accept, broadly, that the students were given many more shifts during the peak holiday periods when colleges/universities would be closed and the respondent would be busy. These often would be 'standard' shifts from the rota which they could chose to accept or not depending on their availability.

The Pension Issue up to March 2018

29. In 2015 Miss Spratt asked to increase the amount of her employee contributions to her pension. The change was duly made. At that time, the respondent offered staff a pension scheme operated by HSBC. Shortly afterwards, the provider changed to ReAssure. In the process of that change, an error was made which meant that Miss Spratt's pension statements reversed the amount shown as an employer contribution with the amount shown as an employee contribution. This meant that her contribution was recorded as being less than it should have been (£36.00 instead of £60.26), and that therefore she missed out on some of the tax relief which should have been paid into her pension. Miss Spratt took this up with ReAssure, in May 2017 and was advised that they needed information from the respondent to establish the correct premium. At page 106 of the bundle was a letter dated July 2017 in which ReAssure wrote to inform Miss Spratt that that the respondent had confirmed that the premiums should be the other way around, but that they were waiting for "evidence from them". Miss Sprat contends that that letter was misdated, as she asserts that the respondent failed to communicate with ReAssure on the matter for the whole of 2017. She bases this assertion on the documents produced as a result of a subject access request she made to ReAssure. These include several 'call log' records of calls she made to ReAssure during 2017, but none made by the Respondent.

30. The Tribunal finds that someone from the respondent, most likely Miss Bamber, did communicate with ReAssure between May and July 2017 and that the letter at page 106 is correctly dated. We find this because the call log at 230 seems to suggest that the letter was discussed in a call on 15 August 2017. Given the date of the letter and the content of the call log, we are satisfied there is no other reasonable conclusion.

31. Unfortunately, the resolution of the pension issue seems to then have hit a stumbling block. The respondent's position is that it did not have the relevant evidence because the mistake had been made by ReAssure. It is unclear to the Tribunal why the matter could not have been resolved simply by sending copies of the claimant's payslips which would have shown her pension contributions, but, on any version of events, it is apparent that ReAssure were very slow to resolve matters, whether by making the change or by communicating clearly about the evidence they needed.

32. We appreciate that this must have been frustrating to the claimant. We also accept that she was unable to work out what tax relief she was missing out on. However, given that the tax relief shown on the statements for the £36.00 monthly contribution was £9.00, it must have been apparent that the relief due on a £60.26 contribution could only have been a few pounds more per month.

33. In 2018, the matter was still not resolved prompting further conversations between Miss Spratt and Miss Bamber and an email from Miss Spratt to Miss Bamber on 5 March 2018 which provided the relevant documents. We find that Miss Bamber delayed in actioning that email as she had lots of other things to do which she considered to be higher priority.

Pregnancy

34. Also around March 2018, Miss Spratt discovered she was pregnant. Mr Chi was at that time making preparations for opening the operation in JFK, and he had asked Miss Spratt if she would be interested in relocating to work there. She therefore disclosed her pregnancy at a very early stage to him, as the explanation for why she did not want to relocate to New York. She discussed money concerns arising from her pregnancy, and Mr Chi attempted to ReAssure her that 'things would work out'. We do not find, as Miss Spratt now claims, that Mr Chi said that she would be able to work from home after having her baby. The context of this conversation was not one in which firm options for a return to work were being discussed. Even if it was, we are confident that Mr Chi would not have made such an offer given the nature of the respondent's business and way of working.

35. Miss Spratt arranged to commence her maternity leave on 1st November 2018 and expressed her intention to take twelve months off. In the run up to her maternity leave, she was understandably concerned to resolve the on-going pension issue. She raised the issue with Miss Bamber who told her it was "on her to do list". Miss Spratt felt frustrated by this and, in around August 2018, during a conversation with a colleague about her upcoming maternity leave, she complained that she had an unresolved issue about her pension contributions that Miss Bamber had failed to sort out.

36. This conversation got back to Miss Bamber who called Miss Spratt. Miss Spratt said that she was 'reprimanded' for talking about the issue with a colleague. There is no question of any sort of formal disciplinary and Miss Bamber therefore denies it was a 'reprimand'. She does, however, admit that she told Miss Spratt that she should not have raised the issue with a junior member of staff and that she was "*frustrated and annoyed to learn that Michelle was (as I saw it) bad-mouthing me behind my back*." We consider that Miss Spratt was reasonable in concluding that this was a 'reprimand' and that it was unjustified in the circumstances.

37. On 16 October 2018 Miss Spratt emailed a written grievance with Mr Chi complaining that the matter was still not resolved. She also complained about the reprimand from Miss Bamber (explaining it had happened 'a couple of months back'). The grievance stated that "*I feel I have no confidence in Laura or other management within GBS, as all of the management team know about this on-going issue and no one seems to want to resolve the issue and I cannot do it myself as it's all done through my employer*." She goes on to say that "*If this matter isn't resolved within the next month I feel again I will have no option but to raise a claim with the pension financial ombudsman for further investigation… the is my last-ditch attempt to get this matter resolved directly with GBS without takng it to the pension ombudsman as my confidence with Laura Bamber dealing with matter has now been broken. I feel as though I can't raise the issue with*

Laura any further without repercussions coming my way, she is very unapproachable and it's clearly just a burden to her which she doesn't want to resolve for me."

38. Within this letter, she expressed an intention to take the matter to the Pensions Ombudsman if the respondent did not resolve it.

39. The company's grievance procedure stipulated that a grievance meeting should be arranged to discuss Miss Spratt's grievance. This did not happen. Mr Chi was abroad when he received it and Miss Spratt had only two working days left before she commenced a period of annual leave running into her maternity leave.

40. Mr Chi's interpretation of the grievance was that the priority was to finally resolve the pension issue before Miss Spratt went on leave. We agree, in these particular circumstances, that that was more important than holding a meeting in accordance with the policy. A few hours after getting the email from Miss Spratt, Mr Chi forwarded it to Miss Bamber, asking her "*Is this still not sorted out yet?"* In giving evidence he accepted that, in hindsight, it would have been better not to forward the entire email, which included Miss Spratt's criticisms of Miss Banber as set out above.

41. On 17 October 2018 a thorough and professional email was sent by Miss Bamber to ReAssure setting out all the details of the error, noting that the company had made several attempts to have it corrected and attaching a payroll spreadsheet showing the contributions as well as correspondence with HSBC from the time the change was made. We consider that this was the right step for the respondent to take at this point. What was missing, however, was appropriate communication with Miss Spratt to acknowledge her grievance and ReAssure her about what was being done and check whether she would like a meeting (or even a phone call) given that she had raised it as a grievance.

42. From this point, both Miss Bamber and Mr Chi made much more concerted efforts to resolve the matter, as demonstrated by an email of 29 October 2018 (*"I am calling ReAssure every other day*"). However, the matter still dragged on, the delay now very clearly the result of lack of action at the ReAssure end.

43. Whilst we accept that matters were being progressed, Mr Chi failed to communicate with Miss Spratt about her grievance in as full a way as we would have expected. He said on 23rd October that he would "*revert back by the end of the week*" but she had to chase him again on 7 November 2018 (by which time her maternity leave had started). This resulted in a swift but brief response outlining the difficulties that were being faced in getting the changes made. A minute later, Mr Chi responded again to the email, this time asking Miss Spratt to call him when she had time to speak about what she would like him to buy for the baby. Miss Spratt did not make that call, and Mr Chi did not follow the matter up.

Maternity Leave period

44. Miss Spratt commenced her maternity leave as planned. On 12 November, very heavily pregnant, she collapsed in a supermarket and was admitted to hospital with high blood pressure. In her witness statement she suggests that this was due to "*on-going work pressures*". She has produced no medical evidence to support this allegation, and pulled back from it significantly in cross-examination, simply saying that being worried about the on-going pension issue "*didn't help*" with her stress.

45. Miss Spratt's baby arrived safely shortly after this. Both Mr and Mrs Chi congratulated her in messages. Neither sent a present and we accept their evidence that there was an intention to send a gift (as indicated by Mr Chi's email mentioned above) and each thought the other had done it. We further accept that no gift was sent to two other employees who commenced maternity leave at a similar time. This was because Mr Chi considered the business no longer had the funds to mark such occasions in the way they previously had. Mr Chi had planned to make an exception for Miss Spratt due to her long service and the fact that they knew each other quite well on a personal level, but ultimately he allowed this to be overtaken by other priorities.

46. There was an error in Miss Spratt's November pay. The respondent's payroll is calculated by an external firm, Castletree. They generate payslips and send a list of payments due to Mr Chi. In order to reduce banking fees, Mr Chi manually transfers the relevant amount into each employee's bank account. As there is a limit on the amount that can be transferred out of the company's account on a single day, he spreads these payments out over a few days, whilst ensuring that everyone receives their payment on or before the contractual payment date, which is the 28th. We pause to observe that this is a good illustration of the 'hand to mouth' way the respondent's operation was operating, and also the huge administrative and managerial workload undertaken by Mr Chi, Mrs Chi and Miss Bamber.

47. HMRC processing rules meant that Miss Spratt should have been paid for her first three weeks of maternity leave in her November payslip, but she was manually overpaid by Mr Chi in the sum of £285.55. After an initial email exchange with Mrs Chi, this was fully and promptly explained in an email to the claimant from Dawn Smith of Castletree on 4 December 2018. The email stated that the over-payment would be recouped from Miss Spratt's December pay. Crucially, there is a very similar email of the same date to one of the other employees on maternity leave who had also been overpaid and an email from Dawn Smith to Mr and Mrs Chi explaining the error, and also noting that it did not affect the November pay of the third employee on maternity leave. As it transpired, Mr Chi omitted to recoup the overpayment in December and Miss Spratt contacted him and arranged to transfer the money back herself as she didn't want to inadvertently spend it.

48. As part of her claim, Miss Spratt contended that these errors had been made deliberately in order to cause her stress and to 'punish' her for raising a grievance against Laura Bamber. The Tribunal considers that this was a somewhat odd conclusion to come to given the nature of the error and the explanation that had been given. However, it became entirely unsustainable when the emails demonstrating the same error in respect of the other employee were disclosed. Unfortunately, Miss Spratt has proved incapable

of standing back and reflecting on her position, and continues to assert that this was the result of a malign conspiracy against her. We find that it was not, and that there was no reasonable basis for her to assert that it was after she had seen those emails.

49. There was further correspondence between Miss Spratt, Mrs Chi and Ms Smith in January and February 2019 about Miss Spratt's tax code. The matter was handled promptly and appropriately by the respondent and Castletree.

50. By 1 March 2019 the pension issue seemingly remained unresolved, as evidenced in an email from Miss Bamber to Mr Chi reporting on the steps she had taken to escalate the matter with ReAssure. However, when ReAssure produced Miss Spratt's annual statement, dated 22 April 2019, this showed the correct contributions levels (and therefore tax relief) from 2 November 2018. It would therefore appear that ReAssure had either implemented the change at the point where it received the formal letter from the respondent, or, if it was made later, had backdated it to that point. It is reasonable to assume that if Miss Bamber had sent such a letter earlier, the change would have been implemented earlier.

51. This left a period of some 30 months of tax relief which Miss Spratt had lost out on. In spring 2019 Mr Chi made efforts to prompt ReAssure to address this, but without success. Another employee was in a similar situation and eventually Mr Chi decided that it would be more efficient for him to simply pay the amounts directly to the employees affected than to continue with the thankless task of pursuing ReAssure. There was some correspondence between Mr Chi and Mis Spratt about this in June 2019. Essentially, he wanted her to come up with a figure (which the other employee had done). Under cross-examination, he made the reasonable point that when an employee has a dispute about money they are due it is better to pay them what they want (assuming it is reasonable) than to impose a calculation on them. Miss Spratt however, was not confident in putting forward a calculation. We do not consider that either party was unreasonable in what they were saying in this correspondence. Unfortunately, having reached this impasse the matter then went into abeyance again for some further months.

Return to work discussions

52. By late summer, the parties began to contemplate Miss Spratt's return to work. It is relevant to note that it was widely known within the industry that Thomas Cook was in difficulty and that it in fact entered administration on 23 September 2019. It was also anticipated that Flybe may be on the brink of collapse. As it transpired, it continued to trade until 5 March 2020, when it also entered administration. The collapse of both of these airlines would have a significant effect on demand for the respondent's services. The pressure to operate on low budgets at maximum efficiency which we have referred to above was continuing, and was only expected to increase. What was not known at this time, of course, was the start of the Covid-19 pandemic in early 2020 and the effect it would have on the industry.

53. A meeting was arranged between her and Mrs Chi on 9 September 2019 to discuss this. There is a conflict of evidence about the content of this

discussion. Mrs Chi said that she was open to hearing Miss Spratt's proposals for her return and also talked through some possible options, including going part-time, moving onto an ad hoc contract to pick up shifts that suited her or moving to terminal work if the shift pattern there was a better fit (in general, shift patterns in the terminals involved working shorter shifts on more days). We clarified during Mrs Chi's evidence that her references to 'part time' work meant picking up a proportion of a full-time shift pattern. From past experience, this was usually 50%, but she was open to considering a lower or higher fraction. The key point is that permanent part-time workers in the respondent's organisation are still required to fit into the rotating shift pattern dictated by the roster.

54. Miss Spratt's evidence was that during the meeting Mrs Chi told her she could come back full-time to her previous call centre supervisor role, or she could work a 50% shift pattern in the terminal, sharing the shifts with another employee returning from maternity. We are content that each witness was giving evidence about the meeting to the best of their recollection and those recollections have a different emphasis due to the different perspectives of Miss Spratt and Mrs Chi. We find that Mrs Chi was keen to have Miss Spratt return as she was a valued and long-serving supervisor. We entirely reject the suggestion that the respondent was looking to push her into resigning. Although there had been some problems, particularly around the pension issue, this was far-outweighed by the experience that Miss Spratt brought to the business and Mr and Mrs Chi's personal regard for her. We find that there was some bad blood between Miss Spratt and Miss Bamber, but Miss Bamber was based at Heathrow and there was no reason to suspect this would have a negative effect on the operation going forward. Further, Miss Bamber played absolutely no part in the discussions about Miss Spratt's return to work. The key, and only, consideration for Mrs Chi was how Miss Spratt could fit into the roster.

55. On 11 September 2019 Miss Spratt submitted a formal flexible working request using a Department for Business, Innovation and Skills template. In that request she outlined her proposal to return to her role as a call centre supervisor working fixed shifts from 8.00am to 2.00pm for two days a week. It was clarified during a later meeting that the two days she wished to work were Tuesdays and Wednesdays. These would be the same days every week. These were the hours offered because those were the hours during which a family member could provide childcare. Miss Spratt had been unable to find a suitable commercial childcare provider with availability.

56. The content of the request is detailed and thought-through. Implicit in it is an acknowledgement that Miss Spratt could not conduct the day-to-day supervisor role whilst undertaking the proposed working pattern. She proposed, instead, that she undertake administration tasks and email queries from airlines, prepared reports and provided training to agents in supervisory responsibilities to make them more confident to take on more responsibility. She identified that she could support other staff 'stepping up' to the supervisor shifts within the rota, leading to a more skilled and flexible workforce within the call centre generally.

57. A meeting took place between Mrs Chi and Miss Spratt on 19 September 2019 to discuss the flexible working request. Miss Spratt covertly recorded

that meeting and a transcript was in the bundle. As well as discussing the claimant's proposal to return to the call centre, there was some discussion about the possibility of returning to a terminal role and whether that would be compatible with Miss Spratt's intention of continuing to breastfeed her daughter. Mrs Chi invited Miss Spratt to tell her if there were any other roles that she would be interested in in the business and Miss Spratt's response was "*as long as I'm still a Supervisor*."

58. Mrs Chi adjourned the meeting without reaching a decision. After the meeting she took steps to obtain information about any risk to nursing mothers or their babies that may be posed by repeated use of airport security scanners. By letter dated 24 September 2019 she communicated her outcome to Miss Spratt. Mrs Chi refused the request for flexible working, citing various grounds which appear in s80G1(b) Employment Rights Act 1996 (permitted grounds for refusing a request for flexible working). The letter expanded on those grounds by setting out details about the nature of the respondent's work and rota system and why Mrs Chi did not consider it would be feasible to create a role for the claimant along the lines suggested. The letter concluded by formally offering the alternatives of a part time role working two days on and four days off. Although this was not stated to be a role in the terminal, the shift pattern described indicates that that was what was envisaged. The second alternative was for Miss Spratt to return on an ad hoc basis. Mrs Chi also passed on the information she had received from Manchester Airport group's Health and Safety Team regarding the lack of any known safety risk to breastfeeding mothers from using airport scanners. Finally, she informed Miss Spratt of her right to appeal.

59. Miss Spratt did appeal by letter dated 30 September 2019. Her appeal was heard on 9 October 2019 by Mr Chi. The focus of the discussion (again, a transcript appeared in the bundle) was on the respondent's need for any part-time role to 'slot in' with the rotating shift pattern, and how employment on the fixed shifts proposed by Miss Spratt "*just can't be done*". Equally, Miss Spratt was adamant that she could offer no flexibility around the Tuesday and Wednesday fixed hours that she had proposed. There was also a significant amount of discussion around what hours she might be able to expect to pick up if she returned on an ad hoc basis.

60. We find that both Mr and Mrs Chi were open to trying to find a solution which suited both parties. We accept Mrs Chi's comments, in giving evidence, that she could, for example, have split Miss Spratt's supervisor shifts so that she worked half-shifts over four days, with someone else covering the other half of the shift. The fundamental problem was that the hours being offered by Miss Spratt could not be accommodated within the rotating shift pattern.

61. By letter dated 14 October 2019 Mr Chi rejected Miss Spratt's appeal. This was a detailed letter which engaged point-by-point with the numerous arguments raised in Miss Spratt's appeal.

62. There was some discussion at the initial stage and at the appeal stage about facilities for breastfeeding. Miss Spratt has provided the Tribunal with large amounts of material from ACAS, the HSE, the NHS and the WHO on the benefits of breastfeeding and the expectations on employers to enable mothers who want to return to work to continue to breastfeed. She gave

evidence about her own strongly-held desire to continue to breastfeed her daughter. The facilities to accommodate expression of breast milk during shifts may have become a live issue if Miss Spratt's working hours could be agreed. On the facts of this case, however, they did not. Miss Spratt confirmed in her evidence that the hours she was able to work were entirely dictated by the availability of childcare for her daughter and not by the requirements of breastfeeding as she would have planned to express milk at work (assuming appropriate facilities were available).

63. By letter dated 25 October 2019 Miss Spratt resigned. Her maternity leave was due to end on 31 October 2019, but she had already arranged to use annual leave and planned to return to work on 26 November 2019. She gave one month's notice meaning that she would not return to work before leaving employment. The resignation letter identified the failure to agree to her flexible working request as being the "*final straw in the breakdown of communications between us*" which had left her with "*no other option but to resign*". The letter went on to detail, at length, Miss Spratt's complaints about the company and to explain that she felt that she had been discriminated against because of the grievance she had raised against Miss Bamber.

64. Mr Chi responded to the resignation letter on 30 October 2019, expressing his gratitude for Miss Spratt's contributions. This letter focused on the fact that the pension tax relief refund remained unresolved and Mr Chi apologized about this, expressed his own frustration with ReAssure, and committed to getting the payment made before the termination of Miss Spratt's employment. This was followed up with a letter on 5 November 2019 setting out a calculation of £301.30. Mr Chi proposed to uplift this by 10% and invited Miss Spratt to confirm whether she would like the amount of £331.43 paid into her salary or pension. Further, on 14 November 2019 ReAssure wrote to Miss Bamber to apologise for the delay in resolving the matter and to confirm that they would send a cheque for £75 to Miss Spratt in recognition of the inconvenience.

65. Miss Spratt commenced ACAS conciliation on 3 December 2019 and brought her claim on 7 January 2020.

Relevant Legal Principles

Constructive dismissal

66. Where an employee terminates his contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct, this amounts to a dismissal under s.95(1)(c) Employment Rights Act 1996 ("ERA"). This form of dismissal is invariably referred to as 'constructive dismissal'.

67. In order to claim constructive dismissal, the employee must establish that:

(a) there was a fundamental breach of contract on the part of the employer

(b) the employer's breach caused the employee to resign

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

Western Excavating (ECC) Ltd v Sharp 1978 ICR 221

68. All contracts of employment contain an implied term of trust and confidence, requiring that the employer will not, without reasonable cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (**Malik v BCCI SA 1997 ICR 606, HL**). Any breach of the implied term is repudiatory in nature. In assessing whether there has been a breach of the implied term, Tribunals must take care not to apply the test of 'reasonableness', familiar from cases involving express dismissals.

69. Although the breach must 'cause' the resignation, it need not be the sole or main cause, provided it played an effective part. (**Wright v North Ayrshire Council 2014 ICR 77, EAT**).

70. Failure to implement a grievance process may be a breach of the implied term, but is not necessarily one. (**W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516** and **Sawar v SKF (UK) Ltd [2010] UKEAT 0355_09_2101**). This will depend on the facts of the individual case and the Tribunal must always come back to the fundamental question of whether the employer acted without reasonable cause in a mater calculated or likely to destroy or seriously damage the relationship of trust and confidence.

71. A constructive dismissal is not necessarily an unfair dismissal. Where a constructive dismissal is found to have taken place, the Tribunal must still consider the reason for that dismissal and whether it is fair or unfair within s98(4) ERA.

Indirect sex discrimination

72. In this case the tribunal had to focus on the justification defence in indirect discrimination claims. That means that the employer is required to show its actions in adopting a particular provision, criterion or practice were a proportionate means of achieving a legitimate aim. The Tribunal had regard to the following relevant principles.

73. In relation to the 'legitimate aim' branch of the test, there has been much debate around the extent to which cost-saving, and avoiding incurring costs, can be a legitimate aim. In **Heskett v Secretary of State for Justice 2020 EWCA Civ 1487, CA**, the Court of Appeal has recently confirmed the principle that the saving or avoiding of costs will not, without more, amount to the achieving of a legitimate aim. The essential question is whether aim can fairly be described as no more than a wish to save costs. (A costs justification is sufficient reason for an employer to refuse a request for flexible working under s.80G(1)(b)(i) Employment Rights Act 1996, but the fact that a request may have been legitimately refused under that regime does not preclude a successful indirect sex discrimination claim. We note that no complaint under s.80H is made as part of these proceedings.)

74. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate

that the measures taken were "reasonably necessary" in order to achieve the legitimate aim(s) (**Barry v Midland Bank [1999] ICR 859, HL**)

75. The actions will not be considered reasonably necessary if the employer could have used less discriminatory means to achieve the same objective. (**Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368, ECJ**).

76. The Tribunal must carry out its own balancing exercise. As expressed by Mr Justice burton, then President of the EAT, "*The decision of the respondent and its business reasons will be respected, but they must not be uncritically accepted.*" (**British airways plc v Starmer]2005] IRLR 863**).

Direct discrimination on grounds of pregnancy or maternity

77. Section 18 Equality Act 2010 provides as follows (subsections which are not relevant to this case are omitted):

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) …
(4) …
(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) …

78. The effect of this provision is that a woman can succeed in a claim of discrimination on grounds of pregnancy or maternity by demonstrating that she has been treated unfavourably, without comparing herself to a man (real of hypothetical) who has received (or would receive) more favourable treatment.

79. In considering the question of whether unfavourable treatment was 'because of' the claimant's pregnancy the Tribunal must examine the respondent's grounds for treating the claimant in a particular way. The pregnancy need not be the only reason, but it must have played a part. Further, it can be a conscious or unconscious motivation.

Submissions

80. Mr Soanes provided a written skeleton argument and oral submissions which the Tribunal had regard to.

81. The Tribunal raised with the parties at an early stage the fact that it was open to them to provide written submissions, but they were not obliged to do so. Miss Spratt felt unable to prepare written submissions given that in the evenings during the hearing she was preparing a supplemental statement and then preparing cross examination of the respondent's witnesses (due to the problems discussed above). Miss Spratt therefore made oral submissions replying to some of the points raised by Mr Soanes. As is common with many unrepresented litigants there was little that she wanted to say as she had fully expressed her arguments in her witness statement. She did, however, indicate that she wished to rely on a copy of a judgment made by another ET in a case called **MacFarlane and Ambacher v easyJet Airline Company Ltd 1401496/2015 and 3401933/2015**. The Employment Judge explained that that case would not binding on this Tribunal, but that we would be prepared to read it if Miss Spratt could provide a copy. Miss Spratt duly did so by email after the end of the hearing, and Mr Soanes provided limited further written submissions commenting on the case. We read both before commencing our deliberations.

82. The **MacFarlane** case concerned two claimants who were cabin crew with easyJet. They sought to return to work after maternity leave but to limit themselves to short flights which would allow them to continue breastfeeding (having regard to the fact that they could not express milk on board the aircraft). This would have required a bespoke rota to be put in place for them, which easyJet was not prepared to do. The claimants succeeded in their claims of indirect sex discrimination and, in essence, the Tribunal found that it would have been practical for bespoke rotas to have been put in place in these circumstances.

83. The claimants in that case had the benefit of representation by a well-known specialist employment law barrister. Although the facts of the cases are not identical, there were some similarities and Miss Spratt wanted the tribunal to take account of the matters discussed in that case as reflecting the way in which the argument might have been put forward in this case had she had access to professional legal representation. The Tribunal have read and had regard to the case in that spirit, whilst not losing sight of the fact that we must, of course, make our own decision on the facts of this case.

Discussion and conclusions

Indirect discrimination

84. We began by considering the indirect discrimination claim. The respondent conceded that it had applied the PCPs set out in Issues 4 and 5 above, and that those PCPs were discriminatory in their effect.

85. Turning to the justification defence, the respondent had set out no fewer than eleven aims in its amended response, specifically:

a. The need to run an operation providing a service to clients 24 hours a day, seven days per week;

b. The need to operate a roster which accommodated those service requirements;

c. The need to avoid financial penalties, which customers could impose if business requirements were missed — business requirements which were significantly impacted by staff numbers and rosters;

d. The need to have the flexibility within the roster to change operational hours and shifts depending on customer requirements, often with just one months' notice or less;

e. The need to be able to accommodate holidays and training, as well as unforeseen sickness and other absences, into rosters;

f. The need to avoid financial penalties if customer service level agreements were missed;

g. The need for work to be turned around quickly;

h. A desire to minimise costs (temporary, ad-hoc cover and/or an additional Supervisor would have been needed in order to accommodate the Claimant's requests, at a significant cost to the Respondent);

i. A desire to allow managers to concentrate on managing the business, rather than engaging in supervisory work — as would have been necessary in order to accommodate the Claimant's requests;

j. A desire not to seriously disrupt the shift patterns of the Claimant's colleagues;

k. A desire not to create an unduly onerous process for setting shift patterns.

86. We consider that these aims were 'legitimate' for the purposes of the justification test. We are not persuaded that they are all distinct and separate aims (for example c and f appeared to be the same aim). Some of them, for example h, may have required closer scrutiny under the costs principle if they had been put forward alone. Taken together, however, we accept that they accurately capture the substance of what the respondent was attempting to achieve by operating the PCPs and that they are legitimate aims. Miss Spratt did not appear to argue to the contrary.

87. The key question was therefore whether the PCPs were a proportionate means of achieving the legitimate aim. In making this assessment, we found that it was appropriate to consider the context of the specific flexible working request made by the claimant. For example, it was not clear to us on the evidence whether, if the claimant had been able to offer two days in eight, on a rotating basis, the respondent might have felt able to 'meet her halfway' and accommodated her working shifts of less than 11.5 hours in the call centre. Had the respondent rigidly adhered to the PCPs as expressed in the list of issues even if there had been more flexibility in the claimant's proposal, it is possible that the balancing exercise that we had to undertake may have had a different outcome.

88. In undertaking this balancing exercise, we took account of the following factors in support of the respondent's decision:

87.1 This was a relatively small, family run company. Its ability to accommodate individual working requirements is less than a large corporation such as easyJet or British Airways.

87.2 We accept that the commercial realities meant that the business was operating in a very 'lean' way, and that it was anticipated that commercial pressures were only going to increase.

87.3 We accept the respondent's characterisation that Miss Spratt's proposal amounted to her taking up a newly-created role as an additional resource in the call-centre, rather than continuing to provide the day-to-day supervisory cover required by the respondent on a reduced-hours basis. We don't doubt (nor did the respondent, as was clear from Mrs Chi's evidence) that the claimant would have been useful and valuable in this new role. The problem was that the respondent simply couldn't justify adding on that role to an operation which was already under pressure to operate in a financially viable way and would continue to be under increased pressure in the future.

87.4 Related to this, we are satisfied that it was essential to the respondent's business that staff were able to be deployed on a rotating shift basis. The numbers were so small, particularly at supervisor level, that it was not practicable for the respondent to create a bespoke shift for Miss Spratt.

87.5 We accept that the specific hours offered by Miss Spratt did not align with the busiest hours of their operation – between 6am and 8am when morning flights were arriving into Manchester.

87.6 We have found that Mr and Mrs Chi would have been willing to give consideration to other working patterns, including patterns that the business had not previously used (for example splitting shifts on a job-share basis, so that Miss Spratt would have done an increased number of short shifts). This demonstrates that they were not blinkered in their approach and lends support to their argument that the working hours proposed by Miss Spratt were simply unworkable given the operating constraints of the business.

87.7 Miss Spratt was not limiting her request to a short-term period, nor was there any flexibility in the hours she was prepared to do. She was not prepared to consider giving up her supervisor status.

89. We took account of the following factors against the respondent's decision:

88.1 We recognise the importance of facilitating the return of mothers to the workplace, even where that may cause cost or inconvenience for the employer or for other members of staff.

88.2 We accept that it was possible that Miss Spratt would have been able to offer more flexibility in the future if more childcare options became available, although we note that she did not suggest at the time that this was a temporary proposal, far less give any timescale for how long it might need to be accommodated.

88.3 We also accept that there was some precedent of the respondent allocating fixed shifts in the call centre to students, particularly to Alex Chi. However, Alex was performing a role which could be done at fixed times and was not integrated with the rest of the operation in the way that the claimant's supervisory role was. It is also relevant that this was a family business and he was Mr Chi's son. The fact that fixed shifts were used in this very specific situation does not, in the view of this Tribunal, preclude a

conclusion that it was not proportionate for the respondent to take the view that they couldn't be offered to the claimant.

90. Having considered all of these matters, the Tribunal was unanimously of the view that the respondent was justified in applying the PCPs to the claimant, with the result that her flexible working request was declined.

91. We did consider the fact that the Tribunal in the **MacFarlane** case reached the opposite conclusion, finding that it was not justified to apply a PCP that cabin crew had to be prepared to undertake lengthy shifts to two breast-feeding women who, on medical advice, wished to limit their shifts to 8 hours to avoid risks of mastitis. Critical to that conclusion was a finding that the respondent could accommodate a low volume of bespoke rostering arrangements without restricting its flexibility to manage supply and demand. We have reached the opposite conclusion, and are satisfied that this company could not accommodate any rostering arrangement which fell outside the over-arching rotating shift pattern (at least not for someone in Miss Spratt's role) without a significant restriction on its ability to effectively and efficiently carry out its business.

Maternity discrimination

92. The maternity discrimination claim also relates to the refusal of the request for flexible working. As noted in the list of issues, the request was made during the protected period as defined in s18(6) ERA.

93. We do not accept either of the claimant's arguments that the refusal of the request was related to the fact that there were other employees on maternity leave who might make similar requests, or that it provided the respondent with an opportunity to make cutbacks to the workforce without incurring redundancy costs. We find that the respondent was willing and eager to have the claimant return to work and refused her request simply because it considered the rigid working pattern she had proposed to be incompatible with the requirements of the business. Given this factual conclusion, it is unnecessary for us to consider whether either of the scenarios suggested by the claimant are properly characterised as unfavourable treatment on the grounds of her pregnancy.

Constructive dismissal

94. In relation to the complaints about the claimant's pension (see paragraph 2(1) of the list of issues), we were unable to conclude that the respondent had itself made errors in relation to the pension payments/contributions. We also reject the suggestion that the claimant had been required to address the errors herself, including with the pension ombudsman. Rather she had threatened to involve the ombudsman when it was not resolved to her satisfaction. We do find that there was a degree of failure on the part of the respondent to resolve the matter in a timely way, although we are satisfied that by far the greater share of blame belongs to ReAssure.

95. In respect of the grievance, although no grievance meeting was convened we accept that Mr Chi attempted to deal with the grievance by dealing with underlying issue. That was an understandable approach in the very specific

circumstances of the case. It is unfortunate that he did not succeed in doing so speedily, and that the communication with the claimant was not better. However, was are satisfied that the respondent's conduct in both of these respects was not likely to destroy or seriously damage the relationship of trust and confidence. This was a festering issue which was undoubtedly highly frustrating to Miss Spratt, it was not so trivial as Mr Soanes sought to portray. Ultimately, however, it was an administrative error which she must have recognised was largely the fault of a third party and which resulted in no immediate loss to her. In those circumstances, we do not find that the respondent's actions can properly be characterized as being in breach of the implied term.

96. Miss Spratt's case in respect of the maternity pay errors being repudiatory rests on the allegation that this was deliberate conduct from the respondent, which it engaged in to 'punish' her for bringing a grievance. We entirely reject that allegation and therefore reject the submission that these errors could have amounted to (or contributed in any way to) any breach of the implied term.

97. The third matter relied on as amounting to a breach of the implied term is the respondent's refusal to allow the claimant to return to work on the working hours she had requested. As noted above, we found that that refusal was not discriminatory. For the reasons set out above we find that the respondent had reasonable cause for refusing the request and therefore, even although the refusal did undermine the relationship of trust and confidence it was not (and did not contribute to) a breach of the implied term of trust and confidence.

98. For completeness, we find that the respondent's refusal to agree Miss Spratt's flexible working request was the only factor in her decision to resign. Although she had concerns about the pension issue and the payment issue she had continued in employment for many months in spite of those issues. Further, she gave evidence that, at the point when she was making the flexible working request, she very much wanted to come back to her role. Therefore, if we were wrong in our conclusion that the pension issues (or, indeed, the maternity pay issues) did not amount to breaches of the implied term of trust and confidence, we would nevertheless have concluded that the claimant was not constructively dismissed as she did not resign in response to those breaches.

Conclusion

99. For the reasons set out above the claim fails.

Employment Judge Dunlop

Date: 18 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 March 2021

FOR EMPLOYMENT TRIBUNALS