EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms H McCarthy	**v**	Right Choice Services Ltd

Heard at: Watford by video **On**: 11 and 12 January 2021

Before: Employment Judge Quill; Mr W Dykes; Mr D Wharton

Appearances
For the Claimant: In person
For the Respondent: Ms P Hall, consultant

This was a remote hearing with the consent of the parties. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in a bundle of 115 pages, the contents of which we have recorded.

JUDGMENT having been sent to the parties on 18 February 2021 and written reasons having been requested on 20 January 2021 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. At this hearing we had a bundle of 115 pages. We took into account the additional pages sent by email by the claimant. The hearing was conducted by video. It was a two day hearing. Initially the claimant was not able to access the electronic version of the bundle which the respondent had circulated but by the time we commenced evidence at 12 o clock on Day 1 the claimant had been able to access that bundle electronically and she also had the witness statements.

2. There were three witnesses in total. On the claimant's side, the claimant gave evidence herself. On the respondent's side, the witnesses were: Mr Toska and Mr Terziu. Each witness had prepared a written statement which they attested to and we took as their evidence and they each answered questions from the other side and from the panel. The witness evidence was concluded on the first day and we heard submissions at the start of Day 2 and then commenced our deliberations and we gave our liability decision and oral reasons just after 3 o clock on Day 2.

3. The claims and issues are as decided at a preliminary hearing on 27 March 2020 and they are at page 28 onwards of the hearing bundle. The liability issues were (retaining the original numbering):

Claimant's status

6.1 Was the claimant an "employee" in accordance with s230 ERA so as to be entitled to bring her claims under s47C and s99 of the ERA?

Detriment complaints — s47C ERA

7.1 Was the claimant subjected to the following alleged detriments by the employer for a reason related to her pregnancy:

7.1.1 the respondent refused to allow the claimant to continue to work towards becoming a manager;

7.1.2 the respondent, having agreed to the claimant undertaking an NVQ level 3 Childcare qualification, did not progress this any further despite previously telling the claimant that funding had been secured;

7.1.3 the respondent removed the claimant from a full time role based at YYY Great Cambridge Road on 30 April 2019 because of hospital appointments the claimant had to attend due to her pregnancy;

7.1.4 After 30 April 2019 the respondent only offered the claimant work when other staff were unavailable;

7.1.5 Shortly after 30 April 2019 being posted to a site in Basildon, Essex some 26 miles from the claimant's hospital in Newham;

7.1.6 Forcing the claimant to resign on 1 May 2019 because of the above treatment.

Automatic Unfair Dismissal — section 99 ERA

8.1 Did the respondent conduct itself in a way that breached the implied term of mutual trust and confidence (for the some or all of the reasons alleged in paragraph 7.1.1 to 7.1.5 above)?

8.2 if so, was reason or principal reason for that conduct related to the claimant's pregnancy?

8.3 If so:

8.3.1 Did the claimant resign on 1 May 2019 because of the respondent's breach of contract?

8.3.2 Did the claimant acquiesce to the breach or affirm the contract following any breach by the respondent?

8.4 Because the claimant does not have sufficient qualifying service (two years or more) the burden is on her to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was related to her pregnancy.

Unfair dismissal - adjustment to remedy

9.1 if the dismissal was unfair, on the balance of probabilities did the claimant contribute to the dismissal by blameworthy and/or culpable conduct?

9.2 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Section 18: Discrimination because of pregnancy and maternity

10.1 Has the respondent subjected the claimant to the following unfavourable treatment falling within section 39 Equality Act, namely:

10.1.1 the respondent refused to allow the claimant to continue to work towards becoming a manager;

10.1.2 the respondent, having agreed to the claimant undertaking an NVQ level 3 Childcare qualification, did not progress this any further despite previously telling the claimant that funding had been secured;

10.1.3 the respondent removed the claimant from a full time role based at YYY Great Cambridge Road on 30 April 2019 because of hospital appointments the claimant had to attend due to her

10.1.4 After 30 April 2019 the respondent only offered the claimant work when other staff were unavailable;

10.1.5 Shortly after 30 April 2019 being posted to a site in Basildon, Essex some 26 miles from the claimant's hospital in Newham;

10.1.6 Forcing the claimant to resign on 1 May 2019 because of the above treatment.

10.2 If so, was any proven treatment because of the claimant's pregnancy or because of illness suffered by the claimant as a result of it? No comparator is needed.

Section 13: Direct discrimination because of sex

11.1 Has the respondent subjected the claimant to the treatment listed in paragraphs 10.1.1 to 10.1.6 above?

11.2 If so, has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator? The claimant relies on a hypothetical male comparator.

11.3 if so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

11.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time/limitation issues

12.1 The claim form was presented on 12 July 2019. Accordingly, and bearing in mind the effects of ACAS early conciliation (which commenced on 5 June 2019 and a certificate being issued on 5 July 2019), any act or omission which took place before 6 March 2019 is potentially out of time, so that the tribunal may not have jurisdiction.

Section 45C ERA claim

12.2 Does the claimant prove that the act or failure to act to which any complaint relates is part of a series of similar acts or failures the last of which is in time?

12.3 If not, was it not reasonably practicable for the claimant to present her claim in time and if so, did the claimant present her claim within a reasonable period thereafter?

Section 13 and 18 EqA claims

12.4 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

12.5 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

The facts

4. The claimant had previously had some experience working with people with special needs including autism, albeit not young people.

5. In around September 2018, her brother-in-law introduced her and Mr Arjan Terziu to each other. Mr Terziu is the Managing Director of the respondent. Following discussions, it was agreed that the claimant would start doing some shifts for the respondent. The claimant had an existing job and she stated that she would only leave her existing job if it was worth her while. Mr Terziu said that a job with the respondent would be full time provided she successfully passed probation.

6. In September 2018, the parties did not sign any written contract of employment or any other written contract. A job description was given to the claimant and she signed it on 6 September 2018. By signing it she made the following declaration which is at page 54 of the bundle. The declaration said:

> I Helen McCarthy acknowledge receipt of the above job description as a description of the daily responsibilities and duties of a care officer. I fully understand their meanings and implications of the above duties and will do my upmost to adhere to the best of my capabilities if my application is successful.
>
> I also understand this is not a written contract but purely a job description.

7. The title of the post was Support Worker and the document said that the Support Worker reported to Support Manager. Amongst other things the duties were:

- to ensure the provision of a safe, secure and homely environment
- to implement care plans for each service user
- to attend meetings and conferences intended to assess and redefine care plans
- to follow agreed procedures with regard to medication and health care
- to follow agreed procedures with regard to service users who are absent from home without authority.
- to undertake allocated tasks in the emotional, physical and psychological care of the service users to the highest possible standard.
- to oversee the purchase of clothes where necessary
- to arrange for food to be provided at appropriate intervals
- to observe The Health and Safety Policy at the home
- to receive and make use of regular supervision
- to attend meetings of the staff group
- to work with supervisors and managers to maximise strengths and minimise weaknesses at both individual and team level
- to make accurate records concerning each service user and complete other general records and documentation in relation to operation and work of the home
- to ensure that all records are stored using accepted and agreed format systems and procedures having regard to confidentiality of the records
- to undertake sleeping duties as necessary
- to carry out all the above duties in a manner which demonstrates commitment to anti-racism and
- to undertake all other reasonable duties within the context of provision of service to people with disabilities at the request of the team Leader or Registered and/or Deputy Manager.

8. On 6 September 2018, the claimant also completed a “Personal Development Plan”. On the plan, the “Line Manager” was stated to be Mr Terziu. Under the heading, “objectives”, the document stated that the plan was to “outline the short to long term development of each individual based on objectives for the next 12 months”. It stated that:

> "Some of the identified objectives will be completed successfully within a 12 month period; however, others may take longer than the specified time and will be reviewed annually with your line Manager."

9. There were questions about what skills and experience the worker might require and what training, if any, the respondent could provide. Under the heading "Action Plan" individual work objectives were set out and these included: ESOL classes; report any concerns to senior staff; write in the message book. It said that the target dates to meet these objectives was "two months and ongoing".

10. Then under 8.2 "Training and Development requirements" was listed:

    10.1 ESOL classes enrolment; Helen to find a course for English classes. (The target date was "Helen within two months");
    10.2 Child protection; Fire safety; Safeguarding; First Aid and some online courses; (The target date was "within one month Arjan to enrol")
    10.3 NVQ3 in Children and Young Persons. (The target date was "Right Choice to fund and provide details of course Helen to start after January 19".)

11. Generally, for support workers, the respondent prefers them to have Level 3 NVQ at the time of appointment. However, it also hires support workers who do not yet have that qualification. In those cases, the respondent supports them to gain that qualification and that is what it agreed to do in the claimant's case.

12. The documents in the bundle do not show what efforts, if any, the respondent made to put the claimant in touch with any course provider. There is a letter from a course provider which says that the course provider attempted to contact the claimant without success. That letter is dated 28 February 2019, but it is not clear when the respondent received it. The letter does not specify what postal address or what phone number the course provider had been given by the respondent in order to try to contact the claimant. The claimant is not aware of any attempts to contact her by that course provider. There were no discussions between respondent and claimant about the alleged inability of the course provider to contact her. There are no notes or contemporaneous documents in the bundle to show that the respondent ever spoke to the claimant or tried to speak to the claimant about the fact that the course provider had said that it was unable to contact her.

13. We accept that the claimant's account that she was not spoken to by the respondent in relation to the NVQ course. Our finding is that if the respondent had intended to retain the claimant then it would have progressed arrangements for the claimant (as it did for other support workers) to obtain the NVQ3 qualification. That is what the Respondent intended and agreed as of completing the 6 September 2018 plan. Our inference therefore is that at some stage later than the 6 September 2018, the respondent decided that it was not going to seek to ensure that the claimant obtained the NVQ

qualification, and our inference from that the Respondent decided that it was not expecting the claimant to remain as a support worker in the long term.

14. Our finding is that the training that the respondent agreed to provide to the claimant was training for the Support Worker role. There was no specific agreement that the respondent would train her to be a Manager. A managerial role would have required the claimant to gain further qualifications and experience which would have taken several years. While the claimant may have aspired to achieve that, and while it might have happened in due course, it was not something that the respondent had guaranteed to her or formally agreed with her, prior to the end of her employment.

15. The claimant was told by Mr Terziu, in September 2018, that Lincoln Crescent was to be her unit and that she would be working there regularly. She was told that there would be a probation period.

16. From September 2018 to December 2018, the claimant worked at Lincoln Crescent, a unit operated by the respondent. There were typically four young people at the unit. The exact number varied from time to time depending on which people had been placed with the respondent by local authorities.

17. On Mondays to Fridays during this period, the agreed time for the claimant to report for work was 8am. However, sometimes she would be flexible and would agree to start earlier on a particular day, if the person on night shift wanted to leave early. The agreed time for the claimant to finish was at 4pm each day. However, sometimes the person who was due to take over from her was late arriving and so she worked later than 4pm on those days. During each shift, the claimant was the only worker on duty at the unit. She arrived in the morning to take over from the worker on the night shift and she stayed in the afternoon until she was relieved by the worker who was doing the next shift. She could not leave the unit until a replacement for her arrived.

18. The arrangement between respondent and claimant was that she would work in Lincoln Crescent each day Monday to Friday between approximately 8am and 4pm. If she was not going to be available then she had to contact the respondent to say so. Unless the claimant contacted him, Mr Terziu expected the claimant to turn up at Lincoln Crescent at the allocated time each day Monday to Friday. Mr Terziu and the respondent did not contact the claimant to tell her that he wanted to offer her a shift or to ask her if she was available for a shift Monday to Friday. The arrangements for the hours which she would work was made in September (orally) and the arrangements for the hours of work (Monday to Friday) and the work location, Lincoln Crescent, (Monday to Friday) did not change during the probation period.

19. The claimant had some leave in approximately November 2018 by agreement with the respondent. The Respondent paid her for that leave period.

20. On 15 December 2018 Mr Terziu supplied the claimant with a letter which had the heading Probation Period. The letter said that Mr Terziu was happy to inform the claimant that she had successfully completed the probation period and “would like to welcome you as a permanent member of staff”. The

letter said that the claimant had demonstrated that she was capable of completing the role of Support Worker. In other words, the respondent was satisfied that she could work to the job description which had been given to her in September, notwithstanding any later concerns that were raised during this hearing in relation to the claimant's ability to complete paperwork.

21. At this time, December, the claimant was given a written contract and the claimant and the respondent each signed it. The contract was headed Support Worker Zero Hours Contract. The contract is in the bundle at page 45. Clause 1 refers to status of the agreement. It says that the claimant is a casual worker, it says it is "**NOT** an employment contract" (the bolding and capitalisation are in the original). It says it does not confer "any employment rights (other than those to which workers are entitled)" and does not create any obligation on the respondent to provide work to the claimant. It says that by entering into the contract, the claimant confirms her understanding that the respondent makes no promise or guarantee of a minimum number of hours of work. It states that the claimant will work on a flexible as required basis and that there is no mutuality of obligation between the parties when not performing work. Clause 2 refers to the job description, Clause 3 says that there is a discretion as to offering work and that the respondent is neither under an obligation to provide work to the claimant at any time nor under an obligation to explain why work has not been offered. Clause 4 says that there is no presumption of continuity and each offer of work is entirely separate and severable engagement.

22. Clause 6 has the heading "place of work" and states as follows. The actual street number is specified in the document, but we have redacted it:

> During each engagement your principal place of work will be XXX Lincoln Crescent, Enfield E1 1JZ.
>
> You may from time to time be asked by RCS to work in alternative location.

23. Pay in the contract refers to an hourly rate of £8 per hour. Clause 8 refers to statutory leave. It says that the amount of holiday, or statutory leave, will be 28 days (which, we note, is consistent with the statutory entitlement for a worker who works 5 days per week). Under the heading Working Hours it says the working hours will vary according to the workload and could include some weekends:

> You will be expected to be available for work within these hours although the organisation cannot guarantee the number of hours that will be offered.

There is a requirement to complete a timesheet.

24. Under Clause 10, Sickness:

> If you are not able to come in to work because of sickness you must inform the designated manager on your first day of absence.

It then goes on to say,

> If the absence lasts for more than 7 calendar days there is a requirement to provide a medical certificate signed by a doctor.

It then refers to the possibility of statutory sick pay being available.

25. Under the Termination Clause it stated that there is no obligation on either side to give notice to the other as such, just to inform the other that the contract is being terminated. It says that on termination the claimant would not be entitled to any further payments from the respondent other than outstanding salary and holiday pay.

26. Clause 12 refers to the Code of Conduct which is said to apply to "employees, workers and volunteers" and that the claimant is expected to observe that Code of Conduct.

27. There are clauses in relation to Equal Opportunity, Health and Safety at Work, Confidentiality and Data Protection.

28. Clause 17, is a clause which is headed Totality of Terms and states that:

> This contract is intended to fully reflect the intentions and expectations of both parties as to our future dealings and in the event of any dispute regarding your engagement as a casual worker by RCS, it shall be regarded as a true accurate and exhaustive record of the terms on which we have agreed to enter into a casual work relationship. Any variation to this contract will only be valid where it is recorded in writing and signed by both parties.

29. On receipt of this document, before signing it, the claimant asked Mr Terziu about the hours and she said that she expected to be full time. Mr Terziu confirmed that she would remain full time. The claimant signed the document, relying on Mr Terziu's comments. The Claimant and Mr Terziu each signed and dated the document on 15 December 2018.

30. In the immediate period after the completion of claimant's probation, all working arrangements continued as before. In other words, each day (Monday to Friday) the claimant continued to turn up to work at Lincoln Crescent and started around 8am (sometimes earlier) and finished around 4pm (sometimes later).

31. The Claimant also occasionally worked on Saturdays on an ad hoc basis. If she was offered, and accepted, work on a Saturday then that work could be at a different unit, and was not always at Lincoln Crescent.

32. We noted the series of text messages in the bundle. Both parties referred to these messages in their oral evidence. The earliest messages provided to us were from around 1 February 2019 and then the latest from around 1 May 2019. It is likely that there were exchanges of text messages between the parties from around September 2018 onwards but those were not placed into the bundle.

33. On Friday 1 February 2019, the claimant sent a message to Mr Terziu which said that unless he could increase her salary then that day would be her last day she would finish her shift that day. Mr Terziu responded to say:

> You need to give one weeks notice at least but since you have made your mind up that's fine I will issue a P45 at the end of the month.

34. The claimant replied to say that she would, in that case, work the following week and that the following Friday (so that would be 8 February) would therefore be her last day. Mr Terziu replied to say that he understood and it was better for the claimant to move on.

35. On around 7 February 2019 the claimant sent a message to say that she was reconsidering and that she would be willing to stay on.

36. On Friday 8 February, Mr Terziu told the claimant to come into work the following Monday and they would talk. In other words, to come to Lincoln Crescent the following Monday. It was then agreed that the claimant would carry on working for the respondent. She did not cease to be an employee around 8 February 2019, even briefly. There was no gap at this time in the working relationship and she continued working with Lincoln Crescent being her place of work.

37. In February 2019, towards the end of the month, the claimant found out that she was pregnant. There was a short period of time during which the claimant knew that she was pregnant but before she told the respondent. The claimant told Mr Terziu about the pregnancy in March 2019. She told him about the pregnancy because she needed to take time off to go to a particular appointment. Neither the claimant nor Mr Terziu are sure of the exact date on which she told him about the pregnancy, we note from the documents that the claimant told Mr Terziu that she had a doctor's appointment on 1 March 2019 and so it is possible that that is the appointment in question. Alternatively, as per page 97 of the bundle, there was a hospital appointment on 3 March 2019 and so perhaps that is the event which led the claimant to inform the respondent about her pregnancy. Our finding is that the latest date by which the respondent knew about the pregnancy is 3 March 2019.

38. There is an assertion in the amended response that the respondent (Mr Terziu in particular) was told about the pregnancy on 8 February 2019 during the meeting at which the parties agreed that the claimant's proposed resignation would be retracted. We reject that assertion. It may have been a typographical error. In any event, it is inconsistent with Mr Terziu's evidence to the tribunal. Our finding is that it was on either 1, 2 or 3 March 2019 that the claimant informed the respondent that she was pregnant. To the extent that the Claimant suggests that the date might have been earlier than 1 March 2019, she has not proven that to our satisfaction.

39. Around 19 February 2019, Mr Terziu asked the claimant if she would work in Basildon the following weekend at a unit the respondent had there. Because of the extra costs in travelling Mr Terziu agreed to pay extra for shifts at that location.

40. On 21 February 2019 there was an exchange of messages. Responding to a query form the claimant, Mr Terziu stated that the respondent would pay the claimant in relation to some particular absences that she had had that month. This was before the respondent knew the claimant was pregnant.

41. In December 2018, the claimant worked 159 hours at Lincoln Crescent, 7 hours elsewhere. In January 2019, she worked 175 hours at Lincoln Crescent and no hours elsewhere. In February 2019, the claimant worked at Lincoln Crescent for the first half of the month and then elsewhere for the remainder of the month. In the second half of February she worked several week days away from Lincoln Crescent. Other than a 7 hour shift in December, this was the first time that this had happened on a week day. In March 2019, she worked 168 hours at Lincoln Crescent and did not work elsewhere.

42. On Monday 25 March 2019, the claimant sent a text message to Mr Terziu, she referred to a particular resident. The claimant said that because she was pregnant she did not think that it would be good for her to be in close proximity to that particular resident. The claimant said in the message that she believed that the resident was suggesting to her that she needed to lock herself in the office and that the resident was doing this because he was in a bad mood. The claimant asked if the respondent could arrange for somebody else to cover her shift for that day. Mr Terziu replied by stating that he would try to get somebody to cover the shift. He added that if the claimant could not do the job then "that's fine". He said that it's not only this particular resident but "every unit we have difficult kids". Mr Terziu said he could get another member of staff to cover the claimant's shifts but "we have no other unit to put you". As it happened, Mr Terziu did arrange for somebody else to come that day. The claimant waited outside the unit until she was relieved, and she was in tears when the replacement arrived.

43. The claimant's communications on 25 March 2019 were not a resignation from the respondent's employment and they were not a refusal to carry on doing work for the respondent. Mr Terziu interpreted the claimant's remarks as meaning that she did not wish to work at that particular unit, Lincoln Crescent, any longer and that was why he said to her that there were no other units available. The claimant then asked him to look for other units and he agreed to do so.

44. On 26 March 2019, the claimant asked by text message to remain at Lincoln Crescent. However, Mr Terziu stated that she would move to another unit instead. He said that this was part of a general reorganisation. Based on her understanding of what she was told at the time, the claimant believed that the different unit to which she was moved after Lincoln Crescent, Great Cambridge Road, would be her new permanent unit. She therefore did not continue to push her request to remain at Lincoln Crescent.

45. The claimant was aware that workers were generally allocated to particular units. Because of that knowledge, when she was told that there was to be a "reorganisation", she believed that that meant that there were to be a new set of permanent allocations for each worker between the various units. Mr

Terziu did not state otherwise. Mr Terziu did not state, and the Claimant did not believe, that the reorganisation might mean that she would become a roving worker, without any regular fixed place of work, or hours of work.

46. In April the claimant started working at the new unit in Great Cambridge Road. As far as the claimant was concerned this was her new permanent unit and she intended to stay there permanently until the start of her maternity leave.

47. In April, the claimant had approximately two weeks at short notice due to family circumstances. This time off was agreed by Mr Terziu and it was paid time off and it was taken as part of her annual leave entitlement.

48. During the claimant's pregnancy, she had hospital appointments approximately once every two weeks or thereabouts on average. They were taken when needed and not necessarily regularly scheduled so the actual interval between appointments varied. The respondent paid the claimant for her to take the time off to go to these appointments.

49. Mr Terziu's evidence to the tribunal was that - for Great Cambridge Road – around April 2019, an existing worker was appointed to be a manager. That person was going to manage two units, Talbot Road and Great Cambridge Road and they were going to work two or three days a week at Great Cambridge Road. Additionally, Mr Terziu stated that, before the claimant had left Lincoln Crescent, he had started the process of recruiting a support worker for Great Cambridge Road. That person had, Mr Terziu said, been given a contract which specified that they would work in Great Cambridge Road only. In other words, according to Mr Terziu, that worker could not be allocated to Lincoln Crescent or to any of the other units operated by the respondent. There were no documents placed into the bundle or before us to support these contentions and no advert was supplied to us and no copy of a contract with any other worker.

50. In Mr Terziu's witness statement at paragraph 19 he states as follows. The actual street number is specified but we have redacted it.

> The claimant informed me she would like to continue to work at YYY Great Cambridge Road on a permanent basis. This was rejected because of qualified manager had been recruited to work at the unit permanently.

51. In the amended grounds of response, it states at paragraph 34 that:

> The claimant informed the respondent she like to continue to work at YYY Great Cambridge Road on a permanent basis. This was rejected by the respondent because a qualified manager had been recruited to work at the unit permanently. The respondent happily allowed the claimant to attend her appointments as and when required and had no issue with this. It is therefore denied that the claimant was removed for the role based at YYY Great Cambridge Road because of any hospital appointments

52. Mr Toska's evidence to the tribunal that Mr Terziu had told him that a post for a manager had been advertised and recruited to and that was why the claimant could not stay at Great Cambridge Road. In submissions it was put forward that the claimant's inability to do written reports on the residents was

part of the reason that another worker had to take her place at Great Cambridge Road.

53. In April 2019, following the claimant's return from annual leave the claimant expected to return to the Great Cambridge Road unit and to remain there. However, on 30 April she was called to a meeting she was not told in advance what the meeting was to be about. Mr Terziu was present and he had also arranged for Mr Toska to be present. Mr Toska is a Consultant for Right Choice and he was at the time also an Independent Reviewing Officer for Looked After Children at Haringey Council. Mr Toska had been a consultant for the respondent for several years and he advised them on legislation and other matters and including providing advice on staffing matters. The reason Mr Terziu asked for Mr Toska to be present was that Mr Terziu did not see this as a routine meeting with a member of staff. Mr Terziu believed that the meeting was potentially going to be a controversial one. Mr Terziu knew that he was going to be giving information to the claimant and he anticipated that she would not like what he had to say.

54. Mr Terziu was aware that the claimant was pregnant and that she had left the Lincoln Crescent unit, which (we have found) had been her permanent unit, for reasons connected to her pregnancy, namely the fact that she did not feel safe at that particular unit while pregnant. The information which Mr Terziu intended to give to the claimant on 30 April (and which he did give) was that she would not be permanently based at the Great Cambridge Road location. This, 30 April, was the first time that the claimant was told that Great Cambridge Road was not a new permanent location. The reason that she was told, on 30 April, that Greact Cambridge Road was not a permanent place of work is that Mr Terziu had formed the view that the claimant could not be relied upon to turn up every day to any unit and he therefore sought to change her job from being a worker allocated to a specific unit (originally Lincoln Crescent and, from the start of April, Great Cambridge Road) to being a floating support worker.

55. The claimant was told on 30 April that if any of the regular workers were absent then she would potentially be offered shifts to cover that absence. We reject the Respondent's assertion that the claimant had already been told at the start of April that she was only being temporarily placed at Great Cambridge Road. The respondent has offered different explanations at different times for why the claimant could not remain at Great Cambridge Road and there is a lack of corroborating documents for any of the different explanations. Our inference is that something changed during April and Mr Terziu changed his mind; at start of April, he was willing for her to work permanently at Great Cambridge Road, but by the end of April he had decided to convert the claimant to a worker who had no permanent unit and no regular hours Monday to Friday. He wanted Mr Toska to be present when he told the Claimant that these were going to be the arrangements; he had not sought Mr Toska's presence for any meeting when the Claimant was allocated to Great Cambridge Road at the start of April.

56. On 1 May 2019, in a text message exchange with the claimant, Mr Terziu said that on 30 April he had offered the claimant alternatives that would have given her less responsibility and more flexibility because she was pregnant but that she had refused those offers.

57. On 30 April, the claimant was told that the respondent was intending to open a new unit. There was, however, no detailed discussion with the claimant about the new unit that day. The situation with the new unit was that it would first have to be approved by the local authorities before any placement of residents could commence there. This had not happened by 30 April. After approval was given then residents would then start being placed. In actual fact, residents began to be placed from mid-May but that was not information which was given to the claimant on 30 April and, indeed, it was not information which the respondent itself had on 30 April. The claimant was not given any particular timescale for when the unit would open. She was not told she could start immediately. She was not told that she could start there on any specific date. She was not told that she could work there before the unit opened for residents. The claimant was left with the impression that, at best, she was being told that potentially she could commence work at the new unit on some unspecified date in the future but, in the meantime, she would have no regular work.

58. The claimant's perception of the meeting was that she was being told (for the first time) that her regular fixed hours, Monday to Friday, 8am to 4pm approximately, were being removed from her and that she was being told that the new situation was that she had no guaranteed hours, no fixed location of work and no guaranteed salary at all. The claimant's perception was also that the reason for this proposed new arrangement was that the respondent was unhappy about her absences for hospital appointments.

59. The claimant resigned because of the removal of her regular hours and the fact that she believed that this was being done because of her pregnancy.

60. Mr Terziu's claim that the personal development plan was produced only after the claimant asked for more money is rejected. The personal development plan was produced at the very start of the claimant's engagement with the respondent, in September 2018.

61. We also note that his written witness statement suggests a chronology about the claimant's proposed February 2019 resignation and a suggestion is made that the Personal Development Plan was produced in response to that. That is not correct and we note that Mr Terziu suggests that was simply a typing error in his written statement.

62. We reject the account that Mr Terziu gave in paragraph 7 of his statement that the only reason he told the claimant on 1 February 2019 that she needed to give a weeks' notice was that he was concerned for the claimant and that he did not want her to be without funds for that week. This is inherently implausible and is not supported by the contemporaneous text messages. Our finding is that the reason Mr Terziu informed the claimant that she had to give one weeks' notice was that as far as the respondent was concerned the

claimant was under an ongoing obligation to report for work each day at Lincoln Crescent unless and until her contract was terminated.

The law

63. The law that we have to take into account is as follows.

64. In relation to interpretation of contracts, outside the field of employment law, the ability of courts and tribunals to look behind the terms of a signed contract is limited to situations where the parties have a common intention to mislead as to the true nature of the rights and obligations under the contract. In other words, where the contract is a sham in the sense described in Snook v London and West Riding Investment Limited. However, in the field of employment law a claimant does not necessarily have to demonstrate a common intention to mislead in that Snook sense.

65. In the field of employment law potentially there might have been unequal bargaining power between the claimant and the alleged employer and it might be the latter, the alleged employer, who decided upon all the terms of the written documents. This was a principle addressed by the Supreme Court in Autoclenz Limited v Belcher R [2011] ICR 1157.

66. In Autoclenz the Supreme Court approved an approach taken in earlier cases (notably by the Court of Appeal in Protectacoat Firthglow Ltd v Szilagyi [2009] *ICR 835*). An employment tribunal faced with an allegation that a written document is a sham must consider whether or not the words of the written contract represent the true intentions or expectations of the parties as to their agreement and contractual obligations. This review does not only apply to the inception of the contract but at any later stage where the evidence shows that the parties have either expressly or impliedly varied the agreement between them.

67. Determining the true intentions of the parties does not mean that an employment tribunal should base its decision on what one (or each) party thought privately to itself. Rather, the exercise requires the employment tribunal to determine what was actually agreed in reality between the parties.

68. In relation to employment status, s230 of Employment Rights Act says, in part:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally

> any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
> and any reference to a worker's contract shall be construed accordingly.
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

69. In other words, for someone to be an employee there must first be a finding that they have a contract of some description with the alleged employer. If there is a contract, then it is necessary to go on to decide if that contract is a contract of employment. On the other hand, if there is no contract at all between the parties then it follows that there is no contract of employment and the individual is not an employee.

70. Section 230(3) provides two limbs by which a person can be found to be a worker for the purposes of the Employment Rights Act. "Limb a" is that they have a contract of employment with the alleged employer and "Limb b" is that they have any other contract which fulfils the remaining parts of that definition. In this case it was conceded that the claimant was a worker. In other words, it was conceded that the claimant was somebody who had undertaken to do or perform, personally, any work or services. The Respondent did not concede that the Claimant fell within "Limb a".

71. Section 83(2)(a) of the Equality Act 2010 states: "Employment" means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

72. Again, there must be a contract (and that includes – of course - oral contracts and/or an implied contracts, as well as written and express contracts). If there is no contract at all then the relationship cannot be one which falls within section 83(2)(a). Provided there is a contract, then it is necessary to consider if it meets the remaining parts of the definition.

73. For a contract to be a contract of employment, then - at the very least - the contract must provide for the three irreducible elements of control, mutuality of obligation and personal performance without which no contract of employment can exist, see Carmichael v National Power Plc [1999] ICR1226.

74. The fact that a person works only casually and intermittently for an employer may, depending on the facts, justify an inference that when she does do work she is providing services as an independent contractor rather than as an employee. On the other hand, even someone who only works intermittently might be deemed to be an employee for the periods of work, provided the contract which governs those periods meets the criteria. Furthermore, in some circumstances, depending on analysis of the facts, and the agreement between the parties, the tribunal might be satisfied that there is a global or umbrella contract of employment that continues to exist during periods between work assignments.

75. In other words, the tribunal has to decide if the requirements for mutuality of obligation and the necessary degree of control and the obligation to do the work personally:

    75.1 Are not met at all,
    75.2 Are met, but only for each successive assignment and not in the gap between such period of work
    75.3 Are met even during periods between assignments during which the employee is not actually performing work, and potentially (therefore) not being paid

76. Section 47(c) of the Employment Rights Act has the heading Leave for Family and Domestic reasons. An employee has the right not to be subjected to any detriment by any act or any deliberate failure to act by the employer done for a prescribed reason and a prescribed reason is one prescribed by regulations. The relevant regulations are the Maternity and Parental Leave Regulations 1999 ("MAPLE").

77. The detriment provisions in section 47(c) run parallel to the provisions of the Equality Act. A woman who is subjected to detrimental treatment because of pregnancy or maternity leave can claim pregnancy and maternity discrimination under section 18 of the Equality Act as well as bringing a claim under section 47(c) of the Employment Rights Act.

78. Whether particular acts or omissions amount to a detriment is a finding of fact for the employment tribunal to make. A detriment is something that an employee reasonably perceives as a disadvantage to them and there is no requirement for there to be any financial loss associated with that. The obligation is on the claimant to show that there was a detriment, but on the respondent to show the ground on which any act was done. (See s48(2) ERA).

79. As per section 48 ERA, a complaint of a breach of section 47C must be presented to the employment tribunal before the end of three months beginning with the date of the act (or failure to act) or where there is a series of acts or failures, the last of them. Tribunals may hear cases that are presented out of time if the tribunal decides that it was not reasonably practicable for the complaint to have been submitted within the time limit.

80. The Maternity and Parental Leave Regulations 1999 are relevant. As per Regulation 19:

    (1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).
    (2) The reasons referred to in paragraph (1) are that the employee–
    (a) is pregnant;

81. Regulation 19(4) excludes dismissals from the definition of detriment.

82. Where a tribunal finds that a complaint under section 47(c) is well founded then remedies are as defined in section 49 of the Employment Rights Act.

Compensation will be an amount that the tribunal thinks is just and equitable in all the circumstances having regard to the infringement.

83. In relation to automatic unfair dismissal, dismissal is defined in section 95 of the Employment Rights Act and section 95(1)(c) states that there is a dismissal when the employee terminates the contract without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This is the type of dismissal commonly referred to as "constructive dismissal".

84. For an employer's conduct to give rise to a successful constructive dismissal claim the conduct must involve a repudiatory breach of contract. In order to prove constructive dismissal, the employee must establish that there was a fundamental breach on the part of the employer and the employer's breach caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

85. A constructive dismissal is not necessarily an unfair one. In a case where the employee had two years' service and is claiming ordinary unfair dismissal then the employer might be able to show that the reasons for its treatment of the employee were reasons which fell within the potentially fair category defined in section 98 of the Employment Rights Act.

86. On the other hand, in a case such as this one where the employee is alleging automatic unfair dismissal then the employee might fail to establish that the reason for the conduct or the principal reason, if more than one, was as set out in the relevant sections of the section of the Employment Rights Act.

87. The implied term of trust and confidence as noted in Malik v BCCI [1997] ICR 606 that term requires that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. A breach of this fundamental term will not occur simply because the employee or employer subjectively feels that such a breach has occurred. The legal test requires the tribunal to view the circumstances objectively. In other words, from the perspective of a reasonable person who was in the claimant's or respondent's position.

88. Section 99 of the Employment Rights Act is part of part 10 and it covers dismissal, the heading is Leave for Family Reasons. Section 99(1):

> An employee who is dismissed shall be regarded for the purposes of this part is unfairly dismissed if the reason, or principal reason, for dismissal is of a prescribed kind or the dismissal takes place in prescribed circumstances.

89. Regulation 20 of MAPLE states, in part:

> (1) An employee who is dismissed is entitled under s.99 of the 1996 Act to be regarded for the purposes of Part 10 of that Act as unfairly dismissed if:

(a) The reason or principal reason for the dismissal is of a kind specified in paragraph 3 or

90. In paragraph 3, it is mentioned:

> (3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with–
> (a) the pregnancy of the employee;

91. Since the claimant in this case has less than two years' service the onus is on her to prove that the reason for her dismissal was the automatically unfair reason in this case, pregnancy.

92. Turning now to the Equality Act complaints. Time limits are dealt with in section 123 of the Equality Act 2010.

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

93. Subject to the early conciliation extensions a complaint within the Act has to be brought within a period of three months starting on the date of the act to which the complaint elates or such other period as the tribunal thinks just and equitable.

94. Just referring briefly to early conciliation. In this case the claim was issued on 12 July and early conciliation started on 5 June and finished on 5 July. Therefore, the claim was issued less than one month after the end of early conciliation. Because of the way early conciliation works that means claims relating to any acts or omissions alleged to have occurred on or after 6 March 2019 are within the time limit set out for the Equality Act claims. However, subject to section 123(3)(a) allegations which relate to incidents on or before 5 March 2019 are out of time, although that of course is subject to the tribunal's ability as per sub section (1)(b) to extend time.

95. When applying section 123(3)(a) of the Equality Act the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks and Lyfar v Brighton and Hove University Hospitals Trust. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in these incidents. That's Aziz v FDA [2010] EWCA Civ 304.

96. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter then time runs from the date when each specific act was committed.

97. In considering whether to extend time the tribunal should have regard to the fact that time limits are relatively short. The tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the tribunal the widest possible discretion unlike section 33 of the Limitation Act 1980, the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard. It is wrong to interpret section 123 as if it does contain such a list. A tribunal can certainly consider the list of factors in section 33 of the Limitation Act if it chooses to do so but when doing so should only treat those factors as a guide and not something which restricts the tribunal's discretion. The factors that might be considered include the length of and reasons for the delay on the part of the claimant, the extent to which because of the delay, evidence is likely to be less cogent than if the claim had been brought in time and the conduct of the respondent after the course of action arose.

98. In relation to the Equality Act. Section 136 of the Equality Act deals with burden of proof that is applicable to all of the Equality Act claims in this action.

99. Section 136 states in part:

> (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, sub section 2 does not apply if A shows that A did not contravene the provision.

100. Section 136 requires a two-stage approach. The first stage the tribunal considers whether the claimant has proved facts on the balance of probabilities form which the tribunal could conclude in the absence of an adequate explanation from the respondent that the contravention has occurred. At this stage it would not be sufficient for the claimant to simply prove that what she alleges happened did in fact occur. There has to be some evidential basis upon which the tribunal could reasonably infer that proven facts did amount to a contravention. That being said, the tribunal can, as always, look at all the relevant facts and circumstances and make reasonable inferences when appropriate from the primary facts that were proven.

101. If the claimant succeeds at the first stage then that means that the burden of proof shifts to the respondent and the claim must be upheld unless the respondent proves that the contravention did not in fact occur.

102. Where the claimant fails to prove on the balance of probabilities that particular alleged incident did happen then complaints on that alleged incident fails. Section 136 does not require the respondent to prove that alleged incidents did not happened.

103. Turing now to some of the definitions in the Act. The definition of direct discrimination, section 13 of the Equality Act:

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

104. The definition in section 13 incorporates two elements. Firstly, whether A has treated B less favourably than others and that is the "less favourable treatment question" and, secondly, whether A has done so because of the protected characteristic and that is the "reason why question".

105. Section 18 of the Equality Act refers to pregnancy and maternity discrimination for work cases. As sub section 1 makes clear it applies to Part 5 Work where the protected characteristic is pregnancy and maternity.

106. Sub section 2 says that:

> (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.

107. Subsection 6 states that the protected period in relation to a woman's pregnancy begins when the pregnancy begins and ends at the end of maternity leave.

108. Subsection 7 states that section 13 so far as relating to sex discrimination does not apply to treatment of a woman in so far as it is in the protected period in relation to her and is for a reason related in subsection 2.

Analysis and Conclusions

109. We now turn to our analysis and we refer to the list of issues which is in the bundle and the list begins on page 28.

110. The first issue is, as stated above, the claimant's status and whether the claimant was an employee in accordance with section 230 of the Employment Rights Act so as to be entitled to bring claims under section 47C and section 99 of the Employment Rights Act.

110.1 Our judgment on that issue is that the claimant was an employee and the actual agreement that was reached between the parties was that the claimant would work at Lincoln Crescent Monday to Friday, 8am to 4pm, each day. There was an obligation on the claimant to be present at that location between those hours each day unless she contacted the respondent in advance either to seek holiday or other permitted absence or else to report a sickness absence. The written agreement entered into in December 2018 was a sham in the Autoclenz sense. The statement in that document that the claimant would not be an employee and that she had no obligation to work did not affect the actual reality of the agreement

which the parties had reached and as they both understood it. The claimant signed the contract because the bargaining position between them was not equal and because she was told by Mr Terziu that her hours would remain unchanged. Furthermore and in any event, the Claimant had been working as an employee for 3 months (from September 2018) prior to signing that document.

110.2 The Claimant was under the control of the Respondent. The list of duties (see paragraph 7 above) showed that it was the respondent which dictated the tasks, and the manner of, and timing of, those tasks. She was required to report to managers and she was fully integrated in the respondent's business. Her start and finish time were fixed by the respondent (albeit with some flexibility for her and the other workers to agree to start slightly earlier or later) and so was her location. The Respondent provided the equipment which was needed. It was conceded by the Respondent that the Claimant had to do the work personally.

110.3 There was mutuality of obligation. The claimant had agreed to attend work and the respondent had agreed to pay her and to provide training.

Detriment complaints

111. Turning now to the detriment complaints. This is Item 7 in the list of issues as quoted above. The complaints are based on section 47C, "was the claimant subjected to the following alleged detriments by the employer for a reason related to her pregnancy". There are 6 items and we will go through each in turn:

Item 7.1.1 - The respondent refused to allow the claimant to continue to work towards becoming a manager.

Our decision on this follows from our findings of fact that there was no specific agreement that the claimant would become a manager. It was a possibility for the longer term future, but not a formal arrangement and no specific plans were in place to achieve it. The respondent did not specifically do anything to terminate existing plans, or to prevent the claimant becoming a manager, because there were no plans in place for that to happen. Therefore, that fails

Item 7.1.2 - As per the list of issues the allegation is that the respondent having agreed to the claimant's undertaking an NVQ Level 3 Childcare qualification did not progress this any further despite previously telling the claimant that funding had been secured.

The claimant was apparently enrolled by the respondent with the course provider DCAS (although the only evidence about that is the letter dated 28 February 2019). After the respondent received the letter of 28 February 2019 from DCAS, Mr Terziu decided that he would not progress the matter further. He did not liaise with the claimant to find out why the letter stated that she had not been in touch with DCAS. He knew that he had not provided her with details of DCAS. He did not contact DCAS to check whether they had the correct contact details for the claimant and he did not

speak to the claimant to see whether she was aware that they had been attempting to contact her. He did not mention it to her at all.

Our judgment is that Mr Terziu would have progressed matters within the month of March 2019 but for the fact that he knew by then, by 3 March at the latest, that the claimant was pregnant. There was no specific evidence provided to us of the date on which Mr Terziu received the letter of 28 February 2019 but we assume it was reasonably promptly after that date.

Item 7.1.3 - The respondent removed the claimant from a full time role based at YYY Great Cambridge Road on 30 April 2019 because of hospital appointments the claimant had to attend due to her pregnancy.

Our finding of fact was that the claimant was permanently allocated to Lincoln Crescent until she left that unit for reasons connected to her pregnancy and that she was then allocated to Great Cambridge Road as a new permanent unit. She was not temporarily allocated to Great Cambridge Road. It was intended that this would be the new permanent location for the claimant and that is what the claimant was led to believe and she was not told otherwise at the start of April 2019.

The respondent decided, later in April 2019, that it would not retain the claimant as the permanent support worker for Great Cambridge Road and its decision was made for reasons related to the claimant's pregnancy. The reasons were not because of any specific hospital appointment, but rather a more general belief that - because of the claimant's pregnancy the claimant could not be relied upon each day (Monday to Friday starting at around 8am) to attend to do her shifts.

Item 7.1.4 - After 30 April 2019 the respondent only offered the claimant work when other staff were unavailable.

Our finding is that the claimant was told at the meeting on 30 April that there would be a change in her working arrangements. Our finding was that the claimant had regular hours, Monday to Friday, 8am to 4pm (approximately) from September 2018 through until 30 April 2019. She has also had an agreement to perform those hours at a specific unit, namely Lincoln Crescent up to 25 March (bar a short period in February 2019), and then at Great Cambridge Road until the end of employment. On 30 April, the claimant was told that in future she would be allocated ad hoc work when other staff were absent. She was not told that she would keep the same hours, Monday to Friday, 8am to 4pm, and that only the work locations might change. She was told that the availability of work would depend on whether other staff were absent or not. The possibility of working regularly at the new unit was mentioned but there was no guarantee and no discussion about when this would potentially start. On 30 April 2019, the respondent changed the claimant's hours of work from being regular and guaranteed at a specific location to being ad hoc and unguaranteed, and at non-regular locations. The reason for this proposed

change was because, of her pregnancy (ie that, because of her pregnancy, the Respondent decided that she might not regularly attend work for the start of her agreed shifts).

Item 7.1.5 - Shortly after 30 April, being posted to a site in Basildon.

Our finding is that this allegation fails. The claimant was not posted to this site after 30 April 2019.

Item 7.1.6 - As worded states "Forcing the claimant to resign on 1 May 2019 because of the above treatment".

We uphold complaints 7.1.2, 7.1.3, and 7.1.4. Those are detriments, because they were disadvantages to which the claimant was subjected and, as mentioned, we found in each case that it was because of her pregnancy.

In relation to 7.1.6 our finding is that the respondent proposed to change the claimant's contract. The claimant did not wish to agree to the change, and she made that clear to the Respondent. She wanted to stay as a worker with fixed hours and working at the same unit each day (by this stage Great Cambridge Road rather than Lincoln). The claimant did not wish to agree to the change but she was told that she had no choice. That was the reason for the claimant's resignation.

Automatic unfair dismissal

112. Turning now to Item 8 in the list of issues, automatic unfair dismissal.

Item 8.1 Did the respondent conduct itself in a way that breached the implied term of mutual trust and confidence for some or all of the reasons alleged in paragraphs 7.1.1 to 7.1.5 above?

Our finding is that the proposed changes to the claimant's terms and conditions did breach the implied term of mutual trust and confidence. Looked at objectively, the respondent decided to make changes to the working arrangements for the claimant in relation to hours of work and place of work without warning. Furthermore, it did so for reasons connected to her pregnancy. Without reasonable cause the respondent conducted itself in a manner likely to destroy the relationship of trust and confidence between the claimant and the respondent. The stable arrangement which had existed to that point was being terminated and the proposal was that it would be replaced with something far less certain and there was no reasonable justification for this.

Item 8.2 If so, was the reason, or principal reason, the conduct related to the claimant's pregnancy.

Our decision is, yes. It was related to the claimant's pregnancy.

Item 8.3 8.3.1 – Did the claimant resign on 1 May 2019 because of the respondent's breach of contract?

Our answer is yes. She did resign in response to the breach of contract.

8.3.2 – Did the claimant acquiesce to the breach or affirm the contract following a breach by the respondent.

No, she did not. The breach occurred on 30 April 2019 and the claimant reacted to it promptly by resigning.

Item 8.4 Reminds us the claimant does not have qualifying serviced and therefore the onus is on her to demonstrate to prove that the reason (or if more than one, the principal reason) for the dismissal was her pregnancy

The claimant has proved to our satisfaction that the reason for the conduct (which we have found was a breach of contract and) which caused her to resign was connected with her pregnancy. That is, because of her pregnancy, the respondent formed the view that she might not attend work at the start of her shifts at Great Cambridge Road and therefore acted in the manner which we have described above.

We therefore found that the automatic unfair dismissal claim, as per section 99 ERA succeeds. For that reason, the allegation of detriment, 7.1.6, fails (in accordance with regulation 19(4) of MAPLE).

113. Item 9 of this list of issues deals with remedy and will be addressed at the remedy stage.

Discrimination because of pregnancy and maternity

114. Item 10 of the lists (see above) asks if the respondent subjected the claimant to the 6 examples of alleges unfavourable treatment, so as to be within the definition of discrimination in section 18 of Equality Act 2010, and therefore to be contraventions falling within section 39 of the Equality Act? These are generally worded the same as 7.1.1 through to 7.1.6 and so we will not repeat the wording in full each time. We will answer the question posed in 10.2 as we discuss each allegation.

10.1.1 Repeats the allegation about becoming a manager.

Our finding is that the respondent has not treated the claimant unfavourably as alleged in 10.1.1 because the allegation fails on the facts. There had not been an agreement for the claimant to become a manager in due course.

10.1.2 The respondent did treat the claimant unfavourably in this regard.

As discussed above, we found that in March 2019, but for the claimant's pregnancy, the NVQ would have been progressed. It was not progressed and that amounted to treating the Claimant unfavourably. She did want it to be progressed, and the respondent had agreed in September that it would arrange this, and the Respondent did progress the NVQ qualifications for other employees. The reason that it was not progressed for the Claimant as and the reason was the claimant's pregnancy.

This was discrimination within the definition in section 18(2)(a) of the Equality Act and was a contravention of section 39(2)(b) of that Act.

> 10.1.3 Removing the claimant from role in Great Cambridge Road.

Our decision is that this was less favourable treatment, again, for similar reasons discussed above when analysing detriment. It was not specifically because of hospital appointments but it was because of the claimant's pregnancy. Our finding, as we have already said, was that she had been permanently allocated to Cambridge Road and then a decision was made and communicated to the claimant on 30 April that she would no longer be permanently allocated to that unit or to any other unit.

This was discrimination within the definition in section 18(2)(a) of the Equality Act and was a contravention of section 39(2)(a) of that Act. Furthermore, if, contrary to our decisions that this was a change to the contract of employment, it was a detriment, and therefore a contravention of section 39(2)(d).

> 10.1.4 Telling the claimant that she would only work when other staff were unavailable was unfavourable treatment.

It was done because the claimant was pregnant. She was told on 30 April that going forward she would only be offered work when other staff were unavailable, subject of course to the comments that were made to her about the possibility of working in the new unit when that work became available.

This was discrimination within the definition in section 18(2)(a) of the Equality Act and was a contravention of section 39(2)(a) of that Act. Furthermore, if, contrary to our decisions that this was a change to the contract of employment, it was a detriment, and therefore a contravention of section 39(2)(d).

> 10.1.5 This allegation fails on the facts. The claimant was not posted to Basildon after 30 April.
>
> 10.1.6 We repeat what we said earlier.

The reason for the claimant's resignation was that she was told on 30 April that there was going to be changes to her contract. She was no longer going to have fixed hours at a fixed location but instead she was going to have

uncertain hours covering absences. The fact that she was told about this change was the reason for the claimant's resignation. The reason for the respondent telling her about this change was her pregnancy and it was unfavourable treatment because of her pregnancy.

The Claimant was dismissed within the meaning of section 39(7)(b) of Equality Act 2010 and was in response to conduct which (as described above) was a breach of the Act. Therefore, the Claimant's dismissal was a contravention of section 39(2)(c) of the Act.

Direct discrimination

115. Item 11 The allegations of direct discrimination fail because of Section 18.7 of the Equality Act.

Time limits

116. In relation to time limits the events of 30 April 2019 are in time. The only matter that is potentially out of time is our finding that the claimant was subjected to less favourable treatment under section 18 of the Equality Act and also subjected to a detriment under section 47C on the basis that the NVQ course was not progressed. The date on which this occurred, at the earliest, was the date on which Mr Terziu saw the letter form the course provider. The letter was dated 28 February and so he did not receive it before then. There was no clear evidence provided to us about when he received or read the letter.

117. For the purposes of the Equality Act, our finding was that the decision not to progress the NVQ course is a continuing act with the events of 30 April. It is the same individual involved, namely Mr Terziu, and our decision is that the reason that the course was not progressed was that it was anticipated that the claimant would not be remaining as a support worker in the long term and that the reason for the respondent's opinion about this was that she was pregnant, which is similar reasoning to its decision that she could not be relied upon to attend her shifts because she was pregnant. Therefore the events of 30 April 2019 are a continuing act in our opinion.

118. In the alternative, if we were wrong about that, if they were not a continuing act, then we would exercise our discretion to extend time under the Equality Act on the basis that it is just and equitable to do so. The claims were at most, only slightly out of time (and of course they might be in time depending on when Mr Terziu actually saw the letter). The respondent has not been prejudiced by having to defend the claims in relation to that particular allegation whereas the claimant would be significantly prejudiced if she was unable to obtain a remedy in relation to that particular complaint. The evidence on that complaint is evidence that would come entirely from Mr Terziu in any event and he is a witness in these proceedings and the respondent has therefore not lost the opportunity to produce relevant evidence in relation to that particular issue.

119. In relation to the complaint (7.1.2 in the list of issues) that not progressing the NVQ course was a detriment contrary to section 47C ERA, our decision is that it is in time because it was part of a series of similar acts, given the events of 30 April 2019 when the respondent also went back on its prior agreement with her by changing her working arrangements.

_____
Employment Judge Quill

Date: 12 April 2021

Sent to the parties on: 14 April 21

For the Tribunal Office