EMPLOYMENT TRIBUNALS

Claimant: Mrs AL Campbell

Respondent: Quirky Tea Rooms Limited

Heard at: Manchester Employment Tribunal **On:** 15, 16 and 17 June 2021
7 and 8 December 2021

Before: Employment Judge Dunlop
Mrs CA Titherington
Mr A Egerton

Representation

Claimant: Mr J Campbell (claimant's husband)
Respondent: Mr D Flood (counsel)

JUDGMENT having been sent to the parties on 13 December 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant worked for the respondent tea room until her resignation by email on 14 September 2019. She subsequently brought a claim of pregnancy discrimination and various ancillary claims.

The Hearing

2. Unfortunately, this was a case which experienced more than its share of procedural problems. The final hearing was listed to take place (after some earlier delay) on 15-17 June 2021. It took place as a hybrid hearing with the claimant and her husband attending in person and the respondent's representative and witness attending remotely. The non-legal members of the Tribunal also attended remotely. The only witnesses were to be Mrs Campbell, the claimant, and Ms Carla Woods, who is the owner of the respondent. We were also provided with an agreed bundle of documents of just over 350 pages.

3. It appeared that the time allocation of three days would be more than adequate, and, following an initial discussion, the Tribunal adjourned until the morning of day 2 to enable the reading to be completed and due to a Tribunal meeting which was taking place that afternoon.

4. However, from the start of day 2 we experienced significant problems with the video hearing platform, which particularly affected the connection from the hearing room. This resulted in much stopping and re-starting of the proceedings, which significantly delayed the progress of the case. Mr Flood's cross examination of Mrs Campbell took very much longer than envisaged, through no fault of the representative or the witness. We were able to conclude Mrs Campbell's evidence but were unable to start Ms Wood's.

5. With the agreement of the parties, it was decided that day 3 would take place fully by CVP on the basis that it would then be unnecessary to rely on the CVP connection to the hearing room, as everyone would log on individually. Unfortunately, Mr and Mrs Campbell's connection turned out to be not strong enough to support the CVP hearing with the result that day 3 had to be abandoned. We had heard only two or three introductory cross-examination questions and answers, so the Tribunal directed that Ms Woods be released from her oath, and that she would re-start her evidence afresh when the hearing could resume.

6. There were then significant difficulties in obtaining a re-listed date which I will not set out in detail. However, all the participants were ultimately able to attend the part-heard hearing on 7 and 8 December. Having regard to the earlier delays and the serious problems with CVP which this case had experienced, the Tribunal had determined that the part-heard hearing would be fully in person. Ms Woods attended on the morning of 7 December and gave her evidence. The panel then heard submissions from Mr Flood and Mr Campbell, and then retired to deliberate. We were able to give an oral judgment and then heard further submissions on remedy, before giving a further oral judgment dealing with the disputed elements of the compensation.

7. A short written judgment was sent to the parties on 13 December 2021 and a request for written reasons was made by the respondent on 22 December 2021.

The Issues

8. A List of Issues appeared in the bundle at pages 70-73. At the outset of the hearing Mr Campbell produced a proposed amended List of Issues. He proposed to add an issue as to what Mrs Campbell's employment start date was (the parties had put forward 1 October 2017 and 24 October 2017 respectively). However, it appeared to the Tribunal that it was not necessary to resolve this issue to determine any of the claims. He also proposed to add an issue as to what the effective date of termination was. It was agreed between the parties that the claimant resigned on 14 September 2019 giving one week's notice, giving a termination date of 21 September 2019. The respondent had subsequently produced various P45s with different dates. Mr Flood, however, did not seek to support any of these alternative

dates. It therefore seemed to the Tribunal that there was no live issue on this point.

9. The original List of Issues is not reproduced due to its length. A summary of the claims we had to consider is set out below:

    1. Underpayment of holiday pay on termination of employment;
    2. Underpayment of statutory maternity pay;
    3. Discrimination on the grounds of pregnancy or maternity (s.18 Equality Act 2010) including detrimental treatment and dismissal;
    4. Detriment on the grounds of having asserted a statutory right (s.45A Employment Rights Act 1996)
    5. Dismissal on the grounds of having asserted a statutory right (s.104 Employment Rights Act 1996)

Findings of Fact

10. Ms Woods owns and runs the respondent, which is a tea room in the tourist resort of Lytham. She has been a small business owner for around twelve years, although has little experience of employing others.

11. In autumn 2017, Ms Woods decided she needed to take on a member of staff. She placed a notice in the café window for an employee to work for two days a week in term time, which Mrs Campbell, who lives nearby, saw and responded to. She started working in the café in October 2017. Other than casual weekend staff, Mrs Campbell was the first person to work for Ms Woods who was not a family member or friend.

12. Ms Woods chose to conduct the employment relationship in a very informal way. She did not issue Mrs Campbell with an employment contract or letter setting out terms and conditions. There was very little documentation and a lot of communication was by messages sent by phone, many of which were reproduced in the bundle. The two women became friendly and even close. However, Ms Woods seems to have thought that this closeness absolved her from having responsibilities as an employer.

13. Mrs Campbell did not, as a rule, work at the weekend. She had a young son with additional needs and she spent the weekends with him. Ms Woods would sometimes ask Mrs Campbell to work at a weekend as an exception, and Mrs Campbell would agree to do so if she could, particularly if her son was due to be with his father. Importantly, however, when Mrs Campbell was asked about working at the weekend, she was free to refuse if this didn't suit her. Although there was no written contract in this case, both parties accept that Mrs Campbell was an employee and (therefore) that there was an implied or oral contract. We find that it was a term of that contract that Mrs Campbell was free to refuse weekend shifts.

14. Ms Woods did not inform Mrs Campbell of her right to take paid annual leave. She did not keep annual leave records and she took no steps to ensure that Mrs Campbell received the annual leave that she was entitled to. On occasion, Mrs Campbell would take some time off. If she asked to be paid for that time off then Ms Woods would generally agree and arrange payment. However, Mrs Campbell felt awkward about asking and was made

to feel that by giving her paid annual leave Ms Woods was doing her a favour rather than simply honouring her statutory employment rights.

15. The café was successful and Ms Woods took on another couple of employees.

16. Around August 2018 Mrs Campbell found out she was pregnant. There is a conflict of evidence as to whether she told Ms Woods then, or later, but it is not material to the claims. In any event, Ms Woods was aware by November 2018. Ms Woods was supportive of the pregnancy.

17. Mrs Campbell was due to be married in December 2018. In November, she went on a trip to Poland for her hen do. Ms Woods closed the shop for the Poland trip, which she also went on. Mrs Campbell received holiday pay in respect of that trip. Ms Woods also closed the shop for Mrs Campbell's wedding in December 2018. Mrs Campbell did not receive holiday pay for that occasion. No one has suggested that she did not have sufficient leave accrued to be paid. Ms Woods has suggested that Mrs Campbell did not ask for leave, because she might have wanted to save it for another time. Mrs Campbell has said that she felt awkward asking for leave given that the shop was closed for her wedding, and given how she had been made to feel for asking in the past, so she didn't do it. Ms Woods emphasised that her involvement in the wedding and hen do showed how good the relationship was between the pair. This is an example of Ms Woods forgetting that she was, first and foremost, Mrs Campbell's employer. Being friends as well is, of course, fine, but the friendship must sit alongside the obligations of the employment relationship, it does not replace them.

18. Ms Woods took no steps to find out what her obligations were towards Mrs Campbell as a pregnant employee, nor to communicate with Mrs Campbell about what she could expect as regards maternity leave and pay, and what information she had to provide to her employer, and when.

19. Mrs Campbell's baby was due in early summer. However, she was admitted to hospital on 4 March 2019 in suspected premature labour. This took both Mrs Campbell and Ms Woods by surprise. Ms Woods contacted her accountant and it was arranged for Mrs Campbell's maternity leave to start from 5 March 2019. Mrs Campbell has since complained about her maternity leave commencing so early and said that she did not agree to this. However, this conflicts with messages that she sent to Ms Woods at the time, and also with the fact that it is agreed that Mr Campbell attended the café to give Ms Woods the maternity certificate that was required to commence payment of statutory maternity pay. Mrs Campbell may have made a different decision if she had been fully informed of her rights around sick pay, but, as a matter of fact, we are satisfied that Mrs Campbell was happy to commence her maternity leave at that point.

20. Mrs Campbell's baby was actually born on 17 April 2019.

21. During the initial period of Mrs Campbell's maternity leave, the relationship between her and Ms Woods remained very friendly. There were frequent messages relating to the baby and to the café. Ms Woods' messages are generally warm and supportive and Mrs Campbell's responses are equally

warm. At some point in early summer, Mrs Campbell took her new daughter into the café and was warmly received. There are some references in the messages to when Mrs Campbell is planning to return to work, both before she started her maternity leave and during that initial period. We consider those messages to be in line with what might be expected in a small business of this nature. We do not see them as evidence of pressure being put on Mrs Campbell to return on a particular date, or to confirm the date of her return prematurely.

22. In early July, Ms Woods contacted Mrs Campbell with a view to her working some specific days over summer, where there were tourist events on or specific staff shortages. Mr Flood has suggested that these were proposed a 'keeping in touch days'. We consider that framing them in the context of the statutory maternity provisions in this way is an optimistic attempt at retrospective window-dressing. We prefer the explanation Ms Woods gave in her evidence, that she was asking Mrs Campbell to help out "not as an employee, as a friend". This leads us back to Ms Wood's genuinely held, but incorrect, assumption, that she could disregard Mrs Campbell's employee rights and protections because they were friends.

23. There was a discussion via messages on 11 July 2019 in which Ms Woods confirmed that Mrs Campbell would be due to return to work on 29 November if she took the full period of maternity leave. There was a discussion about whether Mrs Campbell might return prior to that date and Ms Woods would 'make up' her wages in cash, but Mrs Campbell declined this proposal. Towards the end of the exchange, Ms Woods sent the following message:

    > *"I'm going to taking saturdays off as never see my kids at weekends anymore so will be needing you to do Saturdays and 1/2 days in the week maybe? X"*

    Mrs Campbell's response was non-committal, but we accept her evidence that this proposal represented a change to the previous contractual position and that she was unhappy about it because of the difficulty it would cause to her own personal life.

24. There was a further exchange of messages on 19 July 2019 concerning the fact that Ms Woods was taking on the lease of another nearby café. The exchange is very brief with hardly any detail about the plan. Ms Woods suggested that Mrs Campbell might work there after her return but Mrs Campbell responded that she would prefer to stay where she was. Ms Woods said that "*Everyone will have to do half half*" and Mrs Campbell replied "*no problem*".

25. As it transpired, the proposal to take on another lease came to nothing. Mrs Campbell was not explicitly told that the possibility had lapsed, but the matter was never mentioned again.

26. There were no further messages before the next exchange, on 11 September 2019. There was no contact between the parties by telephone or in person either. We find the relationship had cooled, as Mrs Campbell was somewhat unhappy about Ms Woods' messages, and Ms Woods was somewhat unhappy that Mrs Campbell had not been more enthusiastic and

definitive about her plans to return. Although cooler it was not, at this point, a bad relationship.

27. At 17.03 on 11 September, Mrs Campbell messaged Ms Woods to ask about the holiday pay that she would have accrued in the previous holiday year and had been unable to take due to starting maternity leave early. Mrs Campbell said in her message that she had only just found out about this entitlement and cannot afford to let it go due to her husband going for a month without pay as he was changing job.

28. There are some further messages clarifying whether Mrs Campbell is asking about holiday accrued up to April 2019, or in the current holiday year since April 2019 (the parties agree that the holiday year corresponds to the financial year). At 17.39, in relation to carrying over accrued leave from the previous year, Ms Woods writes "*I don't think you can but I'll check".* During the same exchange, Ms Woods reopened the issue of Saturday working, commenting that "*Everyone's set days are changeable and no one will be having every weekend off they will all be shared on a rota system as we all have children and all need time off at weekends school holidays etc."*

29. Ms Woods then messaged Mrs Campbell at 10.40 the next day (12 September). She says "*My accountant has replied to my email. As I thought it can't be carried over or back-dated…. As you left in March there is nothing I can do about the unclaimed holiday allowance up to April 2019."*

30. We pause there to note that both sides now agree that that was an incorrect statement, and that Mrs Campbell was entitled to carry over her unused holiday in these circumstances.

31. At 10.46 Mrs Campbell replied asking to see the accountant's email. Ms Woods refused on the basis that the email was confidential, but gave Mrs Campbell the email address of her accountant, Ms Lloyd, so that Mrs Campbell could take it up with her directly.

32. At 10.59 Ms Woods sent another message saying "*I've spoke to her as I feel you're not believing me as your employer…"* she then went on to confirm that the accrued holiday could, contrary to the earlier statements, be carried over, exactly as Mrs Campbell had suggested in her first message on the subject. The Tribunal were puzzled by the opening line of this message, as it seems to imply that there is fault on Mrs Campbell's part for not believing Ms Woods, whilst in the very same message Ms Woods is acknowledging that she had got the position wrong (and, therefore, that Mrs Campbell was right not to believe her). It is surprising that Ms Woods did not apologise for the error made by her (or, potentially, by Ms Lloyd acting on her behalf). Rather, the tone of the messages suggest that she considers Mrs Campbell to be acting unreasonably. For example, the exchange ends with Ms Woods commenting "*Tbh I'm not feeling great after my op and could do without all this at the moment but I'll get back to you when she* [Mrs Lloyd] *has worked it out."*

33. Mrs Campbell told the Tribunal that her conclusion during this message exchange was that Ms Woods had not checked the position regarding carry-over with her accountant at all, but had merely said that she had in order to

fob off Mrs Campbell and avoid the liability for accrued holiday. We can understand why Mrs Campbell would reach that conclusion given that Ms Woods' position had apparently changed so quickly when pressed by Mrs Campbell. We find that Mrs Campbell formed a genuine belief (whether or not justified) that Ms Woods was attempting to take advantage of her. We also find that Mrs Campbell formed a belief that Ms Woods was attempting to change the contractual terms on which she would return to work, but introducing a requirement for some Saturday working (albeit that the details were yet to be finalised) which had not previously been the case.

34. By an email on 14 September 2019, Mrs Campbell resigned giving one week's notice. There had been no further communication between the parties following the messages on 11 September. The resignation letter stated:

"I feel your behavior as an employer has been such that my position is unattainable and therefore feel I have no choice other than to resign.

Could you or your accountant make contact to confirm exactly how much holiday entitlement I am entitled to receive with a clear understanding of how this has been worked out, also in the same correspondence could you confirm how you intend to pay the remainder of my smp."

35. There was an exchange of messages on the same date and Ms Woods said "*I don't think you will get maternity pay from me now I will check with my accountant on Monday."* She asked Mrs Campbell to explain her reasons for saying that Ms Woods had been unreasonable. Mrs Campbell simply responded that she would *"not get involved in mud slinging."*

36. From here, the parties managed to take a relationship that appeared to have hit rock bottom and contrived to make it even worse. They were assisted in this by the unfortunately inept contributions of Ms Lloyd.

37. On 15 September 2019 Mrs Campbell wrote directly to Ms Lloyd explaining (in summary) that she believed Ms Woods had made up the 'advice' that she claimed to have received from Ms Lloyd about carrying over holiday. She noted that her relationship with Ms Woods had deteriorated to a point where all trust had gone and, for that reason, she sought Ms Lloyd's direct confirmation of amounts owed in holiday pay and maternity pay.

38. Mrs Lloyd replied on 16 September and her reply (incorrectly) indicated that Mrs Campbell would only be entitled to the remainder of her maternity pay if she stayed in employment until 29 November. She said that she was entitled to 2 weeks' carried over holiday and 2 weeks for 2019-2020, or 2.5 weeks if she stayed until 29 November.

39. Mrs Campbell challenged the assertion that her SMP would stop if her employment ended. Ms Woods replied to this email (also on 16 September) saying that her accountant would deal with it "*this week*" and reminding Mrs Campbell that "*she acts as my accountant and not your financial advisor or citizens advice bureau"*. It is significant that, in a further email which is part of the exchange on this date, Ms Woods commented that "*Your position*

was held open as you know and the only difference being that the occasional weekend would have been required."

40. On 17 September Ms Lloyd advised Ms Woods that she had not spoken to ACAS and discovered that the business did need to keep on paying SMP, and that the accrued holiday pay was immediately payable on termination.

41. On 18 September Mrs Campbell emailed complaining that it had *"taken nearly a week for you and your accountant to work out what my employment rights are"* and giving a deadline of 19 September for various questions to be replied to. In this email she also raises, for the first time, a concern that the original weekly SMP payment had been incorrectly calculated.

42. Ms Woods reply began "*For gods sake Amanda"* and continued in that intemperate vein, including *"calm down please and stop with the ridiculous emails*". She did confirm that Mrs Campbell would get her SMP in that week, which would continue until the end of her maternity period. She would be paid holiday pay at the end of her notice period calculated at 4 x 16 hours.

43. Mrs Campbell then began to push back, via email, on both the holiday pay figure, which she asserted should be calculated with reference to her annual earnings, and on the SMP figure. Although these are complex calculations, Mrs Campbell was correct, at least in principle, on both points. The tone of Ms Woods' correspondence was entirely lacking in any acknowledgement of her responsibilities as an employee, humility as regards the mistakes that continued to be made, or empathy for Mrs Campbell. It is evident that Ms Woods considered herself to be the victim. She characterised Mrs Campbell's actions in seeking what she was entitled to as harassment.

44. A payslip was issued on 4 October 2019 showing a revised SMP weekely figure of £144.57 (increased from the previous figure of £131.63) and a payment of back-pay totaling £310.56. However, despite the payslip being produced, these sums were still not actually paid to Mrs Campbell.

45. On 18 October Mrs Campbell emailed again as she still had not received the back-dated sums. By this point she was also querying whether national insurance deductions had been correctly made.

46. On 20 October, at Ms Woods' request, Mrs Campbell sent a full calculation of the sums she believed she was owed and an explanation of how they had been reached. The total came to £744; a very considerable amount given Mrs Campbell's role and her part-time hours. At this point, Ms Woods was asking Mrs Campbell to be patient whilst Ms Lloyd attempted to secure funds from HMRC. Mrs Campbell (again, correctly) pointed out that it was the business that was responsible for the payments to her, and that payments to them from HMRC were a separate matter. Ms Woods would not be the first small business owner to ask an employee to wait until she had come into funds, in many cases, an employee will take a pragmatic view regardless of their legal rights. What is striking about this case, however, is the continued failure of Ms Woods to take responsibility for sorting out this mess, or even to acknowledge that the responsibility was hers to take.

47. On 22 October Ms Lloyd produced a calculation which came to £654.82. This was finally paid to Mrs Campbell on 25 October 2019.

48. As well as all the difficulties with wages, Mrs Campbell was also frustrated by the difficulty she experienced in obtaining a P45 from her former employer, which was not produced until 2020, and then produced in various iterations, showing different leaving dates. There were also difficulties with her payslips following her resignation, with one payslip being amended by hand and another payslip (as noted above) showing payments which were not actually made.

49. Mrs Campbell's witness statement contained an allegation that Ms Woods and Ms Lloyd had manipulated her original SMP calculation to the advantage of the business. The theory put forward was supported by detailed calculations. When she began to give her evidence, Mrs Campbell commenced by saying that she wanted to retract that evidence, as subsequent disclosure had demonstrated to her that her theory was incorrect. She accepted, and we accept, that the underpayment of SMP (by about £13 per week) was due to an error made by Ms Lloyd in submitting the relevant paperwork at the start of Mrs Campbell's maternity leave.

50. We record here, for clarity, that Ms Lloyd did not give evidence to the Tribunal. Her letterhead (contained on various documents in the bundle) appears to indicate that she is a Member of the Association of Accounting Technicians and a Fellow of the Institute of Financial Accountants, but we had no evidence as to her experience, qualifications, or the areas of practice she holds herself out as being able to provide advice on. It is also fair to record that Ms Woods commented during her evidence that Ms Lloyd had been ill during the time that these events were taking place, although Ms Woods had not, herself, been made aware of that at the time.

Legal Principles, **Submissions**, **Discussion and Conclusions**

51. As there are several claims in this matter, many of which are quite distinct from one another, we will set out below in relation each claim made by Mrs Campbell the applicable legal principles, submissions, discussion and conclusions.

52. Whilst we were grateful for the parties' closing submissions which were thorough in covering the factual ground of the case, it is worth noting that neither party attempted to outline the legal principles involved, beyond the statutory provisions themselves. Whilst we would not necessarily expect this from a litigant in person, even Mr Flood's written submissions contained only two case references on specific points. We have set out below the broad legal principles which we applied. Save where expressly indicated, we did not receive submissions on these from the parties.

53. Before doing so, we reproduce a number of over-arching points which informed our conclusions, and which were included in the oral judgement given at the conclusion of the hearing.

54. We acknowledge that the provisions in relation to statutory maternity leave and pay and holiday leave and pay, are complicated. We fully understand

that it is possible to make mistakes. Our experience tells us not only that small employers often make mistakes, but big employers and even specialist lawyers also make mistakes in this area, particularly when it comes to making detailed calculations. The fact that a calculation is wrong does not necessarily mean an employee has been discriminated against, or that there is anything more sinister going on than a simple error.

55. However, when a business decides to take on employees, that decision comes with responsibility. It is the employer's obligation to ensure that they meet that responsibility. To the extent that they might take advice, or delegate payroll or other functions, it is their responsibility to ensure that they delegate it to people who are competent and reliable.

56. Ms Woods seems to have taken that obligation very lightly. That is evident from the start of employment, when no contract or statement of terms and conditions was produced, through to the announcement of the claimant's pregnancy, when she did nothing to find out, what their respective rights and obligations were, and take steps to inform Mrs Campbell and manage the situation properly. It is also evident in the tone and content of her communication with Mrs Campbell during her maternity leave (which we will come back to) through to, finally, her approach to Mrs Campbell following her resignation when Mrs Campbell was trying to secure the payments she was entitled to, leading into this litigation.

57. We don't doubt that the Mrs Campbell and Ms Woods were on friendly terms, even close terms, through much of their relationship, but that doesn't change the fact that they were employer and employee and it doesn't absolve Ms Woods from the responsibilities that come with being an employer. Even making every allowance inexperience and informality in a small business, things went badly wrong here, and we would suggest that Ms Woods needs to think hard about this judgment if she intends to continue to employ others in her business, either now or in the future.

Unauthorised deductions from wages (notice pay)

58. Mrs Campbell had produced a schedule of loss which included a claim of £43.73 of underpaid notice pay. As noted above, she gave one week's notice. She received her statutory maternity pay for that week which was (including the back-payment made later) £144.57. She claimed the difference between her full weekly wage (calculated as an average) and the SMP she had received. Section 89 Employment Rights Act 1996 ("ERA") provides that an employer is required to pay the employee their full weekly wage during their notice period in this situation, although they are entitled to credit against that wage any SMP paid in respect of that period (as Mrs Campbell's calculation does).

59. The Tribunal pointed out that, although this sum was claimed in the Schedule of Loss, it was not included in the ET1 form and was not reflected in the List of Issues. We invited the parties to address us in their submissions as to whether an amendment to the claim should be permitted.

Neither side had much to say on the point, probably in reflection of the low value of the claim. We determined that the claimant should be permitted to amend her claim. This was a simple financial claim of small value which Mr Flood acknowledged was unanswerable. Mrs Campbell is a litigant in person who has worked hard (with the assistance of her husband) to calculate the sums she is entitled to in circumstances where the law is not necessarily straightforward and where she has not received the assistance she could reasonably have expected from her employer. Applying the balance of prejudice test, the small sum means that prejudice in either direction is minor, however, on balance, we considered that there would have been more hardship and prejudice in denying the claimant the chance to advance this claim on the facts of this case than there was in requiring the respondent to face the claim.

60. The amendment application having been granted, we awarded the claimant the agreed sum of £43.76 (this sum was agreed between the parties and is a few pence more than the original amount in the Schedule of Loss).

Unpaid accrued holiday pay

61. In his closing submission, Mr Flood accepted that even Ms Lloyd's final attempt to calculate outstanding holiday pay had resulted in a significant underpayment. By his calculation, the amount owed was £267.94, only slightly less than the £283.90 set out in the Schedule of Loss. Following discussion between the parties, Mrs Campbell was persuaded that Mr Flood's figure was accurate, and so the Tribunal awarded that amount by consent.

Unauthorised deductions (national insurance)

62. Mrs Campbell claimed £17.35 in unauthorised deductions, being purported deductions made for national insurance, which did not tally with payments made for national insurance on her behalf (as shown on the Government Gateway online site). The respondent acknowledges £13.73 of this, which was wrongly deducted from an SMP payment. We were concerned to devote a proportionate amount of time to this claim given its low value. It was the respondent's responsibility to keep accurate records of payments made, including deductions. Although electronic payslips were produced in this case, we are satisfied that they cannot be relied upon as an accurate record. Although it is difficult to determine exactly where the difference arises, we accept Mrs Campbell's calculations, which are based on documents included in the bundle. It is easy to believe that another error has been made by the respondent/Ms Lloyd, against the backdrop of a litany errors and repeated attempted corrections. We have ordered the respondent to repay this deduction.

Pregnancy and maternity discrimination (s.18 EqA)

Legal Principles

63. Section 18 EqA 2010 provides as follows (subsections which are not relevant to this case are omitted):

Pregnancy and maternity discrimination: work cases

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

2. **…**

3. **…**

4. **A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**

64. Section 39 EqA 2010 provides as follows (subsections which are not relevant to this case are omitted):

Employees and applicants

1. **…**
2. **An employer (A) must not discriminate against an employee of A's (B)—**
   (a)…
   (b)…
   (c)by dismissing B;
   (d)by subjecting B to any other detriment.

65. The effect of these provisions is that a woman can succeed in a claim of discrimination on grounds of pregnancy or maternity by demonstrating that she has been treated unfavourably, without comparing herself to a man (real of hypothetical) who has received (or would receive) more favourable treatment.

66. In considering the question of whether unfavourable treatment was 'because of' the claimant's pregnancy the Tribunal must examine the respondent's grounds for treating the claimant in a particular way. The pregnancy need not be the only reason, but it must have played a part. Further, it can be a conscious or unconscious motivation.

67. Section 136 of the EqA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

68. At the first stage, the Tribunal has to make findings of primary fact based on
the evidence from both the claimant and the respondent. It involves consideration of all material facts. The onus lies on the employee to show potentially unfavourable treatment from which an inference of discrimination could properly be drawn. If the employee does not prove such facts, her claim will fail.

38. It is important for Tribunals to bear in mind in deciding whether the employee
has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention

but merely an assumption.

39. If, on the other hand, the employee does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed the act of discrimination, unless the employer is able to prove on the balance of probabilities that the treatment of the employee was in no sense whatsoever because of her pregnancy, then the employee will succeed.

69. There are six allegations of detriment amounting to unfavourable treatment on grounds of maternity set out in the List of Issues. We will consider each in turn first considering whether, on the facts as we have found, Mrs Campbell was subjected to a detriment and then considering, where we have found detrimental treatment, whether that was unfavourable treatment on the grounds of pregnancy.

A. Knowingly underpaying statutory maternity pay

70. This allegation relates to 4 October 2019. At this point, the respondent had acknowledged that the correct weekly rate of SMP was £144.57, but instead paid £131.63. On 4 October 2019 a payslip was issued showing the revised amount, as well as payment of back-dated SMP totaling £310.56, but, as stated above, the payment was not actually made to the claimant at this time. The amounts were paid on 25 October 2019, when payment was also made in respect of accrued holiday pay (albeit, as we have seen above, not in the correct amount).

71. Mr Flood submitted that this claim had changed, that the list of issues reflected the abandoned argument that the SMP figure had been manipulated from the outset. Whilst we accept that the claim has narrowed, we do not consider that Mrs Campbell is precluded from advancing a claim focused on 4 October.

72. We consider it unarguable that any underpayment of wages, at least of a material amount, is a detriment. Further, we accept that where an employer makes a deliberate choice not to pay an amount owed (even where there is an explanation for this, such as that they are hoping to receive funds from HMRC) that deliberateness is itself an important part of the detriment.

B. Repeatedly asking when Mrs Campbell would return to work
C. Repeatedly asking whether Mrs Campbell would return before the end of her maternity leave period

73. We considered these allegations together. We accept that persistent requests of this nature can amount to detrimental treatment in some cases. However, we did not consider that Mrs Campbell was subject to such a detriment on the facts of this case.

74. The evidence of Ms Woods' asking about her return to work was limited. Whilst we accept that the subject would probably not have been raised in text messages in a larger or more professional organisation, we consider that discussing it in this way is common and acceptable in a business such as this. The messages were not particularly frequent, and they do not, in

our view, show pressure being placed on Mrs Campbell to return early or any reluctance to accept her indications that she did not want to return before the end of her paid leave on 29 November, whether to do odd days of work, or to return permanently.

D: Informing the claimant that she would have to work weekends

75. Mr Flood's submission was that this was not a detriment as it had merely been 'raised' or 'canvassed' and that no instruction had been given to the claimant to work Saturdays.

76. We rejected this submission and found that Ms Woods' statements that Mrs Campbell would be required to work on some Saturdays (on a rota basis) did amount to a detriment.

77. Although there was some conflict of evidence in relation to the frequency of Saturday working before Mrs Campbell's maternity leave, we found that (regardless of the number of weekends where she did actually work, by agreement) Mrs Campbell had had the right to refuse any request to work on a Saturday. That right was particularly important to her given her personal circumstances and particularly valuable in this line of work, where cafés within the town could expect to be busy at the weekends and therefore staff in many of those roles would be required to work at weekends. There was a clear statement by Ms Woods, repeated on several occasions, that that right was to be removed from Mrs Campbell. Although Ms Woods suggested in her own evidence that there was no material change – the proposal was simply to formalise the arrangements that had already been working in practice – that is contradicted by her own email following the claimant's resignation, referred to at paragraph 39 above.

78. We therefore consider that Ms Woods' actions in informing Mrs Campbell that she would be required to work at weekends were sufficiently certain, and sufficiently different to what had gone before, to amount to a detriment at the time the statements were made, notwithstanding the fact that no rota had been produced.

E: Informing the claimant that she would have to work at different premises

79. This relates to the message exchange in July 2019 when Ms Woods contacted Mrs Campbell with exciting news about new premises. See paragraphs 24-25 above. Although the comment "everyone will have to do 50/50" sounds settled, the context of these messages is that the proposal to take on the new premises was at a very early stage (and did not, in fact, work out). The new location was close by and both parties' messages are premised on the understanding that there will be further discussions. Mrs Campbell's return to work date was still relatively far off at this point. In all the circumstances, although Ms Woods' comment was probably ill-advised, we do not think that it could reasonably be interpreted as meaning that Mrs Campbell was definitely going to be required to work at the new venue. To the contrary, both parties' messages are premised on the understanding that they will need to talk about this further. If the requirement had been repeated as the return to work date approached, it might have been a detriment, but in actual fact it had fallen away by then. We therefore find

that there was no detriment of requiring her to work in different premises, and we are also strengthened in that conclusion but the fact it was not focused on by the claimant in her cross-examination.

F: In the handling of the claimant's requests for information regarding statutory maternity pay, holiday pay, or payslips

80. Although that description, taken from the List of Issues, is somewhat vague, it must be read in conjunction with the claim form. In the narrative part of the claim form there is a detailed chronology of the correspondence between the parties from 11 September 2019 to 20 October 2019, i.e. from when the claimant first asked if holiday pay could be carried over to when the respondent set out its final position and (shortly after) made a substantial payment. That sequence of correspondence includes the episode of 'knowing underpayment' on 4 October, which I have already discussed. We find that that sequence of correspondence, taken as a whole, does amount to a detriment to the claimant for the following reasons:

    75.1 The respondent at no point acknowledged her own responsibility as an employer to proactively ensure that the claimant was informed of what she was entitled to and received it. Instead, the respondent repeatedly failed to accurately set out payments that were due or would become due.
    75.2 This meant the Claimant effectively had to put her own case and 'do the legwork', where upon the respondent, seemingly reluctantly, acknowledged some entitlement.
    75.3 There was never any apology for the mistakes nor any acknowledgement that the onus should not have been on the claimant, nor that she had been caused inconvenience or anxiety by the mistakes.
    75.4 The claimant was entitled not to be reassured that the respondent and her accountant were 'working on it', as the tone of the emails on each occasion was to shut down the enquiry.
    75.5 The respondent unreasonably criticised the claimant for the timing and tone of her own emails.
    75.6 The respondent only made the (then) final payment when legal action was threatened. As noted above, various sums were conceded today including £260 in underpaid accrued holiday. The respondent has made no effort to make good its admitted errors up to the point of this hearing.

Unfavourable treatment?

81. We went on to consider, in relation to the detrimental treatment we had found (items A, D and F), whether these amounted to unfavourable treatment on the grounds of maternity.

82. Mr Flood's blanket submission was that, although these things took place during the claimant's maternity leave, that was not sufficient, and none of them were done on the grounds of the claimant's pregnancy of maternity as required by the statute.

83. In respect of detriment D, informing the claimant she would have to work at weekends, we find that this unfavourable treatment was not "because of" her pregnancy or the fact she was on maternity leave. The business was expanding and the requirement for staff to work at the weekend had increased. We accept that Ms Woods had her own childcare commitments and her own reasons as to why she wanted Saturdays off. The business had grown to a point where she believed that should be possible for her and her desire to 'lean on' her experienced staff to achieve this was genuine, and unrelated to Mrs Campbell's absence. Ms Woods' ambition to formalize working arrangements, for example by introducing a rota rather than arranging hours on an ad hoc basic, was both appropriate and understandable given the development of the business. It is natural that this was something that fell to be discussed with Mrs Campbell as her maternity leave was concluding, as that was the time what Ms Woods was trying to take that step, but there was no link between the two other than coincidence of timing. In particular, we do not share Mrs Campbell's belief that Ms Woods was seeking to impose Saturday working in order 'punish' Mrs Campbell for seeking to take advantage of her statutory maternity rights.

84. We considered detriment A (knowing underpayment on 4 October) alongside detriment F (handling of claimant's requests for information regarding SMP, holiday pay and payslips) together. In our view, the underpayment on 4 October was part of an on-going course of conduct which started immediately before Mrs Campbell's resignation and continued until 25 October during which the respondent failed to calculate and pay the sums that were owed to her and failed to engage in a reasonable way with the claimant's queries about those sums. Mr Flood's argument that that this was not something done "because of" Mrs Campbell's maternity leave; it was innocent incompetence rather than discrimination.

85. We find that this was unfavourable treatment within s18(4) EqA 2010 i.e. it was unfavourable treatment because Mrs Campbell was exercising her right to maternity leave. We do not mean that in the sense that Ms Woods was seeking to 'punish' Mrs Campbell for taking maternity leave. However, if Mrs Campbell had not been on maternity leave, then the complex provisions as regarding maternity pay and annual leave would not have arisen for debate. Ms Woods was simply unwilling to apply her mind to her responsibilities as the owner of a business employing a woman on maternity leave and ensure that she dealt properly with the serious matter of ensuring that employee received the benefits and payments that she was entitled to under statute. That is not a failure that could, or would, have come about were it not for the fact that Mrs Campbell was taking maternity leave. This is the sort of case which illustrates why the law requires no comparator in cases of pregnancy discrimination, in contrast to other forms of direct discrimination. Ms Wood's actions, therefore, have a sufficient causal connection to the maternity leave to be properly described as being unfavourable treatment because Mrs Campbell has exercised her right to take maternity leave. We can reach that conclusion on the facts of the case without recourse to the burden of proof provisions.

86. For completeness, we note that much of the conduct complained of took place after the termination date of 21 September 2019. Of course, the EqA prohibits post-termination discrimination (by virtue of s.108) and Mr Flood

has not raised any argument in relation to this part of the complaint being concerned with post-termination conduct. We are satisfied that Mrs Campbell's complaint of unlawful discrimination under s.18 EqA concerning these matters is made out.

Pregnancy and maternity discrimination (s.18 EqA) – dismissal

87. This claim does not include a 'standard' claim of unfair dismissal, as Mrs Campbell did not have sufficient length of service to bring such a claim. However, Mrs Campbell does claim that she was constructively dismissed, and that that dismissal was discriminatory. If she is right, then she can be compensated for that discriminatory dismissal, notwithstanding her short service.

Legal Principles

88. In order to establish a constructive dismissal, the employee must show that:

    (a) there was a fundamental breach of contract on the part of the employer

    (b) the employer's breach caused the employee to resign

    (c) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

    Western Excavating (ECC) Ltd v Sharp 1978 ICR 221

89. All contracts of employment contain an implied term of trust and confidence, requiring that the employer will not, without reasonable cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (**Malik v BCCI SA 1997 ICR 606, HL**). Any breach of the implied term is repudiatory in nature. In assessing whether there has been a breach of the implied term, Tribunals must take care not to apply the test of 'reasonableness', familiar from cases involving express dismissals.

90. Although the breach must 'cause' the resignation, it need not be the sole or main cause, provided it played an effective part. (**Wright v North Ayrshire Council 2014 ICR 77, EAT**).

91. The Judgment of HHJ Burke in **The Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT** summarised the development of the implied term and what is required in identifying a breach of it. Specifically, the EAT rejected a suggested that, following the Court of Appeal decision in **Tullett Prebon PLC v BGC Brokers [2011] IRLR 420** Tribunals were required to make an express finding as to whether the employer, by its conduct, had intended to repudiate the contract of employment. This case (and others) confirmed that the question of whether there has been a breach of the implied term is a question of fact for the tribunal, to be answered objectively. That emphasis on objectivity is apparent from the exert from paragraph 25 of the judgment, cited in Mr Flood's submissions:

> *The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If*

the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…

92. Where an employer is found to have breached the implied term of trust and confidence, it is not open to the employer to remedy the breach by subsequent conduct, **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA**. (Subsequent 'remedial' conduct may well be relevant in determining whether the employee has affirmed the contract and whether they resigned in response to the breach or for some other reason).

93. The effect of s.39(7) EqA is that a constructive dismissal will count as a dismissal for the purposes of s.39(2) (which makes it unlawful for an employer to discriminate against an employee by dismissing them).

94. As Mrs Campbell does not have sufficient qualifying service to bring an 'ordinary' s.98 claim for unfair dismissal, the burden of proof in establishing the reason for dismissal, on the balance of probabilities, falls to her. (**Smith v Hayle Town Council [1978] ICR 996, CA**).

Discussion and conclusions

95. Mr Flood was right to submit that in looking at whether there was a dismissal, we have to be very careful to exclude from our consideration the events which took place after Mrs Campbell's resignation. Of course, the majority of the conduct we have found to amount to unfavourable treatment on grounds of maternity occurred in this later period.

96. We find that, on its own, Ms Woods' statements that Mrs Campbell would have to work some Saturdays on her return did not amount to a breach of the implied term. Although the statements were likely to undermine the relationship, and we have found them amount to a detriment, we are nevertheless satisfied that the respondent had reasonable cause to try to revise the working arrangements of the business.

97. However, Ms Woods' statements and actions around the issue of carried over holiday pay cause us more difficulty. On 11 September Ms Woods said that she didn't believe that holiday pay could be carried over, but she would take advice. If genuine, that statement cannot be criticised. On 12 September she responded saying that she had taken the advice and, on the basis of that advice, holiday pay couldn't be carried over. Giving a considered response which is fundamentally wrong in law, is something which is objectively likely to undermine the relationship. Mr Flood acknowledged in his oral submissions that if Mrs Campbell had resigned at this point then her case would have been difficult to answer. However, if there was a breach of the implied term at this point, then, in accordance with the principle in **Buckland** a subsequent change of position by the respondent does not remedy that breach.

98. What happened next was that, in the message exchange, Mrs Campbell asked for a copy of Ms Lloyd's email containing the advice. The email was not provided, and Mrs Campbell was told it was confidential. Later emails from Ms Lloyd were provided but this key email was never provided during

the extensive correspondence, nor has it been been disclosed in the course of this litigation. Ms Woods was not adequately able to explain why.

99. Within ten minutes of being challenged by Mrs Campbell, Ms Woods then changed her stance and agreed that holiday pay could be carried over. There has never been any explanation of why Ms Woods purported to give an answer 'on advice' which was incorrect but was then able to give the correct answer minutes later. We accept that that eroded Mrs Campbell's trust; she formed the conclusion that *either* Ms Woods knew all along that she was entitled to carry over annual leave and did not want to honour it, *or* that she lied about seeking advice in the first instance. We think that that was a reasonable conclusion for Mrs Campbell to draw in those circumstances. This comes against the background of having no contract, having never been informed of holiday pay entitlement and having taken unpaid holiday the previous December when, to all intents and purposes, she would have accrued paid holiday. The erosion of trust is not remedied by the correction, in a way it is exacerbated by it because there is no explanation offered to why the position has changed so quickly. Instead, Ms Woods chose to criticse Mrs Campbell, saying, "*I feel you're not believing me as your employer…*" a strange comment for an employer to make when they've just admitted a serious error.

100. We do not need to make findings as to precisely what advice Ms Woods received and when. It is sufficient in our view that she incorrectly informed Mrs Campbell that she was not entitled to carry over leave, then reiterated that position citing the fact that she had taken advice, then changed her position a very short time later when challenged by Mrs Campbell.

101. We find that that sequence of events amounted to a breach of the implied term of trust and confidence, however it came about. We find that the breach occurred when Ms Woods told Mrs Campbell,purportedly on advice, that she was not entitled to carry over her annual leave. This breach could not be cured as a matter of law but, in any event, as a matter of fact Ms Woods actions in subsequently reversal her position without a transparent explanation further contributed to the breach themselves. This was all behavior which was likely to undermine the relation of trust and confidence.

102. If there as 'reasonable cause' (i.e. an innocent explanation for how this sequence of events came about) there has been no evidence of it in these proceedings. Of course, if it is the case that Ms Woods' breach of the implied term came about purely because of incorrect advice she was receiving from Ms Lloyd, it may be that she has a remedy against Ms Lloyd, but that is not the subject of these proceedings.

103. Having found that there was a breach of the implied term, we also find that Mrs Campbell resigned in response to that breach. This is evidenced by the timing of her resignation and also by statements to that effect in her email to Ms Lloyd of 15 September. The timing means that there can be no credible argument that she had affirmed the contract (and, unsurprisingly, that was not a point relied on by Mr Flood.)

104. This means that we have found that Mrs Campbell was constructively dismissed by the respondent. We must go on to consider whether that dismissal was discriminatory i.e. whether she was treated unfavourably because of the fact she was on maternity leave.

105. We are satisfied that there was no conscious motivation to discriminate against Mrs Campbell; Ms Woods had been supportive in the early stages of her pregnancy and we find no evidence that she 'had a problem' with Mrs Campbell being pregnant or taking time away from work on maternity leave. We also do not accept (as suggested by Mrs Campbell) that Ms Woods wanted to 'punish' her.

106. Here we repeat the reasoning set out in paragraph 85 above. It is only because Mrs Campbell was a working mother coming to the end of maternity leave that she found herself in this position. It was Ms Woods' poor handling of that situation which gave rise to the conduct which entitled Mrs Campbell to treat herself as being dismissed. We find that there was sufficient connection to lead us to conclude that the dismissal can properly be said to be unfavourable treatment because Mrs Campbell was exercising her right to maternity leave.

Detriment contrary to s45A ERA 1996

107. Section 45A ERA 1996 protects workers from being subjected to a detriment on the grounds that they have done various things related to their rights under the Working Time Regulations 1998. Those regulations govern, amongst other things, the right to paid holiday. S45A provides, so far as is relevant:

> **(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—**
>
> **(a)-(e)…**
>
> **(f)alleged that the employer had infringed such a right.**
>
> **(2)It is immaterial for the purposes of subsection (1)(e) or (f)—**
>
> **(a)whether or not the worker has the right, or**
>
> **(b)whether or not the right has been infringed,**
>
> **but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3)It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.**

108. We accept (and in the end it was not disputed) that Mrs Campbell first raised the question of holiday pay in the messages of 11 September 2019. In particular, by her messages timed at 17.03 and 17.20 on 11 September 2019, Mrs Campbell stated her belief that she was entitled to carry over accrued annual leave from the previous year and looked for confirmation from her employer that this was the case. She did not say that Ms Woods has infringed this right. Rather than looking back (at an

infringement) she is looking forward to what her entitlement will be on her return. She does not even say that she anticipates that Ms Woods will not allow her to have the benefit of the carried over holiday.

109. The question of when a statement related to employment rights will amount to an assertion that those rights have been infringed can be a difficult one. The EAT decision in **Spaceman v ISS Mediclean Ltd [2019] ICR 687** concerned an allegation of unfair dismissal contrary to s.104(1)(b) which contains the same form of wording. That judgment makes clear that the statute requires an allegation that there has been a breach, rather than that there may be one in future.

110. In the circumstances, we find that s.45A was not engaged by Mrs Campbell's actions and this claim must therefore fail.

111. For completeness, we also accept Mr Flood's argument that, even if s.45A was engaged, there is no causal link between Mrs Campbell's messages and the detriments alleged.

112. The two detriments that were alleged to flow from Mrs Campbell's allegation of an infringement (as set out in the List of Issues) were, firstly the Respondent informing her she would have to work on Saturdays and, secondly, the respondent informing her she would have to work from a different premises. As will be clear from our findings of fact set out above, both these matters had been raised by Ms Woods many weeks previously, in July. The 'different premises' issue was not revisited in the September exchange (as Ms Woods had decided against the venture). Although the planned requirement for Saturday working was raised in the September exchange, we are satisfied that this was merely a reassertion of the stance Ms Woods had already adopted. It was raised at this point because arrangements for Mrs Campbell's return from maternity leave were being discussed. We find that there is no causal connection between the proposal that Mrs Campbell would work on some Saturdays and the statements she had made about her right to carry over holiday pay. That means that this part of the claim fails.

Unfair dismissal contrary to s.104 ERA 1996

113. Section 104 ERA protects employees who have asserted specific statutory employment rights from being dismissed due to those actions. It provides as follows (so far as is relevant to this case):

> **Assertion of statutory right.**
>
> **(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**
>
> > **(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> >
> > **(b)alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2)It is immaterial for the purposes of subsection (1)—**

(a)whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3)It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4)The following are relevant statutory rights for the purposes of this section—

(a)any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b)-(c)…

(d)the rights conferred by the Working Time Regulations 1998…

(e)-(f)…

114. The rights relied on by Mrs Campbell (see List of Issues) are the rights not to have unlawful deductions made from her wages in respect of holiday pay and/or statutory maternity pay, and the rights to annual leave conferred by the Working Time Regulations 1998. These are relevant rights within the sub-sections set out above.

115. In respect of SMP, we are content that there was no assertion of any right before the claimant's resignation; the dispute around the correct calculation of SMP occurred afterwards and so that matter can be discounted from consideration.

116. Although s104 is headed "Assertion of a statutory right" the requirements actually set out in the section mirror those in s.45A, discussed above. Specifically, it is not sufficient to engage this section for an employee to simply claim a right, there must be an allegation that the employer has infringed it. For the reasons set out in paragraphs 108-110 above in relation to the detriment claim, we are content that this claim must also fail.

Correction of Judgment

117. In the oral judgment, given to the parties on 8 December 2021, we set out our conclusions and reasons in respect of the claims under s.45A and s.104 in line with the written reasons set out above. However, in preparing these written reasons, it has come to the attention of the Judge that those conclusions were not recorded in the short written judgment sent to the parties on 13 December 2021. Rule 69 Employment tribunal Rules of Procedure 2013 allows for the correction of such errors.Accompanying these written reasons, therefore, is a corrected version of the short judgment indicating that these claims failed and were dismissed.

Remedy

118. The bundle contained a detailed Schedule of Loss setting out calculations for the amounts claimed in respect of each claim. This was a detailed, helpful and realistic Schedule, which greatly assisted in the determination of remedy. Following discussion, the parties were able to agree figures for financial losses flowing from the discriminatory dismissal. Several other figures had already been agreed in respect of the monetary claims, as set out above.

119. We discussed with the parties the boundaries of the ***Vento*** bands in force at the relevant time and heard submissions as to the appropriate award for injury to feelings. Mr Flood sensibly acknowledged that this was a 'middle band' case, but submitted that the appropriate figure was towards the lower end of that band. Mr Campbell, against being pragmatic, argued for a figure towards the higher end of the middle band.

120. We determined that the appropriate sum for injury to feeling damages was £17,750.00. We felt, in particular, that the following factors were relevant:

113.1 This was a case involving a dismissal.

113.2 We had found a course of discriminatory conduct, starting shortly before the dismissal, but continuing for a number of weeks after it.

113.3 Mrs Campbell was in a vulnerable position, as a new mother due to return from maternity leave.

113.4 There was evidence that Mrs Campbell had been significantly distressed by these events, and that that had had a negative impact on her mental health.

121. We awarded interest on both the financial losses and the injury to feelings losses, on the basis set out in the Judgment. Mr Flood did not seek to suggest that interest should not be awarded, and neither party suggested that it should be awarded at a different rate, or on a different basis.

Employment Judge Dunlop
Date: 21 January 2022

WRITTEN REASONS SENT TO THE PARTIES ON
18 February 2022

FOR EMPLOYMENT TRIBUNALS