EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms L De Lacey **Wechseln Limited t/a the Andrew Hill Salon**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON REMISSION FROM THE EMPLOYMENT APPEAL TRIBUNAL

Heard at: Exeter (hybrid hearing) **On** **26 & 27 October 2021**
Before: Employment Judge Goraj
Members: Mrs S Richards
Mr TJ McAuliffe

Appearances
For the Claimant: Mr N Moore, Counsel
For the Respondent: Mr J Allsop, Counsel

RESERVED JUDGMENT

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS THAT: -

1. **Remitted Issue 1**

   1.1 The claimant was not subjected to direct sex discrimination in relation to the allegations set out in Issue 7i).

   1.2 The claimant was subjected to direct sex discrimination in relation to the allegations set out in Issue 11v).

2. **Remitted Issue 2** – The direct sex discrimination in relation to the allegations set out in Issue 11v) sufficiently influenced the overall repudiatory breach so as to render the claimant's constructive dismissal discriminatory.

3. The claimant was therefore unlawfully discriminated against by the respondent in breach of sections 11,13 and 39 (2) (d) of the Equality Act 2010 in respect of her constructive dismissal.

The nature of the Hearing

1. The hearing was conducted as a "hybrid" remote hearing. Two members of the Tribunal panel (Employment Judge Goraj and Mrs Richards) attended the hearing centre. The remaining member (Mr Mc Auliffe) and the parties attended by video conference. A fully in person hearing was not held because: - (a) of the ongoing Covid situation (b) the nature of the matters to be determined did not require oral evidence and (c) that it was therefore in the interests of justice and in accordance with the overriding objective to proceed in such manner including to minimise expenditure on time and costs.

BACKGROUND

The Claims and ACAS Early Conciliation

2. The claimant was employed by the respondent as an apprentice/ trainee hairdresser from September 2012 until 19 January 2017.

3. By a claim form which was presented to the Tribunals on 20 June 2017 the claimant brought claims for :- (a) unlawful discrimination on the grounds of pregnancy and maternity and/or sex contrary to sections 11, 13 and /or 18 of the Equality Act 2010 ("the 2010 Act") and/or (b) constructive unfair dismissal contrary to section 95 of the Employment Rights Act 1996 ("the Act") and/or (c) less favourable treatment on the grounds of her part time status. Claim (c) was subsequently dismissed upon withdrawal by the claimant.

4. The claimant contacted ACAS pursuant to the Early Conciliation process. The ACAS Early Conciliation Certificate recorded that the claimant's EC notification was received by ACAS on 7 April 2017 and that the EC Certificate was issued by ACAS, by email, on 21 May 2017.

The response

5. The claims were resisted by the respondent on the merits and also on the grounds that Tribunal did not have jurisdiction to entertain the majority of the claimant's discrimination claims as they were brought outside the relevant statutory time limits.

Subsequent case management

6. The matter was the subject of a number of case management preliminary hearings including on 23 August 2017, with an associated order which was sent to the parties on 6 September 2017 ("the Order"), in which the issues were then identified (paragraphs 2, 4 and 6- 18 of the Order (page 42 of the bundle). The issues to be determined by the Tribunal were subsequently confirmed/ clarified at the commencement of the liability hearing as recorded at paragraphs 10- 12 of the Liability Judgment (pages 49- 50 of the bundle).

The liability hearing

7. The liability hearing took place over 4 days on 23 – 26 April 2018 with the Tribunal deliberating in Chambers on 27 April 2018. The Tribunal heard oral evidence from 16 witnesses.

The liability Judgment

8. The Tribunal subsequently issued a reserved Judgment (dated 4 June 2017 and issued on 8 June 2018) ("the Liability Judgment").

9. The relevant findings of the unanimous judgment of the Tribunal in the Liability Judgment were that :- (a) the claimant's complaints of unlawful discrimination on the grounds of pregnancy and maternity and /or sex contrary to sections 11, 13 , 18 and 39 of the 2010 Act were dismissed and (b) the claimant was however constructively dismissed pursuant to sections 95 (1) (c) of the Act.

10. The Tribunal's findings of fact are at paragraphs 16 – 96 of the Liability Judgment (pages 51 – 69 of the bundle).

The Tribunal's findings in respect of the pregnancy and maternity / sex discrimination claims.

11. The Tribunal held in the Liability Judgment that the claimant had failed to establish a prima facie case of unlawful direct pregnancy and maternity and/or sex discrimination save in respect of two of the alleged acts of discrimination, namely: -

    11.1 **Issue 7i of the Order - On 27 May 2015 the claimant was told that she had failed her trade test (alleged discriminators Mr Hill, Mrs Delaney and Miss Low) ("Issue 7i"),** (paragraphs 113 and 114 of the Liability Judgment). The Tribunal held at paragraph 114 of the Liability Judgment that, for the reasons set out in that paragraph, the claimant had established a prima facie case that her pregnancy was an effective cause of the failure of her trade test (paragraph 114.5) (pages 72-73 of the bundle).

11.2 **Issue 11 v) of the Order – Mr Hill behaved in a cold way towards the claimant (paragraph 22 of the particulars of claim) ("Issue 11v") (paragraphs 119 and 120 of the Liability Judgment).** The Tribunal held at paragraph 120 of the Liability Judgment that, for the reasons set out in that paragraph, the claimant had established a prima facie case that her pregnancy was an effective cause of Mr Hill's failure to request her to undertake additional duties and to engage/ speak with her prior to her departure on maternity leave (paragraph 120. 5) (page 74 of the bundle).

12. The Tribunal did not however, go on to consider whether the respondent had given a satisfactory explanation for the above treatment for the purposes of section 136 of the 2010 Act as it was not satisfied that such claims had been brought within the relevant statutory time limits (either as part of a continuing act for the purposes of section 123 (3) of the 2010 Act or that it was just and equitable to extend time to allow the them to proceed pursuant to section 123 (1) (b) of the 2010 Act).

The Tribunal's findings in respect of the complaint of constructive unfair dismissal.

13. The submissions which the parties made at the Liability Hearing in respect of the claimant's constructive dismissal claim are summarised at paragraphs 153 – 155 of the Liability Judgment.

14. The Tribunal concluded, in summary, in respect of the claimant's complaint of constructive unfair dismissal that:- (a) it was not satisfied (for the reasons given in respect of the claimant's complaints of unlawful discrimination) that the claimant had established a discriminatory course of conduct between May 2015 and 17 January 2017) (paragraph 156 of the Judgment) and/or that there was a conspiracy led by Mr Hill to drive the claimant out of the business (paragraph 160) (b) that the claimant had however established a number of matters, as set out at paragraph 157- 158 of the Liability Judgment, for which the respondent was not able to show proper cause, and which amounted to a breach of the implied term of trust and confidence not to act in a way which was likely or calculated to destroy or seriously damage the relationship between the parties (paragraph 159 of the Liability Judgment)/ which viewed overall were an effective cause of the claimant's decision to terminate her employment with the respondent (pages 81-82 of the bundle).

Subsequent events

15. The claimant made an unsuccessful application for reconsideration of the Liability Judgment, on grounds which were unrelated to those subsequently pursued on appeal.

16. The parties subsequently reached an out of court settlement of the claimant's constructive unfair dismissal claim.

The claimant's appeal to the Employment Appeal Tribunal

17. The claimant appealed to the Employment Appeal Tribunal ("the EAT"), against the dismissal of her unlawful pregnancy and maternity/ sex discrimination claims. Following the amendment of the original Notice of Appeal, the claimant was given leave to pursue 3 amended grounds of appeal to a full hearing of the EAT namely: -

    17.1 - **Ground 1 -** The Tribunal erred in its approach to the claimant's claim for discriminatory dismissal contrary to section 39 (2) of the 2010 Act by failing to make the necessary findings to determine the claim and/or failing to appreciate that the discriminatory constructive dismissal was a freestanding complaint that was presented in time.

    17.2 – Ground 2 – The Tribunal misdirected itself on the correct approach to determining whether it was just and equitable to extend time on the claimant's detriment claims which was an error of law.

    17.3 – Ground 3 – The Tribunal erred in law by failing to have regard to relevant factors in determining whether it was just and equitable to extend time on the claimant's detriment claims.

The EAT Hearing and Judgment

18 The claimant's appeal to the EAT was heard by The Honourable Mr Justice Cavanagh on 4 March 2021 with judgment being handed down on 1 April 2021 ("the EAT Judgment"). The EAT Judgment is at pages 84 to 120 of the bundle.

Grounds 2 & 3 of the appeal

19 The EAT dismissed grounds 2 and 3 of the appeal for the reasons set out at paragraphs 84 to 93 of the EAT Judgment.

Ground 1 of the appeal

20 The EAT rejected the claimant's contentions that the allegations at Issue 7 i) and Issue11 v) were, taken alone, sufficient to amount to a constructive dismissal for the reasons explained at paragraph 66 of the EAT Judgment (including as the claimant had affirmed her contract of employment in the period between the events in May to October 2015 and her resignation on 19 January 2017).

21 The EAT however:- (a) considered that the Issues as recorded at paragraph 12.2 of the Liability Judgment were also broad enough to encompass a claim that the series of events and incidents taken together, resulted in a discriminatory constructive dismissal (paragraph 74 of the EAT Judgment) (b) held that the Liability Judgment did not address and dismiss the discriminatory constructive dismissal claim and further that the Tribunal did not apply its mind to whether the matters which were set out at paragraph 157 of the Liability Judgment, which gave rise to the constructive dismissal, were sufficiently influenced by sex discrimination so as to render the constructive dismissal itself an act of sex discrimination (paragraphs 75 - 78 of the EAT Judgment) (pages 111 - 113 of the bundle).

22 In the light of the above, the claimant's appeal was allowed on Ground 1 only and was remitted to the same Tribunal to determine the following issues (paragraph 96 of the EAT Judgment - 119-120 of the bundle) :-

22.1 Whether the claimant suffered direct sex discrimination in relation to the allegations set out in Issues 7 i and 11 v?

22.2 In the light of the Tribunal's findings on 22.1, whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory?

23 The EAT further directed that it was for the Tribunal to decide whether it could decide such matters without further evidence or whether it wished to admit further evidence.

24 The above matters were recorded in the EAT's Order dated 10 May 2021.

Preparation for this Hearing

25 Following the remission of the matter back to the Employment Tribunal, the Regional Employment Judge sent to the parties on 23 April 2021 a request for comments on the proposal that, unless either party disagreed,

no fresh evidence would be adduced at the Remissions Hearing. Neither party disagreed with such proposal.

26 By an order dated 3 June 2021, Employment Judge Goraj gave further directions in respect of the preparation for the Remissions Hearing. In order to assist the parties to resolve this longstanding matter, Employment Judge Goraj included a proposal that if the claimant succeeded at such hearing the Tribunal would , having regard to the matters identified in that order (including that the parties had already reached a settlement of the claimant's constructive dismissal claim), go on to deal with remedy on the basis that it would be dealt with by way of submissions only – which proposal was accepted by the parties.

27 It subsequently became clear however, from the later correspondence between the parties that there were significant differences between the parties on the question of remedy which would require further documentary and oral evidence in order to make formal findings of fact. Employment Judge Goraj therefore directed by Order dated 20 August 2021, that if the claimant was successful at the Remissions Hearing the determination of remedy would be considered at a separate hearing. The Order dated 20 August 2021 also contained a provisional timetable for the conduct of the Remissions Hearing.

The Bundle

28 The Tribunal has been provided with an agreed bundle of key documents/ statements (from the Liability Hearing) ("the bundle"). The Tribunal has also, with the agreement of the parties, had regard to the following documents which were available at the Liability Hearing: - (a) the statement of Louise Allan and (b) the documents at 45 – 55 of the original remedy bundle (relating to the claimant's trade test/ associated matters).

The written submissions of the parties

29 The Tribunal has also been provided with helpful written submissions by the parties which are set out in summary below

The claimant's submissions

Issue 7 i) - On 27 May 2015 the claimant was told she had failed her " trade test"

30 In summary, the claimant relied upon the following written submissions: -

30.1 The Tribunal set out at paragraph 114 of the Liability Judgment (page 73 of the bundle) the basis upon which it was satisfied that the claimant had established a prima facie case that her pregnancy was an effective cause of the failure of her trade test. Therefore, it

is for the respondent to show for the purposes of section 136 (3) of the 2010 Act that it did not contravene section 39 (2) (d) of the 2010 Act by discriminating against her by subjecting her to that detriment.

30.2 The Tribunal however characterised the respondent's evidence on such matters in the Liability Judgment as inconsistent and unclear and that it was unable to make any findings of fact regarding the respondent's discussions regarding the outcome of the claimant's trade test including whether it was taken by Miss Low alone (paragraphs 50 and 114.4 of the Liability Judgment).

30.3 The claimant submits that it necessarily follows from paragraph 50 of the Liability Judgment that the respondent has failed to show that it did not contravene section 39 (2) (d) of the 2010 Act as the respondent has failed to adduce sufficiently probative evidence to establish any reason for failing the trade test other than pregnancy.

30.4 The claimant relies on paragraph 13 of the "Barton guidelines" contained in **Barton v Investec Securities Limited [2003] ICR 1205, EAT** as approved in **Igen v Wong [2005] ICR 931,CA** (including that a Tribunal would normally expect cogent evidence to discharge the burden of proof).

30.5 It is clear from the findings of the Tribunal that Miss Low's evidence about the outcome of the trade test was not accepted by the Tribunal including as to whether it was her decision alone to fail the claimant. Further, as the Tribunal was unable to identify with sufficient certainty the decision maker or makers it could not have been satisfied about the veracity of the reason given by Miss Low (paragraphs 49 and 50 of the Liability Judgment).

30.6 A respondent who cannot prove how a decision was taken, in circumstances where the evidence was not coherent or consistent enough to enable it to make the relevant findings of fact, will be unable to prove that the treatment "was in no sense whatsoever on the grounds of sex as required pursuant to paragraph 11 of the **Barton** guidelines.

30.7 The Tribunal should therefore find that the claimant has been discriminated against in respect of the trade test element of the constructive dismissal claim.

Issue 11 v) Mr Hill behaved in a cold way towards the claimant (paragraph 22 of the particulars of claim).

30.8 The claimant contends that there is no possibility of the respondent proving that it did not discriminate against the claimant regarding such conduct having regard to the findings at paragraphs 25 (standing with Mr Hill), 26 – 27 (Mr Hill's scissors), 62 (the admissions/ lack of explanation offered by Mr Hill) and 63.1 (the cooling by Mr Hill of his relationship with the claimant when he became aware of her pregnancy). In the light of such matters the respondent cannot show that such detrimental treatment was "in no sense whatsoever" on the grounds of sex.

30.9 The Tribunal should therefore find that the claimant has been discriminated against by the respondent in respect of the cold way in which Mr Hill acted towards the claimant after he became aware of her pregnancy.

The claimant's constructive dismissal claim Remitted Issue 2

30.10 The Tribunal accepted the claimant's oral evidence that the reasons for bringing her employment to an end had included the cold shouldering specifically referred to at paragraph 95 of the Liability Judgment.

30.11 It is assumed that the Tribunal also accepted all of the reasons given in the claimant's resignation given in the claimant's resignation at paragraph 94 of the Liability Judgment

30.12 The claimant relies on the guidance contained in paragraphs 68 and 69 of the EAT Judgment (pages 108 -109 of the bundle) including :- (a) in principle a "last straw" constructive dismissal can amount to unlawful discrimination if some of the matters relied upon, that are not the last straw itself, are acts of discrimination (b) regarding the causation tests cited at paragraphs 89 and 90 in the EAT Judgment of **Williams v Governing Body of Alderman Davis Church in Wales Primary School [2020] IRLR 589 EAT** (preferring the test of sufficiently influenced) (c) it is a matter of degree, and for the Tribunal to decide on the facts of the case, as to whether discriminatory contributing factors render the constructive dismissal discriminatory paragraph 69 of the EAT Judgment).

30.13 Further, paragraph 69 of the EAT Judgment is consistent with the existing understanding that the discrimination must have been a significant or more than trivial influence on the detrimental

treatment so that it was an effective reason or cause for it – as referred to in **Pnaiser v NHS England [2016] IRLR 170.**

30.14 On the Tribunal's findings, Issues 7i and 11 v had more than a trivial influence on the claimant's decision to terminate her employment with the respondent. They formed part of a cumulative sequence of events which taken together amounted to a breach of the implied term of trust and confidence and could not be described as minor or peripheral.

30.15 The claimant's constructive dismissal was therefore directly discriminatory because of her sex.

The respondent's submissions

31 In summary, the respondent relied upon the following written submissions in respect of the remitted issues: -

Remitted Issue 1 – Whether the claimant was subjected to direct sex discrimination in relation to Issues 7i and 11 v

31.1 Remitted Issue 1 is limited to the determination of whether or not either (or both) of the "straws" relied upon by the claimant in her discriminatory constructive dismissal claim were acts of direct sex discrimination such as to have the potential to render the constructive dismissal an act of direct sex discrimination.

31.2 The Tribunal is required to apply the burden of proof pursuant to section 136 of the 2010 Act in the light of the findings contained in the Liability Judgment and the key evidence.

31.3 The application of the burden of proof pursuant to section 136 of the 2010 Act was recently considered by the Supreme Court in **Efobi v Royal Mail Group Limited [2021] IRLR 811** including in particular that:- (a) section 136 of the 2010 Act did not eliminate the need for the claimant to prove facts on the balance of probabilities from which an inference of discrimination could be drawn. The Tribunal must take into account, in addition to the facts adduced by the claimant, any facts proven by the respondent which would prevent any inference from being drawn (b) at the second stage of the burden of proof the employer's explanation does not have to satisfy an objective standard of reasonableness or acceptability. Further it does not matter that the employer had acted for an unfair or discreditable reason as long as the reason had nothing to do with the protected characteristic and (c) that it is

important not to make too much of section 136 where the Tribunal is in a position to make positive findings on the evidence.

31.4 Whilst it is accepted that the Employment Tribunal has found that the respondent has not shown proper cause for its conduct in relation to the matters which are the subject of Issues 7i and 11v (paragraph 158 of the Liability Judgment)/ found that the claimant has established a "prima facie" case, the Employment Tribunal should still carefully examine the explanations of the alleged discriminators as set out in their witness statements and oral evidence before the Tribunal.

31.5 Issue 7i - the relevant decision maker was Miss Low who gave evidence that the failure of the trade test was due to the unbalanced haircuts (paragraph 113 of the Liability Judgment). The fact that the Employment Tribunal has already found the evidence of relevant witnesses in respect of this issue to be inconsistent or unclear does not necessarily lead to a finding that the notification that the claimant had failed her trade test was an act of sex discrimination if the explanations were not related to her protected characteristic of sex.

31.6 Issue 11 v - the relevant decision maker was Mr Hill who accepted in evidence that he had not signed the claimant's leaving card or made any attempt to speak to the claimant before her departure on maternity leave (paragraphs 61- 63 and 119-120 of the Liability Judgment). The allegations that Mr Hill had sought to prevent staff from buying flowers for the claimant or that he had failed to enquire about the claimant's welfare after she had fainted at work were not, however upheld.

Other matters

31.7 When assessing the respondent's explanations the Tribunal should take into account that it rejected in the Liability Judgment :- (a) the claimant's case of a widespread and systematic conspiracy on the part of management to drive the claimant out of the respondent because of pregnancy/ maternity / the case of a course of conduct (paragraphs 14 and 140 of the Liability Judgment) and (b) the claimant's case on a just and equitable extension of time (paragraphs 148- 149 of the Liability Judgment). Further, the Tribunal should take into account that one of the reasons given in the Liability Judgment for not granting the claimant an extension of time to pursue her discrimination claims was the prejudice caused to the respondent by the delay in issuing the claim and consequential adverse effect on the cogency of the evidence (in

respect of which the respondent's witnesses were required to give evidence about matters which took place 2 ½ - 3 years after the events in question).

31.8 In the light of the above, the respondent contends that the respondent's explanations should be taken at face value – whilst they might not be cogent or demonstrate proper cause they are not tainted by unlawful discrimination. Further, there is no scope to make adverse inferences given the evidential disadvantage faced by the respondent as a result of the claimant's decision to delay bringing her claims in respect of Issues 7i and 11v.

31.9 Remitted Issue 1 should therefore be determined in the respondent's favour and the remaining discrimination claim dismissed.

Remitted Issue 2 – in the light of the Tribunal's finding on Remitted Issue 1 – whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory?

31.10 If the claimant is successful in relation to Remitted Issue 1, the determination of Issue 2 is a qualitive matter for the Employment Tribunal to evaluate on the evidence in the light of the guidance of the EAT in **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589** (paragraphs 89 and 90) as explained in the EAT Judgment at paragraphs 68 and 69.

31.11 The respondent contends that even if the claimant is successful in establishing Issue 7i and /or 11 v as proven acts of direct sex discrimination they did not materially contribute to the overall repudiatory breach so as to render the constructive dismissal an act of unlawful discrimination.

31.12 Four of the matters relied upon by the claimant as being causative of her decision to resign (paragraphs 94 and 95 of the Liability Judgment) were capable of contributing to the breach of the implied term of trust and confidence (paragraph 157 of the Liability Judgment) namely :- (a) the trade test incident in 2015 (Issue 7i)(b) Mr Hill behaved in a cold manner towards the claimant following the announcement of her pregnancy in May 2015 (Issue 11v) (c) Mr Hill demeaned and embarrassed the claimant by comparing her to Vicki Pollard at a trainee briefing in December 2016 and (d) the last straw "dog poo" incident on 17 January 2017.

31.13 The Tribunal's findings at paragraph 158 of the Liability Judgment are crucial to the analysis of Remitted Issue 2 as there is no mention of issues 7i and 11v being of particular weight or importance in the Tribunal's assessment of the overall breach of the implied term of trust and confidence.

31.14 This is consistent with the chronology of the case as the claimant did not act on the matters giving rise to Issues 7i and 11 v at the relevant time and was absent thereafter on maternity leave from 18 October 2015 until the end of August/ beginning of September 2016 (paragraph 65 of the Liability Judgment).

31.15 Stepping back and reviewing the breach of the implied term of trust and confidence in the round, it was the matters that occurred after the claimant's return from maternity leave that crystallised the claimant's constructive dismissal and were the true cause thereof rather than the historic matters of Issue 7i and 11v. This conclusion is consistent with the finding of the EAT (at paragraph 66 of the EAT Judgment) that the claimant had affirmed her contract of employment in the period between the events in May to October 2015 and her eventual resignation on 19 January 2017.

31.16 In all the circumstances, the claimant's constructive dismissal was not materially influenced by either Issue 7i) or 11v) and was not therefore an act of direct sex discrimination. The claimant's residual complaint of direct sex discrimination should therefore be dismissed.

The oral submissions of the parties

32 The Tribunal has also had regard to the further oral submissions of the parties which are included with our findings/ conclusions as summarised as part of our Conclusions below.

THE LAW

33 The Tribunal has had regard in particular to: - (a) the provisions of sections 11, 13, 18 and 39 (2) (d) and 136 of the 2010 Act (b) the Guidance contained at paragraphs 15.32 – 15.36 of the Equality and Human Rights Commission: Code of Practice on Employment 2011, relating to the burden of proof (c) the guidance and legal authorities contained in the EAT Judgment (including the guidance contained in **Williams)** and (d) the further authorities referred to above.

THE CONCLUSIONS OF THE TRIBUNAL

Remitted Issue 1 – Was the claimant subjected to direct sex discrimination in relation to the allegations set out in Issues 7i) and 11 v)

Issue 7i (the failure of the trade test)

The oral contentions of the claimant

34 In brief summary, the claimant further contended in oral submissions in respect of **Issue 7i)** that: - (a) the Tribunal made trenchant criticisms in the Liability Judgment of the respondent's evidence on this matter. The Tribunal found the respondent's evidence to be inconsistent and confused to the extent that it was unable to reach any clear findings regarding the decision-making process or the reasons for the failure of the claimant's trade test (b) the respondent has invited the Tribunal to go back to the witness statements however, if the Tribunal did not find the answer last time it will not find it now. In the light of the findings in the Liability Judgment regarding the decision- making process and the reasons for the failure, the respondent cannot establish a non-discriminatory reason for the treatment.

The oral contentions of the respondent

35 General background - the latest statement of the law on the burden of proof is contained in the Judgment of the Supreme Court in **Efobi** which confirmed that there is no change in the law by reason of the enactment of section 136 of the 2010 Act. The respondent accepted, after discussion with the Tribunal, that the Tribunal had decided in the Liability Judgment that the claimant had established a prima facie case of pregnancy/ maternity / sex discrimination and that stage 1 of the test had therefore been met for the purposes of section 136 (2)/(3) of the 2010 Act. The respondent contended however, that the Tribunal had yet to consider the explanation of the respondent for the purposes of stage 2. The Tribunal is required to make an assessment for the purposes of stage 2, of the quality of the explanation. Further, it is clear from the observations in **Efobi** that the respondent's explanation does not have to be reasonable/ that it does not matter that the respondent acted for a discreditable reason – it is sufficient if it is not tainted by discrimination.

36 Issue 7i) – The respondent contended that the Tribunal is required to consider this issue in the light in particular of paragraphs 113 and 114 of the Liability Judgment including the respondent's explanation recorded at paragraph 113 as the issue has only been considered so far for the purposes of stage 1 of section 136 of the 2010 Act. In respect of paragraph 114.4 of the Liability Judgment the Tribunal has to ensure that it has all matters properly in mind when deciding whether to draw adverse inferences. The Tribunal is required to revisit for such purposes the

questions relating to the relevant decision maker / reasons for the decision/ limited feedback in the light in particular of paragraphs 49 – 50 and 52 of the Liability Judgment in order to determine whether they were tainted by discrimination. The Tribunal should also have regard in particular to: - (a) the statements of Gemma Low and Mrs Delaney regarding such matters (b) the documents at pages 49 – 51 of the original Liability Bundle which contain Gemma Low's typed up notes of the assessors' comments and (c) paragraphs 54 of the Liability Judgment (in which the Tribunal accepted that notes were a broadly accurate account of what was written by the assessors) and paragraph 58 of the Liability Judgment.

Issue 11 v) Mr Hill behaved in a cold way to the claimant between May and October 2015

The oral contentions of the claimant

37 In summary, the claimant further contended in respect of **Issue 11 v** that :- (a) not speaking to the claimant before she went on maternity leave – it is not possible for the Tribunal to find an explanation because the respondent did not provide one for such treatment (b) not requesting the claimant to stand by him – since the respondent denied this outright it is impossible for the respondent to provide a reason now and (c) accordingly the Tribunal is required to find that the conduct was discriminatory.

The oral contentions of the respondent

38 In summary, the respondent further contended that the Tribunal is required to consider Issue 11 v for the purposes of stage 2 in the light in particular of:- (a) paragraphs 61 – 63 and 119 -120 of the Liability Judgment (pages 59 -60 and 174 of the bundle) and (b) the explanations given by Mr Hill in his witness statement at page 130 of the bundle (including paragraphs 17 and 21).

Issues 7i and 11v

39 The Tribunal was further asked by the respondent to take into account in respect of <u>both</u> Issues 7i) and 11v) that :- (a) the Tribunal rejected in the Liability Judgment that there had been a course of discriminatory conduct by the respondent including that there had been an orchestrated conspiracy to remove the claimant from the business (paragraph 140 of the Judgment – page 78 of the bundle) and (b) the findings that the Tribunal made at paragraphs 148 and 149 of the Liability judgment (pages 79 and 80 of the bundle) regarding the cogency of the evidence when assessing the quality of the respondent's explanation for the purposes of stage 2 of section 136 of the 2010 Act . The respondent contended that the Tribunal should take into account that the person in control of the " starting pistol" in these proceedings was the claimant. The claimant's

decision to delay the commencement of the proceedings meant that the respondent was required to give evidence regarding matters which had occurred 2 ½ / 3 years earlier and the question of inferences should therefore be considered against this background.

THE TRIBUNAL'S CONCLUSIONS REGARDING REMITTED ISSUE 1

Background

40 The Tribunal held at paragraph 114.5 of the Liability Judgment that it was satisfied, in the light of the facts recorded at paragraphs 114.1 – 114.4, (pages 72- 73 of the bundle), that the claimant had established a prima facie case that her pregnancy was an effective cause of the failure of her trade test (Issue 7i).

41 The Tribunal further held at paragraph 120.5 of the Liability Judgment that it was satisfied, in the light of the facts recorded at paragraphs 120.1 – 120.4 (page 74 of the bundle), that the claimant had established a prima facie case that her pregnancy was an effective cause of: - (a) Mr Hill's failure to request her to undertake additional duties and (b) to engage / speak with the claimant prior to her departure on maternity leave.

42 In such circumstances, the Tribunal is satisfied that, in respect of both Issues 7i) and 11 v), the claimant has, for the purposes of section 136 (2) of the 2010 Act, established such facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent had contravened the 2010 Act.

43 The Tribunal is further satisfied in the light of the legal authorities referred to above (and this was also accepted by the parties) that, in respect of both allegations:- (a) the burden of proof has therefore passed to the respondent to prove that it did not commit any such act pursuant to section 136 (2)/ (3) of the 2010 Act (b) in order to discharge such burden, it is necessary for the respondent to establish, on the balance of probabilities, that the treatment was in no sense whatsoever because of pregnancy / sex and (c) as part of such process, the Tribunal is required to assess not only whether the respondent has provided an explanation from the facts from which inferences could be drawn but further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that pregnancy/ sex was not a ground for the treatment in question and (d) that if the respondent fails to discharge such burden the Tribunal must hold that the respondent has discriminated against the claimant.

THE CONCLUSIONS OF THE TRIBUNAL ON ISSUE 7i

44 The Tribunal has considered first (paragraph 96 of the EAT's Judgment) (pages 119 – 120 of the bundle) :- "**Whether the claimant suffered direct**

sex discrimination in relation to Issue 7 i) "That on 27 May 2015 the claimant was told that she had failed her trade test". The alleged discriminators for the purposes of this issue are Mr Hill, Mrs Delaney and Miss Low).

45 The Tribunal has had regard, as a starting point, to the provisions of paragraphs 113 and 114 of the Liability Judgment (pages 72 and 73 of the bundle) (the prima facie case) and associated findings together with the respective written and oral submissions of the parties as summarised above.

46 The Tribunal has considered whether, in the light of the prima facie findings at paragraph 114 of the Liability Judgment, (a) the respondent has nevertheless provided an explanation for the failure of the claimant's trade test in May 2015 and (b) if so, whether such explanation is also adequate to establish that the treatment was, on the balance of probabilities, in no sense whatsoever because of pregnancy/ sex.

47 The respondent contends that the reason why the claimant failed her trade test was because Miss Low, who was responsible for training at the relevant time, concluded that her work was not of the necessary standard, including in particular in respect of the quality of her haircuts (which were unbalanced), and that Mr Hill and Mrs Delaney accepted such assessment. The respondent relied in particular on the explanations given by Ms Low in her written and oral evidence and on the documentary, evidence contained in the notes at pages of 49 - 51 of the Liability bundle.

48 Having given careful consideration to the proven facts and to the explanations given by the respondent, the Tribunal is satisfied that the respondent has established, on the balance of probabilities, for the purposes of section 136(2)/(3) of the 2010 Act the following: -

48.1 The claimant took a trade test on 11/12 May 2015 at which her work was assessed by a number of assessors including Ms Low. (paragraphs 36,40 and 41 of the Liability Judgment – pages 55- 56 of the bundle).

48.2 The claimant's colleague Ms E Waldron also took her trade test on 18/ 19 May 2015 and was subject to a similar process (paragraph 36 of the bundle).

48.3 The assessors made manuscript notes of their assessments which were given to Ms Low. Miss Low subsequently typed up the manuscript notes of the claimant's assessments (on or around 3

June 2015), in order to explain to the claimant/her father the reasons why the claimant had failed her trade test. This document, which is at pages 49- 51, of the Liability Judgment, is a broadly accurate record of the manuscript notes of the assessors' assessment of the claimant's work (paragraph 54 of the Liability Judgment – page 58 of the bundle).

48.4 The document at pages 49 – 51 of the Liability Judgment records a number of criticisms of the claimant's work including: - (a) that, in the case of 3 models, the cuts were unbalanced (the assessments of Ms Low and Lois) and (b) in respect of a male model the claimant required further guidance on the use of the comb and scissors and the choice of products (Josh). The Tribunal further accepts the explanation given by Ms Low in her oral evidence to the Liability Tribunal that unbalanced cuts could be damaging to the reputation of the respondent as a 5-star salon.

48.5 The respondent (including Gemma Low) was unaware of the claimant's pregnancy at the time of the above assessments and did not become aware of it until 18/ 20 May 2015 (paragraph 47 of the Liability Judgment and pages 56- 57 of the bundle).

48.6 There was a subsequent brief discussion/ meeting between Mr Hill, Mrs Delaney and Miss Low on or around 23 May 2015 regarding the trade tests of the claimant and her colleague Ellie Waldron following which both of them were informed on 27 May 2015 that they had failed their trade tests. (paragraphs 49, 50 and 51 of the Liability Judgment – page 57 of the bundle).

49 The Tribunal has considered the above in the light of :-- (a) the Tribunal's findings at paragraph 114 of the Liability Judgment, including in particular the findings at paragraph 114.4 that the alleged discriminators were unable to give a cogent account of their discussions of on or around 23 May 2015 concerning the outcome of the claimant's trade test (b) the explanation given by the respondent for the outcome of the claimant's trade test namely, that the claimant had failed her trade test because of the quality of her work and in particular her unbalanced cuts as recorded in the notes at pages 49-51 of the Liability bundle and (c) the respondent's explanation that the alleged discriminators (Mr Hill, Mrs Delaney and Ms Low) were unable to give more cogent evidence of their discussions of on or around 23 May 2015 (concerning the outcome of the claimant's trade test) because of the substantial passage of time since such discussions.

50 Having given careful consideration to all of the above, the Tribunal is satisfied that the respondent has established on the balance of probabilities for the purposes of section 136(2)/ (3) of the 2010 Act that the reason why the claimant failed her trade test was because of the quality of her work and in particular the unbalanced cuts as recorded in the notes at pages 49 – 51 of the Liability Judgment .

51 When reaching such conclusion the Tribunal has taken into account in particular: - (a) the criticisms relating to the unbalanced nature of the claimant's cuts which are clearly identified in the assessors' notes of the claimant's trade test. The Tribunal further accepts the explanation given by Ms Low, who had responsibility at that time for training, that unbalanced cuts could be damaging to the reputation of the respondent (b) that the Tribunal was satisfied at the Liability Hearing that such notes (at pages 49 – 51 of the Liability bundle) were a broadly accurate account of the assessors' original manuscript notes (paragraph 54 of the Liability Judgment – page 58 of the bundle) (c) the accounts given by the alleged discriminators (paragraph 49 of the Liability Judgment – page 57 of the bundle) of their recollections of the subsequent brief discussions of on or around 23 May 2015 including that it was denied that there was any discussion at that time about the claimant's pregnancy and (d) the recognition by the Tribunal at paragraph 148.3 of the Liability Judgment - page 79- 80 of the bundle (in relation to the claimant's contention that it was just and equitable to extend time to allow issue 7 i) to proceed as a stand-alone allegation of discrimination) that the cogency of the respondent's evidence concerning their discussions relating to the outcome of the claimant's trade test was likely to have been adversely affected by the significant passage of time since May 2015 together with the consequential prejudice which would therefore have been caused to the respondent if the claimant had been allowed to pursue such an allegation to which it had not been alerted until January 2017 (nearly two years later). The Tribunal is satisfied that in the light of the above the respondent has provided an adequate explanation for the failure of the claimant's trade test namely because of the criticisms identified by the assessors (as contained at pages 49 -51 of the Liability bundle).

52 The Tribunal has therefore gone on to consider whether the respondent has further established, for the purposes of section 136(2)/ (3) of the 2010 Act, that its explanation is also adequate to establish that the treatment was, on the balance of probabilities, in no sense whatsoever because of the claimant's pregnancy/ sex.

53 Having given the matter careful consideration, the Tribunal is further satisfied that the respondent has also discharged such burden for the purposes of section 136(2)/ (3) of the 2010 Act. When reaching such conclusion, the Tribunal has taken into account in particular: - (a) the criticisms of the claimant's performance during the trade test identified in

the assessors' notes at page 49 – 51 of the Liability bundle as referred to above. The Tribunal accepts the contentions of the respondent that this documentary evidence, which is unrelated to the claimant's pregnancy/ sex, is the most cogent evidence of the claimant's performance at the time of the test/ the reasons for her failure (b) further, the respondent (the assessors including Ms Low) were unaware of the fact that the claimant was pregnant at the time that the assessments were undertaken/ the assessors' notes were prepared (c) the alleged discriminators (Mr Hill, Mrs Delaney and Ms Low) deny that there was any discussion about the claimant's pregnancy during the brief discussions/ meeting on 23 May 2015 regarding the outcome of the trade test of the claimant . Moreover, there was no evidence before the Tribunal to indicate otherwise (d) Further, such conclusion is consistent with the findings of the Tribunal in the Liability Judgment that there was no evidence of any conspiracy orchestrated by Mr Hill and other senior members of the respondent to drive the claimant out of the business because of her pregnancy/ maternity and finally (e) Ms Waldron (who was not pregnant) was subject to a similar process and also failed her trade test at/ around the same time as the claimant.

54 In all the circumstances the Tribunal is satisfied that the respondent has discharged the burden of proof for the purposes of section 136(2)/ (3) of the 2010 Act in respect of Issue 7 i). This means that such conduct does not therefore fall to be taken into account for the purposes of Remitted Issue 2.

THE CONCLUSIONS OF THE TRIBUNAL ON ISSUE 11v)

55 The Tribunal has gone on to consider, for the purposes of paragraph 96 of the EAT's Judgment - **Issue 11v) "Mr Hill behaved in a cold way towards her (paragraph 22 of the particulars of claim)". The alleged discriminator for the purposes of this issue is Mr Hill.**

56 The Tribunal has had regard to the provisions of paragraphs 119 and 120 of the Liability Judgment (page 74 of the bundle) (the prima facie case) and associated findings together with the respective written and oral submissions of the parties as summarised above.

57 The Tribunal has considered whether, in the light of the prima facie findings at paragraph 120 of the Liability Judgment: - (a) the respondent has nevertheless provided an explanation for such treatment and (b) if so, whether such explanation is adequate to establish that the treatment was, on the balance of probabilities, in no sense whatsoever because of pregnancy / sex.

58 The claimant established on the facts that:- (a) there was a cooling of Mr Hill's attitude towards the claimant after he became aware of her pregnancy in May 2015 (b) Mr Hill did not request the claimant to stand with him / assist him as previously after he became aware of the claimant's pregnancy in May 2015 and (c) Mr Hill did not engage with/ speak to the claimant before she went on maternity leave (paragraphs 63 and 120 – pages 60 and 74 of the bundle).

59 The claimant also established on the facts that:- (a) prior to the announcement of her pregnancy she was held in high regard by Mr Hill in recognition of which he asked the claimant to stand with him on a regular basis / gave her a pair of his scissors –(paragraphs 25 and 27 of the Liability Judgment) (b) that he also failed to engage/ speak to Miss Buxton before she went on her maternity leave and (c) that he acted in such a manner notwithstanding that he stated in his oral evidence to the Tribunal that he made an effort to speak to staff on a daily basis and to speak to them about things that were relevant to them and their lives (paragraphs 21, 62 and paragraph 63.1 of the Liability Judgment – pages 52 and 60 of the bundle).

60 The Tribunal has considered first allegations (a) and (b) (the cooling of Mr Hill's attitude towards the claimant and not asking the claimant to stand with him/ assist as previously) in the light of the "explanations" provided by Mr Hill as recorded at paragraphs 62 and 119 of the Liability Judgment and in his witness statement.

61 Having given careful consideration to all of the above, the Tribunal accepts the contentions of the claimant that the respondent has been unable to provide an explanation for such conduct for the purposes of section 136 (2)/ (3) of the 2010 Act as the respondent denied any such conduct (which has been established by the claimant on the balance of probabilities) rather than provide an explanation for it (paragraphs 21, 25, 62, 63 119 and 120 of the Liability Judgment – pages 52, 53, 60,74 and 74 of the bundle).

62 Further as far as allegation (c) is concerned (not engaging with/ speaking to the claimant before she went on maternity leave) Mr Hill accepted that this was the case but did not provide an explanation for such treatment (paragraphs 62 and 119 of the Liability Judgment).

63 In the circumstances the Tribunal is satisfied that the respondent has failed to provide an adequate explanation for the conduct alleged at Issue 11 v) for the purposes of section 136 (2)/ (3) of the 2010 Act.

64 The Tribunal has therefore gone on to consider whether, in all the circumstances, the respondent (alleged discriminator Mr Hill) has unlawfully discriminated against the claimant because of her pregnancy / sex for the purposes of section 136 (2) / (3) of the 2010 Act in respect of Issue 11 v).

65 The Tribunal is satisfied in the light of :- (a) its findings of fact and, in particular, regarding the nature, timing of the conduct and that it was also displayed to Miss Buxton in similar circumstances and (b) the failure of the respondent to provide any adequate explanation for such conduct (let alone one that was in no sense whatsoever because of pregnancy/ sex) that it is appropriate to conclude pursuant to section 136 (2)/ (3) of the 2010 Act in respect of Issue11 v), that it constituted an act of unlawful pregnancy/ sex discrimination for the purposes of the claimant's complaint that her constructive dismissal was discriminatory in breach of section 39 (2) (d) of the 2010 Act.

REMITTED ISSUE 2

Remitted Issue 2 : In the light of the Tribunal's finding in respect of Remitted Issue 1 whether such discriminatory matters (Issue 7i and /or 11 v) sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory?

The oral contentions of the claimant

66 The claimant further contended that:- (a) the claimant is, as a matter of contract law, entitled to rely on waived historical breaches (b) it is clear, as a matter of causation, that the failure of the trade test and the "cold shouldering" formed an integral part of the claimant's decision to resign, both of which are referred to in the claimant's letter of resignation / the Tribunal's findings at paragraph 95 of the Liability Judgment (c) the claimant relies on paragraphs 68 and 69 of the EAT Judgment and the associated test set out in the EAT Judgment in **Williams** (as referred to above) namely that discriminatory conduct does not have to be the sole or principal cause it is sufficient if it materially or sufficiently influenced the overall repudiatory breach such as to be an effective cause of the constructive dismissal (d) the failure of the trade test and the "cold shouldering" had a significant, that is a more than minor or trivial, effect on the repudiatory breaches of the respondent / the claimant's decision to resign and (e) the question of whether the conduct in question was previously affirmed is irrelevant for such purposes – the Tribunal is required to consider the whole sequence of events and decide whether the discriminatory conduct loomed large enough to have influenced the constructive dismissal.

The oral contentions of the respondent

67 The respondent further contended that:- (a) the starting point for the consideration of Remitted Issue 2 is paragraphs 68 and 69 of the EAT Judgment at pages 108-109 of the bundle (including its analysis of paragraphs 89 and 90 of **Williams)**.The Tribunal has to consider whether any of the discriminatory matters sufficiently or materially influenced the overall repudiatory breach and also whether they caused the discriminatory dismissal. It is clear from the EAT Judgment that this has to be assessed as a matter of fact and degree and that the Tribunal should consider carefully where it falls on the range (b) the respondent accepted, in the light of **Kaur v Leeds Teaching Hospital NHS Trust 2019,ICR 1 CA,** that it does not matter for such purposes whether the discriminatory matters relied upon have previously been affirmed as they can still be relied upon if they subsequently contribute to the constructive dismissal. The question of affirmation is however still relevant as it goes to the weighting of such factors as part of the qualitive analysis of whether they materially/ sufficiently influenced the overall repudiatory breach (c) the respondent also accepted that the tests of materially or sufficiently influenced are in line with the previously recognised tests of whether the discriminatory conduct had a significant influence, which means more than minor or trivial, effect on the repudiatory breach/ breaches (d) paragraphs 157 – 159 of the Liability Judgment (pages 81 – 82 of the bundle) are important to the consideration of Remitted Issue 2. There were 4 matters which the Tribunal found to have contributed to the repudiatory breach of contract which led to the constructive dismissal. The respondent contended that it was the later, rather than the earlier incidents, which effected the overall repudiatory breach and that Issues 7i and 11v had only a minor or trivial influence for such purposes and were not therefore sufficient to render the constructive dismissal an act of discrimination (d) the Tribunal should also take into account for the purposes of the qualitive analysis of whether Issues 7i and /or 11 v materially/ sufficiently influenced the overall repudiatory breach, the overall context/ background to the case including that the Tribunal rejected the claimant's contentions that there had been a conspiracy to drive the claimant out of the business and/ or that the claimant had established a continuing course of discriminatory conduct (paragraphs 140 and 141 of the Liability Judgment – page 78 of the bundle) and (e) the respondent contended that the reasons for the claimant's resignation was the alleged campaign against the claimant following her return to work after her maternity leave as evidenced by the contemporaneous notes of the meeting between Mrs Delaney and the claimant's father on the 17 January 2017 (which notes were included in the bundle at the request of the claimant) (page 160 – 161 of the bundle) and (f) in all the circumstances the Tribunal should find that any established discriminatory conduct did not sufficiently/ materially influence the overall repudiatory

breach such as to render the constructive dismissal itself an act of discrimination.

THE CONCLUSIONS OF THE TRIBUNAL ON REMITTED ISSUE 2

68 The Tribunal has therefore gone on to consider, pursuant to paragraph 96 (2) of the EAT Judgment, Remitted Issue 2 namely, **"In light of the Tribunal's findings on (1) whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory".**

69 In the light of our above findings, such "discriminatory matters" are limited to the discriminatory conduct of Mr Hill in relation to Issue 11 v) (as summarised at paragraph 120.1 – 120.4 of the Liability Judgment (page 74 of the bundle).

70 When considering Remitted Issue 2, the Tribunal has reminded itself as a starting point of :- (a) the guidance contained at paragraphs 68- 69 of the EAT Judgment (including the EAT authority of **Williams** relied upon by the EAT) (pages 108 – 109 of the bundle) (b) the nature of the respondent's repudiatory conduct as identified at paragraph 157 and 159 of the Liability Judgment (pages 81-82 of the bundle) and the associated analysis of the EAT at paragraphs 71 and 76 of the EAT Judgment at pages 109 -110 and 112 of the bundle).

71 The Tribunal has further taken into account in particular that:- (a) it was agreed between the parties that," sufficiently / materially" influenced also means conduct which is more than " minor or trivial" (or as referred to at paragraph 69 of the EAT Judgment, more than minor or peripheral) and (b) the fact that the conduct in question may have been affirmed for the purposes of a stand-alone complaint of discrimination does not prevent it from having a sufficient / material influence on the overall repudiatory breaches and (c) the Tribunal is however required to have regard to the passage of time since the incident in question for the purposes of determining the extent of its influence on the overall repudiatory breaches.

72 Having given careful consideration to our findings of fact in the Liability Judgment and to the authorities/ guidance and submissions referred to above, the Tribunal is satisfied that conduct identified at Issue 11 v) (as summarised at paragraph 120 of the Liability Judgment – page 74 of the bundle) sufficiently / materially influenced the overall repudiatory breaches which caused the claimant's resignation such as to render the claimant's constructive dismissal an act of sex discrimination.

73 When reaching such conclusion, the Tribunal has taken into account/ weighed in the balance that the established conduct in respect of Issue 11 v) (the conduct of Mr Hill after he became aware of the claimant's pregnancy) was only one of the four alleged acts identified at paragraph 157 of the Liability Judgment (page 81 of the bundle) and paragraph 76 of the EAT Judgment (page 112) which were found to have contributed to the repudiatory breach of contract which led to the claimant's constructive dismissal. The Tribunal has further taken into account :- (a) the established discriminatory conduct occurred between May – October 2015 (b) the claimant made no complaint about such conduct until the time of her resignation in January 2017 and (c) the EAT accepted at paragraph 66 of the EAT Judgment (pages 107 - 108 of the bundle) the claimant had, for the purposes of any free standing claim of unlawful sex discrimination, affirmed her contract in respect of such conduct in view of the fact that she had gone on maternity leave and had then returned to work for approximately 3 ½ months prior to her resignation.

74 The Tribunal is however satisfied that notwithstanding the above :- (a) the established " cold shouldering " treatment which Mr Hill exhibited towards the claimant after he became aware of her pregnancy in May 2015 was a significant act of pregnancy discrimination perpetrated by the proprietor/ figurehead of the business which extended, in part, from May to October 2015 (when the claimant commenced her maternity leave) (b) that, notwithstanding the significant passage of time between the discrimination in May – October 2015 and the claimant's resignation it was nevertheless still regarded by the claimant as one of the " deepest cuts" of pregnancy / sex discrimination for the purposes of paragraph 71 of the EAT Judgment (page 110 of the bundle) and (c) that the conduct in question had a more than minor or trivial influence on the overall repudiatory breaches and the claimant's consequential decision to terminate her employment with the respondent.

75 When reaching such conclusions, the Tribunal has taken into account in particular :- (a) paragraphs 21, 25 , 27 and 28 of the Liability Judgment – pages 52 – 53 of the bundle (relating to Mr Hill's pre-eminent position in the business as its proprietor/ figurehead and the high regard with which the claimant was regarded by him prior to the disclosure of her pregnancy in May 2015) (b) that the conduct in question extended, in part, over a period of more than 4 months (May to October 2015) (c) the passage of time between the alleged conduct and the claimant's resignation in January 2017 is accounted for in part, by the fact that the claimant was absent from the business on maternity leave for nearly a year during 2015/ 2016 and (d) the context of the further conduct by Mr Hill towards the claimant in December 2016 in respect of the "Vicki Pollard" incident (paragraphs 82 and 157.5 of the Liability Judgement - pages 64 and 81 of the bundle).

76 Further, it is clear from the claimant's letter of resignation dated 19 January 2017 paragraphs 94 (3) and (5) of the Liability Judgment (page 67 – 68 of the bundle) that Mr Hill's treatment of the claimant in respect of the allegations at Issue 11 v), compared to his previous very positive treatment of her (asking her to stand with him more than other trainees, speaking to her on a daily basis and presenting her with his scissors) were matters which were still of concern to the claimant and which contributed to the chain of events which led her to resign her employment with the respondent.

77 Further such conduct (that after Mr Hill became aware that the claimant was pregnant he never asked her to stand with him again and did not speak to her on the last day before she went on maternity leave) was identified by the claimant in her oral evidence at the Liability Hearing, which was accepted by the Tribunal, (at paragraph 95 (e) of the Liability Judgment – page 68- 69 of the bundle) as one of the reasons which contributed to her decision to resign her employment with the respondent.

78 In all the circumstances, and having carefully balanced all of the above, the Tribunal is satisfied that, for the purposes of Remitted Issue 2, the conduct identified at Issue 11 v) sufficiently influenced the overall repudiatory breach so as to render the claimant's constructive dismissal an act of sex discrimination for the purposes of section 39 (2) (d) of the 2010 Act and the claimant therefore succeeds in this aspect of her claim.

Employment Judge Goraj
Date: 10 November 2021

Judgment sent to the parties: 26 November 2021

FOR THE OFFICE OF THE TRIBUNALS

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions
The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once

they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness