EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs F Kite	**v**	B&Q Limited

Heard at: Reading (by CVP) **On:** 1-3 September 2021, and in chambers on 22 September & 1 November 2021

Before: Employment Judge Anstis
Mr C Juden
Ms F Tankard

Appearances
For the Claimant: Mr D Parry (solicitor)
For the Respondent: Mr D Piddington (counsel)

RESERVED JUDGMENT

1. The claimant was subject to unlawful discrimination on the basis of pregnancy and maternity by the respondent in respect of items 4(c), (d) (failure to encourage her to apply), (e), (f), (g) and (h) on the list of issues set out in our reasons.

2. The claimant's claims of unlawful discrimination on the basis of pregnancy and maternity in respect of items 4(a), (b) and (d) (failure to permit her to apply and preventing her from applying) on the list of issues are dismissed.

3. The claimant's claims of unlawful victimisation are dismissed.

4. The claimant was unfairly dismissed by the respondent.

REASONS

A. INTRODUCTION

Introduction

1. The claimant was employed by the respondent from 1 August 2016 until her resignation, which took effect on 10 April 2019. Immediately prior to her resignation she was on maternity leave, and was employed as Trading Manager, Showrooms, at the respondent's Witney store.

2. The claimant submitted her tribunal claim on 5 February 2019 following a period of ACAS early conciliation from 10 December 2018 to 10 January 2019. At that point it was a claim of pregnancy and maternity discrimination in respect of matters that had occurred during her employment up to the receipt of her grievance outcome. A subsequent amendment to her claim added claims of pregnancy and maternity discrimination up to and including her resignation (which was itself said to be a (constructive) unfair dismissal).

The issues

3. The issues for determination by the tribunal are set out in the case management order of Employment Judge Johnson, dated 17 December 2019, as follows:

"Direct Discrimination

1. The Claimant relies on the protected characteristics of pregnancy and maternity.

2. Did the Respondent treat the Claimant unfavourably during the protected period because of her pregnancy or because of an illness she suffered during her pregnancy? (s18(2) EqA 2010)?

3. Did the Respondent treat the Claimant unfavourably because she exercised, or sought to exercise, the right to ordinary or additional maternity leave? (s18(4) EqA 2010)?

4. The Claimant relies on the following alleged unfavourable treatment:

a. On 28 June 2018, Luke Thorne informing the Claimant that:

i. she would not be promoted because she was pregnant; and

ii. she would not be promoted on her return from maternity leave due to having had nine months out of the business.

b. On 19 July 2018, Adrian Barnett giving the Claimant the same message.

c. On 19 July 2018, Adrian Barnett:

i. criticising the Claimant's performance and attitude; and

ii. telling the Claimant, she would need to prove herself within Region 7 before she went on maternity leave.

d. Between July and October 2018, the Respondent failing to promote the Claimant to Deputy Manager in the Abingdon store; in the alternative, the Respondent failing to encourage and/or permit the Claimant to apply for the position.

e. One Sunday afternoon in August 2018, Adrian Barnett making the Claimant feel uncomfortable about asking to leave work for a pregnancy related illness.

f. During August and September 2018, Adrian Barnett requiring to work more than minimal late shifts that the Claimant had requested due to the symptoms of her pregnancy related illness worsening in the evenings.

g. On 8 September 2018, Adrian Barnett arranging the evening shift such that the Claimant had no option but to remain at work when she was suffering from pregnancy related illness.

h. On 11 September 2018, when the Claimant handed to Adrian Barnett a fit note recommending amended duties because of pregnancy related illness, he responded by saying, "You can't do that; you are a manager and need to support the team."

5. If any of the alleged unfavourable treatment is found to have occurred, are they time barred by virtue of s123 of the Equality Act 2010?

Victimisation

6. [Omitted – the respondent accepts that both the claimant's grievance and tribunal claim amount to "protected acts" for the purposes of a victimisation claim.]

7. Did Craig Black's rejection of the Claimant's appeal against the outcome of her grievance on 27 February 2019 amount to a detriment?

8. If yes, was the Claimant subjected to this detriment because she had done a protected act?

Constructive Unfair Dismissal

9. Did the following incidents (individually or cumulatively) amount to a breach of the implied duty of trust and confidence?

a. The discriminatory treatment referred to in paragraphs 4 and 6 above;

b. The Abingdon Store Manager failing to respond to the Claimant's expression of interest in the Deputy Manager position on 18 July 2018;

c. Jeff Henderson unreasonably rejecting the Claimant's grievance

d. Craig Black unreasonably rejecting the Claimant's appeal against the grievance outcome.

10. Is this conduct that amounts to a fundamental breach of contract?

11. Did the Claimant resign in response?"

The hearing and subsequent consideration in chambers

4. The hearing took place on 1-3 September 2021 by CVP, with all parties attending remotely. It was to address matters of liability only. We heard oral evidence from the claimant, and for the respondent from Luke Thorne (who had been interim unit manager at the Witney store), Adrian Barnett (who was the later permanent unit manager) and Jeff Henderson and Craig Black (who were respectively the managers dealing with the claimant's grievance and then her appeal against the grievance outcome).

5. At the end of the hearing a provisional remedy hearing was set for 28 January 2022, in case it was needed. Directions were agreed in respect of preparation for that hearing. The tribunal met in chambers to consider its decision in relation to liability on 22 September 2021 and then again on 1 November 2021.

B. THE FACTS

Introduction

6. The claimant started work for the respondent on 1 August 2016. She had previously been a manager at a retail store but took a step back in the managerial hierarchy to work as Trading Manager, Showrooms, in the respondent's Witney store.

7. The typical management structure within the respondent's stores is for a unit manager to be in overall charge, with a deputy manager, front-end supervisor and three trading managers beneath them. Since the respondent's stores operate seven days a week, usually with extended opening hours, any of those levels of manager may be the most senior person in charge at any particular time and, effectively, the duty manager for the store, responsible for any issues arising at the time as well as either opening or closing the store. Local store management reported to regional and divisional management.

8. It was expected that there would be progression, and sometimes rapid progression, through these grades. Although we were not told as much during the hearing, our impression was that the respondent sought to promote from within and as such had set up programs by which individuals could advance through its managerial hierarchy. The claimant was ambitious for promotion, particularly given that she had previously operated as a store manager, albeit in a very different environment. As may be expected for a national retailer, promotion would often be to a role in a different store, rather than the one they had previously worked in. The respondent's Abingdon store was the nearest store (geographically) to the Witney store.

9. The various managerial roles would sometime be performed on an interim basis by people who were referred to as "acting" managers. This may be people who were already at that managerial grade (or higher) taking on work on an interim basis, or by "acting up" – that is, people who were employed at a lower grade but working at a higher grade on an interim basis.

10. The events the claimant complains of occurred during a period of instability at the Witney store when there was a high turnover of managerial staff (sometimes on an interim basis) as well as extended periods during which vacancies were not filled.

11. One of the ways in which performance of individuals was encouraged and monitored at the respondent was through the "performance and achievement log" (or "PAL"). By September 2017 her then unit manager had identified the claimant (in her PAL) as "*a potential deputy manager … at start of 2018*". By November 2017 she is recorded as being "*keen to take the next step ASAP*" and noted as "*fully on list and agenda to be next deputy for region 22*". Region 22 was the region that the Witney store was then part of.

12. Another means by which career progression was managed was by regional "talent and development reviews" (or "TDR"). In the TDR for January 2018 the claimant achieved the maximum score of 9 under the "9 box rating" system used by the respondent and is noted as being able to travel to the Abingdon, Newbury and Swindon stores.

13. In January 2018 her then unit manager moved on to another store and was replaced on an interim basis by Luke Thorne. In early 2018 the respondent rearranged its regions so that the Witney store moved to region 7 and was no longer in the same region as the Abingdon store. Not only that, but it was no longer in the same division (the geographic area above a region) as the Abingdon store.

14. It is not in dispute that in early 2018 the claimant was poised for a move to a more senior position, subject to that position being available and subject to who else was in competition for that role. It is also not in dispute that following the departure of the manager the Witney store was under-staffed by the managerial roles identified above.

15. The claimant became pregnant in April 2018, and from May 2018 for the rest of her pregnancy suffered badly from hyperemesis gravidarum. She describes this (and it is not in dispute) as "*a pregnancy-related condition and the symptoms included an inability to keep food and fluids down, constant nausea, dehydration, exhaustion and weight loss*". This led to substantial periods of sickness absence, starting with 25 May – 6 June 2018 and then from 8 – 22 June 2018, though with a brief return to work interview taking place on 10 June 2018. She returned to work on 24 June 2018 with a return to work interview the following day. Luke Thorne obtained additional sick pay for her and she was paid throughout this period of absence.

The leaving dinner with Luke Thorne

16. By the end of June 2018 Luke Thorne was due to move on from his role of interim unit manager. The claimant had not been able to attend his main leaving do, but she and the other trading manager went out for dinner with Mr Thorne on 29 June 2018. She describes a conversation that evening as follows:

> *"Luke said that I would not be promoted as I was pregnant. He also said that I would not be given promotion on my return from maternity leave due to having had nine months out of the business."*

17. This is said to be the first act of unfavourable treatment on the basis of pregnancy and maternity.

18. Mr Thorne put it this way in his evidence:

> *"I deny saying this. I do not recall ever saying anything along those lines and this is not something I would ever say or have cause to say."*

19. We prefer the claimant's version of events, for the following reasons:

    19.1. The claimant has consistently been clear that this is what Mr Thorne said. She first complained of this in her grievance on 8 November 2018. During the course of the grievance investigation Mr Thorne said that he could not recall saying this and could not recall the conversation. By the time of his witness statement for this tribunal this had developed to a denial that the conversation had happened. (It was said that Mr Black and Mr Thorne had met during the grievance appeal process and that Mr Thorne had denied saying this – but there are no notes of any such meeting in contrast with there being notes of the remainder of the grievance appeal investigation.) Mr Thorne was unable to explain how not remembering the conversation had developed over time into a denial that it had happened.

    19.2. During Mr Thorne's evidence the tribunal suggested to Mr Thorne that the three major topics of conversation at that dinner were likely to be Mr Thorne's next role, the future of the store and the claimant's pregnancy. He accepted that the first two were discussed but not the claimant's pregnancy or her prospects. We find this unlikely. The way the claimant put the conversation appeared to be exactly the kind of thing that may come up in discussion between work colleagues at a leaving dinner.

    19.3. The respondent could have, but did not, call the other trading manager (who was present during the conversation) to give evidence on what was said, nor did it ever interview him during the grievance or grievance appeal.

20. As we will return to in our discussion and conclusions, despite this being alleged as unfavourable treatment the claimant was notably reluctant during her evidence to accuse Luke Thorne of being responsible for discrimination, and it is common ground at the point of this leaving dinner Luke Thorne had

no influence over whether the claimant did or did not get promoted. We also note from the claimant's closing submissions that she "*was not asserting that these were Luke Thorne's views, but the institutionalised view held by the respondent*".

Adrian Barnett

21. Luke Thorne's replacement as unit manager was Adrian Barnett. He describes in his witness statement a distinguished career with the respondent initially as a unit manager in several stores (including Abingdon), before taking charge of a special project at the respondent's head office. On completion of that he moved to be unit manager of the Witney store from July 2018. In doing so he took over a troubled store which had not stabilised despite Mr Thorne's efforts.

The deputy manager's position at Abingdon

22. In mid-July 2018 the claimant found out that there either was or had been a vacancy for the deputy manager's role at Abingdon. This was initially advertised between 25 May and 9 June 2018. The claimant makes no complaint in relation to this initial period of recruitment for the vacancy.

23. On 18 July 2018 the claimant sent a text message to the Abingdon unit manager asking whether the position remained open to applications. The claimant's message was as follows:

> *"Hi James*
>
> *It's Frankie from witney. How are you?*
>
> *I heard you had a deputy role going on your store? I know that Martina is acting up but are you still accepting applications as I'm very interested in the role? Been waiting for a deputy role close enough to home for a year!*
>
> *Thanks*
>
> *Frankie"*

24. On 8 August 2018 the manager replied:

> *"Hi Frankie*
>
> *I've only just seen this, so apologies, I've been in Ireland and my phone got wet so had to change it over.*
>
> *Please feel free to call me.*
>
> *Thx"*

25. The claimant did not take the manager up on the invitation to call him.

26. The claimant accepted that even given her previous good rating under the PAL and TDR any deputy manager position at Abingdon would not be hers as of right. The PAL and TDR records showed that her previous manager had regarded her as being competent to apply for the roles, but she would still have had to apply and compete against others who may also be interested in the role. She did not ever apply for the deputy manager's role.

Initial comments by Adrian Barnett

27. On learning of the possible Abingdon vacancy (which she had not been told of before) the claimant confided in the HR assistant at the store, who she regarded as a friend. She also raised with her questions about how the respondent was supporting her with her pregnancy-related health issues. She said that she was thinking of raising a grievance. Following this, the HR assistant arranged a meeting between the claimant and Adrian Barnett. This coincided with Mr Barnett's own desire to have a meeting with the claimant.

28. This meeting occurred on 19 July 2018. There are brief notes of it (taken by Mr Barnett) in the tribunal bundle. Whatever the claimant's expectations of that meeting were, Mr Barnett took this as an opportunity to express his views on ways that the claimant needed to improve her work. This took the claimant by surprise, particularly as the last feedback she had got was that she was a good performer who was ready to step up to the next level of management. The meeting never moved on to discuss the concerns the claimant wanted to raise.

29. Mr Barnett had apparently (within three weeks of joining the store) formed the view that the claimant was not such a high performer as had previously been identified. He expressed those views in an informal meeting despite the respondent having various procedures (such as the PAL) in which such concerns may be raised. He accepted in cross-examination that he had formed this view based on nine days work with the claimant, and without reference to the previous PAL and TDR notes. He said that he would not have prevented her from applying for the Abingdon deputy manager's role, but nor would he have recommended her for promotion if she had applied for the role.

30. The claimant says that during this meeting Mr Barnett said:

> *"… there was nothing to stop me from applying for any positions that came up internally whilst I was on maternity leave, but it was likely that I would need to be in my current position on returning from maternity leave. He also said that, if I wanted to be remembered whilst off and considered for promotion after my return, I would need to prove myself with region 7 prior to going on maternity leave."*

31. In his evidence, Mr Barnett denied that he was critical of the claimant during that meeting and said "*I guarantee I would not have pre-judged her development on her pregnancy or maternity leave*". He referred to a later conversation that he felt the claimant may be misremembering.

Later allegations against Adrian Barnett

32. The claimant goes on to say:

> "*One Sunday afternoon in August 2018 I asked Adrian if I could leave work early as I was vomiting and nauseous. Adrian responded: 'What will you do differently at home rather than here?' This made me uncomfortable about asking to leave work early, even though it was because of a pregnancy-related illness.*"

33. To some extent Mr Barnett admits this, although he casts it in a different light. He says:

> "*I remember Frankie and I were both working on the Sunday and Frankie came to me 20 minutes before we closed the store and said she wasn't feeling well. I didn't purposefully make her feel uncomfortable I just explained it was only 20 minutes and otherwise it would be a sickness absence on the system which may have implications for her pay …*"

34. The claimant says:

> *"On numerous occasions during August and September 2018 I asked Adrian if I could do minimal late shifts due to my symptoms worsening in the afternoons and evenings. This is something I had been asking for since my return to work meeting with Luke Thorne on 24 June 2018. Despite my requests, during the first week of September 2018 I was required to undertake three late shifts, with Adrian doing none."*
>
> *…*
>
> *On 8 September 2018, Adrian was on the early shift and I was on the late shift. Throughout the day, I was struggling with severe nausea and sickness. When I told Adrian about this, he was unsympathetic and dismissed my comments by saying, "Oh are you?". Two of my colleagues … were concerned enough to approach Adrian but he responded by saying "But she is always sick at the moment". Due to Adrian's attitude and being the only manager and trained first aider in the store, I had no option but to remain at work between 4:00pm and 8:00pm when I was not actually fit to be at work."*

35. She goes on to describe going to her GP on 12 September 2018 and getting a fit note saying "*it would be helpful for her* [the claimant] *to work early shifts only, if unable to accommodate this, then not currently fit for work*". She gave this to Mr Barnett the next day, and says:

> *"Initially, when I said that I was not fit to do late shifts, Adrian said, "You can't do that; you are a manager and need to support the team". At this point I advised Adrian of pregnancy discrimination law and my rights. Adrian said that he would take advice from HR. Having done so, he agreed to me doing early shifts until 26 September 2018."*

36. The claimant gave a fuller account of that meeting in her oral evidence, saying that the HR assistant had been present, and had suggested on

hearing his response that Mr Barnett should calm down. She said that on speaking to HR his attitude had change and she concluded that HR had told him that he needed to do what the GP had said.

37. The claimant makes no complaint of Mr Barnett's behaviour after this point. From this point on she spent most of the time on either sick leave or holiday, prior to the start of her maternity leave on 7 December 2018.

38. Mr Barnett's evidence on this was as follows:

> *"Frankie has also said that on 08 September 2018, I didn't address her concerns and left her with no option other than to stay in store as the only first aider. Firstly, Frankie was not the only first aider in store, we have multiple. Also, had she come to me and said she was unfit for work I would have sent her home and arranged cover for the rest of the shift. But she never came to me and said she was unfit for work. It is fair to say that Frankie did often feel nauseous, like many pregnant ladies are at different stages of pregnancy, but on this occasion she never said to me she couldn't carry on with her shift.*
>
> *Frankie has also said that on numerous occasions during August and September she had requested to work minimal late shifts but that she still worked late shifts in the first week of September. I can't remember Frankie requesting to work no late shifts until this had been recommended by her GP on 12 September 2018. If she'd mentioned this before, we would have made this adjustment in the same way we did once we'd received the GP note.*
>
> *Frankie has said that when she handed in her GP note recommending no late shifts that I said "you can't do that". This is not an accurate reflection of my reaction. I remember saying something along the lines of "I need to figure out how this is going to work". It was me thinking out loud about the practical impact rather than any negativity or frustration being aimed at Frankie. I just needed to get my head into a place about how it would work and confirmed I would get advice from our Employment Relations team on practical steps for this."*

39. There was in the evidence before us a note dated 13 September 2018 of a conversation between Mr Barnett and a member of the respondent's employee relations team, arising from a call by Mr Barnett to some sort of employee relations helpline or advice line. It appears to be the call that was prompted by the claimant's fit note. It includes the following:

> *"U*[nit] *M*[anager] *took over store in July.*
>
> *He is concerned about her considerable illness and absence relating to her pregnancy. He feels this is causing a direct effect on her role as a trading manager.*
>
> *She was sick but remained in the building. She was sick on Sunday.*

> *Today she brought in a statement of fitness to remain in work – nausea and vomiting during pregnancy. Hyperemesis on fit note from June.*
>
> *Early shifts only – she is saying that the early shifts are because she feels worse in the evenings – so helpful to work early shifts only."*

40. The note records the advice given as follows:

> "[refer] *her to* [occupational health] *and to contact E*[mployee] *R*[elations] *to discuss. That we would be looking to support any reasonable adjustments that are made either by* [occupational health] *or her GP around her working earlier shifts as opposed to late shifts … we would support her as covered by the E*[quality] *A*[ct]."

41. It is difficult to separate the question of what Mr Barnett did or said from why he may have done or said it, so we will defer consideration of what he did or said until our final discussion and conclusions.

The grievance

42. As we have mentioned above, from mid-September 2018 through to the start of her maternity leave on 7 December 2018 the claimant was largely absent from work through either sick leave or holiday. On 8 November 2018 she submitted her grievance to Craig Black. He was Mr Barnett's manager. This grievance outlined a range of complaints of pregnancy and maternity discrimination. These were along very much the same lines as the discrimination complaints she brought in her original tribunal claim.

43. The respondent accepts that this grievance amounts to a "protected act" for the purposes of a victimisation claim.

44. Craig Black delegated the task of addressing the grievance to Jeff Henderson, a unit manager. Mr Henderson invited the claimant to a grievance hearing, which eventually took place on 20 November 2018. The claimant's complaints about this grievance process are set out in her closing submissions, as follows:

    44.1. That the grievance was not investigated properly or at all (or her complaints were not addressed properly or at all).

    44.2. Mr Henderson found that there had been no comments about her pregnancy prospects being affected by her pregnancy or maternity leave, in circumstances where he did not ask Mr Barnett about that and Mr Thorne simply said he could not recall saying this.

    44.3. Mr Henderson failed to consider properly or at all why Mr Barnett had formed the view that the claimant was not ready for promotion as opposed to the previous determination that she was ready for promotion.

44.4. Mr Henderson finding that she "*had been supported in the best possible way through her pregnancy*".

45. It is only the handling of the appeal, not the original grievance, that is said to be an act of victimisation. The handling of the grievance is said to amount to (or make up part of) a fundamental breach of contract leading to the claimant's resignation.

46. Mr Henderson met the claimant on 20 November 2018 to discuss her grievance. Following this, Mr Henderson had a series of meetings (or phone calls) with, amongst others:

46.1. Mr Thorne (in which he said that he could not remember the conversation identified by the claimant).

46.2. Neil Hill (who said the claimant was regarded as a "*deputy manager of the future*").

46.3. The HR assistant (who denied that the question of not being promoted because of pregnancy had come up in the meeting with Mr Barnett).

46.4. Mr Barnett (when asked by Mr Henderson "*She feels she was struggling – pregnancy and illness. When were you aware of this?*" Mr Barnett is recorded as replying "*Feels like she was ill everyday she was definitely struggling some days worse than others some days okay. Feels like whole time I've been there she has been unwell.*" When asked "*No conversations about pregnancy related promotion*" Mr Barnett is recorded as replying "*Irrelevant – would not have happened*".)

47. Having done this, Mr Henderson compiled his findings against the different elements of the claimant's written grievance. He then relayed his findings to the claimant first in a phone call and then in writing, by a letter dated 12 December 2018. On the claimant's complaints about her promotion prospects and performance management, he concluded:

> *"Both* [Mr Barnett] *and* [the HR assistant] *confirmed there was no conversation about pregnancy or illness in* [the 19 July meeting]. *My opinion is that the PAL reviews and structured meetings do need to have more documentation and also use the documents that we have in place such as daily/weekly reviews on showroom to capture performance as this was not satisfactory during my investigation …"*

48. In relation to the claimant's pregnancy-related illness, Mr Henderson concluded:

> "*I think we have supported this in the best possible way. We have lots of evidence of support from* [Mr Barnett] *and the HR function, we have completed all the correct paperwork with you and the risk assessment has been completed and then reviewed later. Changes have been made to support you …*"

49. The claimant gave birth to her daughter on 16 December 2018. In early 2019 she took legal advice, and her solicitor wrote what was effectively a letter before action on 9 January 2019. Following further correspondence, it was agreed that this letter would be treated as an appeal against the grievance outcome. This appeal was dealt with by Mr Black.

The appeal against the grievance outcome

50. Mr Black met the claimant to discuss her appeal on 6 February 2019. This was the day after the claimant's employment tribunal claim was originally submitted: 5 February 2019. Following this, he met twice each with Mr Barnett, Mr Henderson and the Abingdon unit manager.

51. The respondent accepts that the claimant's employment tribunal claim amounts to a "protected act".

52. In their oral evidence, both Mr Black and Mr Thorne said that they had met at the Abingdon store as part of this process. We do not accept this. Neither made reference to this meeting in their witness statements, and, in contrast to the other meetings Mr Black held during this process, there are no notes of this meeting.

53. On 21 February 2019 Mr Black submitted what appears to be draft findings in relation to the appeal to the respondent's Employee Relations Team Leader. In his covering email he says:

> *"I am almost ready to respond to* [the claimant] *but just wanted to ask some advice.*
>
> *Basically* [she] *doesn't want to work with* [Mr Barnett] *again.*
>
> *Is this an easy option considering there is no findings to the issue of my appeal*
>
> *Or do we hold out"*

54. He also notes in that email that the claimant had told him she was "*working on submitting a ET by 8th Feb*". In later correspondence on 27 February 2018 (the day before he sent his outcome letter) the Employee Relations Team Leader tells him that the tribunal claim has now been received.

55. In his oral evidence, Mr Black denied that the reference to "*holding out*" was anything to do with a tribunal complaint.

56. Mr Black set out his conclusions in detail in an outcome letter dated 28 February 2019.

57. On the key point of the claimant having been heading for promotion, but then being denied promotion (or discouraged from promotion) on account of her pregnancy, Mr Black accepts that the claimant had been destined for promotion under the previous manager, but simply moves on then to say that both Mr Thorne and Mr Barnett deny having made the comments

attributed to them. He does not appear to form a conclusion on whether those comments were made by either of them, or why it was that the claimant was no longer suitable for promotion. Much of what follows in the letter is set out as an account of what the individuals involved (in particular Mr Barnett) told him during his investigations, without Mr Black forming a view of whether their accounts (where they differed from the claimant's) were true. He does say:

> *"In hindsight I agree that the* [occupational health] *referral and agreed adjustments could have been done earlier for you."*

However, he concludes:

> "*Based on my findings, I do not feel you have been discriminated against or prevented from progressing your career as a result of your pregnancy and/or maternity leave.*"

58. Except perhaps in relation to the Deputy Manager's role in Abingdon, it is not at all clear what findings Mr Black is referring to that lead him to that conclusion. As previously stated, the majority of what precedes this statement in his letter is simply Mr Black giving Mr Barnett's account of events, without having said whether he has tested the accuracy of the information or whether he accepts that as true or not. Setting aside the Deputy Manager's role, the clearest finding he makes is that adjustments ought to have been made for the claimant earlier. It is not clear how this leads him to the conclusion that the claimant had not been discriminated against.

59. Mr Black concludes by suggesting some alternative arrangements if the claimant feels unable to return to work under Mr Barnett.

The claimant's resignation

60. On 11 March 2019 the claimant resigned, giving one month's notice. In her resignation letter, she says:

> *"I feel strongly that I have been discriminated against. I lodged a grievance. The investigation was inadequate and the findings of Jeff Henderson were unsustainable and contrary to the evidence presented to him.*
>
> *I subsequently appealed to you. In your appeal outcome letter of 27 February 2019, you prefer the evidence of Luke Thorne and Adrian Barnett in almost every respect and, in particular, that they did not say to me the things that I reported to you in relation to the effect of my pregnancy on my chances of promotion. It must follow that you have found that I was not being truthful.*
>
> *In the circumstances, my trust and confidence in B&Q has been destroyed …"*

C. THE LAW

Pregnancy and maternity discrimination

61. Section 18 of the Equality Act 2010 provides as follows:

> *"(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably:*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it ...*
>
> *(6) The protected period, in relation to a woman's pregnancy begins when the pregnancy beings, and ends:*
>
> *(a) … at the end of the additional maternity leave period …"*

62. The respondent accepts that any allegations of pregnancy and maternity discrimination relate to events occurring during the "protected period".

63. "Unfavourable treatment" is addressed at paras 8.21 onwards of the EHRC Code of Practice as follows, and we are obliged to take this into account so far as relevant (s15(4) Equality Act 2006):

> *"An employer must not demote or dismiss a woman, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. Nor must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment.*
>
> *As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons:*
>
> - *the fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed-term contract;*
> - *the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;*
> - *the costs to the business of covering her work;*
> - *any absence due to pregnancy related illness;*
> - *her inability to attend a disciplinary hearing due to morning sickness or other pregnancy-related conditions;*
> - *performance issues due to morning sickness or other pregnancy-related conditions."*

64. Section 27 of the Equality Act 2010 provides:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:*
>
> *(a) B does a protected act,*
>
> *(b) A believes that B has done, or may do, a protected act*
>
> *(2) Each of the following is a protected act:*
>
> *(a) bringing proceedings under this Act,*
>
> *(b) giving evidence or information in connection with proceedings under this Act,*
>
> *(c) doing any other thing for the purposes of or in connection with this Act,*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

65. Section 39 of the Equality Act 2010 provides that:

> *"(4) An employer (A) must not victimise a person (B) …*
>
> *(d) by subjecting B to any other detriment."*

66. Time limits are dealt with under section 123 of the Equality Act 2010 as follows:

> *"(1)* [discrimination claims] *may not be brought after the end of:*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable …*
>
> *(3) For the purposes of this section:*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period,*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is taken to decide on failure to do something:*
>
> *(a) when P does an act inconsistent with doing it, or*

> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

67. Those provisions on time are subject to the usual adjustments on account of early conciliation.

68. Under section 136 of the Equality Act 2010:

> *"(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."*

69. However, we note from Hewage v Grampian Health Board [2012] UKSC 37 (para 32) that: "*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*"

Constructive dismissal

70. The parties agree on the essential matters required to establish a constructive dismissal. The claimant must establish a breach of the implied term of trust and confidence and must resign in response to that breach of contract. As the respondent puts it, "*in deciding this issue, the tribunal will also need to consider whether, at the time of resigning, the claimant had acted in such as way as to affirm the contract and/or waive the breach*".

71. If the termination of the claimant's employment amounts to a constructive dismissal, it is not argued by the respondent in this case that that there was a potentially fair reason for the dismissal, so it will follow from a finding of constructive dismissal that the claimant was unfairly dismissed.

D. DISCUSSION AND CONCLUSIONS

Luke Thorne's comments

72. We have found that Luke Thorne made the comments the claimant attributes to him. The respondent argues that if these comments were made, they do not amount to unfavourable treatment and were not made in the course of employment.

73. Harvey on Industrial Relations and Employment Law describes "unfavourable treatment" in the following terms (at para L[264.06]):

> *"By analogy with the approach adopted in disability discrimination (see Williams v Trustees of Swansea University Pension &*

> *Assurance Scheme [2018] UKSC 65 …), 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial."*

74. We need to be clear about what the alleged discrimination is in this case. During her oral evidence the claimant said that she had no issues with Mr Thorne, liked him and did not want him to suffer any repercussions. She described his comment as amounting to "*professional advice*". She said that he was not saying that he would not promote her. In answer to questions from the tribunal she described him as "*tipping her off*" on what might happen. The claimant's position was essentially that Mr Thorne was giving her honest advice on the situation as he saw it, when he had no influence over it. The allegation we are addressing is what he said, not whether there was any truth to what he said. We also note that Mr Thorne was at this time not in any position to himself influence the claimant's promotion, nor was he setting out his opinion on how he would address an application for promotion. He was, at most, setting out his views on how the respondent viewed such a situation.

75. It is certainly possible to imagine circumstances where honest advice can amount to unfavourable treatment, but it seems to us that this all depends on the surrounding circumstances. For instance, a woman who participates in a mentoring scheme for women leaders within an organisation, and is told by her mentor that "*women have to work twice as hard as men to get promoted in this organisation*" might consider this simply to be honest career advice, rather than unfavourable treatment, but it would have a different flavour if this comes from their manager or someone who is in a position of influence over their career. In the circumstances of this case, and bearing in mind the claimant's description of her view of this at the time, we find that this comment by Luke Thorne did not amount to unfavourable treatment. It was meant and taken as honest advice from someone who would have no say in whether she was promoted. The fact of Luke Thorne saying this was not unfavourable treatment on account of her pregnancy or maternity.

76. The second argument – that the comments were not made in the course of employment – arises from the scope of s109(1) of the Equality Act 2010, imposing vicarious liability on the employer for acts done by someone "*in the course of … employment*". This is dealt with at para 10.46 of the EHRC Code of Practice, which says:

> *"The phrase 'in the course of employment' has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work-related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party."*

77. In this case, the leaving dinner for Mr Thorne appears to have been arranged between him and the two colleagues who attended. It was not established by the respondent as such. However, the purpose was to commemorate a work milestone – Mr Thorne leaving – and the only

attendees were employees of the respondent. The words alleged to amount to the unfavourable treatment concerned their workplace. In those circumstances we find that what occurred was in the course of employment, but as it was not unfavourable treatment it does not amount to unlawful discrimination.

Allegations against Adrian Barnett

78. Mr Barnett was a unit manager with what he describes as an impressive track record. Having completed his task at the respondent's head office, he took on the role of unit manager at Witney. Our clear impression is that at the time Witney was regarded as being a problem store which needed firm management to turn it around. As an experienced manager, Mr Barnett was sure of his own opinions about what needed to be done. He told us in his evidence that under his management the Witney store has gone on to be one of the best performing in the country.

79. Mr Barnett was also clear in his evidence that the claimant was frequently unwell or absent from work, and it is not in dispute that her illness (and any absences) were pregnancy-related. He would have known from the start of his time at the store that the claimant was pregnant and that the claimant's illness was pregnancy-related.

80. Despite knowing this, there is nothing in the evidence to suggest that Mr Barnett ever took steps to acknowledge or accommodate this other than when forced to by the claimant's fit note. To his credit, on receiving this and taking advice, as the claimant puts it, his attitude changed and she found no further cause for complaint. However, all of this gives rise to a clear flavour that up to that point Mr Barnett was impatient for the store to be brought to success, and gave little or no thought to the difficulties that the claimant may be having. That flavour is, of course, reinforced by the nature and tone of the note of Mr Barnett's conversation with employee relations: "*He is concerned around her considerable illness and absence relating to her pregnancy. He feels this is causing a direct effect on her role as a trading manager.*" Mr Barnett was worried that her illness was having an adverse effect in what was already a difficult store. He spoke in very similar terms when interviewed by Mr Henderson during the course of the grievance investigation.

81. The claimant did not seek to conceal or minimise the difficulties her pregnancy was causing her. She was open about her health problems. It was in her interest to be open so that the respondent could take action to assist her.

82. The impression we have formed from the evidence is that Mr Barnett saw the claimant's ongoing pregnancy-related illness as an impediment to his attempts to restore the store to good performance.

83. The claimant's complaints in respect of Mr Barnett start with the meeting on 19 July 2018. Two allegations are made by the claimant in respect of this meeting.

84. The first was that during that meeting Mr Barnett described her promotion prospects (during pregnancy) in similar terms to those we have found Mr Thorne used.

85. As the respondent points out in its closing submissions, the claimant was in some difficulty on this point. The first element of the allegation was that Mr Barnett told her that she would not be promoted because she was pregnant. There is nothing in the claimant's witness statement to that effect, nor does this allegation appear in her original grievance. She is clear in that grievance that Mr Thorne used those words, but in contrast does not attribute those words to Mr Barnett. While we have some reservations about the respondent not calling the HR assistant as a witness, we note that she was asked about this during the course of the grievance investigation. The notes of her interview record the following:

> *"Q. Any conversation about not being promoted because she was pregnant?*
>
> *A. Not at all 100% never mentioned in front of me."*

86. Given this, we find that Mr Barnett did not at that meeting tell the claimant that she would not be promoted because she was pregnant.

87. The second element is an allegation that Mr Barnett said that the claimant "*would not be promoted on her return from maternity leave due to having nine months out of the business*".

88. The claimant does mention this in her witness statement, although she describes it happening "*at one of our review meetings*" rather than at the meeting on 19 July 2018. It appears from the claimant's statement that this discussion occurred prior to 18 July 2018 (she says "*despite what Adrian had told me about my promotion prospects, on 18 July 2018 I messaged* [the Abingdon store manager]"), but we do not see how that can be. There is no mention of any discussion with Mr Barnett earlier than 19 July 2018, and the claimant goes on to say that "*since the start of the year, I had had no monthly review meetings with my line manager*".

89. The claimant does complain about Mr Barnett having said this in her original grievance.

90. Little is said about this in the claimant's closing submissions. The closing submissions talk about the arrangements for the meeting on 19 July 2018, and say "*It is inconceivable that the claimant would not have raised the very issues that she wanted to discuss with Mr Barnett*". Even if that is the case, it does not assist us in determining what Mr Barnett may or may not have said in response.

91. It has not been easy for us to resolve this point. To some extent it overlaps with the question of the claimant "*proving herself in region 7*" that we deal with below, but we need to separate the issues for the purposes of our decision. While finding below that the region 7 comment was made we have, on balance, come to the conclusion that Mr Barnett did not say that the

claimant would not be promoted on her return from maternity leave due to having nine months out of the business. The reasons for that are our doubts about the claimant's different accounts of when this was said, along with the reference in the interview with the HR assistant to "*not being promoted because she was pregnant*" "*100% not being mentioned*". We consider this is sufficiently wide to encompass any reference to even a delayed promotion.

92. The second is that Mr Barnett criticised the claimant's performance and attitude, telling her she would need to prove herself within region 7 before going on maternity leave.

93. Mr Barnett puts this more in terms of challenging the claimant to better performance. Having heard and seen both witnesses we accept that this would have been put by Mr Barnett as criticism, not as encouragement or challenge. The tone of his note of the meeting is critical rather than encouraging and the atmosphere at that meeting was such that the claimant did not feel able to raise her own concerns, despite that being (to her mind) the purpose of the meeting. He did criticise the claimant's performance and attitude during that meeting, and this amounted to unfavourable treatment.

94. The question that follows is why he did this, and whether it was because of the claimant's pregnancy.

95. Mr Barnett was aware of the claimant's pregnancy-related illness from the start of his time as unit manager, yet as we have described above there is nothing to suggest he ever made any accommodations or allowance for that until presented with the fit note, which occurred much later in the process. His attitude is revealed in the note taken by employee relations – her "*considerable illness and absence related to her pregnancy*" were "*causing a direct effect on her role as a trading manager".*

96. While that note relates to a later conversation, her illness had been consistently bad, and is the most obvious explanation as to why someone who had previously been assessed as scoring maximum marks and suitable for promotion would later come to find her standards of work criticised.

97. The EHRC Code of Practice we have cited above is particularly relevant to this: "*It will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons: … any absence due to pregnancy related illness* [or] *performance issues due to … pregnancy-related conditions.*"

98. This is what we find Mr Barnett did – he treated the claimant unfavourably because of her pregnancy related illness and absences. This started with this initial conversation, and continued until he took proper advice on the matter from employee relations. The criticism was an act of pregnancy and maternity discrimination, and we conclude that this extended as far as saying that she had to prove herself within region 7 before going on maternity leave.

99. On the question of the claimant asking to leave work on a Sunday afternoon in August 2018, it is plain from the evidence that he did make the claimant feel uncomfortable about asking to leave work. This was unfavourable treatment because of her pregnancy-related illness and amounts to unlawful pregnancy and maternity discrimination.

100. We have said before that the claimant was not shy of raising the question of her pregnancy-related illness. We accept that she did ask for minimal late shifts, and it is clear from the rotas that we saw in evidence that these were not offered to her until she obtained her fit note. Her case on this is bolstered by the fact that she eventually obtained the fit note. Where she required these accommodations, it would make sense to ask for them first and only then if they were not provided to go on to the formality of a fit note. The claimant's account of Mr Barnett's changed attitude after consulting HR also rings true for us in considering this situation. Up until that point he had not seen the significance of the claimant's illnesses being pregnancy-related, and what that might mean for arrangements at the store. We conclude that she had asked to undertake early shifts prior to submitting her fit note, but that this was not granted to her. This was unfavourable treatment because of her pregnancy-related illness and amounts to unlawful pregnancy and maternity discrimination.

101. The subsequent two allegations of pregnancy-related discrimination against Mr Barnett – on 8 and 11 September 2018 – also fit this pattern of Mr Barnett being frustrated by the difficulties the claimant's pregnancy-related illness and absence were causing his attempts to turn the store around and, as we have said above, the claimant's account of Mr Barnett's attitude changing on him taking advice from Employee Relations rings true to us. We find that both these incidents occurred, that they amounted to less favourable treatment based on pregnancy or maternity and therefore were unlawful discrimination.

Promotion

102. The claimant's complaint in relation to promotion to the role of Deputy Manager at the Abingdon store has three aspects.

103. The first is that she was not appointed to the role. This cannot succeed as a claim of discrimination since she had to apply for the role to be appointed to it, and never did. The respondent did not promote people to roles outside the usual process of competitive applications. Without an application she could not be appointed to the role.

104. The second is broader – that the respondent failed to encourage her to apply for the role. The allegation here appears to be in relation to Mr Barnett's actions, rather than the actions of the Abingdon store manager.

105. Mr Barnett says that he was aware of the Abingdon vacancy, but could not say when he became aware of it. It is not surprising that he was aware of the vacancy given that he had previously managed the Abingdon store and (despite being not in the same region) it was the closest geographically to Witney. It is equally not disputed that he did not encourage the claimant to

apply for it. The claimant and anyone in her position would be entitled to expect their unit manager to be interested in their career progression and to encourage them to apply for suitable vacancies, so we find that this failure to encourage her to apply for the deputy manager's role was unfavourable treatment.

106. In his statement Mr Barnett says that a trading manager at the Abingdon store had been noted as suitable for promotion and was acting up in the deputy manager role. However, as we have seen in the claimant's case promotion was based on open competition, rather than people being earmarked or selected for roles without a process of competitive application. He also points out that the store was in a different region (and division) and so fell under a different TDR process. That is true, but does not explain why he did not encourage her to apply for what would otherwise appear to be a suitable vacancy in the local area.

107. The most obvious explanation for why he did not encourage her to apply for this role, and the one that we find applies in this situation, is that he did not consider her suitable for promotion. We have set out above what led him to that conclusion, and why that decision amounted to discrimination based on pregnancy or maternity. As it derives from the same reason, his failure to encourage the claimant to apply for this role also amounts to unlawful pregnancy and maternity discrimination.

108. The third is that the respondent failed to permit her to apply for the position. Any complaint relating to failing to permit her to apply for the position must fail. There is nothing to suggest that the respondent failed to permit her to apply for the role – that is, that the respondent somehow prevented her from applying for the role.

The grievance and appeal

109. We have set out above our findings in respect of the grievance and appeal processes. They give rise to two potential legal issues in this claim. The first is that it is said that Mr Black's rejection of the claimant's appeal (but not Mr Henderson's original rejection of her grievance) is an act of victimisation.

110. We have set out above, and will return to below, the difficulties with Mr Black's appeal outcome letter. It is not difficult to see these inadequacies as amounting to a detriment. What is more at issue in considering whether it was an act of victimisation: that is, were the inadequacies attributable to any material extent to the fact that the claimant had raised a grievance and/or a tribunal complaint of discrimination.

111. The claimant puts her case in this way in her closing submissions:

> "*Mr Black's … decisions were so unreasonable and his failure to explain what he meant by his email to employee relations on 13 September 2018 mean that the tribunal is entitled to draw the inference … that he chose to reject the claimant's complaints of discrimination because he did not want to jeopardise the respondent's chances of defending these proceedings.*"

112. There is no evidence as to how Mr Black has dealt with any other grievance appeal, so as to suggest that he is in the habit of dealing with non-discrimination grievance appeals better than he addresses discrimination grievance appeals.

113. In general, simply pointing to poor handling of a grievance appeal is not going to be sufficient to shift the burden of proof or to support an inference that the poor handling was because of the nature of the grievance appeal or the threat of (or actual receipt of) a tribunal claim.

114. The claimant is on stronger ground in pointing to the email of 13 September 2018, but even then we do not read the comment "hold out" as inferring that Mr Black was addressing the grievance appeal in bad faith to protect the respondent's position as regards the claimant's anticipated tribunal claim. It follows on from Mr Black saying that the claimant does not want to work with Mr Barnett any more. Mr Black questions whether "*this*" (presumably not working with Mr Barnett) is "*an easy option*" and contrasts this with "*holding out*". In those circumstances the most natural reading of "*holding out*" is insisting that the claimant return to her role working for Mr Barnett. We also note the respondent's submission that, despite the general weaknesses of the grievance appeal outcome, Mr Black did make a potentially significant finding in the claimant's favour: that the occupational health referral and adjustments should have been made earlier. That is not consistent with the claimant's case that "hold out" effectively meant to stonewall the grievance appeal for fear of giving the claimant material to support her claim.

115. In those circumstances, we do not consider it appropriate to draw the inference of victimisation contended for by the claimant, and find that the grievance appeal outcome was not a matter of victimisation.

Time limits and discrimination

116. It is said by the respondent that the claimant's discrimination claims are out of time to the extent that they occurred on or before 10 September 2018 (unless they amounted to a continuing act together with an act occurring after 10 September 2018).

117. The last act of discrimination we have found proven is Mr Barnett's comments on 11 September 2018 (which would be within time). As with those comments, the other matters of discrimination that we have found proven all relate to Mr Barnett's approach to the claimant's pregnancy and pregnancy-related illness, and we find that they form a "continuing act" with this last act of discrimination, so that all are within time.

118. If we had not found that these were a continuing act, we would nevertheless have extended time in respect of the claimant's discrimination claims on the basis that there is nothing in what we have heard to suggest that the respondent faced any prejudice (other than the simple fact of having to address the claims) if time was extended, whereas a failure to extend time would deprive the claimant of valid discrimination claims.

Constructive dismissal

119. As we have found above, most, but not all, of the matters alleged by the claimant to be pregnancy and maternity discrimination occurred. We do not understand it to be automatically the case that unlawful discrimination amounts to a breach of the implied term of trust and confidence (and therefore a repudiatory breach of contract) but the circumstances in which unlawful discrimination does not also amount to a breach of the implied term of trust and confidence must be very limited and would not apply in a case such as this where there has been a repetition of discrimination over several months.

120. The claimant relies on more than simply the discrimination as being a breach of the duty of trust and confidence. The second matter said to be a breach of contract was the Abingdon store manager failing to reply to the claimant's expression of interest in the Deputy Manager's position. It is true that, despite their earlier adjournment application, the respondent did not call the Abingdon unit manager to give an account of his response. However, there was equally nothing in the evidence submitted by the claimant to suggest that the response from the Abingdon unit manager – that his reply was delayed because his phone was damaged and he needed to get a new one – was untrue. We do not consider this to amount to (or contribute to) a breach of the duty of trust and confidence.

121. The third matter said to be a breach of contract is "*Jeff Henderson unreasonably rejecting the claimant's grievance*". As the claimant's submissions correctly accept, "*not every rejection of a grievance amounts to a breach of the duty of trust and confidence*". Plainly our judgment differs from the conclusions that Mr Henderson reached in considering the claimant's grievance, but that cannot be said by itself to amount to a breach of the duty of trust and confidence. Our primary concern in relation to Mr Henderson's handling of the claimant's grievance is his failure to go further in investigating the claimant's complaint about Mr Thorne's comments. Despite having the opportunity to interview the third participant in that conversation, he did not. This was against the background of a positive assertion on the conversation by the claimant, with Mr Thorne simply saying he did not remember it. However, we also have to bear in mind that the claimant only became aware of the extent of the grievance investigation after her resignation. A failure to interview the third participant in the conversation cannot have contributed to her resignation when she was not aware of that failure at the time of her resignation.

122. The fourth matter said to be a breach of contract is "*Craig Black unreasonably rejecting the claimant's appeal against the grievance outcome*".

123. In contrast to the position with Mr Henderson's outcome letter, the inadequacies of Mr Black's approach to the grievance appeal are far more apparent on the face of the appeal outcome letter he produced. We have set out the major weakness as being that the outcome letter largely recited Mr Barnett's responses to the claimant's allegations, without any findings as to whether the claimant or Mr Barnett had given the more accurate account

of matters. He then goes on simply to say that he finds that the claimant has not been discriminated against.

124. It is clear to us that this, particularly when combined with our earlier findings concerning the discrimination that the claimant had been subject to, did amount to a breach of the duty of trust and confidence. Mr Black had barely attempted to discharge his task of weighing up the evidence for and against the claimant's contentions. He had either not made any findings as to who was telling the truth, or he had preferred the evidence of Mr Barnett and Mr Thorne without setting out any basis for doing so. The first and fourth matters relied upon amount, both together and separately, to a breach of the implied term of trust and confidence and therefore a fundamental breach of contract.

125. The respondent contended that even if there were a fundamental breach of contract this was not the reason for the claimant's resignation. They point to the claimant having met with a former colleague (who was also a friend) early in 2019, and to have later formed a business with the friend, which was incorporated in May 2019, a month after the claimant's resignation took effect. We do not accept that argument. The claimant's evidence, and her eventual resignation letter, are entirely consistent with her argument that it was the respondent's breach of contract that caused her resignation. We find that the reason for the claimant's resignation was the respondent's breach of contract, and not her intention to start a new business with her friend. The claimant's resignation was her response to a fundamental breach of contract by the respondent and amounts to a constructive dismissal. As set out above, there is no argument from the respondent that such a dismissal was fair or for a potentially fair reason. We find that the claimant was unfairly dismissed.

Provisional remedy hearing

126. The provisional remedy hearing listed for 28 January 2022 will now take place (by CVP) and directions for that will be given separately in the terms agreed at the end of the liability hearing.

Employment Judge Anstis
Date: 1 November 2021

Sent to the parties on: ...23.11.2021....

.....GDJ.....
For the Tribunals Office