



EMPLOYMENT TRIBUNALS

Claimant: Ms R Khatun

Respondent: Cheltenham Borough Homes Ltd

Heard at: Bristol **On:** 17, 20-24 September
and 19 October (decision
meeting) 2021

Before: Employment Judge Matthews

Members: Mr K Ghotbi-Ravandi
Mr H Launder

Representation:
Claimant: In Person
Respondent: Mr M Jackson of Counsel

UNANIMOUS RESERVED JUDGMENT

1. Ms Khatun's claims that she was discriminated against on dates before 1 May 2019 because of the protected characteristics of her race, sex and/or pregnancy by reference to sections 13 (direct discrimination), 18 (pregnancy and maternity discrimination: work cases) and 26 (harassment - race and sex only) of the Equality Act 2010, were not presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have no jurisdiction to hear those claims.
2. Accordingly Ms Khatun's claims of discrimination (as referred to above) are dismissed.
3. Ms Khatun's claims that she was discriminated against on 1 May 2019 because of the protected characteristics of her pregnancy by reference to section 18 (pregnancy and maternity discrimination: work cases) of the Equality Act 2010 are dismissed.
4. Ms Khatun's claim for wages is dismissed.

5. Ms Khatun was unfairly constructively dismissed by Cheltenham Borough Homes Ltd.

6. The case will be set down for a CVP remedy hearing with a time allowance of one day. Case Management Orders in preparation for this are made separately.

REASONS

INTRODUCTION

1. Ms Reshma Khatun's claims and the issues involved were discussed at a number of preliminary hearings. At the hearing before us, it was agreed that they were as set out in a document headed "List of Issues". This is supplemented by a second document bearing the same heading listing alleged breaches of the ACAS Code of Practice 1 Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code") and a third document headed "Details of Comparators". Reference should also be made to Table 1 of the "List of Acts of Discrimination" at pages 26-31 of the bundle ("Table 1").
2. Ms Khatun expected that the Tribunal would also address Table 2 of the "List of Acts of Discrimination" at pages 32-37 of the bundle. However, it is clear from paragraph 47 of Employment Judge Midgley's Orders of 23 September 2020 that these matters were no longer pursued by Ms Khatun. This includes a distinct claim for wages, which was one of the claims made in Ms Khatun's ET1. We dismiss it for the sake of good order.
3. In summary, Ms Khatun claims that she was discriminated against because of the protected characteristics of her race, sex and/or pregnancy by reference to sections 13 (direct discrimination), 18 (pregnancy and maternity discrimination: work cases) and 26 (harassment – but in this case in respect of race and sex only) of the Equality Act 2010 (the "EA"). To the extent that any such claims are out of time, Ms Khatun applies for time to be extended.
4. Ms Khatun also claims that she was unfairly constructively dismissed. Ms Khatun says that some of the Company's conduct amounted to a fundamental breach of the implied term of trust and confidence in her employment contract entitling her to resign and treat herself as unfairly constructively dismissed.
5. As far as the issues are concerned, we will use the agreed List of Issues as a reference point. They are broadly stated and, in some cases, they are not easy to tie in to what happened. Mr Jackson had originally focussed on Table 1 in respect of the discrimination issues and, with the benefit of hindsight, it would have been better to have

done so, as that is a far more coherent document. Nevertheless, we will follow what happened during the hearing and use the List of Issues. The numbering runs to 23, although there are only 17 of them. We have adopted the numbering in the List of Issues for the purposes of cross referencing. To save repeating the issues in this Judgment we have used them as headings in our conclusions.

6. The Company denies any discrimination and says that there was no fundamental breach of contract and, if there was, it was not why Ms Khatun resigned. The Company says that Ms Khatun resigned to move back to her home in London and take up another job. Further, even if Ms Khatun resigned because of a fundamental breach, she delayed too long before resigning and thereby affirmed the contract. If there was a dismissal, the Company says it was fair. The Company allows that the claim of unfair constructive dismissal is in time but raises time points in relation to the discrimination claims. It says that any complaint about any alleged act of discrimination before 1 May 2019 is out of time and there was no conduct extending over a period falling within section 123(3)(a) of the EA.
7. Ms Khatun gave evidence supported by a written statement. On the Company's side we heard from Ms Louisa Foster (formerly Dowsett - Corporate Project Manager with the Company), Mr Steve Slater (formerly Executive Director (Finance and Resources) - now the Company's Chief Executive) and Ms Liz Garner (Head of HR). Each produced a written statement.
8. There were two bundles of documentation, "A" and "B". Bundle B was admitted following a late application by Ms Khatun on the first day of the hearing (a reading day). The Company objected to bundle B being admitted because the application was made at a very late stage in the proceedings. Notwithstanding, the Tribunal allowed the application. The bundle was small and Ms Khatun, a litigant in person, felt it essential to her case. In the event, there was nothing in it the Company was not prepared to deal with. The numbering of the electronic version of bundle A does not all coincide with that of the physical bundle. References in this Judgment to page numbers are to the pages in the electronic version of bundle A unless otherwise specified.
9. There was a Statement of Agreed Facts, a preparatory Schedule of Loss, and Mr Jackson produced written argument.
10. The Hearing was listed for the six days it eventually took and was confined to liability only. The Tribunal reserved judgment to consider better, the evidence, in particular. The Tribunal sat again on 19 October 2021 to finalise this Judgment.

11. The hearing was a remote hearing using the CVP platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
12. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate the provisions of section 136 EA (Burden of Proof) have been taken into account as is explained below.
13. This Judgment is unanimous save in respect of one area concerning the payment of an honorarium. This is dealt with below.

FACTS

14. The Company is an arms length management organisation for Cheltenham Borough Council. It evidently deals with social housing. In her evidence Ms Garner mentioned that the Company employs some 195 people.
15. Ms Foster started work for the Company on 29 June 2013. In February 2017 Ms Foster was appointed Corporate Project Manager in the Finance and Resources department.
16. Ms Khatun describes herself as of British Bangladeshi ethnic origin.
17. Ms Khatun was recruited by Ms Foster and Mr Stafford Cruse (Ms Foster's manager – Head of Finance and Reporting) as a Project Support Officer. That employment commenced on 8 August 2017 and ended with Ms Khatun's resignation taking effect on 6 September 2019. Throughout her employment Ms Khatun reported to Ms Foster. This was Ms Foster's first experience of line management. Ms Khatun's job was to assist Ms Foster in providing project support to key change programmes.
18. We know from a copy of a report accompanying Ms Khatun's application for an extension of time that she was diagnosed with dyslexia on 4 March 2012. The diagnosis was made when Ms Khatun was a third year student at Queen Mary's University in London reading English Literature. The diagnosis recommended that Ms Khatun be given an extra 25% time allowance when completing written exam work. Poor time management was noted as one of the effects of Ms Khatun's dyslexia. When Ms Khatun joined the Company, she mentioned that she was dyslexic (although she seems

not to have produced her diagnosis at that stage). At page 4 in Bundle B, we see a note made by Ms Penelope Ashton (HR Business Partner). Dyslexia is recorded together with a note that the only adjustment Ms Khatun would like was extra time if she was reading large amounts of material.

19. We are not concerned here with any discrimination claim founded on the protected characteristic of disability. Nor is it established that Ms Khatun had a disability. However, having heard the case, we are bound to say that we suspect that dyslexia may have played a part in what happened. In mentioning this we imply no criticism of either party in these proceedings.
20. As we will record, over time and following a promising start, the relationship between Ms Khatun and Ms Foster seems to have broken down almost completely. Certainly, any discussion of time keeping became an emotive “no-go” area as far as Ms Khatun was concerned. Each came to mistrust the other. As time went by, Ms Foster relied heavily on advice from HR when addressing anything problematical with Ms Khatun. That advice came from Ms Ashton. This, in turn, drew Ms Ashton into the frame and the relationship between Ms Khatun and Ms Ashton also suffered accordingly.
21. Ms Foster held regular one to ones with Ms Khatun. The first recorded in the bundle (probably the first in any event) was held on 25 August 2017 (227-229). It noted that Ms Khatun had a training requirement for a Prince2 project management course on successful completion of her probationary period, expected in February 2018. This was echoed in the September 2017 and October 2017 one to ones (230-228 and 233-234). At this stage the one to ones reflect satisfaction on both sides with the working relationship. In the October one to one there was low key mention of Ms Khatun having to work back hours. This is a reference to hours owed under the Company’s flexi time scheme.
22. On 23 and 28 November 2017 Ms Khatun and Ms Foster completed a three month new employee assessment process for Ms Khatun (235-243). Ms Khatun mentioned Prince2. There was now also a more specific reference to the problem to come. This is best understood in Ms Khatun’s own words:

“Another way in which CBH can help me improve my effectiveness is to understand the travel that I undertake on a daily basis, which sometimes means travelling up to 3 hours a day to get to and from work. The earlier that I strive to get in, I find that the longer I am spending on public transport due to rush hour between 08.00-09.00. What

should be a 25 minute journey by car from Gloucester to Cheltenham is a 1 hour journey on the bus, plus an additional 20-25 minute walk (including the walk from home to the bus station, to work). I feel that my Line Manger Lou Dowsett does understand this and has taken this into consideration. In order for me to be effective, I need to not worry about the culture of the working hours in the office and how most colleagues are in the office before me, as that is not entirely in my control with regards to bus schedules and delays on the road.”.... “In terms of travel and the concern cited above, in order to improve my own effectiveness, I need to get into a routine that works both for my work life and personal life. I need to be able to commute to work via another means of transport and ideally via a car that will get me into work relatively faster than on public transport (the bus) that I am using now. This therefore means that I need to revise for my car theory test, take driving lessons and ultimately learn how to drive, which would ensure that I can start work early and leave at a reasonable time.”

23. This statement of the problem in November 2017 reflects the position that persisted in various degrees throughout Ms Khatun’s attendance at her workplace. Nothing really changed. Ms Khatun continued to have to use the bus and did not pass her driving test during this time.
24. Apart from that, Ms Khatun expressed herself satisfied with her job. In her turn Ms Foster marked Ms Khatun as “1” (Excellent) for everything except attendance, for which Ms Khatun received a “2” (Above average). However, there were some revealing comments:

“I am particularly impressed with how well Reshma is performing while she is transitioning through a lot of change in her personal life including moving to a new city and away from her family. We have started speaking about some of this change and the impact on her and the different support mechanisms we can put in place to help at work. While she has been going through all of this, her performance at work continues to be excellent.”....

“Notes of Objectives to be achieved in the next 3 months”...

“Focus on getting into routine for commuting, hours and flexi time.”

25. A one to one on 21 December 2017 noted Ms Khatun being in deficit on flexi time, that Ms Khatun was being allowed to do work on a 4G

tablet on her way home (to help her make up her working hours) and mentioned that Ms Khatun was looking into training (246-242).

26. On 14 and 16 February 2018 Ms Khatun and Ms Foster completed a six month new employee assessment process (248-255). In it, Ms Khatun mentioned her wish to take the Prince2 course. Ms Khatun acknowledged that Ms Foster had discussed the options available, encouraging Ms Khatun to research what was available and decide which course would be best. On the subject of time keeping Ms Khatun commented:

"In my 3 month self-appraisal, I identified a concern about how much time it takes for me to commute to and from work using public transport. My line manager Lou and CBH very kindly mitigated this concern via coming up with a solution to make my work/life balance more tolerable in terms of saving me some time. They accommodated me by very generously providing me with a work tablet that I could use to access my e-mails and the internet to undertake project research. By giving me this option, I have been able to reduce my flexi in making up for any owed time."....

"....I will need to organise my time better in terms of when I come into and leave work. If I start earlier, I will be able to attend meetings that start at 09.00 and therefore will not join later than others, potentially missing crucial information to capture. In order to do this, I will need to discipline myself to leave home between 07.15 and 07.45. This will ensure that I get into work for 08.45 - 09.00. An alternative to this however is to learn how to drive...."

27. This time Ms Foster marked Ms Khatun with "1" for everything except attendance for which Ms Khatun received a "3" (Acceptable). Ms Foster commented:

"I have scored Reshma a 3 for attendance and we have been discussing this during the last few weeks. Her Bradford score is very low so I am not worried about that, however we have discussed the approach to notifying me of leave and the importance of keeping in touch during any sickness or unplanned leave. We are both happy with the approach now."....

"I agree with Reshma that I would like her to try and get in a bit earlier in the mornings if she can, as I think this will dramatically help her routine and help her get home earlier in the evenings. We have discussed how this is difficult on the

bus, and especially with the dark mornings. It's something to work on over the next few months."

On the subject of training Ms Foster commented:

"I'm pleased Reshma is considering her options for further training and by talking to our consultant Ian Henderson will give her a rounded view of the possible options out there. We have discussed that how any course will need to reflect business need as well as personal development so I think we will get a good combination of this in our discussions and subsequent decision."

28. Apart from the attendance issues, the relationship between the two appeared fine and they paid each other mutual compliments.
29. Between 24 May and 28 May 2018 there was an exchange of e-mails involving Ms Khatun, Ms Foster and Ms Ashton (Bundle B 5-7). Ms Khatun took Ms Ashton to task for asking Ms Foster to take Ms Khatun through a role profile, rather than just sending Ms Khatun a copy. Ms Khatun felt Ms Ashton had broken confidence. Ms Khatun's e-mail to Ms Ashton was prickly and Ms Ashton complained to Ms Foster. This incident would not have endeared Ms Khatun to Ms Ashton.
30. On 1 June 2018 Ms Foster had a one to one with Ms Khatun (266-267). Flexi was recorded as 3 hours under and an action was to keep on top of this. Ms Khatun was recorded as being a *"Bit tired at the moment so struggling to get up in the morning due to getting up in the night. Trying not to get back into habit of coming in after 9.30 am as LD has been really happy for past couple of weeks with time keeping."* A note on this page in the bundle, probably made by Ms Khatun after the event, comments that the early rising was attributable to fasting during Ramadan. It seems that sometime between 16 February and 1 June 2018 Ms Foster and Ms Khatun had agreed that Ms Khatun aiming to get in for 0900 was unrealistic and had agreed a target time of 0930.
31. The one to one also records under the heading "Issues or concerns":

"RK concerned that she isn't clear on what her role is in relation to the SIP implementation team. Understands that she isn't seconded onto the team but feels it's a grey area around how much work she will be expected to do for the SIP team and whether there is capacity to do anything else, and therefore fulfil the role supporting the rest of the business."

This has an onward impact on the receiving of an honorarium which seconded team members and LD have received.”.... “LD to talk to SC” [Mr Cruse] “about this and feedback to RK.”

In relation to training the one to one noted: “Need to assess capacity and definition of role (in relation to issues above) to determine whether there is capacity to dedicate to training.”

32. The SIP (Service Improvement Programme) implementation team was sponsored by Mr Slater. It included employees from across the business. It was put together from January 2018 onwards to run for a year (various dates are in evidence but it was something like July 2018 - July 2019) to upgrade IT systems and associated processes across the business (Garner WS 3 and Slater WS 3). The Company's case is that the SIP team consisted of 8 people (being 7 people reporting, for the purposes of project management as distinct from line management, to Ms Foster) and did not include Ms Khatun. The 7 were Ms Amanda Goddard, Mr Mike Scourfield, Ms Monika Pyziak-Mollov, Mr Paul Slater, Ms Rebecca Waterhouse, Ms Stella Curle and Ms Tina Williams. Members of the team including Ms Foster were to receive an honorarium of £2,000 paid over the life of the project. Ms Khatun did not receive the honorarium.
33. Not receiving the honorarium is one of the issues for Ms Khatun in these proceedings. Ms Khatun points out that her job profile included project support to key change programmes of which SIP was one (216). In the event, Ms Khatun did considerable work with the SIP team (Ms Khatun estimated 70-80% of her time (WS 73)) and sat in the same area as it did. At 258 in the bundle there is a structure chart showing the SIP team with Ms Foster and Ms Khatun in a box next to that team. Ms Khatun also draws our attention to her inclusion in communications to and about the team (259, 275, 280 and 351). Ms Foster referred to Ms Khatun as being part of the team in her investigatory interview with Mr Hall (301). At the one to one on 1 June 2018 mentioned above, Ms Foster had to refer to Mr Cruse to clarify why Ms Khatun was not to receive the honorarium. Comparing herself with Ms Foster, Ms Khatun points out that Ms Foster's job profile (212-215) includes managing project teams, so she could not see that Ms Foster was taking on any more responsibility. This was compounded by the fact that the 7 SIP team members had to apply for their roles whereas Ms Foster had gone through no such process.
34. In evidence to us, Mr Slater explained how the decision about who to pay the honorarium to had been made by an Executive Team of three including himself. Mr Slater had no doubt that the right decision had been made and was justifiable in terms of responsibility.

35. Ms Khatun says that Ms Foster did come back to her on the subject, as promised at the one to one on 1 June 2018 (WS 56). Ms Foster relayed the information from Mr Cruse that the honorarium was being paid to Ms Foster in recognition of the responsibility for 7 more staff. This, however, did not satisfy Ms Khatun because project managing project management teams was part of Ms Foster's job description.
36. The majority of the Tribunal takes the view that, in the absence of a discriminatory reason, it is legitimate for the management team in a business organisation to exercise such a discretion. Mr Ghotbi-Ravandi takes a different view. Mr Ghotbi-Ravandi takes the view that, as Ms Foster and Ms Khatun were both doing no more than their job descriptions required, there was no legitimate reason for withholding the honorarium from Ms Khatun.
37. It was sickness absence rather than time keeping as such that led to the first formal process involving Ms Khatun. On 7 June 2018 Ms Foster wrote to Ms Khatun on the subject (270-271). Ms Khatun was required to attend a formal review meeting under Stage 1 of the Company's Health and Attendance at Work Policy in respect of 6 days of sickness absence since 25 September 2017. The meeting was to take place on the 14 June 2018 with Ms Foster and Ms Ashton. Ms Khatun was reminded of her right to be accompanied. A possible outcome was a first warning and the setting of a formal review period.
38. We have seen no note of that meeting but the outcome letter is at 273-274. A formal warning was given that Ms Khatun's attendance was unsatisfactory and that any further sickness absence within 6 months may result in the process moving to Stage 2. Paragraph 3 of the letter explores one of the absences:
- "3. Your absence on 26th March 2018 was due to your husband breaking his hand over the weekend and you having to visit the hospital multiple times at unsociable hours over the whole weekend. You were exhausted by the Monday and also worried about your husband as he had surgery and was still feeling the effects of anaesthetic. We spoke about whether this was sickness or carers leave and agreed to fully explore this next time before presuming it is sickness."*
39. The significance of this is that Ms Khatun maintained that this particular absence was not sickness absence (see 268). Had that not been counted, there would have been no Stage 1 process. This continued to rankle with Ms Khatun. However, it appears that Ms Khatun's absence on 26 March 2018 was attributable to exhaustion.

On the face of it that is sickness absence. If the outcome letter is a fair record of what happened, the matter was discussed and it was left that it would be treated as sickness absence.

40. On 15 October 2018 Ms Foster wrote to Ms Khatun about a further sickness absence on 3 October (276-277). There was a meeting between Ms Foster, Ms Ashton and Ms Khatun on 16 October to discuss this followed by an outcome letter on the same day (278-279). Ms Khatun was given an informal warning for the remaining review period through until 14 December 2018, but the process was not escalated to Stage 2. Ms Foster's evidence is that the decision not to escalate was partly a recognition of the point Ms Khatun had originally raised about her sickness absence on 26 March 2018.
41. The last note of a one to one in the bundle is for 28 November 2018 (281). This does not seem to be complete and is covered in hand written notes which we believe to have been made by Ms Khatun after the event. Flexi time was noted to be 3 hours under, which needed to be made up before the end of the year. Under "Issues or concerns" Ms Foster noted:

"Timekeeping – LD continues to be concerned that RK is arriving after 09.30 on a number of occasions during each week. LD asked again that RK aim for a 9am start so that delays on the bus can be accommodated which means you are not late starting. LD understands that RK has commitments in the morning. We agreed that RK would aim to get up earlier to make sure that she could be at work on time.

Post meeting note; follow up from meeting the next day following further lateness, LD explained that if lateness continues then the consequences will be referral to HR regarding disciplinary action."

As far as training was concerned: "LD continues to await the project management training business case that RK is pulling together.".... "RK to send business case over once she is happy with it."

42. On 5 December 2018 Ms Khatun completed and sent the business case to Ms Foster (see 286). From the evidence we heard, it seems that requiring a business case to justify training of this sort is uncommon in the Company.
43. By this time, if not before, it seems that over a year's worth of late arrivals and flexi time deficits had finally soured the relationship

between the two. Ms Khatun was moving from trying to address her late arrivals by improvement to seeing herself as being picked on by Ms Foster.

44. Ms Foster's evidence is that, by this stage, she didn't know what more she could do and sought advice from Ms Ashton and Mr Cruse (WS 8). The result was that, on 10 December 2018, Ms Foster told Ms Khatun that Mr David Hall (Housing Services Manager) had been appointed to conduct an investigation into Ms Khatun's alleged time keeping. On 11 December 2018 Ms Khatun was given a letter confirming the position referring to "*Poor time keeping*" and "*Breach of CBH's Flexi-Time Policy*" (294-295). The investigatory meeting with Mr Hall was set for 13 December 2018. Ms Khatun was reminded of her right to be accompanied and that the investigation might result in disciplinary action. Ms Khatun says that, on this occasion, she asked Ms Foster to explain the process whereupon Ms Foster stormed out (WS 15).

45. Ms Khatun sent Ms Foster an e-mail about this (292-293). It included:

"Further to this morning, is it possible to have a proper catch up with you?"

I felt this morning was handled unprofessionally on your part to be honest and nor did it give me the opportunity to ask you any questions, which was unfair.

A meeting room wasn't booked, we were in Hester's Way and you spent just under minute explaining to me the decision you had made before rushing off back to Chelt House, even though the message you sent on Whatsapp this morning explained that you were getting back there for 11am.

We really need to speak about this because I personally don't agree with the way the situation was handled. The previous Thursday," [this is a reference to the meeting on 29 November referred to in the one to one of 28 November see paragraph 41 above] "you called me into a room and had a go at me without really asking or understanding why I was late, which I felt was uncalled for, unfair and also found extremely unprofessional on your part. I had a meeting that morning and instead of waiting to speak to me afterwards, you shouted at me without even asking what had happened that morning.

Your decision to speak to HR is your choice, however, it's difficult for me to understand and accept your decision when you've said to me that you're not quite sure what the process entails as it's your first time. As a manager, I feel you should understand the process and what it means before making a decision like that as it greatly affects me. As my manager, you did not speak to me at all last week about my lateness, when I copied you into an email to Paul and even when I sent you a text message on both occasions explaining my reasons, which on both occasions were outside my control.

Please let me know when you are free to discuss this."

46. Ms Foster copied the e-mail to Ms Ashton (292). Ms Ashton advised that Ms Foster had done the right thing in deciding not to respond and that matters should be left to Mr Hall and the investigation.

47. It is easy to see how these interactions between the three would have left bad feeling on all sides.

48. Ms Foster met Ms Khatun on 11 December 2019 and handed her the letter concerning the investigation. Ms Foster told Mr Hall about this in her subsequent investigatory meeting on 12 December (see 300). The note records:

"On the advice of HR, I explained that everything that RK wanted to say in relation to the Investigation should now be directed to DH at the meeting on Thursday. RK didn't take this well and then started to complain about my management style, and that she'd tell you (DH Investigation Officer) all the things she has seen. RK alluded to other things going on at home but said she didn't want to disclose them to work. These things had influenced her not being able to attend work on time. RK then stated that I had not been supportive, and I advised it's hard to be supportive on a matter if not aware of issues going on at home."

49. Ms Khatun later told Mr Hall in her investigatory interview that *"This was a very poor meeting and didn't end well at all with LD refusing to speak to me, suggesting that I speak to DH before storming off."*

50. Mr Hall had an investigatory interview with Ms Foster on 12 December 2018. The note is at 298-303. During the meeting Ms Foster described the effect on her of Ms Khatun's late arrivals:

"It's stressful for me as I find myself clock-watching to see when she is going to arrive at the same time as trying to complete my own work. This is compounded by the fact the

rest of the team are in. It reflects poorly on the team that she is coming in late (not later than people, but actually late). It's not fair on the rest of the team. She is late for meetings. If have a 9am meeting, although not frequent I basically know she will be late. It's unprofessional conduct as colleagues from other teams are often involved and then a member of Project Management not being in attendance is poor."

51. Mr Hall interviewed Ms Khatun on 13 December. The note is at 304-316. It includes a number of post meeting notes inserted by Ms Khatun. Commenting on her relationship with Ms Foster Ms Khatun said this (306 and 313):

"It's been a great relationship up until two weeks ago, and this feels like a very quick escalation. LD is aware of problems I've had outside work and been supportive; I've had a poorly father, marriage counselling for which I've had to leave early each Wednesday from April to August 2018, I moved to Gloucester from London. I've been able to open up to LD and we have talked about personal things going on in our lives.

RK post meeting comment: LD has been made aware of my mother passing away in June 2016, me getting married and moving from London to Gloucester in April 2017, starting a new job in August 2017, my father being seriously unwell especially around February-April 2018 and having to take care of my two younger siblings as a single parent/widower. She was made aware of the stress and strain that this has placed on me and my marriage, feeling guilty and homesick for being away from my father and 9 year old sister who weren't coping. I was considering handing in my notice and moving back to London in April 2018 and LD and the business were aware of this. And most recently my gran passed away in November this year which has further impacted my concerns for my father."....

"RK post meeting comment: In April, I was considering handing in my notice and leaving CBH. I shared this with LD and was told that the business does not want to lose me as an employee and I was advised and given the option of taking a sabbatical, unpaid leave, temporary adjustment to working patterns and buying extra annual leave."

On the subject of addressing late arrivals Ms Khatun wrote (311): *"RK post meeting comment: My lateness will be resolved based on a combination of things. Trying to leave*

the house earlier as waking up and being up in the mornings is not an issue. It's also learning to not allow personal and domestic issues getting in the way of me leaving the house earlier and causing delays. If I can learn to manage my personal life, emotions, grief and pressure to not impact my mornings as well as ensuring that I get on a much earlier bus than I am, that can help resolve the issue."

Ms Khatun told Mr Hall of her dyslexia (312). (It appears that she may have shared the report on her diagnosis.):

"When I first joined I didn't disclose I have dyslexia. Often people think this only means people struggle with maths/writing, but I'm the opposite, mine is processing information and organisation which is heightened by stress.

I really struggle with routine change i.e. getting 8:35 bus. It's hard for me to compute that for example the 8:25 bus should get me to work for before 920 etc. It's a real struggle. Following discussion with ACAS on Wednesday 12 December I felt ok to disclose, I hadn't previously as it doesn't affect my work but does affect my concept of time (RK Post meeting comment Because of my dyslexia, I'm a lateral thinker and not a linear thinker like most when it comes to time perception) and this is with extra stress in my life.".... "It had never registered to tell LD that due to my dyslexia being told to try to get in for 9 from 930 and suddenly change from my routine It's really hard to cope with that expectation."....

"In terms of support I'm not sure you can put something in place. Hopefully a better understanding and some patience with me as a lot of it is out of my control. I see it as my responsibility to try a bit more, try harder than I am." [Ms Khatun says that no adjustments were made to her working times in respect to her dyslexia (WS 41). From this note of the investigatory interview, it would appear that Ms Khatun did not request any, other than understanding and patience.]

Ms Khatun raised the issue of home working (315): *"I think people are treated differently in the team; there is more flexibility for some than others.".... "RK post meeting comment: I have requested LD to work from home in our last 1 to 1/ catch up a couple of weeks ago for Friday 28 December when hardly anyone will be in the office. I explained that I have a lot I can work on. However, LD has said that I need to demonstrate to her what I will work on*

from home and that she will not agree to it until we meet again to discuss this. I have spoken to SC about this and his view appears to be that it should be okay for me to work from home but to wait on what LD says. I have sent her a work list today and as a result I've not been able to book coach tickets to London (home) over Christmas as I am waiting on her approval. There is genuinely a clear disparity here.

If Monika" [Pyziak-Mollov] "wants to work from home then LD says ok and won't challenge, others have asked and not gotten this, there is a disparity about how others are working."

52. The sickness absence review process duly ended on 14 December 2018 and Ms Foster wrote to Ms Khatun confirming this to be the case (327). Ms Foster did, however, point out that, if the trigger point was reached again, the process could go straight to Stage 2.
53. On 18 December 2018 Ms Khatun sent Ms Foster a message to say she was likely to be late again. In the event Ms Khatun was not late. However, the exchanges between the two on this occasion confirm the state the relationship between them had got to (320-321). Ms Foster had attempted to manage the situation but, in effect, Ms Khatun had walked out on the conversation. We note that Ms Khatun questioned why Ms Foster had not spoken to Ms Tina Williams about Ms Williams' arrival after 0935 that day.
54. On 19 December 2018 Ms Khatun sent Ms Foster an e-mail asking if Ms Foster had received Ms Khatun's business case for the Prince2 course (285). Ms Foster replied to say she had and had started to read it through (285).
55. On 21 December 2018 Ms Foster refused Ms Khatun permission to work from home on 28 December (325-326). Ms Khatun was taking leave on 27 December to attend a family birthday party in London and needed to know if she had to be physically present in the office on 28 December. It seems Ms Khatun's hope was to work from home in Gloucester, although she couldn't see the difference between Gloucester and London in that respect (see 330). Ms Foster was obviously in no mood to accommodate the request (WS 12). This was despite Ms Khatun providing a list of work including work she could do from home (322-323).
56. Ms Khatun reports that Ms Foster worked from home on occasions when it suited her, once when having a wedding dress fitted, for a week when her dog had surgery and once when her builder arrived

late one morning (WS 22). As Ms Khatun saw it, Mr Scourfield was allowed by Ms Foster to work from home on 21 December 2018 because of childcare needs in the afternoon (331 and WS 23). Ms Foster also allowed Ms Goddard to work from home when her mother was in hospital. Ms Khatun says that Ms Pyziak-Mollov was allowed to work from home on a number of occasions and repeatedly on Fridays to avoid traffic. This was something Ms Pyziak-Mollov had done when working for Mr Cruse. Mr Zunaid Bhaiyat had been allowed to work from home on the days of his wife's antenatal appointments (WS 24). Mr Cruse had worked from home when his wife and child were unwell.

57. On 3 January 2019 Ms Khatun sent Ms Foster an e-mail asking that she be told when Ms Foster had finished reading her business case for Prince2 and what the next steps were. Ms Foster replied on 7 January to say that she wouldn't be doing any work on this whilst she caught up after the Christmas break. Ms Foster's aim was to discuss it at the next catch up on 27 February. Notwithstanding, on 8 January Ms Khatun asked Ms Foster about the cause of the delay (283-285). Ms Khatun reinforced this with an e-mail to Mr Cruse on the same day. The exchanges are at 283-285. It is obvious from this exchange that Ms Khatun was angry about the delay and was appealing to Mr Cruse to intervene. If he did, we have seen no evidence of it.
58. Mr Hall issued his report on 8 January 2019 (332-313). Mr Hall found both the allegations, of poor time keeping and breach of flexi time policy, proven but with mitigating circumstances. A large part of the mitigation was that *"The relaxed management of these issues compounded the behaviour and comments such as "come in earlier if you can" would not have been an appropriate way to correct behaviour if there was dissatisfaction."* Mr Hall did not recommend a disciplinary hearing but, rather, Formal Counselling. The outcome letter dated 10 January 2018 (it should have been dated 2019) from Ms Ashton to Ms Khatun is at 341. Mr Cruse was to supervise the counselling. Ms Khatun was invited to appeal but did not do so.
59. If either Ms Khatun or Ms Foster had been unclear about the importance of time keeping, adhering to the flexi time policy and recording lunch breaks before this process, they were left with no room for doubt thereafter.
60. On 7 January 2019 Ms Foster agreed that Ms Khatun could work half a day at home on 9 January (328). Ms Khatun had a flight from Heathrow that evening and the rest of the day was to be made up in flexi time.

61. Mr Cruse met Ms Foster on 11 January 2019 to discuss the outcome of Mr Hall's investigation. The note is at 342. Ms Foster accepted the outcome, including her own shortcomings. Ms Foster understood the criticism of her relaxed management style. In the event, Ms Foster's subsequent attempts to manage Ms Khatun's absence more firmly contributed to the turn events took.
62. On 17 January 2019 Ms Foster sent an e-mail to the 7 members of her SIP team setting guidelines for when they might or might not be given permission to work from home (343). This was not copied to Ms Khatun, who Ms Foster says was not part of the SIP team, although Ms Foster says they applied to Ms Khatun and were explained to her (WS 13).
63. Sometime in January 2019, Mr Slater gave the members of the SIP team a small gift accompanied by a note thanking them for their hard work. Mr Slater says that Ms Khatun, although not a member of the SIP team, was included because of the support she had given the team and her physical proximity to it (WS3). Mr Slater's note to Ms Khatun is at 441.
64. On 4 February 2019 Ms Ashton wrote to Ms Khatun to arrange the first of two counselling sessions (344). Ms Ashton explained that Mr Cruse would chair the meeting and act as counsellor between Ms Khatun and Ms Foster. Ms Ashton would attend to support Ms Khatun at Ms Khatun's request. However, exchanges between Ms Khatun and Mr Cruse at 345-347 show that Ms Khatun was not happy with Ms Ashton attending. Although this is couched in diplomatic language, it is not much of a stretch to suppose that Ms Khatun did not want Ms Ashton involved because Ms Khatun identified her as an adversary having been party to both the sickness absence and time keeping disciplinary processes. On her side, Ms Ashton would have either been told or worked out what was going on and, that being the case, we see more signs of the reasons behind the strained relationship between the two.
65. Ms Khatun says that she told Ms Foster she was pregnant at a one to one on 27 February 2019 (WS 74). Ms Khatun decided to share the information because she had taken sick leave on 20 and 21 February and Ms Foster was concerned Ms Khatun might trigger the sickness absence review level again and wanted to discuss this. On learning that the sickness absence was pregnancy related, Ms Foster assured Ms Khatun that it would not count as a trigger. Ms Foster told Ms Khatun that Ms Khatun should inform HR. Generally, Ms Khatun wanted to keep the news private. This discussion is acknowledged by Ms Khatun to have overtaken the scheduled discussion about Prince2 (WS 75).

66. The Company has a Work & Families policy and this covers the procedure on an employee becoming pregnant (177-178) including the need for a risk assessment. The policy also records that all pregnant employees are entitled to paid time off to attend antenatal appointments.

67. The Company also has a New and Expectant Mothers policy (179-183). We note the following:

Aims - "4.4 Providing suitable facilities for workers who are pregnant or breastfeeding to rest."

Ante-natal appointments – "Expectant mothers are entitled to reasonable time off to attend ante-natal appointments."

68. Around this time two others of the Company's employees, in particular, were pregnant. The first was Ms Ashton. Ms Ashton travelled by bus to Gloucester for her antenatal appointments, attending the same hospital as Ms Khatun. Ms Ashton found that 1½ hours was adequate for this. The second was Ms Sarah Roberts. Ms Roberts drove to antenatal appointments either in her own time or at the end of her working day and was not, therefore, required back in the office.

69. Ms Foster reports that two counselling sessions took place as the outcome of Mr Hall's investigation. The first was on 15 February 2019 (Foster WS 11).

70. Ms Khatun says that, at a catch up sometime in March 2019 she had a discussion with Ms Foster about the Prince2 course (WS 50). Ms Khatun says: "*Ms*" [Foster] "*expressed how she was unsure that I would have time to complete the PRINCE2 qualification before going on MAT leave in September 2019. Ms*" [Foster] "*had said that we could discuss my business case and the next steps on the 22nd May 2019, five months after submitting the business case.*" In questioning, this was put to Ms Foster differently. It was suggested to Ms Foster, in terms, that she had told Ms Khatun that she could not go on the course because of her pregnancy. Ms Foster did not accept that, pointing out that there were courses available in June and July, well before the date on which Ms Khatun's confinement was expected to start. Ms Foster also explained that she was concerned about Ms Khatun having the time to take the course given her work commitments. This echoes earlier one to ones (see paragraph 31 for example). We accept Ms Foster's evidence on these points.

71. On 12 March 2019 Ms Khatun had an ante-natal appointment at Gloucestershire Royal Hospital in Gloucester. Because it fell at the

start of the day, Ms Foster agreed that Ms Khatun should work half a day at home on that day. Ms Foster says this followed standard policy (WS 15). Ms Khatun bumped into Ms Ashton who was also having an antenatal appointment at the hospital. As Ms Khatun points out, this put Ms Ashton on notice of Ms Khatun's pregnancy.

72. In any event, Ms Khatun told Ms Ashton that she was pregnant on 13 March 2019. In an e-mail on that day Ms Khatun asked Ms Ashton if there was any provision available in case a rest or sleep break was needed at work (354).
73. On 14 March 2019 the second of the two counselling sessions concerning time keeping took place. An undated note at 357 records what was agreed. Ms Khatun would be in on time (before 0930), would work her 37 contracted hours a week and would not go into debit on flexi time.
74. Also, on 14 March 2019, Ms Khatun formally notified Ms Ashton of her pregnancy (356). At 1511 Ms Khatun sent Ms Foster an e-mail (355). Ms Khatun had not taken her lunch break but was hoping to take a half hour nap in a room by the IT team. Ms Khatun commented that she was struggling with her energy levels and needed a power nap. Ms Foster told Ms Khatun that she was not happy about her being in that room because the chairs were not nice but she could take her work chair in there or use the couch in the kitchen.
75. On 15 March 2019 Ms Khatun had a meeting with Ms Ashton about Ms Khatun's pregnancy. We only have Ms Khatun's account of this (WS 81-83). When considering what happened at this meeting, we bear in mind that, by this time, there is plenty of evidence that the relationship between the two was strained on both sides.
76. Ms Khatun says that they discussed maternity leave in some detail and compared notes on their respective pregnancies. Ms Khatun continues:

WS 81. "...I also asked Ms Ashton about additional rest breaks and a place that I could lie down as I was feeling very tired at work.

82. Ms Ashton definitively explained that legislation around making reasonable adjustments for pregnant/breastfeeding women is a "grey area and that CBH do not have a legal requirement to provide pregnant or breastfeeding women a room or place to rest (or lie down) and nor are they required to provide additional rest breaks, even if this is required. Ms Ashton also advised me of only being entitled to 1.5 hours

for ante-natal appointments and when I explained that I took the bus, she said that was still reasonable time.

83. Ms Ashton produced a timesheet template and showed me how to correctly fill it out when taking time off for antenatal appointments. This shows 1.5 hours inputted for the MAT code and also shows 30 minutes required to be put in for lunch breaks on days of antenatal appointments. I questioned Ms Ashton about appointments falling within lunch times and Ms Ashton said 30 minutes would still be required to be put in. In effect, 30 minutes for lunch would need to be put in even if they were not taken.”

77. In making our findings on this we have taken into account the later paper records made by Ms Khatun and Ms Ashton's preparatory note for the meeting on 9 May 2019, that, in the event, did not take place. We deal with these below. The Tribunal found Ms Khatun to be a truthful witness. Ms Khatun said what she believed. However, it is clear, both from the evidence before us and Ms Khatun's presentation of her case, that Ms Khatun often reached a conclusion or interpreted an event in a way that was not supported by what was said or done. This is one such occasion. In summary we find that:

1. We know that Ms Ashton and Ms Foster had been in contact prior to this meeting. In particular they had exchanged e-mails on Ms Khatun's "nap" on 14 March (359). It was almost certainly in Ms Ashton's mind that Ms Foster was concerned about Ms Khatun napping on the floor of the IT room. Consequently, there was a discussion about napping and where it should be done. Ms Ashton explained that the Company was not obliged to provide a dedicated room or place for pregnant women to rest. That is, in fact, what Ms Khatun says in her witness statement. However, Ms Khatun has then extrapolated from this, seeing it as a statement that the Company had no obligation to allow an employee to rest or lie down at all.

2. It is not then a big step to see this discussion about a dedicated room as being the source of Ms Khatun's account that Ms Ashton told her the Company did not have to provide additional rest breaks even if they were required. We do not think that is what Ms Ashton said. The later risk assessment and Ms Ashton's preparatory notes for the meeting on 9 May make it clear that additional rest breaks were available by agreement with Ms Foster and that is probably what Ms Ashton told Ms Khatun at this meeting. Ms Khatun has turned the qualification that additional rest breaks had to be

agreed by Ms Foster into no entitlement to additional rest breaks at all.

3. As Ms Khatun says, it was Ms Ashton's view that 1.5 hours for ante-natal appointments was a reasonable time allowance.

4. Ms Ashton explained to Ms Khatun that, on days of antenatal appointments, lunch breaks must still be taken. Ms Khatun gets close to this in her witness statement. Ms Khatun then proceeds to draw the conclusion that she had been told that lunch breaks had to be put down even if they were not taken. In fairness to Ms Khatun, her interpretation appears to have been shared later by Ms Foster. In the meeting on 25 April 2019, which we will come to, Ms Foster undoubtedly did tell Ms Khatun that she must put down a lunch break, whether she took it or not.

5. Having made these findings, we do accept that Ms Khatun left the meeting believing that the Company's position was that it had no obligation to allow an employee to rest or lie down at all, that it did not have to provide additional rest breaks and lunch breaks had to be entered on time sheets, whether taken or not. We do not, however, accept that is what she had been told by Ms Ashton.

78. Over the period 20-21 March 2019 Ms Foster recorded this in Ms Khatun's sickness record, describing the reason for absence as pregnancy related sickness (473):

"Reshma has text me this morning to say she is feeling unwell and extremely fatigued with aches and pains all over which I understand is pregnancy related as I know she has been struggling with similar symptoms throughout her pregnancy."

The next day: *"Reshma called me in the morning and we spoke about how she is feeling. We agreed that she would rest all day"*

The next day: *"I have spoken to her this morning and she is feeling worse today, with continued exhaustion and severe aches and pains. I have asked her to contact the Dr."....
"We've talked about how we need to discuss what we do if rest is not alleviating her symptoms."*

On 22 March 2019 Ms Khatun went into work but was later signed off sick until 29 March with “Fatigue” (361). The entries continue:

“...the Dr has advised that she should be signed off for 1 week to recuperate from a suspected virus that is causing fatigue/exhaustion and aches and pains.”... “Spoke Reshma on Friday. She explained she was feeling much better”

79. On 9 April 2019 Ms Khatun had an ante-natal appointment and was allowed to work from home for half a day.
80. On 11 April 2019 Ms Khatun met a consultant to the Company, Mr Alan Turner, for her pregnancy related risk assessment. Ms Khatun says that she took up with Mr Turner various topics from her conversation with Ms Ashton on 15 March. Mr Turner reportedly disagreed about the requirement that the Company provide a suitable place to rest or lie down and additional rest breaks. Mr Turner’s views were, of course, conditioned by the way Ms Khatun had reported her conversation with Ms Ashton to him. We have dealt with Ms Khatun’s understanding of that conversation above.
81. On 24 April 2019 Ms Khatun sent Ms Foster a text message and there was a subsequent exchange of text messages between the two (383). They can be referred to for their full content but the salient parts are these:

“Morning Lou,”... “I’m not feeling great at all. My hayfever symptoms are really bad and it just feels a lot worse this time around being pregnant. It’s actually hurting my tummy from all the sneezing and coughing. I’d like to be able to work from home so as not to waste the entire day but I understand that is not the policy when feeling unwell. Leaving the house will just worsen my symptoms and I’m already really tired from not getting a good night’s sleep from the nasal congestion.”...

Ms Foster replied: “You may not work from home, you will need to take the day sick. Please can you contact the dr, midwife or pharmacy for advice on what you can take to help your hayfever while pregnant.”

82. This absence was recorded by Ms Foster as “Sickness Other reason – not specified” (474).
83. The following day, 25 April 2019, Ms Foster had what she refers to as a “return to work meeting” with Ms Khatun. There is a note at 357 in the bundle that was almost certainly prepared by Ms Ashton (it is the

same typeface she uses elsewhere) for Ms Foster. If it was not in preparation for this meeting, it at least reflects the context. It refers back to the last counselling session on 14 March 2019 and notes Ms Khatun's continuing late arrivals in the month preceding the meeting and flexi time deficits. It is echoed in the later notes prepared by Ms Ashton for a proposed meeting on 9 May 2019. What it certainly evidences is that Ms Foster and Ms Ashton were in continuing discussions about Ms Khatun's time keeping and were not going to let matters rest.

84. It is plain from all accounts that what took place was not what an objective observer might expect from a return to work meeting. Ms Foster says that she started the meeting by asking Ms Khatun how she was feeling and whether she was better (WS 20). The meeting then moved on to other issues. These issues were not about the sickness absence the day before but, rather, time keeping issues. In particular, Ms Foster raised the issue of three lunch breaks that had not appeared on Ms Khatun's April time sheet. There appears to have been a discussion in which the issues of taking a lunch break and using lunch breaks for pregnancy related rest became confused. Each was proceeding from a different starting point on the lunch break issue. Ms Khatun was coming from her interpretation of her conversation on the subject with Ms Ashton on 15 March. Ms Foster's starting point was that an outcome of Mr Hall's investigatory meeting had been Ms Khatun's agreement to take lunch breaks. Ms Foster also raised the issue of Ms Khatun being in flexi time deficit. Again, this became confused because Ms Khatun made the point that she was not prepared to work back time equivalent to lunch breaks that she had not taken. The meeting clearly broke up acrimoniously. Both were frustrated and angry.
85. The only contemporaneous record of this meeting we have seen is Ms Foster's subsequent e-mail to Mr Cruse and Ms Ashton timed at 1358 the same day (386). It is not a long e-mail and it can be referred to for its full content. We note the following. Ms Foster referred to the meeting as a catch up regarding flexi, rather than a return to work meeting. Ms Foster asked for advice, in essence about passing the matter of flexi time and lunch break issues to a meeting between Mr Cruse, Ms Ashton and Ms Khatun. No doubt Ms Foster was hoping someone would take the problem away from her. As far as lunch breaks were concerned, Ms Foster had, in terms, told Ms Khatun that she must put down 30 minutes as a lunch break even if she had not taken it. Ms Foster ended:

"There have been some comments from Reshma today about the way she is feeling now that she is pregnant, and that she is trying to work her hours, even though she doesn't

feel good. She has also alluded to the fact that I am not being lenient enough or considerate of her circumstances regarding her request to work from home yesterday.

I did not enter into conversation with her on this, as I wanted to keep it focused on the flexi & deficit discussion, however I am slightly worried that these comments will continue.

Any advice would be appreciated.”

86. We do not know how Mr Cruse and/or Ms Ashton reacted to this. We would have expected it to be with some alarm for a number of reasons. First, it was clearly wrong to tell an employee to put a lunch break down when it had not been taken. Second, both Mr Cruse and Ms Ashton knew that Ms Khatun was pregnant and the reference to her making comments about how she was feeling and a lack of consideration for her circumstances should have set alarm bells ringing. It is self evident to any HR professional and properly briefed manager that pregnant women in the workplace enjoy special legal protections and consideration.
87. It seems that Ms Khatun went to see Mr Cruse after her meeting with Ms Foster (Foster WS 21). We do not know what happened at that meeting but Mr Cruse asked Ms Foster to set up a meeting between Ms Foster, Ms Khatun and himself for the following day, 26 April 2019 (see 387 in this connection). If this, or indeed any of the other attempts at setting up a meeting to sort things out, had succeeded, all may yet have been well. There was, however, to be no meeting.
88. On 26 April 2019 Ms Khatun sent an e-mail to Mr Cruse and Ms Foster refusing to attend the meeting without Ms Ashton being present (389). It included this:

“Further to my return to work catch up with Lou yesterday and the information discussed, I believe it is important for Penelope from HR to be present so we can discuss what was agreed with me regarding timesheets and maternity too, as the two are related in respect of my timesheet for this month.

Lou, I have consistently kept you up to date with my conversations with Penelope and have recorded my timesheet as accurately as possible, including the lunch breaks I did not take as I was reserving them for taking rest/nap breaks as I was explicitly told by Penelope that additional rest breaks are not available to pregnant staff and our own lunch breaks need to be used.”...

“To be told that it is a legal requirement to put in 30 minutes on my timesheet for a lunch break that I did not take that is not in the company policy, the ACAS guidance notes and nor in the Working Time Regulations, I question the advice and information that I am being given. I disagreed with Lou regarding Penelope instructing me to put down 30 minutes for lunch even if it was not taken. My understanding and agreement was that I would take 30 minutes lunch everyday but for circumstantial reasons, I have not been able to on three occasions this month.

In light of this, it’s also extremely difficult for me to accept this information when my own manager has not taken lunch breaks in the past and nor has she recorded the 30 minutes in her own timesheets, that I was told yesterday is a legal requirement.”

89. Ms Khatun either had or has since these events, carried out an overview of Ms Foster’s time sheets for 2017-2018 (WS 34). Ms Khatun says these show that Ms Foster periodically failed to include lunch breaks. Further, Ms Foster breached flexi time policy (WS 39 and 40). We note, however, that all these pre-dated Mr Hall’s investigation after which Ms Foster says she put matters right. Ms Khatun also says that Ms Pyziak-Mollov was spoken to about this and refused to comply (WS 35). Further, Ms Khatun says that Ms Goddard and Mr Slater did not complete their time sheets accurately (WS 36 and 37).
90. Although we do not know if Ms Ashton saw the e-mail of 26 April 2019, Mr Cruse was a recipient. Presumably he would have picked up the fact that new topics had come onto the table. Ms Khatun was saying she had been advised by Ms Ashton that additional rest breaks were not available to pregnant staff and that lunch breaks were to be used for that purpose. Whether that was true or not, this was a second occasion for alarm bells to ring.
91. Later, on 26 April, Ms Khatun asked for a private meeting with Mr Cruse, which Mr Cruse sidestepped unless Ms Foster was present. Ms Khatun replied to say that it was unfair that Ms Foster could talk to him privately about what had happened on the day before, but Ms Khatun could not (388).
92. 26 April 2019 was a Friday. Ms Foster, presumably on Mr Cruse’s instruction or with his knowledge, rearranged the meeting due to take place that day, for Tuesday 30 April 2019. Ms Foster did this in a note on 26 April (395). It read:

“Hi Reshma,

Please keep this time in your diary free for a discussion with Penelope, Stafford and myself following on from our catch up yesterday, and your email to Stafford and I today (26th April).

This meeting is taking place to discuss the agreed outcomes from your disciplinary hearing earlier in the year, a review of the achievement of these outcomes during your monitoring period and to cover the points you have raised today.

Please can you prepare for this meeting by reviewing the following documentation that has previously been provided to you;

- *Your disciplinary hearing notes from Dave Hall*
- *Disciplinary outcome letter*
- *Flexi policy*
- *Your flexi sheets from March and April”*

93. Ms Foster admits the error in her note referring to a disciplinary hearing and outcome (WS 22). They were, of course, an investigatory hearing and outcome respectively.

94. Coincidentally, Mr Turner signed off the pregnancy related risk assessment for Ms Khatun on 26 April (375-377). It had initially taken nearly a month to progress this assessment (HR had been formerly notified of Ms Khatun’s pregnancy on 14 March and Ms Khatun first met Mr Turner on 11 April). It had then been further delayed by Ms Khatun’s typically detailed input. Because of this it did not come into play until too late. For instance, it seems that Ms Foster did not see it at the time. However, we note the following. The report recorded that Ms Khatun could take rest breaks when needed. There were several repetitive mentions of the potential discomfort caused by the commute to work, both walking and on the bus. Mr Turner noted a possible requirement for additional rest breaks, which were to be agreed with Ms Khatun’s line manager. Consideration needed to be given to identifying somewhere to rest, including lying down.

95. Ms Khatun spent the weekend of 27-28 April worrying about the position she found herself in. Ms Khatun tells us about this in her Witness Statement at 99. We have no doubt that her account is truthful, although the objective grounds for her worries are open to debate.

96. The Company's meeting system included a function by which those invited to a meeting could "accept" it. Ms Khatun did not accept the meeting scheduled for 30 April and Ms Foster spoke to her about this. It is not entirely clear when this happened and the timing is not important, but we think it may have been in the morning of 30 April. Ms Khatun said that she believed the meeting would be a formal meeting and she would not attend without trade union representation. Ms Foster asked if Ms Khatun was a member of a trade union. Ms Khatun said she was not. Ms Foster then said that she presumed that Ms Khatun would not, therefore, be able to find trade union representation but she did not know and would speak to HR. Apparently Ms Ashton looked into the position and the upshot was, because Ms Khatun was not a member, the trade union in question would not represent her. Ms Foster suggested Ms Khatun bring a work colleague to the meeting.
97. In the morning of 30 April Ms Khatun sent an e-mail to Mr Turner on the subject of her pregnancy risk assessment (390-391). It was copied to Ms Garner. The e-mail can be read for its full content. However, in summary, it included the following points that Ms Khatun wanted documented by Mr Turner. First, Ms Ashton had told Ms Khatun that the Company had no obligation to provide a pregnant woman with a facility to rest or lie down and was not required to provide additional rest breaks. Second, Ms Ashton had told Ms Khatun that she was limited to 1½ hours for ante-natal appointments. Third Ms Khatun was sleeping on the floor during some of her lunch breaks as there was no facility available and Ms Khatun was not allowed to sleep at any other time. Fourth, Ms Foster was not allowing Ms Khatun to work from home for more than half a day on days when she had antenatal appointments. Fifth, Ms Khatun had been advised by Ms Foster to ask her husband to see if his employer would allow him to start and finish work early to provide transport in the later stages of Ms Khatun's pregnancy. [This had come up at some stage previously, in conversation between Ms Khatun and Ms Foster when they were brainstorming ideas. Ms Foster does not accept that she did any more than raise the possibility of Ms Khatun's husband helping her with lifts.]
98. In the afternoon of that day, 30 April, there was a meeting between Ms Foster and Ms Khatun. As we mention above, this may have followed on from an earlier meeting that morning. Ms Foster sent an e-mail to Ms Ashton recording what happened (397). Ms Khatun had told Ms Foster that she feared coming into work in the morning, that she had been discriminated against because of her pregnancy because Ms Foster was not allowing her to work from home when other members of staff were allowed to do so and was confused about who was managing her given the involvement of Ms Ashton

and Mr Cruse. Ms Foster reported Ms Khatun as being *“rude, persistently talking over me and aggressive” in the meeting.*”

99. The e-mail we refer to in the previous paragraph was timed at 1714, but Ms Foster had clearly had a conversation with Ms Ashton about the subject before then. This follows from the e-mail Ms Ashton had sent Ms Khatun at 1441 (403-404). Referring to the train of events, including the conversation with Ms Foster referred to in the preceding paragraph, Ms Ashton was to set up a formal monitoring meeting on the subject of time keeping, flexi time and working contracted hours. Ms Khatun could attend with trade union representation. Ms Ashton added that any issues Ms Khatun wished to raise regarding her pregnancy could be dealt with as a separate topic or at a separate meeting. Ms Ashton confirmed this in a letter to Ms Khatun the same day (396), although that letter did not mention that Ms Khatun could raise issues regarding her pregnancy. The meeting was to be on 9 May 2019.

100. The response from Ms Khatun was a lengthy e-mail to Ms Ashton setting out a range of points about what had happened and raising wider issues (399-403). On any objective view this was a list of grievances. It was copied to Ms Foster, Ms Garner and Mr Cruse. This is an important document in understanding Ms Khatun’s case in these proceedings. It can be referred to for its full content. In many respects, however it is repetitive and remakes the same points in different ways. The points included the five made in the e-mail to Mr Turner earlier in the day (see paragraph 97 above). To these were added:

1. Ms Foster had not been concerned about Ms Khatun’s wellbeing at the return to work meeting on 25 April. Rather, Ms Foster had focussed on unjustified time keeping issues, including lunch breaks. In particular, Ms Foster had told Ms Khatun to manipulate her time sheets by recording breaks she was not taking.

2. A more general complaint that Ms Foster had allowed others to work from home and that this amounted to discrimination.

3. The lack of progress on Ms Khatun’s personal development, particularly in taking the Prince2 course.

101. Ms Ashton did not respond to Ms Khatun on these points but, rather, sent an e-mail saying they could all be discussed at the meeting now scheduled for 9 May 2019 (398).

102. Whilst Ms Ashton did not respond directly to Ms Khatun, she did make some lengthy notes in preparation for the meeting on 9 May (406-409). These can be referred to for their full content. Whilst they would, presumably, not have been presented in the way they were written, in the Tribunal's view they are angry notes and they display animosity towards Ms Khatun. This may have been driven simply by Ms Ashton's irritation at being misrepresented by Ms Khatun, but we suspect it reflected something wider. We did not hear from Ms Ashton, nevertheless it would seem to be obvious to anyone reading these notes in the context of all that had happened that Ms Ashton saw Ms Khatun as a problem employee because of the time keeping issues and the reports Ms Ashton was getting from Ms Foster. From the notes we record the following.

1. It seems that Ms Ashton took the same bus route to work as Ms Khatun and managed not to be late (see 408).

2. Ms Ashton compared her experience of pregnancy in the Company's workplace with the issues Ms Khatun was raising (see paragraph 17 on 408).

3. It should have been obvious to Ms Ashton from the express content of Ms Foster's e-mail of 25 April that Ms Khatun's issue was not about whether she should take a lunch break but, rather, about being told to put one down on her time sheet when she had not taken one. However, Ms Ashton focussed on the issue that Ms Khatun had been told to take lunch breaks and was not taking them.

4. Ms Ashton's position was that she had not provided legal advice on pregnancy related rights but had simply gone through the ACAS website on the subject.

5. Ms Ashton drew a distinction between rest breaks and nap breaks. The Company was not obliged to provide nap breaks. If Ms Khatun wanted these, they must come out of her lunch hour. Ms Ashton noted that Ms Khatun had never asked for rest breaks. Additional rest breaks had to be agreed with Ms Foster.

6. In Ms Ashton's view, Ms Khatun's pregnancy and time keeping issues were separate matters. As an example of the tone of the note:

"No-one else in the company pregnant or not is late for work, doesn't work their contracted hours or is in debit on their flexi. You talk about inconsistencies but you are asking us to

give you more favourable treatment than the rest of the company which we will not do.”

7. Ms Ashton noted that the Company was not obliged to provide a rest room. Rather the obligation was to provide a place to rest and this had been done. Ms Khatun was not to sleep on the floor of the IT room and the Company had not condoned this action.

103. We have mentioned that, in our view, events on 25 and 26 April 2019 should have set alarm bells ringing. In any event, combined with the events on 30 April 2019, alarm bells do seem to have rung. It appears that Mr Cruse was on leave due to a family bereavement. In his absence and having received Ms Khatun's e-mail detailing her grievances, he had asked Mr Slater to talk to Ms Khatun (Khatun WS 106).

104. Mr Slater says that he had been aware of concerns about Ms Khatun's time keeping for some time and had talked to Ms Foster about allowing Ms Khatun to work from home to show some flexibility on the Company's part. Mr Slater met Ms Khatun on 1 May 2019. It was an informal meeting without a prior invitation.

105. Mr Slater's view of the position was that *“it was clear there was a level of stubbornness from both Reshma and Lou where they were butting up against each other and neither party was moving. I didn't see intervening with a formal process would help things. I wanted to keep it informal to keep a good working relationship and ensure the two colleagues could work together by getting to a middle ground.”* (WS 5).

106. In short Mr Slater offered Ms Khatun a package. Flexi time debit hours would be set to zero. Ms Khatun could work the whole day from home on days when she had ante-natal appointments. Further, working from home on specific pieces of work would be an option, subject to Ms Foster's agreement on each occasion. In return, Ms Khatun was to be at work on time, work her contracted hours and take her lunch breaks. Ms Khatun asked if she could have a different manager. Mr Slater replied that he did not see how that could be done. Ms Khatun mentioned that she had been sleeping on the floor of the IT server room. Mr Slater was unaware of this although, prior to her pregnancy, he had previously seen Ms Khatun asleep on the sofa in the kitchen. After the meeting Mr Slater spoke to Ms Garner about this and asked Mr Peter Hatch (Executive Director (Property & Communities)) *“about making this room a more comfortable area”*. Mr Slater doesn't remember trade union involvement being mentioned but Ms Khatun says, in terms, that the package was offered to her to

avoid such an involvement. We do not think that was the case. We allow that Mr Slater might have said something along the lines that the package might mean that a trade union need not be involved.

107. Mr Slater's conclusion about the meeting was (WS 10):

"I felt the meeting was positive but my fear was that she was still holding onto a lot of frustration with the points of detail which she was struggling to let go of. She said she would go away and think about it and come back to me and she thanked me for my concern and my suggestions for resolution. I think she was battling, however, as to whether she wanted to find that middle ground."

108. Ms Khatun's account of what happened at the meeting is in paragraphs 105-114 of her witness statement. Reading that, the Tribunal can only agree with the conclusion Mr Slater reached. Ms Khatun was looking for redress for all the injustices she believed she had suffered and not a re-setting of the clock. In particular, Ms Khatun wanted nothing further to do with Ms Foster as her manager.

109. After work on 2 May 2019 Ms Khatun's waters broke unexpectedly. Ms Khatun was rushed to hospital and miscarried in the early hours of 3 May.

110. Ms Khatun's evidence is that she believes her miscarriage to have been caused by workplace stress and unlawful discrimination (WS 118). Beyond noting that evidence, for the avoidance of any doubt, the Tribunal records that it makes no finding on that subject.

111. Ms Foster telephoned to find out why Ms Khatun had not attended work on 3 May and was told by Ms Khatun's sister that Ms Khatun had had a miscarriage.

112. Following her miscarriage Ms Khatun was signed off sick and did not attend her workplace again.

113. On 9 May 2019 Ms Khatun formally notified Ms Garner of what had happened (419-420).

114. On 2 June 2019 Ms Khatun applied for an Administration Support Officer role with the London Borough of Hackney.

115. There was a chain of calls and e-mails between Ms Garner and Ms Khatun (414-419 – see also Ms Garner's notes at 422-423) leading to a welfare meeting between Ms Garner, Mr Cruse, Ms Khatun and her husband on 18 June 2019.

116. In preparation for the meeting Ms Garner produced an agenda on which she made some notes (425). It is clear from the notes that a return to work was discussed, albeit inconclusively. Ms Khatun was not physically or mentally well enough to return to work at that moment. Ms Khatun explained how she felt about the events of her last two weeks in the workplace and there was some discussion about mediation as the way to resolve outstanding issues. Ms Garner wrote to Ms Khatun on 19 July 2019 summarising the outcome (430-431).
117. It is clear to us that Ms Khatun never intended to return to work. In agreeing to the welfare meeting, Ms Khatun was simply going through the motions.
118. On 23 June 2019 Ms Khatun applied for a Project Support Administrator role with Hackney. On 8 July Ms Khatun was offered a job by Hackney. Ms Khatun subsequently sought references from Ms Pyziak-Mollov and Mr David Milner at the Company and the Company itself.
119. On 31 July 2019 Ms Khatun submitted an ACAS conciliation form. Ms Khatun says that she was delayed in taking this step because of the mental and emotional effects of her miscarriage. Another factor Ms Khatun mentions is the difficulty she has in processing information attributable to dyslexia.
120. On 9 August 2019 Ms Khatun was advised by Hackney not to resign from the Company until Ms Khatun had a contract from Hackney.
121. Having received her reference from the Company, Ms Khatun wrote to Ms Garner with her resignation on 22 August giving 4 weeks' notice expiring on 6 September 2019 (433). The letter provides no explanation of Ms Khatun's decision.
122. For much of her sick leave following the miscarriage Ms Khatun was with her family in London to help her recovery.
123. Ms Khatun moved back to her family home in London on 7 September 2019 and started her new job on 9 September.
124. On 14 September 2019 ACAS issued an Early Conciliation Certificate to the parties and Ms Khatun lodged her claim on 14 October 2019.
125. The Company operates a flexi time policy (184-191). At the heart of this is the contracted working week. Around that, times of arrival and departure can be varied as can the length of lunch breaks and time

can be taken off work when employees have accrued additional working hours. There are some time limits, in particular on deficits that can be carried forward. In general employees are in “credit” and deficits are unusual. The process is monitored by managers through time sheets. It appears that Ms Foster, Ms Waterhouse, Ms Goddard and Ms Pyziak-Mollov were all spoken to about not completing time sheets correctly (Garner WS 5).

126. The Company’s Health & Attendance at Work Policy (119-139), when dealing with absences, provides this under the heading “Special Considerations”:

“8.1 Absences relating to pregnancy

Special provision is made for pregnancy related absence. Records of pregnancy related absence are still maintained but these can be discounted when it comes to consideration of trigger points and any subsequent action.”

APPLICABLE LAW

127. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his or her employer. For this right to arise there must be a dismissal.
128. Section 95(1) of the ERA, so far as it is relevant, provides:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if”....

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

129. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer’s actions (and not for some other reason, although the employer’s

actions need not be the sole cause) or he or she risks waiving the breach and affirming the contract.

130. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

131. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.

132. Section 4 of the EA, so far as it is relevant, provides:

"4 The protected characteristics

*The following characteristics are protected characteristics-
.... "pregnancy and maternity;*

race;"

"sex;"

133. Section 9 of the EA, so far as it is relevant, provides:

"9 Race

(1) Race includes-

(a) colour;"

"(c) ethnic or national origins."

134. Section 13 of the EA, so far as it is relevant, provides:

"13 Direct discrimination

(1) 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."

135. Section 18 of the EA, so far as it is relevant, provides:

"Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person 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.”

“(6) The protected period, in relation to a woman’s pregnancy, begins when the pregnancy begins,”

“(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as-

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2),”

136. The word “because” in section 18 EA is important. Causation is important in this context. It is not enough that the unfavourable treatment would not have happened “but for” the pregnancy or pregnancy related illness. An employment tribunal must examine “the reason why” the unfavourable treatment occurred.

137. Section 26 of the EA, so far as it is relevant, provides:

“26 Harassment

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B’s dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

“(4) In deciding whether conduct has the purpose or effect referred to in section (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

The relevant protected characteristics include race and sex but not pregnancy and maternity (section 26(5) EA).

138. Section 123 of the EA, so far as it is relevant, provides:

“123 Time limits

(1) Subject to section 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 is 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 that period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

Section 140B of the EA is the provision that extends time limits to facilitate conciliation through ACAS. The scheme of it is twofold. First, the period of conciliation is discounted when calculating time limits. Second, if a time limit would have expired in a period of conciliation, the time limit is extended for a month beyond the end of conciliation.

139. A recent Court of Appeal decision (*Adedeji v University Hospital Birmingham NHS Trust* [2021] EWCA Civ 23) cautions against using the traditional approach of going through the factors in section 33 of the Limitation Act 1980 when applying the “just and equitable” test. In his leading Judgment, Lord Justice Underhill made it clear that the focus in applying the test, should be on the factors behind the delay. Further, Lord Justice Underhill pointed out that the employment tribunals have a wide discretion in this area.

140. There is no presumption that a tribunal should exercise its discretion to extend time. Time limits are exercised strictly in

employment cases and the onus is on the claimant to justify the claimant's failure.

141. Section 136 of the EA, so far as it is relevant, provides:

“136 Burden of proof

(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.”

142. The Tribunal was referred to Walker v Josiah Wedgwood & Sons Ltd [1978] ICR 744, Meikle v Nottingham County Council [2005] ICR 1, Omilaju v Waltham Forest London Borough Council [2005] ICR 481, Madarassy v Nomura International plc [2007] ICR 867, Richmond Pharmacology v Dhaliwal [2009] ICR 724, Hartley v Foreign and Commonwealth Office UKEAT/0033/15, Pnaiser v NHS England [2016] IRLR 170, Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 and Efobi v Royal Mail Group Ltd [2021] ICR 1263.

CONCLUSIONS

143. The root of what happened in this case is that Ms Khatun was persistently late for work throughout her employment by the Company. We may speculate on the reason or reasons why this was so, but the evidence is insufficient for us to draw any firm conclusion on that subject. Unable to change this pattern of late arrivals, Ms Khatun sought to shift the blame, to the failings of her manager, Ms Foster. Indeed, as Mr Hall found, Ms Foster was at fault in not managing the late arrivals firmly enough. Notwithstanding the agreed outcomes of Mr Hall's investigation, time keeping issues continued to be a concern. This exasperated Ms Foster and affected the way she managed Ms Khatun in other ways, such as progressing her development and allowing her to work from home. Ms Foster asked for help from HR and Ms Ashton became increasingly involved. Ms Ashton also became frustrated by the situation and that affected the way she, in turn, dealt with Ms Khatun. That exasperation and frustration lead to Ms Khatun on the one hand and Ms Foster and Ms Ashton on the other having difficulty with any sensible interaction such was the lack of trust, respect and objectivity between them.

Those in the management structures above Ms Foster and Ms Ashton were slow to react and their eventual intervention through Mr Slater came too late to recover the situation.

144. **Time points**

145. The Company properly takes no time point on the unfair constructive dismissal claim. The employment relationship ended on 6 September 2019, conciliation ended on 14 September and Ms Khatun lodged her application with the employment tribunals on 14 October 2019, well within the applicable three month primary time limit.

146. The Company's time point on the discrimination claims is that any claim in respect of an act before 1 May 2019 is out of time.

147. Ms Khatun's claims include an act of discrimination on 1 May 2019, arising from the meeting on that day with Mr Slater. The primary three month time limit for that claim would have expired on 31 July 2019. However, it did not, because Ms Khatun entered into early conciliation on 31 July 2019. Conciliation ended on 14 September 2019. Because the time limit in respect of the act on 1 May 2019 would have expired within the conciliation period, Ms Khatun benefited from a month's extension running from the end of conciliation. The time limit therefore expired on 14 October 2019, on which day Ms Khatun lodged her claim. That claim is in time.

148. All Ms Khatun's other discrimination claims related to acts before 1 May 2019. In respect of them, the primary three month time limit expired before conciliation was entered into on 31 July. Therefore, Ms Khatun does not benefit from any extension of time for the conciliation period. These claims were outside the three month primary time limit.

149. There are two exceptions to the primary three month time limit, apart from the extension for conciliation, where appropriate. The first is the "conduct extending over a period" exception. The second is where an employment tribunal extends the time limit on the "just and equitable" ground.

150. We turn first to the "conduct extending over a period" exception. In short this means that time will be extended in respect of earlier otherwise out of time acts (including failures to act) if those acts are part of conduct extending over a period of time ending with an act or acts that are in time. It is, however, established that the in time act or acts relied on must, itself or themselves, be a discriminatory act or acts. In this case, the only act relied on is Mr Slater's meeting with Ms Khatun on 1 May 2019. As we explain below, this was not a

discriminatory act. It follows, therefore that this claim cannot save any other claim relating to an earlier act on the basis of “conduct extending over a period”.

151. Second, we turn to Ms Khatun’s application for an extension of time in respect of any out of time claims on the “just and equitable ground”. The issue is, did Ms Khatun bring her proceedings in respect of those alleged acts of discrimination after the end of such other period as the Tribunal thinks just and equitable? As an example of the extension of time sought, we take the alleged discriminatory acts on 25 April 2019, the day of Ms Foster’s “return to work” meeting with Ms Khatun. Any claim in relation to that would have had to be lodged on or before 24 July 2019. Ms Khatun did not enter into conciliation on or before that date so Ms Khatun cannot benefit from any extension of time attributable to the conciliation period. The claim was, therefore, well over two months out of time (24 July – 14 October 2019).
152. The Tribunal sees no particular general prejudice factor favouring either party.
153. Ms Khatun says that the factors behind the delay were two. First, the period of time needed to recover sufficiently from the mental and emotional effects of her miscarriage to enable her to deal with the claim. Second, the difficulty Ms Khatun has in processing information attributable to her dyslexia.
154. The problem from Ms Khatun’s point of view with both these factors is that, notwithstanding them, Ms Khatun was able to apply for a job as early as 2 June 2019 and lodge her early conciliation application on 31 July 2019. The Tribunal cannot, therefore, see that Ms Khatun could not have lodged the early conciliation application by, say, 24 July 2019 thereby bringing the train of events starting on 25 April 2019 within the primary three month time limit. Ms Khatun has not said so, but the Tribunal has considered the possibility that Ms Khatun was not familiar with the intricacies of the time limits running from the acts complained of. Even if that were to be the case, the evidence points to Ms Khatun being able to enquire about them. The Tribunal cannot see any sustainable argument for it to exercise its discretion to extend time on the just and equitable ground.
155. The Tribunal’s conclusion is that all the claims in respect of acts before 1 May 2019 are out of time, there is no conduct extending over a period within the meaning of section 123(3) of the EA and it is not just and equitable to extend time. Those claims are, therefore dismissed.

156. Notwithstanding, if we were to be wrong about that, we have heard the evidence and it is proportionate to consider whether or not the out of time claims of discrimination would have succeeded if they had not been out of time. It is also the case that an out of time act of discrimination may have a bearing on the unfair constructive dismissal claim. Our conclusions on all the discrimination claims set out below, save for the claim in relation to events on 1 May 2019, are to be read on the basis that this is the decision we would have made, had the claim been in time.

157. **Breaches of the ACAS Code**

158. Ms Khatun's allegations of breaches of the ACAS Code are set out in a second List of Issues. This is a lengthy and discursive document. It can be distilled into a few headings.

159. First, Ms Khatun says that the ACAS Code applied to the investigatory process overseen by Mr Hill. Although there was no disciplinary hearing and no disciplinary action was recommended, there was an investigation into a potential disciplinary matter. The ACAS Code does touch on such investigations. Basically, it requires that investigations should establish the facts of the case. In that respect we do not see, on the facts, how Mr Hill's investigation can be criticised. Since the matter did not become a disciplinary matter the ACAS Code has no further application. As required by the Company's own disciplinary procedures, Ms Khatun was offered the right to be accompanied.

160. Second, Ms Khatun says that the meetings set up for 26 and 30 April and 9 May 2019 were disciplinary meetings to which the ACAS Code applied. In the case of the meeting set up for 26 April, it was not. The meetings set up for 30 April and 9 May could be categorised as investigatory meetings. However, they did not take place and the ACAS Code cannot, therefore apply to them. For the more formal meeting scheduled for 9 May, the Company invited Ms Khatun to be accompanied as was arguably required by the Company's disciplinary policy.

161. Third, Ms Khatun says that the Company did not treat her e-mail of 30 April as a formal grievance. They should have done so and suspended the disciplinary process in order to deal with the grievance. The first point is that, even if there was a disciplinary process at the stage Ms Khatun lodged her grievance, the ACAS Code does not require that it be suspended. It is permissive rather than mandatory on the point. The Company's own procedures are to the same effect (see 164). There is, however, a secondary point arising from how the Company dealt with Ms Khatun's grievance. Ms

Ashton did not specifically acknowledge it as a grievance but confirmed that it could be discussed on 9 May. That is somewhat surprising because any employer looking at Ms Khatun's e-mail objectively would instantly classify it as a grievance and would have explained the options. However, one such option encouraged by ACAS is informal resolution and that is clearly what Mr Slater was trying in his meeting with Ms Khatun on 1 May 2019. If that had failed, the ACAS Code would have required the Company to arrange a formal meeting in respect of the grievance. However, events overtook matters.

162. In short, we see no breaches of the ACAS Code.

163. **The discrimination claims**

164. 1. Failing to consider the impact of Ms Khatun's pregnancy and health and safety risks when managing work performance at the return to work meeting on 25 April 2019 and on 26 April 2019 and 30 April 2019.

165. This is brought as a claim of harassment, the protected characteristic being race and/or unfavourable treatment because of Ms Khatun's pregnancy or because of illness suffered by her as a result of it.

166. There was no meeting on 26 April 2019 as far as we can see. We are concerned with Ms Khatun's meetings with Ms Foster on 25 and 30 April. These are dealt with respectively at paragraphs 83-85 and 96 and 98-99 above.

167. As far as harassment is concerned, there can be little doubt that Ms Foster's conduct towards Ms Khatun on 25 and 30 April would have been unwanted. Was it, however, related to Ms Khatun's race? Did Ms Foster's conduct relate to Ms Khatun's British Bangladeshi ethnic origin? We cannot see any facts that would lead us to draw an inference that it did. Ms Khatun does not offer any, beyond the assertion that Ms Foster's conduct was related to race.

168. We turn to unfavourable treatment because of Ms Khatun's pregnancy or illness suffered by her as a result of it. The first thing to note is that, in this case and in the case of the other unfavourable treatment claims brought under section 18 EA, the alleged treatment was within the protected period. The way in which Ms Foster behaved towards Ms Khatun on 25 April was, no doubt, unfavourable treatment. It was not, however because of Ms Khatun's pregnancy or illness suffered by her as result of it. Ms Foster did not take Ms Khatun to task about her pregnancy related illness but, rather,

continuing issues with time keeping, albeit that the discussion on lunch breaks became intertwined with Ms Khatun's pregnancy. On the facts, it is clear that what operated on Ms Foster's mind was time keeping and not pregnancy or illness suffered as a result of it.

169. Turning to 30 April 2019, we see no unfavourable treatment on Ms Foster's part. If there was a morning meeting on that day, it seems to have been innocuous. At the afternoon meeting, it was Ms Khatun who came to a surprised Ms Foster with her complaints. However, if there was unfavourable treatment it was not because of Ms Khatun's pregnancy or any illness suffered as a result of it.
170. 2. Carrying out a disciplinary investigation, failing to take account of the Claimant's dyslexia and failing to follow the ACAS Code.
171. This is concerned with the disciplinary investigation carried out by Mr Hall, the events leading up to it and its outcome. It is brought as a claim of harassment and direct discrimination, the protected characteristic being race. It is a claim brought at least six months out of time.
172. In the context of the discrimination claims, the issues of dyslexia and any breach of the ACAS Code are off the point. There is no claim of disability discrimination before this Tribunal. Further, we do not understand Ms Khatun to be saying that there was a breach (if there was one) of the ACAS Code in her case but there would not have been one in the case of a white person of British ethnic origin. The thrust of the complaint is that a white person of British ethnic origin with the same time keeping issues as Ms Khatun would not have been investigated or subjected to the same process.
173. In the case of the harassment claim, no doubt the process was unwanted conduct as far as Ms Khatun was concerned. Was it, however, related to Ms Khatun's British Bangladeshi ethnic origin? We cannot see any facts that would lead us to draw an inference that it was. Ms Khatun does not offer any, beyond the assertion that the process was related to race.
174. As far as the direct discrimination claim is concerned, we can see that the process may be considered as a detriment and potentially less favourable treatment. The test is, are there facts from which we could decide, in the absence of any other explanation that the process was less favourable treatment because of Ms Khatun's race? There are none and Ms Khatun does not offer any, beyond the assertion that the process was less favourable treatment because of her race. The hypothetical comparator would be a white British person with the same time keeping issues as Ms Khatun. We

conclude that the Company would have treated the hypothetical comparator in exactly the same way in the circumstances.

175. 3. Failing to award Ms Khatun an honorarium paid to all members of the Implementation Team including the Corporate Project Manager, Ms Foster.

176. This is put as a direct discrimination claim, the protected characteristic being race. Again, it is a very out of time claim. Although the honorarium was paid in instalments over the life of the SIP team, the decision about who it was to be paid to appears to have been made before 1 June 2018. That would be the date of the alleged act of discrimination meaning the claim was over a year out of time.

177. The evidence is that the decision about who should receive the discretionary honorarium was made by Mr Slater as part of an executive team of three. We can see that not paying the honorarium to Ms Khatun may be considered as a detriment and potentially less favourable treatment. The test is, are there facts from which we could decide, in the absence of any other explanation, that the non payment was less favourable treatment because of Ms Khatun's race? There are none and Ms Khatun does not offer any, beyond the assertion that the non-payment was less favourable treatment because of her race. Ms Khatun offers Ms Foster as a comparator. The Tribunal's majority view is that Ms Foster is not a suitable comparator because she had a different role. Mr Ghotbi-Ravandi takes a different view. Mr Ghotbi-Ravandi considers that Ms Foster is a suitable comparator. This is because Ms Foster was doing no more than performing her role as was Ms Khatun. Notwithstanding, if Ms Foster is a suitable comparator, Mr Ghotbi-Ravandi does not see this as a primary fact from which he would draw an inference that Ms Khatun's British Bangladeshi ethnic origin played any part in the decision as to who should be paid the honorarium.

178. 4. Refusing to provide and advising there was no legal requirement to provide additional rest breaks and a suitable place to rest for pregnant/breastfeeding women (with somewhere to lie down) and only allowing 1.5 hours for ante-natal appointments inclusive of travel.

179. This is brought as a claim of harassment, the protected characteristic being pregnancy and maternity. There is no such statutory claim (see section 26(5) EA) and Ms Khatun's claim is really one of unfavourable treatment because of her pregnancy or illness suffered by her as a result of it.

180. It arises out of Ms Khatun's conversation with Ms Ashton on 15 March 2019 (see paragraphs 75-77 above). There is no evidence that the Company refused to provide additional rest breaks. To be fair to Ms Khatun, she may not have asked for them because she believed she was not entitled to them. We do not find that Ms Ashton said that there was no legal requirement to provide additional rest breaks. We do not find that Ms Ashton told Ms Khatun that there was no legal requirement to provide a suitable place to rest and/or lie down. Therefore, in respect of these parts of the allegations, we see no unfavourable treatment.
181. As far as allowing 1½ hours for antenatal appointments is concerned, Ms Ashton seems to have had direct personal experience of this being a reasonable time allowance. This was supported by Ms Garner in evidence. That being the case, there is, again, no unfavourable treatment.
182. 5. Failing to make reasonable adjustments based on health and safety in relation to working time.
183. This is brought as a claim of harassment, the protected characteristic being pregnancy and maternity. As explained above, there is no such statutory claim and Ms Khatun's claim is really one of unfavourable treatment because of her pregnancy or illness suffered by her as a result of it.
184. Ms Khatun's allegation is that Ms Foster required her to make up time when she left work early due to feeling unwell because of illness suffered by Ms Khatun as a result of her pregnancy.
185. As far as we can tell the position was this. Pregnancy related sickness absence was treated like any other sickness absence, save that it did not count for the absence review process. Sickness absence was put down as sickness absence and did not have to be worked back. If Ms Foster knew that Ms Khatun was away sick with a pregnancy related illness, it was put down as such. All such records were reviewed by Ms Khatun as a matter of course. We cannot see the factual basis for this allegation. That is, we cannot see an occasion when Ms Foster knew Ms Khatun was absent sick because of illness suffered by Ms Khatun as a result of her pregnancy and required her to make the time up. We see no unfavourable treatment.
186. 6. Failing to consider the impact of Ms Khatun's pregnancy and contradictory advice from HR when deciding the outcome of the disciplinary hearing on 9 May 2019, the Company failed to follow the ACAS Code.

187. Ms Khatun accepted during the hearing that, as the hearing scheduled for 9 May 2019 never took place, this cannot amount to a claim on any basis.
188. 7. Refusing to allow Ms Khatun to be accompanied by a trade union representative to the meeting on 30 April 2019 which was arranged to discuss disciplinary matters and failing to follow the ACAS Code.
189. This is brought as a claim of harassment, the protected characteristic being pregnancy and maternity. As explained above, there is no such statutory claim and Ms Khatun's claim is really one of unfavourable treatment because of her pregnancy or illness suffered by her as a result of it.
190. This claim fails on the facts. At no stage did the Company refuse to allow Ms Khatun to be accompanied by a trade union representative.
191. 10. Micromanaging Ms Khatun by calling her when she was late for work and overbearingly scrutinising her timesheets and lunch breaks.
192. This is brought as a claim of harassment and direct discrimination, the protected characteristic being race.
193. This is about Ms Foster's monitoring of Ms Khatun's time sheets and calling Ms Khatun when she was late for work. There is little doubt that Ms Foster spent more time on these issues with Ms Khatun than she did with anyone else.
194. In the case of the harassment claim, no doubt these things were unwanted conduct as far as Ms Khatun was concerned. However, did the calls and scrutiny of time sheets and lunch breaks relate to Ms Khatun's British Bangladeshi ethnic origin? We cannot see any facts that would lead us to draw an inference that they did. Ms Khatun does not offer any, beyond the assertion that these things were related to race.
195. In the case of the direct discrimination claim, we can see that doing these things may be considered as a detriment and potentially less favourable treatment. The test is, are there facts from which we could decide, in the absence of any other explanation, that the calls and scrutiny were less favourable treatment because of Ms Khatun's race? There are none and Ms Khatun does not offer any, beyond the assertion that this was less favourable treatment because of her race. Ms Khatun offers Ms Pyziak-Mollov (who apparently at some stage refused to record lunch breaks on her time sheet), Ms Foster herself (who had made serial errors in completing her time sheets according to reviews undertaken by Ms Khatun, but seemingly was not spoken to by Mr Cruse about this), Ms Waterhouse (who apparently entered

lunch breaks incorrectly), Ms Goddard (who apparently password protected her time sheets and had discrepancies in them), Ms Williams (who, it seems, came to work late on one occasion) and Mr Slater (who apparently did not complete his time sheets correctly) as actual comparators. The difficulty with all of them is that they did not have the same history of persistent time keeping issues and are not, therefore, suitable comparators. The simple fact is that there was no-one else who had a persistent problem with time keeping. Further, no-one else had been subjected to an investigation of the issue (which we have found to be non-discriminatory) and, as a result, had agreed to take their lunch breaks, not to go into deficit on their flexi time and not to be late to work. The hypothetical comparator would be a white British person with the same time keeping issues as Ms Khatun's. We conclude that Ms Foster would have treated the hypothetical comparator in exactly the same way in the circumstances.

196. 11. Refusing permission for Ms Khatun to work from home on days of antenatal appointments and allowing only a maximum of one hour to be worked from home in a morning. Refusing permission for Ms Khatun to work from home generally.

197. This is in two parts. The first is about working from home on days of ante-natal appointments. The second is a more general point about being allowed to work from home. The first is put as a claim of unfavourable treatment because of Ms Khatun's pregnancy or because of illness suffered by her as result of it and as a claim of direct discrimination on the ground of sex. (It cannot, of course be both – section 18(7)(a) EA). The second is put as a harassment claim and a claim of direct discrimination, the protected characteristic being race. Each needs to be considered separately.

198. As far as working from home on days of ante-natal appointments is concerned, we know that Ms Khatun was permitted to work at home for half days depending on whether or not the appointment was in the morning or afternoon. In the absence of evidence that other pregnant women were allowed more working time at home on days of antenatal appointments, we do not see any unfavourable or less favourable treatment for the purposes, respectively, of either a section 18 EA or a section 13 EA claim.

199. We turn to the more general claim that, in effect, Ms Khatun was not as favourably considered as others when it came to being allowed to work from home. There is evidence that this was the case. There was at least one instance of Ms Foster showing distinct reluctance to let Ms Khatun work from home. On the facts the reason for this is crystal clear. Ms Foster was not going to do Ms Khatun any favours

because of her time keeping issues and the poor relationship that had resulted.

200. In the case of the harassment claim, no doubt this was unwanted conduct as far as Ms Khatun was concerned. Was it, however, related to Ms Khatun's race? Did the less favourable consideration of Ms Khatun's requests to work from home relate to Ms Khatun's British Bangladeshi ethnic origin? We cannot see any facts that would lead us to draw an inference that it did. Ms Khatun does not offer any, beyond the assertion that these things were related to race.

201. The direct discrimination claim works better as a framework for this particular claim but fails for essentially the same reason. We can see that this may be considered as a detriment and potentially less favourable treatment. The test is, are there facts from which we could decide, in the absence of any other explanation, that this was less favourable treatment because of Ms Khatun's race? There are none and Ms Khatun does not offer any, beyond the assertion that this was less favourable treatment because of her race. Ms Khatun offers a number of actual comparators. They are Ms Foster herself (who worked from home on at least one occasion), Ms Goddard (who worked from home when her mother was in hospital), Ms Pyziak-Mollov (who worked from home regularly) Mr Scourfield (who worked from home for half a day on a day when he had childcare responsibilities) and Mr Bhaiyat (who worked from home on days when his wife had antenatal appointments). Leaving aside the fact that we are not sure of Mr Bhaiyat's ethnic origin, none of these are suitable comparators because they did not share Ms Khatun's characteristic that Ms Foster was not going to do Ms Khatun any favours because of her time keeping issues and the poor relationship that had resulted. The hypothetical comparator would be a white British person for whom Ms Foster was not going to do any favours because of their time keeping issues and the poor relationship that had resulted. We conclude that Ms Foster would have treated the hypothetical comparator in exactly the same way in the circumstances.

202. 12. Refusing permission for Ms Khatun to work from the family home in London when her father was in a critical condition in hospital.

203. This is put as a claim of direct discrimination, the protected characteristic being race. It is a very out of time claim relating to events in March 2018 (see the Agreed Statement of Facts).

204. The claim is a subset of the issues discussed in paragraph 201. We reach the same conclusion for the same reasons.

205. 13. Threatening Ms Khatun with a disciplinary, scheduling a meeting, speaking to her about not getting a trade union involved and failing to follow the ACAS Code.

206. This is put as a claim of unfavourable treatment because of Ms Khatun's pregnancy or because of illness suffered by her as result of it. We have already explained that reference to the ACAS Code in the context of this discrimination claim is off the point.

207. Factually it relates to two issues. First, in her letter of 26 April 2019 to Ms Khatun, Ms Foster used the word "disciplinary" in relation to the 2018/2019 process conducted by Mr Hall. Further, in her letter of 30 April 2019 to Ms Khatun, Ms Ashton had mentioned that the meeting on 9 May 2019 might result in an escalation in the disciplinary procedure. The description by Ms Foster of the process overseen by Mr Hall as "disciplinary" can hardly be described as unfavourable treatment. We can see, however, that Ms Foster's mention of a possible disciplinary process could be seen in that way. That mention was not, however, because of Ms Khatun's pregnancy or illness suffered by her as result of it. It was because of the continuing issues with time keeping. On the facts, it is clear that what operated on Ms Ashton's mind was time keeping and not pregnancy or illness suffered as a result of it.

208. Second, is the allegation, in effect, that the Company tried to prevent Ms Khatun getting a trade union involved. This is a reference to Ms Khatun's conversation with Mr Slater on 1 May 2019 and is the in time discrimination claim. There is some evidence that Mr Slater's package was offered on the basis that it might avoid the need for trade union involvement but that is not the same as being spoken to about not getting a trade union involved, which implies that the Company sought to prevent such involvement. It did not. There was no unfavourable treatment here.

209. 20. Asking Ms Khatun to speak to her husband about his place of work making adjustments so he could provide transport.

210. This is put as a claim of unfavourable treatment because of Ms Khatun's pregnancy or because of illness suffered by her as result of it.

211. Factually, there is a deal of difference between Ms Foster asking whether or not Ms Khatun's husband could help her with lifts and demanding that Ms Khatun ask her husband to speak to his employer about modifying his working arrangements to allow for this. We do not find there was any such demand. In the absence of that demand, we

cannot see that it is less favourable treatment to ask, in effect, if Ms Khatun's husband could help out with lifts.

212. 22. In refusing to provide training and telling Ms Khatun there would not be enough time to do the course before going on maternity leave, the Company prevented Ms Khatun's career progression by intentionally blocking development opportunities.

23. a. Failing to advance Ms Khatun's application to undertake a training course

b. Ms Foster commenting that she did not think Ms Khatun would have time to complete the course before commencing maternity leave.

213. We will take these two issues, 22 and 23, together as they more or less amount to the same things. The factual allegation is in two parts. First, That Ms Foster deliberately blocked Ms Khatun from taking the Prince2 course. Second, that Ms Foster commented that Ms Khatun would not have enough time to take the course before going on maternity leave.

214. These are put as claims of unfavourable treatment because of Ms Khatun's pregnancy or because of illness suffered by her as result of it. The claim can only run on that basis in the protected period. Apart from the unfavourable treatment claim, we think that Ms Khatun also saw the claim in terms of direct discrimination, the protected characteristic being race. This is not in the List of Issues as a claim but we will deal with it anyway.

215. As far as the unfavourable treatment claim is concerned, we are confined to events on or after 27 February 2019, when Ms Khatun told Ms Foster that she was pregnant. The protected period had begun before then, but we do not know when. Further, it is most unlikely that there was any discrimination if Ms Foster did not know of Ms Khatun's pregnancy or illness suffered by Ms Khatun as a result of it. Ms Khatun accepts that, on that occasion, the news of her pregnancy overtook the planned discussion about progressing her wish to take the Prince2 course. The only further discussion of the subject took place sometime in March 2019. We deal with this in paragraph 70 above. Our finding is that Ms Foster made a comment that she was unsure that Ms Khatun would have time to complete the PRINCE2 qualification before going on maternity leave in September 2019. At the same time Ms Foster told Ms Khatun they would discuss the subject again on 22 May 2019. With courses available in June and July, that discussion could have resulted in Ms Khatun attending one of those courses. This was not unfavourable treatment.

216. We turn to the direct discrimination claim that we are sure Ms Khatun had in mind. The factual background here is more extensive. From the moment Ms Khatun joined on 8 August 2018 the matter of her going on a Prince2 course or something similar had been on the agenda. It frequently came up in appraisals and one to ones as can be seen from our findings of fact above. Ms Khatun was eventually required to produce a business case to support her participating in a Prince2 course and this appears to have been uncommon in the Company. Looking at the picture as a whole it seems to us that Ms Foster was dilatory in her approach to Ms Khatun's wish to take a Prince2 course. If that is right, factually the reason seems obvious. Ms Foster was not well disposed towards Ms Khatun whose time keeping issues had made her a problem employee for Ms Foster. This is something akin to Ms Foster's reasons for not allowing Ms Khatun to work from home generally. There may also have been a concern in Ms Foster's mind that Ms Khatun did not have the capacity to take the course on top of her workload.

217. We can see that Ms Foster's dilatory approach to Ms Khatun taking the Prince2 course may be considered as a detriment and potentially less favourable treatment. The test is, are there facts from which we could decide, in the absence of any other explanation, that this was less favourable treatment because of Ms Khatun's race? There are none and Ms Khatun does not offer any, beyond the assertion that this was less favourable treatment because of her race. Ms Khatun offers two actual comparators. Ms Khatun says that Ms Foster received training without having to produce a business case. Ms Foster, however, says that she did produce a business case and we accept her evidence. Ms Khatun also offers a Ms Alison Salter as a comparator. Ms Khatun believes that Ms Salter did not have to produce a business case. On this latter point we have no corroborative evidence. We know that business cases were not commonly required, we have weighed that in the balance and think we need enquire no further than that. The hypothetical comparator would be a white British person for whom Ms Foster was not going to do any favours because of their time keeping issues and the poor relationship that had resulted. We conclude that Ms Foster would have treated the hypothetical comparator in exactly the same way in the circumstances.

218. **The unfair constructive dismissal claim**

219. Why did Ms Khatun resign?

220. Ms Khatun told us that she resigned because of her miscarriage. It is clear that what Ms Khatun meant by that was that she resigned because she believed that her miscarriage was attributable to the

acts of the Company, particularly in the period immediately before her miscarriage. Objectively viewed, that is the same as saying that Ms Khatun resigned because of the way she had been treated by the Company. Although Ms Khatun's resignation letter of 22 August 2019 gave no reason for her resignation, it seems to us that Ms Khatun's detailed reasons were set out in her grievance e-mail of 30 April (see paragraph 100 above).

221. In our view, there was clearly another factor in Ms Khatun's decision to resign. Ms Khatun wanted to move back to London to be near her family. Indeed, we understand that she moved back into the family home. If this had not been a factor, we would have expected Ms Khatun to look for another job in the Gloucester area. This would have avoided the need for her husband to have to give up his job and find another in London. We do not, however, find that this was the main reason for Ms Khatun's resignation. The principal reason was that set out in the preceding paragraph.

222. Did the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Company going to the root of the contract of employment? In other words, was there a fundamental breach of contract entitling Ms Khatun to resign and treat herself as constructively dismissed?

223. The List of Issues alleges the following as fundamental breaches of contract. Issues 1 (paragraph 164 above), 2 (paragraph 170), 5 (paragraph 182), 6 (paragraph 186), 7 (paragraph 188), 13 (205) and three others:

9. Falsely accusing Ms Khatun of refusing to attend the meeting on 26 April 2019.

14. Failing to follow the ACAS Code at the meeting on 30 April 2019.

15. In arranging a formal meeting to take place on 9 May 2019 following the meeting on 30 April 2019, the Company failed to follow the ACAS Code. There is a note in the List of Issues that this was identified as the last straw.

224. There are also issues that are not specifically listed in the List of Issues as part of the unfair constructive dismissal claim but which clearly form part of it.

225. First, Ms Khatun complains that she was micro managed by Ms Foster in relation to her time keeping (issue 10). That was hardly

surprising and justifiable in the circumstances we have recorded in our findings of fact.

226. Second, Ms Khatun complains that, in effect, Ms Foster denied her an opportunity to take the Prince2 course (issues 22 and 23). We have commented on this in our conclusions on the discrimination claims. Although we found no discriminatory motive because of a protected characteristic in terms of the EA, we do find there is substance to this. We think that, because Ms Foster came to view Ms Khatun as a problem employee, Ms Foster was dilatory in her approach to Ms Khatun's wish to take the Prince2 course. Ms Foster was at fault in allowing herself to be influenced in that way. Ms Foster's job was to put her feelings aside and deal with Ms Khatun's application objectively. We know this was in Ms Khatun's mind because it was mentioned in her grievance e-mail on 30 April 2019.
227. Third, Ms Khatun complains that Ms Foster did not look as favourably on her applications to work from home compared with others (issue 11). Our view of this is the same as our view of the training issue. There was no discriminatory motive caught by the EA but Ms Foster did look unfavourably on these applications because Ms Khatun was a problem employee. This was not an objective approach. Again, we know this was in Ms Khatun's mind because it was mentioned in her grievance e-mail on 30 April.
228. Fourth, was the matter of not including Ms Khatun in the honorarium (issue 3). We have recorded that we see no discriminatory motive covered by the EA in this. Further, as the decision was not taken by Ms Foster, it cannot have been influenced by any view Ms Foster held about Ms Khatun being a problem employee.
229. Ms Khatun complains about the process overseen by Mr Hall in respect of her time keeping issues (issue 2). We have dealt with what happened in our findings of fact. We cannot see anything amiss with that process, far less that it constituted a fundamental breach of the implied term of trust and confidence.
230. We turn to the events of the last few weeks of Ms Khatun's attendance at the Company's workplace. On the evidence it is clear to us that, by 15 March 2019 (probably much earlier), Ms Foster saw Ms Khatun as a problem employee because of her persistent time keeping issues. Ms Foster also found Ms Khatun difficult to deal with. We think that Ms Ashton shared those views. We know that Ms Khatun had sought to exclude Ms Ashton's involvement in the counselling sessions set up as an outcome of the process overseen by Mr Hall. That, together with Ms Ashton's involvement in Ms

Khatun's sickness absence and time keeping issues had, no doubt, coloured Ms Ashton's view of Ms Khatun. From the notes Ms Ashton made in preparation for the meeting scheduled for 9 May 2019, we think that Ms Ashton had developed an animosity towards Ms Khatun. Those notes were made no earlier than 30 April 2019 but we suspect that the animosity they display had been a feature of the relationship for some time before. We think that these views of Ms Foster's and Ms Ashton's played a significant part in how Ms Foster and Ms Ashton dealt with Ms Khatun at the time. Although, by this time, Ms Khatun seems to have been suspicious about almost any dealing the Company had with her, she probably rightly picked up Ms Foster's and Ms Ashton's feelings towards her. This all came to the fore on and after 25 April 2019.

231. On 25 April 2019 Ms Foster held the "return to work" meeting with Ms Khatun (paragraphs 83-85). As such, it should have been an occasion to explore Ms Khatun's sickness absence and the reasons behind it. That subject seems to have had no more than a mention. The note we have referred to in our findings of fact giving context to this meeting was almost certainly prepared by Ms Ashton. It is evidence that Ms Ashton and Ms Foster had discussed how Ms Khatun's latest time keeping issues should be addressed. We are far from saying, as Ms Khatun does, that they were working towards having her dismissed by the Company. Ms Khatun was, however, a problem employee to whom neither was well disposed. In our view they were "on her case". This is why Ms Foster then turned the meeting to continuing time keeping issues. Whilst a return to work meeting was not the right occasion for doing this, there were clearly time keeping issues to be addressed. Ms Foster, however, ended with a clear instruction to enter a lunch break of 30 minutes onto time sheets, whether taken or not. That was wrong on any basis. It appears that the meeting ended in a row, almost certainly contributed to by both participants.

232. In our view, Ms Foster's conduct of the meeting on 25 April 2019, together with the additional context of the way Ms Foster was approaching Ms Khatun's requests to work from home and application to take a Prince2 course, evidenced that the Company was not, by that stage, treating Ms Khatun objectively and fairly. Taking account of all the circumstances we find that that lack of objective and fair treatment amounted to a fundamental breach of the implied term of trust and confidence in the contract of employment between Ms Khatun and the Company. It entitled Ms Khatun to resign and treat herself as constructively dismissed.

233. What happened thereafter was, in essence, an attempt by the Company to retrieve the situation by setting up a meeting to resolve

the issues. Mr Slater seems to have grasped the seriousness of the situation and tried a more inventive way to move matters forward. In some of this we see evidence that supports our view of Ms Ashton's, in particular, feelings towards Ms Khatun. However, we see nothing that amounts to a further fundamental breach of contract by the Company. Ultimately, Mr Slater's initiative was overtaken by Ms Khatun's miscarriage on 3 May 2019.

234. Did Ms Khatun affirm the contract following the breach? In essence, did Ms Khatun delay too long before she resigned?

235. Some four months passed between Ms Khatun's meeting with Ms Foster on 25 April 2019 and Ms Khatun writing her resignation letter on 22 August 2019.

236. The general rule is that an employee who wishes to resign and claim that he or she has been unfairly constructively dismissed must make up their mind soon after the conduct complained of and resign. If they continue without leaving for any length of time, they will lose the right to complain of the conduct in question. They will have affirmed the contract.

237. As a general proposition, in the absence of other factors, four months is probably too long to wait. However, in this case, there were a number of other factors. Some were for and some against the proposition that Ms Khatun affirmed the contract by delaying her resignation.

238. Ms Khatun did not return to work at the Company's premises after 2 May 2019. The only interaction of any substance Ms Khatun had with the Company after 2 May 2019 was to go through the motions of a welfare meeting.

239. We know that Ms Khatun had been through the traumatic experience of a miscarriage. This might have undermined her ability to make a decision on whether she should resign or not. Weighed against that, it seems to us that Ms Khatun made up her mind almost straightaway after her miscarriage that she would not return to work. That was her evidence and we know that, on 2 June 2019, she applied for another job.

240. Although sometime after the job application (and, indeed, after Hackney had made a job offer on 8 July 2019) on 9 August 2019 Hackney advised Ms Khatun not to hand her notice in until she had a contract from them. This, no doubt, would have influenced Ms Khatun.

241. The final delay, until 22 August, seems to have been because of Ms Khatun's decision to wait until she received a reference from the Company, a natural action in the circumstances.
242. In no sense of the lay use of the word did Ms Khatun affirm the contract. Taking all the circumstances into account, on balance our view is that Ms Khatun did not affirm the contract of employment in the context of the legal test.
243. Has the Company shown a reason for the dismissal? If so was it potentially fair and was the dismissal itself fair?
244. The Company has not pursued this argument. Had it done so, it would have failed on the facts. There was no potentially fair reason for dismissal that we can see.
245. It follows that Ms Khatun's claim of unfair constructive dismissal succeeds. The case will be set down for a one day remedy hearing.

Employment Judge Matthews
Date: 19 October 2021

Judgment & reasons sent to parties: 3 November 2021

FOR THE TRIBUNAL OFFICE