EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107866/2019

Held in Glasgow on 14 and 15 January and 7 August 2020

Employment Judge: G Woolfson
Tribunal Members: Lorna Taylor
Liz Farrell

Ms A Jackson	**Claimant** **Represented by:** **Mr S Healey – Solicitor**
The Fresh Food Company (2007) Ltd	**Respondent** **Represented by:** **Mr T Muirhead – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims for unfair dismissal, sex discrimination, pregnancy or maternity discrimination and breach of contract do not succeed. All of the claims are dismissed.

REASONS

Introduction

1. The claimant has brought claims for unfair dismissal, sex discrimination, pregnancy or maternity discrimination and breach of contract.

2. We heard evidence from the claimant, and four witnesses for the respondent: Ashley Gray, Maxine Valentini, Linda Queen and Yvonne Thompson. We were referred to a joint bundle of documents.

3. The hearing took place over three days in Glasgow. The hearing was postponed after the second day due to the health of the respondent's fourth witnesses, Yvonne Thompson. Due to the COVID-19 pandemic, and also the health of the witness, the third and final day of the hearing was by way of a CVP (cloud video platform) hearing. A witness statement was provided for Yvonne Thompson, together with an agreed statement of facts in respect of that part of her evidence which could be agreed. Outline written submissions were also provided in advance of the final day of the hearing, and these were supplemented by oral submissions after the evidence of Yvonne Thompson had been completed.

4. The claimant is not seeking a compensatory award, as she has fully mitigated her loss. She is seeking a basic award of £300 and injury to feelings of £15,000. She is also seeking damages for breach of contract of £240.

The issues to be determined

5. The issues to be determined were originally set out in a Note following a preliminary hearing which took place on 2 October 2019.

6. At the start of the hearing on 14 January 2020, the parties agreed that the claimant had resigned with effect from 21 May 2019. However, the solicitor for the claimant applied to amend the claim, following on from an email which had been sent to the Tribunal that morning. The amendment was to include an argument (as an alternative to the claim for constructive unfair dismissal) that the respondent implicitly terminated the claimant's employment by ignoring correspondence of 7 May 2019 from the claimant's solicitor and that the dismissal was an act of pregnancy discrimination and/or direct sex discrimination. It was argued that the effective date of termination (for this

purpose) should be treated as being 14 May 2019. There was no objection to this application and the amendment was allowed.

7. The Tribunal and the solicitors then agreed upon a revised list of issues, before evidence was led.

8. Following the postponement of the hearing after the second day, and after a case management preliminary hearing which took place on 18 May 2020, the Tribunal confirmed in writing the issues to be determined, which are as follows:

Discrimination

8.1. Did the respondent decide to: (i) refuse to allow the claimant to return to work following maternity leave, and/or (ii) refuse to discuss with the claimant or her solicitor her return to work?

8.2. If so, when was this decision made and was this within the protected period?

8.3. Was this unfavourable treatment because the claimant was on maternity leave, further to section 18 of the Equality Act 2010?

8.4. Alternatively, was this less favourable treatment because of the claimant's sex and/or pregnancy or maternity, further to section 13 of the Equality Act 2010?

Constructive dismissal: section 95(1)(c) Employment Rights Act 1996

8.5. Did the respondent receive and ignore an email of 10 May 2019 from the claimant's solicitor and, if it did, was that a repudiatory breach of contract?

8.6. Was there otherwise a breakdown in trust and confidence which amounted to a repudiatory breach of contract?

8.7. Did the claimant resign in response to a repudiatory breach of contract?

8.8. If so, did she resign without delay such that she did not affirm the contract?

8.9. If the claimant was dismissed further to section 95(1)(c) of the Employment Rights Act 1996, was the dismissal for some other substantial reason and was it fair or unfair, further to section 98 of the Employment Rights Act 1996?

Unfair dismissal: section 95(1)(a) of the Employment Rights Act 1996, and discrimination

8.10. Alternatively, was the claimant dismissed further to section 95(1)(a) of the Employment Rights Act 1996 as a result of a refusal to allow a return to work within a reasonable period following the correspondence of 7 May 2019?

8.11. If so, was there a potentially fair reason for dismissal and was the dismissal fair or unfair, further to section 98 of the Employment Rights Act 1996?

8.12. Was any such dismissal under section 95(1)(a) of the Employment Rights Act 1996 an act of pregnancy discrimination and/or sex discrimination, further to section 13 of the Equality Act 2010?

Breach of contract

8.13. Is the claimant entitled to pay in lieu of notice?

Compensation

8.14. If any of the claims succeed, how much should be awarded by way of compensation?

9. During oral submissions at the conclusion of the hearing, the solicitor for the claimant stated that the claimant was also advancing an argument that her constructive dismissal was discriminatory. However, this is not in the list of issues to be determined. In any event, we have concluded that the claimant was not constructively dismissed.

Findings in fact

10. The respondent supplies food to various places, including restaurants, colleges, pubs and shops.

11. The claimant commenced employment with the respondent on 7 November 2016 as an Order Processor.

12. She applied for the position via Gumtree and was interviewed and recruited by Ashley Gray, General Manager.

13. The claimant and Ashley Gray communicated through Gumtree messages during the recruitment process.

14. This Gumtree account was not used by Ashley Gray after the recruitment process. She no longer received any notifications through Gumtree.

15. The claimant provided the respondent with her home address, being an address in Hamilton. She also provided her mobile number and email address.

16. The claimant signed a contract of employment on 23 November 2016. The contract contained a declaration at the end to say that the claimant had *"read, understood and is willing to abide by the terms and conditions laid down in the Employee Handbook and accept that they form an integral part of the Contract of Employment".* Although the claimant was not provided with her own copy of the Employee Handbook, she had access to it.

17. The Employee Handbook contains a statement that employees must inform the respondent when there is a change in personal circumstances, such as a change in address.

18. The claimant worked between the hours of 7:00pm and midnight or 6:00pm and 11:00pm, and initially worked 20 hours per week, over four days.

19. The claimant reported to Ashley Gray (General Manager) and Yvonne Thompson (Office Manager).

20. After her employment started, the claimant used the internal company email address (ffc@chef.net) to send emails to Ashley Gray at her work email address: a.gray@freshfoodcompany.co.uk. The claimant did this on a number of occasions and was aware of Ashley Gray's work email address.

21. The claimant moved to her mother's address in Glasgow at the end of 2016. She did not inform the respondent of this.

22. In around September 2017 the claimant informed her colleague, Joyce Murray, that she was pregnant. Joyce Murray informed Ashley Gray.

23. In October 2017 the claimant's hours of work were reduced. She worked three days a week instead of four.

24. On 16 November 2017 the claimant used the internal company email address (ffc@chef.net) to send an email to Ashley Gray at a.gray@freshfoodcompany.co.uk. She asked for a copy of her maternity certificate and asked about how many holidays she had left so she would know when she could stop work before going on maternity leave.

25. The claimant was on annual leave from 4 December to 17 December 2017.

26. She gave birth on 18 December 2017, and was then on maternity leave from that date. Ashley Gray was also on maternity leave from the start of 2018.

27. During the claimant's maternity leave, another employee of the respondent, Kayleigh McPherson, covered the claimant's Friday night shifts. The other shifts were shared amongst others. Kayleigh McPherson, who is the niece of the owner of the business, covered for the claimant on a temporary basis, whilst she continued to carry out her own duties. She was not a permanent replacement for the claimant.

28. In June 2018 the claimant moved to homeless accommodation. She did not inform the respondent of this, as she had been advised by the case workers not to give out that address. She did not provide the respondent with any alternative address for correspondence.

29. Yvonne Thompson, who is the Office Manager, was handling the claimant's return to work following maternity leave. She wrote to the claimant on 1 October 2018 to advise that the claimant's maternity leave allowance was due to expire. She asked the claimant to contact her in writing or by phone by 8 October 2018 to discuss her return to work. Yvonne Thompson used the claimant's Hamilton address for this letter, being the only address which had been provided by the claimant.

30. The claimant did not receive this letter, as it had been sent to the Hamilton address and the claimant had not provided an up to date address.

31. On 26 October 2018, the claimant sent a message via Gumtree to Ashley Gray asking whether her maternity pay had finished as she had not been paid that day. She also stated that she had lost Ashley Gray's number as she had lost her phone, and she provided a new mobile phone number. This message was sent by the claimant as a reply via Gumtree to an earlier message from Ashley Gray which had been sent at the point when the claimant was recruited. However, Ashley Gray did not receive the message of 26 October 2018, as she no longer used the Gumtree account. Ashley Gray was not therefore aware of the claimant's new phone number. The claimant sent her message to Ashley Gray via Gumtree, even though they had not used Gumtree to communicate with each other since the claimant's recruitment,

and even though the claimant was aware of Ashley Gray's work email address.

32. On 26 October 2018 the claimant also called the office of the respondent. She spoke with Maxine Valentini, who is an Account Manager. The claimant informed Maxine Valentini that she had not been paid, and that she wanted to be paid holiday pay. Maxine Valentini said she would pass on a message, and she then left a post-it note with a message on Yvonne Thompson's keyboard. The claimant did not speak again with Maxine Valentini and she did not provide Maxine Valentini with an up to date address.

33. Having been passed on the message from Maxine Valentini about the claimant having called, Yvonne Thompson tried to call the claimant on the number which the respondent had on file, but received no reply. She then wrote to the claimant on 29 October 2018, again to the address in Hamilton, referring to the call with Maxine Valentini and also referring to Yvonne Thompson's earlier letter of 1 October 2018. Yvonne Thompson confirmed that a payment in respect of holiday pay would be paid as requested, on 2 November 2018. She also stated the following:

> *"I tried to call you back on the number we have on file for you but there was no answer. Can you please contact me either by phone or in writing to confirm whether you will be returning to work or not. If I am not available when you call please leave a number you are contactable on and I will get back to you."*

34. Shortly after 29 October 2018, Yvonne Thompson informed Ashley Gray that this letter had been sent.

35. However, the claimant did not receive that letter, as it had been sent to the Hamilton address and the claimant had not provided an up to date address.

36. Yvonne Thompson made no further attempt to contact the claimant.

37. The claimant's maternity leave ended on 17 December 2018. The claimant understood that she would be returning to work in January 2019.

38. On 7 January 2019 the claimant sent a message to Yvonne Thompson via the Facebook Messenger app. The message asked Yvonne Thompson to call the claimant about returning to work. However, Yvonne Thompson did not receive that message. At that time, she was not using Facebook. The claimant had been given Yvonne Thompson's mobile phone number, though she did not try to call Yvonne Thompson.

39. From January 2019, Yvonne Thompson was in and out of work whilst undergoing hospital treatment.

40. The claimant did not attempt to contact the respondent again until towards the end of April 2019, when she engaged a solicitor.

41. By letter dated 24 April 2019 the claimant's solicitor wrote to Yvonne Thompson, stating that the claimant had sought advice in connection with returning to work following her maternity leave. The letter stated that the solicitor understood the claimant had made efforts to contact Yvonne Thompson, but had not received a response. The letter also included the following:

"Our client remains an employee of your company and is ready to return to work on her previous terms and conditions following maternity leave. We would be grateful if you would please reply to our Mr Healey providing details of when her employment will recommence."

42. This letter was not received by Yvonne Thompson, as she was on sick leave at that time and was receiving hospital treatment. Ashley Gray was on annual leave when this letter arrived.

43. By email dated 7 May 2019, sent just after 12:00 noon, to Ashley Gray at her email address a.gray@freshfoodcompany.co.uk, the claimant's solicitor attached the letter of 24 April 2019 and another letter dated 7 May 2019. The letter of 7 May 2019 referred to the letter of 24 April 2019, to which no

response had been received, and explained that this was a *"final effort to make contact with you so that arrangements can be made for our above named client to return to work"*. The letter went on to say:

"If we do not hear from you by 4:30pm on 9 May 2019 then we will assume that you are refusing to allow our client to return to work following their maternity leave and it may be that our client takes necessary action against you."

44. Ashley Gray had not been dealing with the claimant's return to work. At that time, this was Yvonne Thompson's responsibility. Ashley Gray therefore attempted to speak with Yvonne Thompson about the correspondence received from the claimant's solicitor. However, Yvonne Thompson was on sick leave and Ashley Gray was unable to make contact with Yvonne Thompson. She obtained information from Yvonne Thompson's computer about what had happened in October 2018.

45. Ashley Gray replied to the claimant's solicitor, by sending an email on 9 May 2019 at 11:00am. She started by apologising for the delay and confirmed that she had been on annual leave. She explained that she had herself been on maternity leave the previous year, so had not been at work, but that she had called Yvonne Thompson, who was on long term sick leave (though she did not confirm that she had not been able to get hold of Yvonne Thompson). Ashley Gray then said the following in the email:

"Amanda maternity leave pay ended on the 19th of October last year. We had no contact from her until the week ending Friday 26th of October when she asked for all her holiday entitlement that she had accrued to be paid. It was a sales rep Maxine she spoke to and this was paid to her week ending Friday the 2nd November. Yvonne then tried to contact Amanda by writing to her at 59 Chriss Avenue, Hamilton ML3 7RN which is the address we have on our records for her but got no reply. She also tried to call her on the number we have on the system for her but again got no response. As I said I was also off so this is information I have been passed on. If you have any more information

regarding when she contacted ourselves and who she spoke to that would be great so I can go and speak to them."

46. When sending the email of 9 May 2019, Ashley Gray (in the absence of Yvonne Thompson) was trying to explain what she understood had happened, and wanted to establish whether there had been any other communications between the claimant and Yvonne Thompson, beyond the correspondence from October 2018. No decision had been taken by the respondent that the claimant would not be allowed to return to work.

47. By email of 10 May 2019 the claimant's solicitor again wrote to Ashley Gray. The solicitor referred to the original letter of 24 April 2019 and asked for details of when the claimant's *"employment will recommence following her maternity leave"*. The email went on to say:

> *"If your position is that our client is no longer employed by the Fresh Food Company then please provide the reasons for this, together with details of when our client's employment terminated, why their employment was terminated, how the fact of that termination was communicated to our client, together with when their P45 was generated (and a copy of same) and details of the notice pay that our client received.*
>
> *Whilst we acknowledge that you have been on annual leave and therefore it has not been possible for you to respond to the previous correspondence which we sent until now, we must ask that you respond within the next 5 days i.e. by Wednesday 15 May 2019, as this is now a matter of urgency and is of considerable importance to our client. These delays are causing our client a great deal of distress."*

48. That email was not received by Ashley Gray and therefore she did not respond to the email.

49. The claimant received an email which contained the wording for her resignation. This had been prepared for the claimant, and the resignation

email was dated 13 May 2019. The claimant sent this to Ashley Gray on 21 May 2019, though the body of the email which set out the claimant's resignation was still dated 13 May 2019. In this email, the claimant informed Ashley Gray that she was resigning with immediate effect. The reason given by the claimant was the following:

> *"Following the end of my maternity leave, I have received absolutely no contact from you and I find this to be unacceptable. Additionally, I have made several efforts to contact you both by telephone, through Facebook and in writing via my solicitors.*
>
> *At no point has anybody contacted me in order to make arrangements for my return to work. I think I have been discriminated against because I went on maternity leave and I have lost all trust and confidence in you as an employer."*

50. The claimant's employment terminated on 21 May 2019, as a result of her resignation, though Ashley Gray did not receive the claimant's resignation as the email had been sent to a Gumtree email address not used by Ashley Gray (and this was even though the body of the email itself referred to Ashley Gray's work email address).

51. The claimant's P45 is dated 22 August 2019, though it provides a leaving date of 3 November 2018. The claimant was still employed by the respondent on 3 November 2018, and the leaving date of 3 November 2018 was inputted sometime after the employment of the claimant had terminated.

52. The claimant earned a gross weekly wage of £150 with the respondent, which was £119 a week after tax. She also had a second job while she was employed by the respondent, at Key Housing Association. She has continued in employment with Key Housing Association, and she also obtained employment with City of Glasgow College in January 2020. As a result, the claimant has not suffered any financial loss.

Observations on the evidence

53. It was alleged by the claimant during her cross-examination that the respondent had fabricated letters dated 1 and 29 October 2018 for the purposes of the hearing or that the letters had not been sent, and it was put to Yvonne Thompson that she had made up the letters for the purposes of the hearing. It was alleged that Yvonne Thompson was not being truthful when she said that she did not use Facebook in January 2019. It was alleged that Ashley Gray was not being truthful in relation to what she had said in her email of 9 May 2019 about having called Yvonne Thompson. It was alleged that Ashley Gray had received the email from the claimant's solicitor of 10 May 2019, but had deliberately ignored it. There were therefore important issues of credibility to consider. We preferred the evidence of the respondent in relation to each of those matters, and we expand on this in the course of the judgment.

54. Yvonne Thompson was also questioned on the contract of employment provided in the joint bundle of documents and which is dated 23 November 2016. Even though it was agreed that the claimant, when she commenced employment in November 2016, worked four days a week (reduced to three days a week in October 2017), the contract in the bundle, dated 23 November 2016, only refers to the claimant working three days a week. Yvonne Thompson was unable to provide a conclusive explanation for the contract not being accurate, albeit she put forward potential explanations. It was put to her that she had not in fact issued the contract which was in the bundle and signed by her. She denied this. Even though Yvonne Thompson could not explain the anomaly, this does not lead us to conclude that she was not being honest. We believe that Yvonne Thompson gave evidence to the best of her ability and recollection and we viewed her as being honest with the Tribunal. The claimant's contract and hours of work do not otherwise feature as an issue in the case. Although the claimant stated in evidence that she had concerns around her days having been reduced from four to three, this was confirmed by the claimant's solicitor as being only background

information and not part of the claim, and the respondent's witnesses were not questioned on this.

55. There was a lack of clarity around when the claimant's maternity leave started. We conclude from the evidence that the claimant was on annual leave from 4 December 2017. The claimant gave birth on 18 December 2017. Therefore, and with reference to the Maternity and Parental Leave etc. Regulations 1999, we conclude that the claimant's maternity leave commenced on 18 December 2017.

The claim for discrimination

The Equality Act 2010

56. Under section 18 of the Equality Act 2010:

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

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

57. Under section 13(1) of the Equality Act 2010:

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.

58. Two of the protected characteristics are: (i) sex and (ii) pregnancy and maternity.

59. Section 136 of the Equality Act 2010 is in the following terms:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…….

(6) A reference to the court includes a reference to— (a) an employment tribunal.

60. In **Ayodele v Citylink Ltd** [2018] ICR 748, the Court of Appeal confirmed that section 136 of the Equality Act 2010 means that it is firstly for a claimant to prove the facts from which it can be inferred that discrimination has taken place. To use more technical language, this is known as a claimant showing there is a *"prima facie"* case. The Court of Appeal also referred to earlier cases, including **Laing v Manchester City Council** [2006] ICR 1519 and **Madarassy v Nomura International plc** [2007] IRLR 246, and confirmed a number of principles:

60.1. A tribunal should consider all of the facts (and not just those which the claimant brings) before deciding whether a claimant has shown there is a *prima facie* case. This can include taking into account factual evidence brought by the respondent which presents a fuller picture or puts the facts brought by the claimant into context.

60.2. If a claimant can prove a *prima facie* case, then it is for the respondent to prove that the treatment had nothing to do with the protected characteristic. The respondent is at that stage providing an explanation for the treatment in question.

60.3. There may be cases in which a tribunal concludes, having heard all of the evidence, that acts which are alleged to be discriminatory never happened or that, if they did happen, they were not less favourable treatment, or that any less favourable treatment was not because of the protected characteristic. Such evidence could show that a *prima facie* case has not been established.

60.4. If a claimant establishes that there has been less favourable treatment, then it is necessary to consider the subjective reasons which caused the employer to act in the way it did.

61. In **Hewage v Grampian Health Board** [2012] ICR 1054, the Supreme Court explained that it is important not to make too much of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but they have nothing to offer where a tribunal can make positive findings on the evidence one way or the other.

Summary of the submissions for the claimant

62. Where evidence conflicts, we should prefer the evidence of the claimant, and in particular should conclude that Ashley Gray has not been truthful. We

should find that she received the email of 10 May 2019 from the claimant's solicitor. We should accept the evidence of the claimant that she called Maxine Valentini on three or five occasions. Yvonne Thompson lacked credibility and gave confusing answers.

63. The claimant wanted to return to work and made several phone calls, specifically to Maxine Valentini. She sent a Facebook message to Yvonne Thompson and also made contact through her solicitor in correspondence in April and May 2019, which correspondence made it clear she wished to return to work.

64. The claimant did not return to work because the respondent did not let her return to work or make any positive effort to manage her return to work which it was incumbent on them to do, particularly after they received the emails from the claimant's solicitors which were asking when the claimant could return to work.

65. It is plain from the email from Ashley Gray of 9 May 2019 that the respondent was not prepared to engage in a discussion about facilitating a return to work. Despite the email being detailed, and despite the clear terms of the letter sent by the claimant's solicitor, Ashley Gray ignored the most important issue: when will the claimant be allowed to return to work? She instead focused on irrelevant information about who the claimant had contacted and when this was.

66. The respondent, by deliberately ignoring the claimant's clear request, refused to discuss with the claimant or her solicitor the issue of her return to work and that was effectively a refusal to allow her to return to work.

67. The decision to refuse to allow the claimant to return to work was made during the protected period. In support of this are the following: (a) the claimant's P45 is dated 3 November 2018, (b) the respondent made no effort to contact the claimant after 29 October 2018, and (c) the claimant had been replaced by a family member of the owners of the business. The respondent decided not to contact the claimant in the hope she wouldn't mind.

68. This is unfavourable treatment caused by the claimant being on maternity leave. It was in any event direct sex discrimination for which no comparator is required (**Webb v EMO Air Cargo (U.K.) Ltd (No.2)** [1995] 1 WLR 1454 and **Commissioner of the City of London Police v Geldart** 2019 WL 06467966).

Summary of the submissions for the respondent

69. The matters relied upon by the claimant did not happen because of the claimant's sex, pregnancy or maternity. The matters happened in the way that they did because of an unfortunate set of circumstances.

70. The respondent's letters of 1 and 29 October 2018 were sent to an old address of the claimant, through no fault of the respondent. The claimant had not provided an up to date address, despite the claimant's contract stating that it was a requirement to do so. The suggestion of the claimant that the letters were made up should not be accepted, in which case this is powerful evidence that the respondent was not intent on getting rid of the claimant.

71. The claimant emailed her correspondence of 26 October 2018 to an unused email address of the respondent, and the respondent cannot be faulted for this. In the email, the claimant did not provide her new postal address.

72. The letter from the claimant's solicitor of 24 April 2019 was not responded to because Yvonne Thompson was absent on sick leave, and Ashley Gray was on holiday at the time.

73. The fact that Ashley Gray, in her email of 9 May 2029, did not address the issue of the claimant returning to work is understandable given the short timescale of one and a half days to respond, and the fact she had just returned from leave and wanted to clarify matters with Yvonne Thompson. This was not a deliberate attempt to refuse to allow the claimant to return to work.

74. From the respondent's perspective, they had not heard anything from the claimant since October 2018.

75. The respondent did not receive the email of 10 May 2019 from the claimant's solicitor.

76. The respondent did not receive the claimant's resignation letter dated 13 May 2019, as it was sent to an out of date Gumtree address. The respondent cannot be faulted from this, bearing in mind it is clear from the resignation letter that the claimant was aware of Ashley Gray's actual email address.

77. The claimant could have made a number of other attempts to contact the respondent, such as visiting the respondent's premises.

78. There was therefore an unfortunate set of circumstances, in which the claimant was significantly to blame.

79. The events did not happen in the protected period. The claimant's maternity leave ended on 3 or 17 December 2018, and all of the events happened after those dates.

80. The events did not happen because of the claimant's sex, pregnancy or maternity, but because of the unfortunate set of circumstances. Reference is made to the Court of Appeal in **Robinson v DWP** EWCA (Civ) 7 July 2020, in which it is stated that it is not enough for a claimant to show that "but for" the protected characteristics she would not have suffered the treatment that she did. Rather, the Tribunal has to consider whether the treatment complained of was because of the protected characteristic, which requires consideration of the thought processes of the alleged discriminator.

81. With regard to the P45, nothing should be taken from the fact that it contains a leaving date of 3 November 2018. This was not indicative of a decision having been made. The P45 is dated 22 August 2019, and the respondent had to put some date in there (as a leaving date) and may well have put in the date the claimant was expected to return to work.

82. Yvonne Thompson gave credible evidence, and we need to bear in mind her state of health which has resulted in her memory being affected due to hospital treatment. We should also accept the evidence of Ashley Gray.

Decision

83. The basis of the claimant's case for discrimination, as set out in the ET1, is the allegation that the respondent made a decision to refuse to allow the claimant to return to work following her maternity leave and to refuse to discuss with the claimant or her solicitors her return to work. This is the alleged unfavourable treatment and less favourable treatment for the purposes of sections 18 and 13 of the Equality Act 2010, and is reflected in the first issue to be determined by the Tribunal, at paragraph 8.1 above, which is in the following terms:

Did the respondent decide to: (i) refuse to allow the claimant to return to work following maternity leave, and/or (ii) refuse to discuss with the claimant or her solicitor her return to work?

84. The allegation that the respondent refused to discuss with the claimant or her solicitor her return to work, and refused to allow the claimant to return to work, is based on the following events, as set out in the ET1:

84.1. In January 2019, the claimant spoke with Maxine Valentini and asked to speak with Ashley Gray or Yvonne Thompson, but each time she called she was told they were busy and she was never called back.

84.2. On 7 January 2019 the claimant sent Yvonne Thompson a Facebook message asking for arrangements to be made for her return to work, but she received no response.

84.3. On 24 April 2019, the claimant's solicitor wrote to the respondent asking for details of the claimant's return to work, but received no response.

84.4. On 9 May 2019, Ashley Gray replied to the letter from the claimant's solicitor of 7 May 2019, but did not provide any information about when the claimant could return to work.

84.5. On 10 May 2019, the claimant's solicitor wrote to Ashley Gray and asked the respondent to confirm when the claimant could return to work, failing which to confirm the claimant's employment status, and a reply was required by 15 May 2019. By 21 May 2019, no response had been received and the claimant resigned.

85. Before addressing each of these, it is important to note that during the hearing the claimant stated that she believed letters which the respondent says were sent on 1 and 29 October 2018 were either fabricated or not sent. This allegation by the claimant was only made for the first time during her cross-examination. It was put to Yvonne Thompson during her cross-examination (after the evidence of the claimant) that these letters had been made up for the purposes of the hearing. Yvonne Thompson denied this.

86. No credible evidence has been brought to lead us to conclude that the letters of 1 and 29 October 2018 were made up or fabricated for the purposes of the hearing. Reference was made to documents showing the total editing time of the letters. However, we do not believe this lends support to the allegation that the letters were fabricated or made up for the purposes of the hearing. The documents in question state that the letters were created and saved by Yvonne Thompson on 1 and 29 October 2018. We accept the evidence of Yvonne Thompson that she sent these letters. We accept the evidence of Ashley Gray that she was informed by Yvonne Thompson, shortly after 29 October 2018, that the letter of 29 October 2018 had been sent. It is also relevant that Ashley Gray states in her email of 9 May 2019 that Yvonne Thompson had written to the claimant after the claimant made contact with the respondent towards the end of October 2018. The email of 9 May 2019 was prior to the claimant's employment terminating and prior to a claim being raised, which is inconsistent with the allegation that the letters were made up

for the purposes of the hearing. We accept that the respondent sent the letters of 1 and 29 October 2018.

87. The letter of 1 October 2018 asked the claimant to contact Yvonne Thompson to discuss the claimant's return to work. The claimant did not reply. The letter of 29 October 2018 asked the claimant to contact Yvonne Thompson to confirm whether she would be returning to work. The claimant did not reply to that letter either.

88. The reason the claimant did not reply to the letters of 1 and 29 October 2018 is that she did not receive them, because she had changed address and had not informed the respondent of this.

89. During her evidence, the claimant said that she called the respondent on a number of occasions at the end of December 2018 and the start of January 2019, and that she left messages with Maxine Valentini to say that she wished to speak with Ashley Gray. The claimant also said that in December 2018 or January 2019 she gave Maxine Valentini the address of her mother, which is where the claimant had moved to at the end of 2016.

90. However, Maxine Valentini's evidence was that she only spoke with the claimant on one occasion, in October 2018, when the claimant called the office and was asking about her pay, and that she was not told about a change of address for the claimant. Maxine Valentini states that she informed Yvonne Thompson of the call from the claimant by leaving a post-it note for Yvonne Thompson. Maxine Valentini is clear that she did not speak with the claimant again. Yvonne Thompson's evidence is that Maxine Valentini informed her that the claimant had called the office on 26 October 2018 to ask about her holiday and maternity pay. The letter of 29 October 2018 refers to the claimant having spoken with Maxine Valentini on 26 October 2018.

91. We accept the evidence of the respondent on this issue. We conclude that the claimant called the office on 26 October 2018 and spoke with Maxine Valentini, and that she did not speak with Maxine Valentini in December 2018

or January 2019. We also accept the evidence of Maxine Valentini that she was not told about a change of address for the claimant.

92. The claimant signed a contract of employment which confirmed she had read and understood the Employee Handbook, and the Employee Handbook states that employees must inform the respondent of a change of address. Yvonne Thompson stated in her witness statement that the claimant had either been given her own personal copy of the Employee Handbook or had been provided with one to read. This evidence was not challenged. Ashley Gray confirmed that employees have access to the Employee Handbook and it is available for them to read. We conclude that the claimant was not provided with her own copy of the Employee Handbook, but that a copy was available for her to read. In any event, we do not consider it to be of particular significance whether or not the claimant actually read the Employee Handbook. It is a matter of common sense that if an employee no longer lives at the address which has been provided to their employer, then they should provide their employer with an up to date address. In this case, the claimant had been advised not to provide the address of her homeless accommodation. Whilst it is therefore understandable that she did not provide that address, she did not give the respondent any alternative address for correspondence (such as her mother's address), and she had not previously informed the respondent when she had moved to her mother's address. We consider that the respondent cannot be faulted for writing to the only address for the claimant which the respondent had on file.

93. Following the call from the claimant on 26 October 2018, during which the claimant spoke with Maxine Valentini, Yvonne Thompson tried to call the claimant on the number which the respondent had on file, but received no response.

94. The claimant's number had changed, but the respondent was unaware of this. The claimant had notified Ashley Gray of the new number by way of a Gumtree message which Ashley Gray did not receive as she did not use Gumtree at that time. The claimant says that when she sent her message to

Ashley Gray on 26 October 2018 via Gumtree she did so because that was how she had communicated with Ashley Gray at the point of her recruitment and she thought that means of communication was still in use. However, she provided no evidence that Gumtree was used as a means of communication beyond her recruitment (almost two years earlier), and we accept the evidence of Ashley Gray that she did not use Gumtree after the claimant had been recruited. Therefore, Ashley Gray did not receive the Gumtree message of 26 October 2018.

95. The respondent produced emails from 27 and 30 April 2017, 18 August 2017 and 16 November 2017, which it was said show that the claimant had emailed Ashley Gray to a.gray@freshfoodcompany.co.uk from the email address ffc@chef.net. The claimant stated during cross-examination that the email of 27 April 2017, which said *"Hi that's them printed and put in tray x"*, must have been generated from the computer and that she did not think she had written the email. On further questioning, the claimant stated that she did not think she had ever corresponded with Ashley Gray by using the ffc@chef.net email address. However, she went on to say that all she did was reply to emails and it was not an email address which she used. Then, when she was shown an email dated 16 November 2017, stated as being from "Amanda" and which asked for a copy of her maternity certificate and for confirmation of how many holidays she had left so she could know when she could "finish up", the claimant said only that she thought she had sent that email. The following exchange then took place:

> *"Q: Are you saying you didn't know the email address for Ashley Gray?*
>
> *A: I didn't use it.*
>
> *Q: I've just brought you to examples when you did use it.*
>
> *A: I just reply and it goes away. I don't store emails, that's data protection."*

96. Ashley Gray's evidence was that each of the emails produced were from the claimant. We accept this evidence of Ashley Gray and conclude that the claimant did write and send the emails, including the email of 16 November

2017. Even though the claimant only used the respondent's internal email address (ffc@chef.net) to send emails to Ashley Gray at Ashley Gray's work email address, we conclude that the claimant was aware of Ashley Gray's work email address. She could have used Ashley Gray's work email address to notify Ashley Gray of her new phone number, but did not do so.

97. We conclude, therefore, that the respondent attempted to make contact with the claimant on three occasions in October 2018 (twice by letter and once by telephone) in order to discuss the claimant's return to work. The claimant did not receive these communications because she had not provided the respondent with an up to date address and the respondent was not aware of her new phone number.

98. Yvonne Thompson did not try to contact the claimant after receiving no response to her letter of 29 October 2018. She did not address this in her witness statement, and she was not questioned on this during cross-examination. During cross-examination, Ashley Gray accepted that there had been no positive efforts to engage with the claimant after October 2018.

99. The submission on behalf of the claimant is that the failure to contact the claimant after October 2018 is evidence that the respondent had made a decision, during the protected period, that the claimant would not be allowed to return to work.

100. However, in order to determine whether any such decision had been made (whether during or after the protected period) we need to consider all of the facts, which includes the events that took place after October 2018 and other matters relied upon by the claimant, in relation to whether the claimant had been permanently replaced and the fact that the P45 has a leaving date of 3 November 2018.

101. We will therefore now consider each of the events set out in the ET1 (as noted above), and also the issues of whether the claimant had been permanently replaced and the fact that the P45 has a leaving date of 3 November 2018.

January 2019: contact with Maxine Valentini

102. We refer to our conclusion above that the claimant called the office on 26 October 2018 and spoke with Maxine Valentini, and that she did not speak with Maxine Valentini again either in December 2018 or in January 2019.

7 January 2019: Facebook message to Yvonne Thompson

103. We accept the evidence of Yvonne Thompson that she was not using Facebook in January 2019 when the claimant attempted to send her a message via Facebook Messenger, and that she did not receive the message which the claimant sent her on 7 January 2019.

24 April 2019: correspondence from the claimant's solicitor

104. Yvonne Thompson did not receive the email from the claimant's solicitor of 24 April 2019, as she was absent from work on sick leave. Ashely Gray was on annual leave.

9 May 2019: email from Ashley Gray

105. The claimant's solicitor wrote again to Yvonne Thompson on 7 May 2019, and this time the letter was also emailed to Ashley Gray, to her work email address, and a copy of the letter of 24 April 2019 was provided.

106. Ashley Gray replied on 9 May 2019, within the deadline set by the claimant's solicitor. That email provided some detail, referring to the communications which had taken place in October 2018 and the fact that Yvonne Thompson had attempted to contact the claimant but had received no response. At the end of the email, Ashley Gray asked the claimant's solicitor for more information about when the claimant had contacted the respondent and who the claimant was saying she had spoken with (though during cross-examination Ashley Gray explained that what she had actually meant to ask was whether there had been any other correspondence between the claimant and Yvonne Thompson).

107. It is submitted for the claimant that the email from Ashley Gray of 9 May 2019 shows that the respondent was not prepared to engage in a discussion about facilitating a return to work, as the email did not address the central question of whether the claimant could return to work. However, we do not accept this. Ashley Gray had been given a short timescale from the claimant's solicitor to respond to the email of 7 May 2019. She had just returned from annual leave and she wished to clarify matters with Yvonne Thompson who was on sick leave. Yvonne Thompson had previously attempted to contact the claimant to discuss her return to work, and when the claimant's solicitor contacted the respondent this was still Yvonne Thompson's responsibility (as confirmed by Ashley Gray during her evidence).

108. When sending the email of 9 May 2019, Ashley Gray (in the absence of Yvonne Thompson) was trying to explain what she understood had happened, and wanted to establish whether there had been any other communications, beyond the correspondence and telephone calls from October 2018.

109. We also conclude that Ashley Gray attempted to contact Yvonne Thompson before sending the email of 9 May 2019, but was unable to make contact with her (Yvonne Thompson being on sick leave at that time). We note that Ashley Gray's email of 9 May 2019 states that she called Yvonne Thompson, but does not go on to explain that she was unable to speak with her. It was put to Ashley Gray that what she said about this in her email of 9 May 2019 did not reflect the true position. However, we accept that Ashley Gray did attempt to contact Yvonne Thompson before sending the email. We do not consider it likely that Ashley Gray made up that part of her email of 9 May 2019, bearing in mind the rest of the email accurately reflects what had happened. We should also note, however, that this conclusion is not consistent with the evidence of Yvonne Thompson, who said that she had a discussion with Ashley Gray at some point between 7 and 9 May 2019. We believe this inconsistency can be explained by the fact that the events took place over a year ago and that Yvonne Thompson was at the time undergoing hospital

treatment which she explained during cross-examination impacted on her memory. Ashley Gray stated, during re-examination, that she spoke with Yvonne Thompson sometime later. We conclude it is more likely than not that Yvonne Thompson and Ashley Gray did have a conversation, but that this conversation took place at a later point in time and after the email of 9 May 2019, with Ashley Gray having attempted to contact Yvonne Thompson before sending the email on 9 May 2019.

110. We accept, therefore, that Ashley Gray wished to clarify matters in May 2019 having heard from the claimant's solicitor. As Ashley Gray stated in evidence, she wished to make sure that she had all the facts. Even though she did not, in her email of 9 May 2019, put in place arrangements for the claimant's return to work (something which she acknowledged during evidence), we do not believe that she was deliberately ignoring that issue or that this reflected a decision having been taken that the claimant would not be allowed to return to work. When sending the email of 9 May 2019, Ashley Gray was engaging with the claimant's solicitor. She wanted to provide the information which she had available about previous efforts to contact the claimant. She also wanted to try to obtain further information from her colleague, Yvonne Thompson, who was on sick leave and from the claimant, in circumstances where it was not entirely clear to Ashley Gray what had happened.

111. We do not believe that the email of 9 May 2019 can be taken to mean that the respondent was refusing to allow the claimant to return to work.

10 May 2019: correspondence from the claimant's solicitor

112. The claimant alleges that Ashley Gray received, but deliberately ignored, the email sent by the claimant's solicitor on 10 May 2019. Ashley Gray was clear in her evidence that she did not remember receiving the email and that if she had received it, then she would have responded. She explained there would have been no reason not to reply to the email. She said that the first time she saw the email was when she was speaking with the respondent's solicitor, at some point prior to the hearing, and that as soon as she saw the email she explained that she had not seen it before. Bearing in mind her prompt

response to the email of 7 May 2019, only three days earlier, and taking into account our conclusion above that Ashley Gray wanted to provide the claimant's solicitor with the information which she had available and try to obtain further information, we accept this evidence of Ashley Gray. We found her insistence that she did not receive the email to be genuine and credible. We accept that she did not receive the email from the claimant's solicitor of 10 May 2019, and therefore did not ignore it. She did not reply to the email because she never received it.

Had the claimant been permanently replaced?

113. It is submitted for the claimant that evidence of a decision being made that the claimant would not be allowed to return to work is the fact that the claimant had been permanently replaced by a colleague, who is related to the owner of the business. However, we conclude that the colleague who covered for the claimant was only doing so on a temporary basis. We accept the evidence of Ashley Gray in this respect, and do not believe that the claimant had been permanently replaced.

The P45

114. Reference was made to the claimant's P45 and the fact that it has a leaving date of 3 November 2018. Ashley Gray stated in evidence that she was not sure why this was the case and that Yvonne Thompson should be asked about this. However, this was not covered in Yvonne Thompson's evidence. It was not addressed in her witness statement or during cross-examination. The submission for the claimant is that the stated leaving date in the P45 of 3 November 2018 is evidence that a decision had been taken, during the protected period, that the claimant would not be allowed to return to work. However, the leaving date on the P45 of 3 November 2018 is only five days after the letter of 29 October 2018. As that letter was asking the claimant to make contact in relation to her return to work, we do not believe that a decision had been taken by 3 November 2018 to the effect that the claimant would not be allowed to return to work. In addition, the claimant's employment terminated on 21 May 2019, when she resigned with immediate effect, and

the P45 is dated 22 August 2019, which is three months after her resignation. This leads us to conclude that it is more likely than not that the leaving date of 3 November 2018 was inputted sometime after the employment of the claimant had terminated. It is not clear why 3 November 2018 was stated to be the leaving date, though we do not believe this supports the view that a decision had been taken to not allow the claimant to return to work.

Summary and conclusion

115. We have found that:

115.1. whilst the claimant attempted to provide Ashley Gray with her new phone number on 26 October 2018 by sending a message via Gumtree (even though she was aware of Ashley Gray's work email address), this was not an account being used by Ashley Gray at that time and therefore Ashley Gray did not receive the message;

115.2. the claimant spoke with Maxine Valentini on 26 October 2018, but did not speak with her in December 2018 or January 2019, and the claimant did not provide Maxine Valentini with an up to date address;

115.3. Yvonne Thompson attempted to make contact with the claimant on three occasions in October 2018 (twice by letter and once by telephone) in order to discuss the claimant's return to work, though the claimant did not receive these communications because she had not provided the respondent with an up to date address and, as noted above, the respondent was not aware of her new phone number;

115.4. Yvonne Thompson did not try to contact the claimant after not receiving a response to the letter of 29 October 2018;

115.5. Yvonne Thompson did not receive the Facebook message from the claimant of 7 January 2019, as she was not using Facebook at that time;

115.6. Yvonne Thompson did not receive the letter from the claimant's solicitor of 24 April 2019 as she was on sick leave; Ashley Gray was on annual leave at that time;

115.7. following receipt of the letter of 7 May 2019 from the claimant's solicitor, Ashley Gray engaged promptly with the solicitor on 9 May 2019 and (in the absence of Yvonne Thompson) was trying to explain what she understood had happened, and wanted to establish whether there had been any other communications, beyond the correspondence and telephone calls from October 2018;

115.8. Ashley Gray did not receive the email from the claimant's solicitor of 10 May 2019, and therefore did not ignore it;

115.9. the claimant had not been permanently replaced; and

115.10. the claimant's P45 was completed after her employment had terminated.

116. Looking at the evidence as a whole and all of the facts, we conclude that the respondent did not decide, either during or after the protected period, to refuse to allow the claimant to return to work following maternity leave, and did not decide to refuse to discuss with the claimant or her solicitor her return to work. That is our answer to the first issue to be determined, under paragraph 8.1 above.

117. We have therefore concluded that the alleged unfavourable treatment (for the purposes of section 18 of the Equality Act 2010) and less favourable treatment (for the purposes of section 13) did not take place. The claimant has not proved a *prima facie* case of discrimination, and in this regard we refer to the principles set out above from the cases of **Ayodele v Citylink Ltd** and **Hewage v Grampian Health Board.** The claim for discrimination therefore does not succeed.

118. Given our conclusion above, we do not require to determine the issues under paragraphs 8.2 to 8.4 above.

The claim for constructive and unfair dismissal

The law

119. In terms of section 95 of the Employment Rights Act 1996 ("ERA"):

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) –**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

120. In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 Lord Denning confirmed the basis of any claim for constructive dismissal, being conduct which is a significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

121. In **Woods v WM Car Service (Peterborough) Ltd** [1981] ICR 666, the Employment Appeal Tribunal confirmed that there is an implied term in a contract of employment that the employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

122. The implied term of trust and confidence was confirmed in **Malik v Bank of Credit and Commerce International SA** [1998] AC 20 in which the House of Lords also confirmed that the test whether there has been a breach of the

implied term of trust and confidence is objective and must involve an examination of all the circumstances.

123. The Court of Appeal in **Tullett Prebon PLC v BGC Brokers** [2011] IRLR 420 stated that the central question is whether the employer has clearly shown an intention to abandon and altogether refuse to perform the contract, though it is the objectively assessed intention which must be considered. That case was considered in **The Leeds Dental Team Ltd v Rose** UKEAT/0016/13, in which the Employment Appeal Tribunal reiterated that the test for constructive dismissal requires tribunals to consider the facts objectively, make an objective assessment of the intention of the employer, and consider whether the conduct, considered objectively, was likely to destroy or seriously damage the relationship of trust and confidence.

124. A relatively minor act may be sufficient to entitle the employee to resign if it is the last straw in a series of incidents. There is no need to characterise the final straw as unreasonable or blameworthy conduct, though an entirely innocuous act on the part of the employer cannot be a final straw (**London Borough of Waltham Forest v Omilaju** [2004] EWCA Civ 1493).

125. If there has been a repudiatory breach of contract by the employer, followed by affirmation of the contract by the employee, and there is then further conduct which does not, by itself, amount to a repudiatory breach, but would be capable of contributing to such a breach (i.e. a final straw), then the employee can treat that conduct, taken with the earlier conduct, as terminating the contract of employment (**Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978). The Court of Appeal also set out a series of questions which it explained it is sufficient for a tribunal to ask itself where an employee claims to have been constructively dismissed.

126. More recently, the Employment Appeal Tribunal in **Williams v The Governing Body of Alderman Davies Church In Wales Primary School** UKEAT/0108/19 confirmed that even if there has been no final straw, there can still be a constructive dismissal if there has been a repudiatory breach of contract by the employer, and the employee has not affirmed the contract.

127. If there has been a repudiatory breach of contract which the employee is entitled to treat as terminating the contract, the employee must resign at least partly in response to the breach.

128. In terms of section 94(1) of the ERA an employee has the right not to be unfairly dismissed by his employer. In order to determine whether a dismissal (including a constructive dismissal) is fair or unfair, the employer must show the reason for dismissal and that it is a potentially fair reason in terms of section 98(2) of the ERA or some other substantial reason of a kind such as to justify the dismissal. If the employer is able to do so, the question of whether the dismissal is fair or unfair falls to be determined with reference to section 98(4) of the ERA.

Summary of the submissions for the claimant

129. There is no good reason to decide that the email of 10 May 2019 was not received. Ashley Gray could offer no explanation as to why the email was not received. There was no evidence that on 10 May 2019 there was a general problem with the email server. Her position is that this was an isolated incident apparently affecting only this email.

130. In her email of 9 May 2019, Ashley Gray ignored the substance of the email from the claimant's solicitor of 7 May 2019. Then, the email from the claimant's solicitor of 10 May 2019 offered the respondent nowhere to hide. The respondent had to confirm whether the claimant was returning or whether she had been dismissed. This email was received by Ashley Gray, and was deliberately ignored. This was a calculated decision.

131. The claimant was fit and willing to work, and it is an implied term that in such circumstances the employer must offer work or pay (unless there is some contractual provision). It must also be implied that a person on maternity leave has the right to return to work following that leave, and to refuse to allow this is a repudiatory breach.

132. Therefore, ignoring the email of 10 May 2019 was in and of itself a repudiatory breach. Alternatively, this was a final straw in a course of conduct, taking into account the other correspondence.

133. If the email of 10 May 2019 was not received and deliberately ignored, then there was an earlier breach which was not affirmed, i.e. the refusal to allow the claimant to return to work. The refusal took place on 9 May 2019. In her email of 9 May 2019, Ashley Gray does not deal with the request for a return to work. This was a deliberate act and a repudiatory breach in and of itself.

134. There was in any event a breakdown in trust and confidence. The claimant had made her own efforts to contact the respondent and later engaged solicitors to do this for her. When the respondent finally decided to engage with the claimant (via her solicitors) regarding her return to work, rather than arranging a return to work for her or making other arrangements that would be seen as the steps towards her return to work, they firstly sought only to find out when she had previously contacted them and secondly chose to ignore her entirely. The respondent also made no efforts from January 2019 to get the claimant back to work, which was not in itself a repudiatory breach but part of a course of conduct.

135. The claimant was entitled to have her attempts to return to work treated with respect, taken seriously, and acted upon. The respondent chose to do none of these and in so doing acted in precisely the way the Court in **Malik** forbade.

136. The claimant resigned in response to the repudiatory breach, as she resigned shortly after the respondent did not reply to the email of 10 May 2019. There was no other reason for her resignation. The resignation date was 21 May 2019, and as such there was no delay. She did not affirm the contract.

137. Any constructive dismissal cannot be fair because the dismissal was as a result of a repudiatory breach and because of discrimination.

Summary of the submissions for the respondent

138. The respondent did not act in such a way that amounted to conduct calculated or likely to destroy the relationship of trust and confidence between the parties.

139. The respondent accepts in hindsight that they could have handled matters better than they did in respect of certain elements of the claimant's return. However, regard must be had to the set of circumstances the respondent found itself in at the time the claimant was expected to return from her leave, (as narrated in the submissions of the respondent above in respect of the claim for discrimination).

140. Whilst the respondent's failures could be said to be unreasonable, they were not so unreasonable such as to amount to a repudiatory breach (**Post Office v Roberts** [1980] IRLR 347). The events were an oversight on the part of the respondent, and it is important to take into account the context. They do not cumulatively amount to a repudiatory breach. It is curious that between 10 and 13 May 2019, when the letter of resignation was prepared, the claimant lost all trust and confidence even though the claimant's solicitor had given a deadline of 15 May 2019. This suggests the claimant had already made up her mind.

141. Should the Tribunal find that there was a repudiatory breach (which is not accepted), the claimant did not resign in response to it, but for reasons of her own, most likely that by the time of her resignation she had decided that she no longer wanted to return and was content with increased earnings in her other employment. In that regard, the Tribunal is invited to consider as significant that the Claimant had already prepared her resignation letter on 13 May 2019, despite her solicitor giving the respondent a deadline to reply of 15 May 2019.

142. Should the Tribunal make a finding that the claimant was constructively dismissed, it is submitted that the dismissal was for some other substantial reason in terms of section 98 ERA and was fair in the circumstances.

Decision

143. Following the guidance in **Kaur** (referred to above), we need to identify the most recent act or omission of the respondent which the claimant says triggered her resignation.

144. The act which the claimant says triggered her resignation was Ashley Gray receiving but then deliberately ignoring the email from the claimant's solicitor of 10 May 2019. This was said to be a calculated decision.

145. However, we have already concluded that, in fact, that alleged act did not happen. Ashley Gray did not receive the email of 10 May 2019 and therefore did not ignore it. We refer to our conclusions above, at paragraph 112.

146. The alleged act was therefore neither a repudiatory breach by itself nor a final straw, as it did not happen. The respondent cannot be said to have repudiated the contract with reference to an alleged act which did not happen in the first place.

147. Notwithstanding the conclusion above, and with **Williams** (referred to above) in mind, did the respondent otherwise repudiate the contract and, if it did, was that affirmed by the claimant?

148. The submission for the claimant is that on 9 May 2019 the respondent refused to allow the claimant to return to work, which was by itself a repudiatory breach of contract which was not affirmed.

149. We refer to our conclusions above, at paragraphs 105 to 110. Ashley Gray wanted to explain what she understood had happened and establish whether there had been any other communications, beyond the correspondence and telephone calls from October 2018.

150. When viewed objectively, we do not believe that the email of 9 May 2019 can be taken to mean that the respondent was refusing to allow the claimant to return to work. There was therefore no repudiatory breach of contract on 9 May 2019.

151. The submission for the claimant is also that there was in any event a breach of the implied term of trust and confidence and that the failure of the respondent to make any efforts from January 2019 to get the claimant back to work was part of a course of conduct. The submission for the respondent is that whilst the respondent's failures could be said to be unreasonable, they were not so unreasonable such as to amount to a repudiatory breach of contract.

152. We believe that the respondent should have tried to contact the claimant after no response had been received to the letter of 29 October 2018. As noted above, at paragraph 98, Yvonne Thompson was not questioned on this, though Ashley Gray accepted that there had been no positive efforts to engage with the claimant after October 2018. However, in order to determine whether there was a course of conduct which breached the implied term of trust and confidence, we need to consider all of the circumstances and we need to do so objectively.

153. We refer to our conclusions above, at paragraphs 86 to 97 and 101 to 115. In summary, Yvonne Thompson attempted to make contact with the claimant on three occasions in October 2018 in order to discuss the claimant's return to work. The claimant did not receive these communications because she had not provided the respondent with an up to date address and the respondent was not aware of her new phone number. The claimant spoke with Maxine Valentini on 26 October 2018, but did not speak with her again and did not provide her with an up to date address. Yvonne Thompson did not receive the Facebook message on 7 January 2019 (and the parties also agreed that the claimant had Yvonne Thompson's mobile number, but did not attempt to call her). The claimant's solicitor first wrote to Yvonne Thompson on 24 April 2019, making it clear that the claimant was still an employee and wished to

return to work. This letter was not received because Yvonne Thompson was on sick leave, and Ashley Gray was on annual leave. The claimant's solicitor then sent the letter of 7 May 2019 (by email), together with a copy of the letter of 24 April 2019, and Ashley Gray replied by email on 9 May 2019. Ashley Gray wanted to explain what she understood had happened and establish whether there had been any other communications, beyond the correspondence and telephone calls from October 2018. She asked the claimant's solicitor for more information. She was not refusing to allow the claimant to return to work. Ashley Gray did not then receive, and therefore did not ignore, the email of 10 May 2019.

154. Taking all of the circumstances into account, we do not believe there was an objective intention on the part of the respondent to refuse to perform the contract, or that the circumstances, looked at objectively, amount to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

155. We also reach the same conclusion if we leave aside our finding that Ashley Gray did not receive and ignore the email of 10 May 2019. In other words, and again having the **Williams** case in mind, we conclude that there was no repudiatory breach of contract when we consider objectively all of the circumstances prior to the stated final straw.

156. This addresses the issues at paragraphs 8.5 and 8.6 above, and we are not therefore required to consider the issues at paragraphs 8.7 to 8.9.

The alternative claim for unfair dismissal and discrimination

The law

157. In terms of section 95 of the ERA:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) –**

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

…..

158. There needs to be communication of an unequivocal intention to terminate the contract. However, there need not be direct or express communication. A termination of employment may be implied. Termination can be by words or actions, which may be ambiguous, and the test is how they would be understood by the objective observer (**Sandle v Adecco Ltd** UKEAT/0028/16).

159. The burden of proving that the contract has been terminated lies with the claimant.

160. Reference is made to sections 94 and 98 of the ERA, and also the statutory provisions under the Equality Act 2010, as set out above.

Summary of the submissions of the claimant

161. If the Tribunal decides that by their actions, and prior to the claimant's resignation, the respondent dismissed the claimant by refusing to let her come back to work, then such a dismissal would have to be unfair because there has not been a potentially fair reason offered or any evidence heard that the reason would be for some other substantial reason (or what that reason might be).

162. In addition, the reason for dismissal must be because of either pregnancy/ or sex because the circumstances in which the dismissal took place were entwined with the claimant's desire to return to work from maternity leave.

Summary of the submissions of the respondent

163. Should the Tribunal make a finding that the claimant was dismissed, it is submitted that the dismissal was for some other substantial reason in terms of section 98 ERA and was fair in the circumstances.

Decision

164. The claimant's case is that she should be treated as having been dismissed on the basis that the respondent refused to allow her to return to work following receipt of the correspondence from her solicitor of 7 May 2019. It is argued that the respondent ignored that correspondence and that the effective date of termination was 14 May 2019.

165. We refer to our conclusions set out above, at paragraphs 105 to 110. When the claimant's solicitor made contact with Ashley Gray on 7 May 2019, Ashley Gray responded promptly on 9 May 2019. Whilst she did not put in place arrangements for the claimant's return to work, she wanted to explain what she understood had happened and establish whether there had been any other communications, beyond those from October 2018. At the end of her email, Ashley Gray asked the claimant's solicitor for more information.

166. Looking at this objectively, Ashley Gray was not refusing to allow the claimant to return to work. She did not ignore the correspondence from the claimant's solicitor or communicate any intention to terminate the claimant's employment contract, and we do not believe that such an intention can be implied from the email of 9 May 2019 or from the fact that no arrangements were made in that email for the claimant's return to work.

167. For the claimant to have been dismissed further to section 95(1)(a) of the ERA, her employment contract must have been terminated by the respondent, and it is for the claimant to prove that this is what happened. We conclude the claimant has not proven that the respondent terminated her employment contract following receipt of the letter from her solicitor of 7 May 2019. We do not agree that the claimant should be treated as having been dismissed with effect from 14 May 2019.

168. This addresses the issue at paragraph 8.10 above, and we are not therefore required to consider the issues at paragraphs 8.11 and 8.12.

The claim for breach of contract

The law

169. An employee will have a claim in damages if the employer, in dismissing them, breached the contract and caused them loss.

170. This applies to an employee who is dismissed under section 95(1)(a) or 95(1)(c) of the ERA, i.e. whether they are directly or constructively dismissed.

Summary of the submissions

171. The parties were in agreement in relation to this issue. They agreed that because the claimant had not obtained new employment during what would have been her two week period of notice beginning with her effective date of termination, then she will be entitled to notice pay if she is found to have been dismissed.

Decision

172. We have concluded that there was no repudiatory breach of contract by the respondent. The claimant was not constructively dismissed. We have also concluded that there was no direct dismissal. Therefore, the claim for breach of contract and payment of notice pay does not succeed. This addresses the issue at paragraph 8.13 above.

Employment Judge: G Woolfson
Date of Judgment: 14 September 2020
Entered in register: 14 September 2020
and copied to parties