EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110611/2021

Held in Glasgow on 21 and 22 March 2022 (Final Hearing); and private deliberation in chambers on 11 May 2022

Employment Judge Ian McPherson

Miss Kirsty Blyth	**Claimant In Person**
BR Fast Food Limited	**Respondents Debarred – ET3 Struck Out under Rule 37**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved Judgment of the Employment Tribunal is that:

(1) The claimant's complaint seeking a redundancy payment from the respondents was withdrawn by the claimant at this Final Hearing, and it is accordingly dismissed by the Tribunal, in terms of **Rule 52 of the Employment Tribunal Rules of Procedure 2013,** following upon that withdrawal.

(2) The Tribunal finds that the claimant is a disabled person in terms of **Section 6 of the Equality Act 2010**, on account of her Post Traumatic Stress Disorder (PTSD), and that she was a disabled person at all material times during her employment with the respondents, and that the respondents were aware of her disability.

(3) Further, the Tribunal finds that the claimant's employment with the respondents ended on 3 July 2021, and that she had been reinstated, after an earlier dismissal on 27 November 2020, without any break in continuity of her employment from 24 April 2019, and with back payment of her

outstanding wages, further to settlement of an earlier Tribunal claim brought by her against the respondents, and that claim was withdrawn and dismissed by the Tribunal in a **Rule 52** Judgment dated 8 February 2021 in case number **4100231/2021**.

(4) The discrimination heads of complaint raised by the claimant, relating to alleged direct discrimination and victimisation in February and November 2020, are time-barred, and, as such, those heads of complaint are not allowed to proceed, on the basis that it is not just and equitable to allow them to proceed, and the Tribunal refuses to grant the claimant an extension of time in terms of **Section 123 of the Equality Act 2010**. The other discrimination heads of complaint are not time-barred, and the Tribunal allows them to be considered on their merits.

(5) The Tribunal finds that the respondents unlawfully discriminated against the claimant, on the grounds of her disability, contrary to **Section 15 of the Equality Act 2010,** by treating her unfavourably because of something arising as a consequence of her disability, namely refusing to allow her to return to work after maternity leave on the basis of 16 hours per week, and also finds that that refusal constituted a failure by the respondents to make reasonable adjustments for the claimant's disability, contrary to **Sections 20 and 21 of the Equality Act 2010**.

(6) Further, the Tribunal finds that the respondents unlawfully discriminated against the claimant, on grounds of pregnancy and maternity, contrary to **Section 18 of the Equality Act 2010**, during the protected period, by failing to allow her to return to work after maternity leave on the basis of 16 hours per week.

(7) The Tribunal also finds that the respondents victimised the claimant, contrary to **Section 27 of the Equality Act 2010**, by subjecting her to a detriment by failing to allow her to return to work after maternity leave on the basis of 16 hours per week, because she had done a protected act, on 15 January 2021, namely the bringing of proceedings under that Act in her earlier Tribunal claim against the respondents, in case number **4100231/2021**, and on 20 June

2021 she had submitted a formal grievance to Matthew Campbell, director of the respondents, making allegations that the respondents had contravened legislation, which grievance was ignored, leading the claimant to bring the present claim against the respondents, presented on 1 August 2021, after ACAS early conciliation between 2 and 28 July 2021.

(8) In respect of the respondents' discrimination and victimisation against the claimant, the Tribunal awards the claimant compensation, in terms of **Section 124 of the Equality Act 2010**, as follows:

(a) In respect of financial loss arising from termination of her employment with the respondents, the Tribunal awards the claimant the sum of **Eight thousand, nine hundred and forty-six pounds (£8,946),** plus interest of **Three hundred and thirteen pounds, seventy-two pence (£313.72),** calculated in accordance with the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**; and

(b) In respect of injury to the claimant's feelings, the Tribunal awards the claimant the further sum of **Six thousand, two hundred and eighty-five pounds (£6,285),** plus interest of **Four hundred and forty pounds, eighty-one pence (£440.81),** calculated as previously mentioned.

(9) The Tribunal further finds that the respondents failed to pay the claimant for annual leave accrued but untaken during her employment with the respondents and, that being an unlawful deduction of wages contrary to **Section 13 of the Employment Rights Act 1996**, and / or a breach of **Regulation 30 of the Working Time Regulations 1998**, the respondents are ordered to pay the claimant the further sum of **One thousand, four hundred and seventy one pounds, twenty three pence (£1,471.23).**

(10) Further, having allowed the claimant's application, made at this Final Hearing, to be allowed to amend her ET1 claim form to include a further head of claim, in respect of wages unpaid and outstanding to the claimant, as at the effective date of termination of her employment with the respondents, on 3 July 2021, being an alleged shortfall of £2.56 per week, the Tribunal finds that the claimant has not shown that she suffered an unlawful deduction from wages in that regard, contrary to **Section 13 of the Employment Rights Act 1996**, and so that part of her claim is not well-founded, and it is dismissed by the Tribunal.

(11) Having allowed the claimant's application, made at this Final Hearing, to be allowed to amend her ET1 claim form, to include a further head of claim, in respect of the respondents' failure to provide the claimant with itemised pay statements, contrary to **Section 8 of the Employment Rights Act 1996,** the Tribunal, in terms of its powers under **Sections 11 and 12 of the Employment Rights Act 1996**, makes a declaration to that effect, but there is no further monetary award made, as the Tribunal has already ordered the respondents to pay to her the total amount of unlawful deduction of wages, including unpaid holiday pay.

(12) The claimant was dismissed in breach of contract in respect of notice, and the respondents are ordered to pay to her the sum of **Two hundred and eighty-four pounds (£284.00)**, being two weeks' gross pay, being the minimum statutory period of notice due to her in terms of **Section 86 of the Employment Rights Act 1996.**

(13) Further, having allowed the claimant's application, made at this Final Hearing, to be allowed to amend her ET1 claim form, to include a further head of claim, in terms of **Section 38 of the Employment Act 2002,** the Tribunal also awards the claimant a further sum of **Five hundred and sixty eight pounds (£568.00)**, and the respondents are ordered to pay to her that further sum, being four weeks' gross pay, in light of the fact that when these Tribunal proceedings began, the respondents were in breach of their statutory duty as an employer to provide to the claimant a written statement of employment

particulars, in terms of **Section 1 of the Employment Rights Act 1996**, and there being no exceptional circumstances known to the Tribunal which would make such an award unjust or inequitable.

(14) The Tribunal reserves, for determination by the Judge, at a later date, and in a further Judgment to follow, whether or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Rights Act 1996,** and allows the respondents a period of **no more than 14 days from date of issue of this Judgment** to make any written representations to the Tribunal, which failing the Tribunal will make a reserved decision without any further delay, and without the need for any attended Hearing, unless the respondents request to be heard.

REASONS

Introduction

1. This case called before me, as an Employment Judge sitting alone, on Monday 21 March 2022, for a two-day Final Hearing, for its full disposal, including remedy if appropriate, further to amended Notice of Final Hearing in person issued by the Tribunal to both parties under cover of a letter from the Tribunal dated 22 February 2022.

Claim and Response

2. Following ACAS Early Conciliation between 2 and 28 July 2021, the claimant, acting on her own behalf, presented her ET1 claim form against the respondents, received at the Glasgow ET on 1 August 2021. She brought her claim against BR Manpower / BR Fast Food complaining that she had been discriminated against on the grounds of disability, and pregnancy or maternity, claiming a redundancy payment, and also claiming that she was owed notice pay, and holiday pay.

3. In her ET1 claim form, the claimant indicated there was a continuing employment relationship, and, at section 8.2 of her ET1 claim form, she set forth the background and details of her claim, as follows (sic) :

"I was on maternity leave and meant to return on the 03/07/2021, i emailed my employer for my flexible working & to return to my previous role of 16 hours & no set days (rota is done weekly always said what days You could & couldn't do), i was told they dont work round (personal issues/reasons) i work 16 hours due to my mental health & this employer knows this as i was hired and couldn't work a wednesday due to counciling. This was still a moan & groan and was moaned at for even going there. I have Ptsd so it is needed. I explained i could only work the days my partner is off due to child care, so my days would change each week, i didnt think this was an issue as this was what i was on previously. So they're refusing to work around mY mental health & my child. This employer also sacked me during my maternity leave & went as far as launching a tribunal case, then when he seen it was accepted offered my job back & what i was owed. I cancelled the case as this is what i wanted. Now They have found something else for me not to return, i launched a formal grieveance which has been ignored, i still emailed and have been ignored, now they have ignored acas again, im

Now a month down the line in limbo and left without money or a job, my mental health has gotten worse, i cannot support my daughter, and cannot pay my bills im constantly in negative loosing my earnings, i was excited to go back even though the owner threatened me and i was also flung out the shop away back when they sacked me with my 9 week old daughter at the time, i am honestly exhausted and appalled with my treatment that i have cried because i never once took a holiday when i worked for them, always made myself available always swapped to suit someone else and this is how im treated after having my child"

4. The claimant further indicated that, in the event her claim was successful, she was seeking an award of compensation from the respondents. At section 9.2 of her ET1 claim form, she stated that, as regards the compensation or remedy she was seeking, as follows (sic):

"I would like my two years Holiday pay / £2794.04, my holidays are worked on my hours (part time) i used the gov calculator

I would like my two week notice period as i have worked for them for two years - £285.12

I would my two weeks wages - £285.12 as its a weeks wage for every year worked.

Also i would like compensated for the lost earnings.

I just would like what im owed and help as im honestly spiraling"

5. On 3 August 2021, her ET1 claim form was accepted by the Tribunal, and a copy served on the respondents, requiring them to lodge an ET3 response form by 31 August 2021 at latest. Parties were advised that there would be a telephone conference call Case Management Preliminary Hearing held on 28 September 2021.

6. Thereafter, on 30 August 2021, Mr Matthew Campbell, a director of the respondents, lodged an ET3 response on their behalf, in the name of ***"BR Fast Foods"***, defending the claim. While a copy of the ET3 was not included in the claimant's Bundle used at this Final Hearing, a copy was available to the Judge, and copied for the claimant, in the Tribunal's case papers.

7. Stating that the respondents employed 21 people, the ET3 response admitted that the claimant's hours of work were correct, as were her earnings, as specified in the ET1 claim form, being 16 hours per week, and £142 per week normal take home pay. However, it did not confirm a start or end date of employment, but it did state that her employment was not continuing, notwithstanding Mr Campbell's narrative that "***Kirsty position is still available."***

8. Mr Campbell's ET3 response set forth the respondents' position at section 6.1 of that ET3 response, as follows (sic):

"After reviewing Kirsty allegations I feel it?s appropriate to provide some additional clarity, back in August 2020 Kirsty?s previous employer went into liquidation. I then was offered the opportunity to take over the running of the premises that they operated from, I made the moral decision that I would employ the current work force including Kirsty who was on maternity leave at the time. As you will be aware there was no legal responsibility for me to employ the staff including Kirsty, it was difficult time to open a new business during a pandemic when the hospitality industry was struggling. I can see from Kirsty?s statement that she has highlighted issues in relation to her relationship with her previous employer, particularly how she was treated in relation to her mental health. In terms of how Kirsty was treated whilst working there, unfortunately I can?t comment on these allegations or am I liable for them.

I then heard from Kirsty on 18/01/2021 (Email) Kirsty informed that she didn?t request to leave and in fact informed she me was informed she was sacked. I informed Kirsty on the 02/02/2021 (email) that after speaking to staff who where present at the time there was some discrepancies with her version of events but as I didn?t was to cause her anymore stress I would reinstate her and backdate her maternity pay to the 29/11/2020. I then arranged for Kirsty to received a bank transfer payment of £1,255.70 to cover her backdated maternity pay. I then continued to pay Kirsty maternity pay.

Then on then 07/03/2021 Kirsty contacted me to inform me that she wished to extend her maternity for an additional 13 weeks which would be unpaid, and on her return we need to work the staff rota around her partners employment hours and the change on a weekly basis. I Informed Kirsty that it wasn?t possible to work the rota around her partners work on weekly basis, as I need to take other staff in to

consideration. Kirsty maternity period and pay was due to end on the 16/04/2021 then the additional 13 week unpaid period would begin, I paid Kirsty an additional 4 weeks maternity up until the 22/05/2021 because I was concerned how she would survive with no pay.

Kirsty position is still available, I have no wish to make Kirsty redundant. Kirsty has requested by email on two occasions I make her redundant."

9. On 3 September 2021, that response was accepted by the Tribunal, and a copy sent to the claimant, and to ACAS. On 6 September 2021, following initial consideration of the claim and response by Employment Judge Robert Gall, he ordered that the claim would proceed to the listed telephone conference call Case Management Preliminary Hearing on 28 September 2021.

10. On that date, the case called before Employment Judge Sandy Kemp. His written Note and Orders were issued to parties on 6 October 2021. He made various case management orders, and in particular, he ordered that the case should be listed for Final Hearing before a full Tribunal, to be heard remotely by Cloud Video Platform, for a period of 3 days, on a date to be afterwards fixed.

11. The claimant was sent various orders for compliance, within four weeks, and the respondents were allowed a period of two weeks thereafter, to write to the claimant, with copy to the Tribunal, confirming any dispute in relation to the claimant's schedule of loss, and whether or not the respondents accepted the claimant is a disabled person for the purposes of the Equality Act 2010, and whether or not it argued that, if so, the respondents did not have actual or imputed knowledge of that at the material time.

12. On 27 October 2021, the case was listed by the Tribunal for a 3-day CVP Final Hearing on 13, 14 and 15 December 2021. This followed a series of emails sent by the claimant to the Glasgow ET, with copy to Mr Campbell

for the respondents, on 26 October 2021, enclosing her response to Judge Kemp's orders, being her schedule of loss, disability impact statement and medical records / reports.

13. While the claimant had replied timeously to Judge Kemp's orders, the respondents' representative, Mr Campbell, did not do so, by 9 November 2021. In these circumstances, a Legal Officer at the Tribunal, on 11 November 2021, gave the respondents' representative a further seven days to reply, and comment upon the claimant's documentation produced in compliance with Judge Kemp's orders.

Strike Out of the Response

14. On 23 November 2021, on the Judge's instructions, the Tribunal wrote to the respondents' representative, Mr Campbell, noting that he had still not complied with Judge Kemp's orders, despite an extension of time to do so and, in the circumstances, the Judge intended to strike out the response, for failure to comply with an Order of the Tribunal, unless, within the following seven days, the respondents complied, and explained the failure to comply with the extension previously granted by the Legal Officer on 11 November 2021.

15. The respondents were issued with a Strike Out warning, and advised that if they disagreed, they should set out their reasons for disagreeing in writing, by no later than 4pm on 13 November 2021, and tell the Tribunal by that date that they wanted the Employment Judge to fix a Hearing but, if nothing was heard from them in the timescale set out, then the Employment Judge would decide whether to strike out their response, or part of it as the case may be, on the basis of the information otherwise available.

16. By email to the Glasgow Tribunal office sent on 26 November 2021, Mr Campbell for the respondents advised that he had "***significant personal issues"*** which had resulted in him taking sometime away from work, but he would submit his response to the Tribunal by the end of business on Monday 29 November 2021, which he duly did, and by email of that date,

sent to the Glasgow ET (but not copied to the claimant), he attached what he referred to as "***evidence in relation to the case"***.

17. This evidence comprised an email exchange between the claimant and Mr Campbell on 7 and 29 March 2021; an email between Anne Marie Hannah, payroll manager, and the claimant on 11 August 2021; BR Manpower Limited employee pay details for the claimant for 2020/21; Companies House online printout for BR Fast Food Limited (company number SC655793) showing Matthew Campbell as a director (appointed 26 February 2020); Companies House online printout for Black Rooster Peri Peri Coatbridge Limited (company number SC587615), showing the company in compulsory liquidation from 21 January 2020; and employee personal details for the claimant, with BR Fast Food Limited showing a start date of 3 April 2021.

18. Following the respondents' representative's failure to respond to the Strike Out warning, the case file was referred to the Judge. On 6 December 2021, sitting in chambers, a **Rule 37** Strike Out Judgment was issued on the grounds of the respondents' non-compliance with an order of the Tribunal in terms of **Rule 37 (1)(c)**. The respondents had failed to comply with Order no. 4, granted by Employment Judge Kemp, in his Preliminary Hearing Note dated 28 September 2021, and issued 6 October 2021, and while he had emailed "***evidence in relation to the case"***, to the Glasgow ET on 29 November 2021, Mr Campbell simply attached a PDF document, with 11 pages of assorted documents.

19. Mr Campbell did not address the three discreet parts of Judge Kemp's order, and he did not copy his email to the claimant as required by **Rule 92**. The respondents having failed to give an acceptable reason why such Strike Out Judgment should not be made or to request a Hearing, the Judge struck out the response, and it was stated, at paragraph 7 of the Reasons to that Judgment, that the respondents would only be entitled to participate in the three-day CVP Final Hearing on 13/15 December 2021 to the extent permitted by the Judge presiding at that Hearing.

Postponement of Final Hearing and relisting

20. On 10 December 2021, Mr Campbell emailed the Glasgow Employment Tribunal stating that his partner had been diagnosed with COVID and had become really unwell, and this had resulted in him having to self-isolate and take on the responsibility of looking after his child who could not attend school, so he would be unable to attend the three-day Hearing starting on Monday, 13 December 2021. He asked if the Hearing could be rescheduled, or would carry forward in his absence.

21. Following consideration by Employment Judge Susan Walker, the Tribunal wrote to both parties, on 13 December 2021, advising that, on the application of the respondents, a postponement had been granted, on the grounds that Mr Campbell must self-isolate due to COVID-19 being present in his household, and the Hearing arranged for 13/15 December 2021 was cancelled. Date listing stencils were issued for completion and return by 23 December 2021.

22. The claimant returned her date listing stencil timeously, but the respondents' representative, Mr Campbell, did not do so. On 21 February 2022, following an email from the claimant to the Glasgow ET, enquiring about a date for the relisted Final Hearing, the case file was referred to Employment Judge Ian McPherson who decided, having considered the case file, and the change in circumstances since the previous listing for a three day Final Hearing to be held remotely by CVP, that the Final Hearing should be two days, and in person, at the Glasgow Tribunal Centre, because in person Hearings are the default for Final Hearings, in terms of the ET Presidential Guidance and Roadmap March 2021,and the length of the Final Hearing was reduced, because the Judge had struck out the respondents' ET3 response on 6 December 2021 by the **Rule 37** Judgment issued by him on that date.

23. Detailed case management orders for the Final Hearing to be relisted were issued by Judge McPherson. The respondents were advised that they could only participate in the Final Hearing to the extent permitted by

the Judge at the Final Hearing and, as they had failed to comply with earlier orders of the Tribunal, which was the Judge's reason for striking out their response, if they sought to participate in the relisted Final Hearing, then they should intimate that fact to the Tribunal, with copy to the claimant, as soon as possible, and certainly within the following fourteen days at latest.

24. The respondents were advised that the basis on which they might seek to participate in the Final Hearing must be detailed in any such application, so that it could be considered by the Judge before the start of the Final Hearing. They were further advised that, where a response has been struck out, the effect is as if no response has been presented, and as such, the ET3 response presented on 30 August 2021 by Matthew Campbell for the respondents, and copied to the claimant on 3 September 2021, was of no effect, the case now proceeding as undefended, and the Employment Judge would consider the case against the respondents on the available material, as per the ET1 claim form presented on 1 August 2021, and served on the respondents on 3 August 2021.

25. On 21 February 2022, Notice of Final Hearing by CVP for three days, on 21-23 March 2022, was issued by the Tribunal to both parties, but in error, and an amended Notice of Final Hearing in person for two days, being 21 and 22 March 2022, was issued to both parties on 22 February 2022, along with an explanation and apology from the Tribunal for the clerk's error in listing.

26. On 22 February 2022, Mr Campbell, for the respondents, emailed the Glasgow Employment Tribunal, but without copy to the claimant, as per **Rule 92**, highlighting that he had previously advised the Tribunal that he was not available on the relisted dates.

27. Following referral to the Judge, on 23 February 2022, Mr Campbell's request for postponement of the listed Final Hearing was refused. The Judge referred to the previous Strike Out Judgment, and the Tribunal's letter of 21 February 2022, and advised him that he had until no later than

4pm, on Monday 7 March 2022, being expiry of the 14-day period granted, to intimate to the Tribunal if the respondents sought to participate in this Final Hearing.

28. Mr Campbell was advised that accordingly the case would call before Judge McPherson at the Glasgow ET, on 21-22 March 2022, unless the claim was withdrawn by the claimant, or parties achieved a settlement via ACAS in advance of that date.

29. Thereafter, on 28 February 2022, the claimant, in compliance with the case management orders made on 21 February 2022, emailed the Glasgow ET, with copy to Mr Campbell for the respondents, enclosing documents detailing what she sought by way of remedy, compensation, details of benefits received, summary of jobs applied for, and details of how she had tried to minimise her financial loss.

30. By email sent to both parties, on 2 March 2022, the claimant's correspondence of 28 February 2022 was acknowledged, and placed on the case file, and Mr Campbell, for the respondents, reminded that he had until 7 March 2022 to reply to the Tribunal's letter of 21 February 2022, if the respondents sought to participate in this Final Hearing, and he also had seven days to reply to the claimant's schedule of loss, as per Order (4) in that previous Employment Tribunal letter of 21 February 2022.

31. No further correspondence was received from the respondents' representative, or anybody else, on behalf of the respondents, in advance of the start of this Final Hearing on Monday, 21 March 2022.

Final Hearing before this Tribunal

32. In the leadup to the start of this Final Hearing, the claimant emailed the Tribunal, on 2 March 2022, about productions for inclusion in the Joint Bundle to be used at the Final Hearing, and to advise that she had a video as part of her evidence, but she did not have a laptop nor was she able to afford one to show this in the Tribunal, and seeking guidance from the Tribunal clerk.

33. Following referral to the Judge, directions were issued by the Tribunal to both the claimant, and Mr Campbell for the respondents, on 7 March 2022, and further directions on 11 March 2022, after the claimant had emailed the Tribunal, on 7 March, about her video evidence. The claimant emailed further documents to the Glasgow ET (with copy to Mr Campbell for the respondents) on 11 March 2022.

34. When the case called before me, as an Employment Judge sitting alone, on the morning of Monday, 21 March 2022, the claimant was in attendance, acting on her own behalf, and accompanied by her father, Mr John Blyth, for moral support, and also as a witness for the claimant.

35. After discussion with the claimant, and clarification of the issues before the Tribunal, together with an explanation of how the Final Hearing would be conducted, given the claimant is an unrepresented, party litigant, and the respondents were not participating, I heard evidence on affirmation from Mr Blyth, and then from the claimant herself, her evidence continuing over to day two, on Tuesday, 22 March 2022. The claimant advised me that she could not afford a lawyer to represent her at the Tribunal, despite attempts to get a legal aid lawyer, so she was representing herself. I noted her position, referred her to the Tribunal's overriding objective (under **Rule 2**) to deal with the case fairly and justly, and sought to reassure her that the Tribunal was well used to dealing with unrepresented, party litigants.

36. The respondents were not in attendance, nor represented at this Final Hearing. In terms of my Strike Out Judgment of 6 December 2021, they were debarred, and they had made no application to be allowed to participate to any extent in this listed Final Hearing. Nobody appeared on their behalf to make any representations to the Tribunal.

37. The claimant advised me, at the start of proceedings, that she had had no contact from anybody at the respondents, directly or via ACAS, and that she had never had any contract of employment, or payslips, issued in the name of BR Fast Food Ltd, which entity she understood to be her

former employer, where she had worked in the same Black Rooster restaurant in Coatbridge for over two years.

38. The Final Hearing proceeded as undefended for these reasons although, in the course of the Final Hearing, when taking evidence from the claimant, I did put to her the terms of the ET3 response lodged by Mr Campbell for the respondents on 30 August 2021, which document she had not included in the Bundle provided for use at this Final Hearing, as also refer her to the documents enclosed by Mr Campbell, on 29 November 2021, with his "***evidence pack***." As there was no ET3 response in her Bundle, I handed her the spare brown folder of the Tribunal's case papers containing the ET3, so that she had available to her the same papers as I had at this Hearing.

39. The claimant produced for the Tribunal a large Bundle of 200 pages, but without an index, and with documents produced, but not necessarily in any chronological order, labelled as pages 1 to 200 inclusive. From the formatting of some documents, produced by screenshot grabs from her phone, it was a difficult Bundle to navigate.

40. To this main Bundle, there was a further small bundle of another 18 pages, labelled as pages 201 to 218 inclusive. In the course of the Final Hearing, I allowed the claimant to produce some further documents that I felt were relevant and necessary for a fair hearing, and these too were added to the documents before the Tribunal.

41. These additional documents included copy documents provided by the Tribunal clerk, relating to two earlier Tribunal claims brought by the claimant, as spoken of by her in her oral evidence to the Tribunal, and emails from the claimant to the Tribunal enclosing missing documents / incomplete documents from the Bundle, and bank statements showing payments received from the respondents.

Findings in Fact

42. I have not sought to set out every detail of evidence which I heard nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings, relevant to the issues before me for judicial determination, based on the balance of probability, are as set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal. The Tribunal has found the following essential facts established:

(1) The claimant, aged 26 at the date of this Final Hearing, was formerly employed by the respondents, BR Fast Food Limited, or their predecessors in business, as a waitress at the Black Rooster Peri Peri restaurant at 244 Whifflet Street, Coatbridge, ML5 4RX.

(2) In her evidence to the Tribunal, she described it as an unlicensed restaurant, a takeaway, or sit in, with her role as a front of house waitress, in a restaurant with up to 40 covers, with 9 tables : 3 x 2 persons ; 6 x 4, and a long family table for 10.

(3) The manager was Nicky (surname unknown), with Andrew (surname unknown) as Area manager for Coatbridge & Parkhead, and previously head chef at Coatbridge. She was one of maybe 10 + waitresses. She described staff turnover as high – "***it was like Sauchiehall Street, new people in every day***".

(4) On the information available to the Tribunal, from Companies House website, the respondents, **BR Fast Food Limited**, are an active private limited company, company number SC655793, having their registered office at 21 West Nile Street, Glasgow, G1 2PS, having been incorporated on 26 February 2020, and being a takeaway food shop and restaurant. According to their ET3 response, they employ 21 people. In her

evidence to the Tribunal, the claimant disputed that figure, and stated that it was maybe 30+.

(5) The director of the respondents is a Mr Matthew Campbell. He was so appointed on 26 February 2020. He lodged the respondents' ET3 response defending this claim on 30 August 2021, and he appeared, representing the respondents, at a telephone conference call Case Management Preliminary Hearing held on 28 September 2021 before Employment Judge Sandy Kemp, whose written Note and Orders dated 28 September 2021 were issued to both parties by the Tribunal on 6 October 2021.

(6) On the information available to the Tribunal, from Companies House website, Mr Campbell is also a director of **BR Manpower Limited**, company number SC 667025, having their registered office at 21 West Nile Street, Glasgow, G1 2PS, the same address as the respondents' registered office, and he has been a director in that company since 10 July 2020.

(7) According to the claimant's evidence at this Final Hearing, her employment at the Black Rooster Peri Peri restaurant in Coatbridge started on 24 April 2019, when she was employed by Jodie (surname unknown), the partner of Kevin Bell, for 16 hours per week, variable shifts, at NMW rate. She referred to being paid cash in hand, until the March 2020 lockdown. She was reinstated back onto the respondents' payroll after her January 2021 claim to the Employment Tribunal.

(8) She regarded her employment with the respondents as having ended on 3 July 2021, being what should have been her return date from maternity leave, and she stated that she did not resign, nor did the respondents terminate her employment by any formal means.

(9) She gave evidence to this Tribunal that she never received any P45 certificate from the respondents giving a leaving date, nor did she receive any payments after the payment of £125.57 paid into her back account by BR Fast Food Ltd on 24 May 2021. Further, she stated, she had received no P60 tax certificate for the tax year 2020/21, nor had she received any payslips from the respondents.

(10) On the information available to the Tribunal, the claimant's employer, at that stage, may have been **Black Rooster Peri Peri Coatbridge Limited**, a private limited company (SC587615), but at no stage in her employment at that Black Rooster restaurant did the claimant ever receive a written contract of employment, or written particulars of employment, as per **Section 1 of the Employment Rights Act 1996**, from the respondents, nor any of its predecessors in running that business.

(11) Documents before the Tribunal, in the ET1 claim form, and the ET3 response, do not dispute that the claimant's employer was BR Fast Food Limited but, on the information available to the Tribunal, it appears that whoever first employed the claimant, on 24 April 2019, as a waitress, her employment in that restaurant business, continued, until 3 July 2021, notwithstanding any transfer of the business undertaking in terms of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE). In her evidence to the Tribunal, the claimant stated that she was never told of any TUPE transfer at the time, and that she had worked, in the same place, doing the same job, for 2 years.

(12) While the business may have been bought over, around August 2020, by Matthew Campbell, the claimant advised the Tribunal that she had never seen him before, she has never met him, and while, in correspondence he had stated he did not want to

cause her stress, she stated that he has caused her stress by not paying her what is due to her. Further, she added, the Black Rooster continued in operation, and both Kevin Bell and Michael Kennedy were still coming into the shop.

(13) In her evidence to this Tribunal, the claimant recalled signing a starters sheet, in April 2019, in giving personal information, emergency contact, allergies etc, to the restaurant manager, Nicky, including details of the claimant's existing mental health and medication.

(14) As part of the respondents' "***evidence pack"***, submitted to the Glasgow Employment Tribunal, by email, on 29 November 2021, by Matthew Campbell of the respondents, there was enclosed a two page sheet entitled BR Manpower Limited employee details for the claimant, printed on 23 September 2021, showing total pay of £3266.79, for payments £125.56 per week from weeks 27 to 34 (9 October 2020 to 27 November 2020), £1255.70 in week 44 (5 February 2021), £125.57 per week for weeks 45 to 51, and £127.62 for week 52 (9 April 2021).

(15) The claimant never received any payments from BR Manpower Limited, but she did receive payments in these sums from the respondents, BR Fast Food Limited, as per copy of her bank statements produced to the Tribunal, at this Final Hearing, as additional documents received by the Tribunal from the claimant during the Final Hearing.

(16) These bank statements show payments from BR Fast Food Limited into the claimant's classic bank account, being a payment of £1,255.70 on 8 February 2021, and subsequent weekly payments of £125.57 on 15 and 22 February 2021, 3, 9, 15, 23 and 29 March 2021, 6, 14, 19 and 26 April 2021, and 4, 10 and 24 May 2021, totalling £3,013.68 over 15 payments.

(17) While the claimant produced copy payslips from **Fusion Payroll Limited**, for weeks 22 to 26 (4 September 2020 to 2 October 2020) showing net payment of £125.56 per week, described as "***furlough pay"***, the claimant did not understand that company to be her employer, but the payroll provider for her employer, BR Fast Food Limited, and the payments to be for maternity pay, and not furlough pay.

(18) In her evidence to the Tribunal, the claimant stated that she got paid £123.00 cash, and there was therefore a shortfall of £2.56 per week not paid to her which, when she queried it, she says she was advised it was a deduction for national insurance.

(19) In her evidence to the Tribunal, the claimant stated that while there was reference to furlough, she received no paperwork from the respondents, and she signed no furlough agreement. If she was furloughed, she understood she was the only employee furloughed, as the others were still working during lockdown, and were there when she went in weekly to collect her money.

(20) She stated that she went on maternity leave from 5 July 2020. She attended weekly to pick up her wages in cash, in a white envelope, and while she asked for wage slips, she stated that she never got them. HMRC told her to write to her employer about getting confirmation of her pay. She entered into correspondence with the respondents.

(21) She referred to going to HMRC and the Benefits Agency, and how she launched a Tribunal claim after she did not receive statutory maternity pay from the respondents. This (first) Tribunal claim is referred to later in these findings. It was settled by Matthew Campbell paying the claimant.

(22) In section 15 of her ET1 claim form, in the present case, the claimant had stated : " ***I would just like to say I have proof of***

him refusing my maternity pay and that I took him to a Tribunal before. ***Just as a new mum I would just like what I am owed and to move on I would have loved to be back but I get the feeling that I am not wanted and its really upset me. I never got my maternity leave due to this employer worrying if I will be sacked again or be back and my worse*** [sic] ***fears have happened."***

(23) On 26 October 2021, when replying to Judge Kemp's orders, the claimant provided the Tribunal, and Mr Campbell for the respondents, with some copy documents relating to a NEST pension. This documentation was reproduced to the Tribunal at pages 179 to 183 of the Bundle used at the Final Hearing.

(24) It referred to Fusion Payroll Ltd having enrolled her into NEST with effect from 3 June 2019, but no further contributions after 11 June 2019. She raised it with Michael Campbell who stated he would take it up with his accountant, but the matter was never resolved, and the claimant was not added back into any pension scheme or asked about it again.

(25) On the information available to the Tribunal, from Companies House website, Fusion Payroll Limited, company number SC 614573, was incorporated on 23 November 2018, and dissolved on 6 April 2021. It is described as a temporary employment agency, and its directors included Kevin Wallace Bell and Michael Hugh Kennedy, with the registered office at 21 West Nile Street, Glasgow, G1 2PS, the same address as the respondents' registered office.

(26) Also included in the respondent's "***evidence pack***" of 29 November 2021, was a BR Fast Food Limited personnel details form for the claimant, showing her as a new starter with that company as from 3 April 2021, and showing her as to be paid

weekly, by BACS. Her normal hours were shown as "***others***," but not specified, and nor was her normal pay rate specified.

(27) In the respondents' ET3 response lodged by Matthew Campbell, on 30 August 2021, he accepted the claimant's hours as 16 hours per week, with her normal take home pay of £142 per week. He did not confirm a start or end date of employment, but he did state that her employment was not continuing, notwithstanding his narrative that "***Kirsty position is still available."***

(28) In her evidence to the Tribunal, the claimant stated that while she did 16 hours per week for the respondents, it varied from week to week, with no set days, but she did not work Wednesdays as that was her day for mental health counselling.

(29) In his email to the Tribunal, on 15 September 2021, at 16:11, copied to the claimant, Matthew Campbell stated that:

"Thank you for highlighting the error, this is obviously an admin error as I clearly state your job is open for you to return.

In regards to you highlighting that Kevin and Michael owning Black Rooster that is in fact correct, Black Rooster is now a Franchise Business model across the whole UK, they both own the rights to the brand. The stores are run by individual independent franchisees under their own legal companies, you will see them commenting on the business as they own the overall brand under Black Rooster Franchising Ltd.

Kirsty, as I said on several occasions I'm not here to cause you stress, can I ask what you wany from the situation and we can bring this matter to a conclusion."

(30) In the claimant's email of 21 September 2021, at 13:48, sent to the Tribunal, and copied to Mr Campbell, a part of which was produced to the Tribunal at page 117 of the Bundle used at the Final Hearing, she stated that:

" For attention of tribunal Judge & matthew,

I knew nothing of liquidation, wasn't made aware of a new company operating, the first I knew of this was the letter I recieved [sic] *that matthew took over operational running this was November 2020, states he could no longer afford my maternity pay, thats when nicky & andrew told me I was sacked even stated my p45 was with it & it wasn't. The letter is there what I was met with when I arrived to pick up my weekly maternity pay, and chucked out with my 9 week old daughter in my arms, I didn't know who matthew was and was never informed what happened.*

…so I launched a formal grievance about this & was ignored, I then contacted acas again they were also ignored, so it was then launched with the Tribunal again then 12 August 2021 I had anne contact me regarding days to start back ? Quoting wrong dates a full month after I was due back ? A month after being told they couldn't cater for my circumstances and after its been accepted by the tribunal it can now be worked ? I feel this is so I stop the tribunal, I added in how I was treated to show that on more than one occasion I haven't been treated the way a employee is meant to be treated and justifys why I am scared to even go back as I feel something would happen to let me go.

As stated I have safe guarded myself, my mental health & continued with the case as something just doesn't add up.… I have PTSD, post traumatic stress disorder from a previous abusive relationship and all the staff know about this…..

I don't want another pregnant women or mum in my position, I haven't been able to enjoy my maternity leave due to stress, especially as I was 'sacked' before Christmas, was my daughters first and was tainted."

(31) In compliance with case management orders made by Employment Judge Kemp, on 28 September 2021, the claimant was ordered to provide a disability impact statement setting out the impact of her alleged disability (PTSD) on her ability to carry out day to day activities; and produce any relevant medical records in relation to her alleged disability on which she wished to found, and any medical report on which she wished to found.

(32) The claimant duly did so, on 26 October 2020, copying her documents to both the Glasgow ET and Mr Campbell for the respondents, a copy of which was produced to the Tribunal at pages 149 and 150 of the Bundle used at the Final Hearing.

(33) In her disability impact statement, which she adopted as part of her oral evidence at this Final Hearing, stating that she had prepared it herself, but with some help from Hamilton CAB, the claimant referred to her mental health condition, being PTSD, and arising from a previous abusive relationship with mental and physical abuse at the hands of a male ex-partner, where she has recurring nightmares and flashbacks of what he did.

(34) Following criminal proceedings, where the accused male was found not proven and walked free, the claimant was diagnosed with PTSD and received treatment and counselling, that are ongoing. She described her work at the restaurant as ***"my escape from the horrible reality"*** and her employers were informed that she had to attend counselling on a weekly / fortnightly basis. She referred to having "***unresolved trauma***", and living with this possibly for the rest of her life.

(35) In her disability impact statement, as per the cop[y produced at page 150 of the Bundle, the claimant specifically stated that :

" I feel like an inconvenience to employers and that of my employer as I do have issue so however I was hired on this and stuck it out as I needed the income but I also needed to still be doing my best to be out the house, for my recovery and didn't want to let my employer down as they did take me on with my issues however the issues involving staff members and having to explain myself made me far worse but I still did try.

My mental health has gotten worse … My fear of these threats from the owner still replay in my head and that day I was handed that letter and sacked still replays over and over. The embarrassment as it weas done infront or staff members and customers.

It is hard living with this as before I was such happy go lucky person and im a shell of my former self. I just wanted my employer to be proud of me and my family and my mental health team, I just wanted to prove to myself I could get through my issues I feel like im back all those years ago starting out again.

I have applied for other jobs but the fear I could go into another work place and be treated the same way panics me and having to start over, everyone says be kind however no one is really."

(36) In addition to her disability impact statement, the claimant provided the Tribunal, and Mr Campbell for the respondents, with medical reports and records, and evidence of her Personal Independence Payments.

(37) The Community Mental Health Team confirmed that the claimant was attending to engage in a programme of depression and anxiety management, and that she was also

known to the Psychological Therapies Team whom she was engaging with due to experiencing symptoms of PTSD.

(38) In her evidence to the Tribunal, the claimant stated that she is still on various medication, and she has fortnightly telephone calls with her community mental health nurse.

(39) Copy medical records, from July and September 2018, referred to the claimant being the victim of a previous abusive relationship, and she was assessed as suffering from PTSD, and prescribed various medications and psychological input for PTSD. These documents were produced to the Tribunal at pages 151 to 177 of the Bundle used at the Final Hearing.

(40) Further, in her responses to Judge Kemp's orders, in that email of 26 October 2020, a copy of which was produced to the Tribunal at pages 141 to 150 of the Bundle used at the Final Hearing, the claimant set forth her further particulars of her case as follows, at pages 146 to 148:

" <u>Victimisation</u>

I have taken advice from citizens advice and they did say what kevin had done could be victimisation as it was relating to the issues of being sacked while on maternity leave and refusing me my money.

Victimisation was on the grounds of my findings of being entitled to SMP and it was illegal to be sacked or refuse to pay me this my complaints & findings were sent to the main facebook page and then i was contacted by Kevin with threats, abuse and not to go down this route.

I receieved 2 phonecalls in total, the first one with the threatening me, my partner & child and the second telling me to

stop sending messages and swearing at me, this was relating to the advice i had got from citizens advice & hmrc, that what was happening wasn't right and he wasn't happy, so i complained in these messages that its against maternity rules, the law what they had done and was treated badly both by kevin & michael who are said to not operate coatbridge anymore so they should have passed me on to matthew.

The letter stating this was from Matthew with an email at the time the email didn't work, i thought this was a fake email and couldn't get the correct one until January, no discussion through phone or face to face only email.

Injury to Feelings

I would like to submit for injury to feelings.

I propose the middle band of £9,100, as i have been devastated with not working and not bringing an income into my household. I feel worthless and stressed and a complete failure to my daughter not being able to provide. Me and my partner have had strain on our relationship had non stop arguements about bills and this case. Came to the point i was sleeping on the couch and he was upstairs. We have nearly seperated over this and how ive became extremely angry and stressed all the time, i just feel like a complete failure to my daughter & partner and worthless about myself.

Treatment

I feel matthew is infact liable for the treatment i recieved from November 2020 the day i was handed the letter regarding my maternity no longer being paid & i was sacked, Nicky the

manager & Andrew the chef/area manager sacked me, said beth had been sacked as well, this is what happened and i phoned my dad & my partners mum right after this happened distraught was flung out the shop with my 9 week old in my arms (girls always loved me bringing her) so they must have phoned him or kevin/michael as they were kind until i refused to leave to speak to michael about it.

*I wasn't informed who matthew was and was told to contact michael or kevin myself. I emailed the main page, about how its illegal to refuse smp or sack me during maternity (if the reason is relating to my maternity) i then recieved no caller id's with kevin on the other end with abuse and threats, threatened my partner and told my child (a baby to have a sh*** christmas) i was in bits, i emailed again and to recieve another phonecall and swearing (video as proof) explaining what hmrc & the advice i had recieved and point blank refused to listen (he states that they liquatdated so why was kevin on the coatbridge page & contacting me) i also have emails with michael discussing this and refusing to listen to my findings (again why was michael dealing with this if he is no longer involved) this was november 2020. Matthew bought them over August 2020?.*

Also i was told nothing of this buy over or tuppee? I was under the impression kevin & michael were still my employers, the first i knew of matthew was this letter stating my maternity was no longer being paid and contact benefit agencies. I signed nothing nor knew of this.

I then took this to acas who were stonewalled and given my certificate to launch a tribunal, i then recieved Matthews correct email from michael and this matter regarding my maternity pay was resolved and the tribunal case cancelled, however my

treatment was never spoke about and i thought i might have got a meeting or discussion about this.

Now i was due back 04 April 2021 after 39 weeks of maternity leave however i extended this the extra 13 weeks as i wasnt ready to leave my daughter just yet, this accepted however i was told my not set days & 16 hours couldn't worked, as i would need to work when my partner is off and also i have ptsd so 16 hours was & still is the most i could do before i have a breakdown, panic attack (and this was my previous contract) however i still asked for flexibilty to then again be told 'we dont work round personal individual circumstances' so again not willing to help me at all, however while working here they bent over backwards for nicky, amanda, ashleigh, stephanie, i put in for days off well cant call them that as i was never paid for holidays or time off 'we weren't intitled' as kevin said and always ended up working them cause the other girls seemily asked first and i kept emailing to see what would happen and if by luck that matthew would change his mind (hoping he would be understanding) my return date was 03/07/2021 i was ignored & sent a formal grieveance which was ignored and so i launched with acas again they were ignored i was given my certificate and launched the case.

I was ignored so i assumed i had no job and i have been on Universal credit and applying for other jobs. To then recieve an email August 12th a month and bit later to offer me hours? I then sent i was awaiting advice as this was a pending case to recieve a cheeky reply. I then again stated i wouldn't be returning safe guarding myself & rights and was ignored once again.

The treatment i recieved in November proves this hasn't been a one off and then being left a month and trying to change my return dates from original dates when i have sent 5/6 emails containing the correct dates for my return is baffling.

I get the treatment before hand while working there is nothing to do with matthew but the treatment when he bought over the business is and also should have been notified about this and wasn't, i asked employees who i still spoke to within the company who matthew was and they didnt even know who he was. The employee nicky who sacked me on that day is still working for the shop so i would be returning to hostile enviroment and the fear she would find something to 'sack' me again has given me the fear and I was told kevin still came into the shop also so this kickstarted me having panic attacks again about returning but i thought this might have been addressed and never was.

Its stated that events werent the way i described and matthew was told i resigned, i was on maternity leave it was my source of income so i would not have resigned as this was my form of paying my bills and buying stuff for my daughter, it was the way it was written to me no investigation, i was told that the events are different to what i say so again no understanding or even asked my side of things. I would never resign it was my income and so many different stories about that day. We did sort this issue with my maternity pay & job back, so i cancelled the tribunal case, to then not even a month or so later to have something else to not return? Then not have any contact for a month until it is accepted by the tribunal that i can now be offered hours, just confuses me, one minute it can't happen and then when its accepted by the tribunal and hearing set it can be."

(41) In her evidence to the Tribunal, the claimant referred to her working at the Coatbridge restaurant, and to there being a staff WhatsApp group chat, known as "***Coatbridge Non work***". She produced several screenshots from this chat, in the period February to April 2020, at pages 22 to 29 of the Bundle used at the Final Hearing. The claimant was pregnant during the COVID lockdown.

(42) She complained that, in this open staff group chat, she had been questioned about pregnancy / maternity scans and tests that she was having , and that she had had to write (on 28 February 2020, as reproduced at page 27 of the Bundle) that she had had previous miscarriages and that is why she received these early, and that she was put to work when she had already told them she had a scan and she got someone to cover the girl who was covering then backed out, so she was getting told to get into work while she was sitting at her midwife appointment causing her further stress.

(43) Further, in her evidence to the Tribunal, the claimant also spoke to the circumstances, post the Covid lockdown, in March / April 2020, and she produced several screenshots of texts exchanged over that period, as reproduced at pages 31 to 53 of the Bundle used at the Final Hearing, including some with Michael Kennedy about getting paid, and whether or not she should be placed on furlough.

(44) As the Tribunal understood it, from the limited information available, the respondents not having attended the Final Hearing, and they only having provided limited information in their ET3 response, and limited documents in the "***evidence pack***", submitted on 29 November 2021 by Mr Campbell, that evidence pack included the claimant's email of 7 March 2021 to Matthew Campbell, and his reply to her of 29 March 2021,

copies of both of which were included in the claimant's Bundle used at this Final Hearing.

(45) In the claimant's email of 7 March 2021 to Matthew Campbell, she stated as follows:

"Subject: Re: My dismissmal [sic] *and maternity pay*

Hi Matthew,

I am writing to say that I would like to take my full maternity leave, the last 13 weeks are unpaid, then I would return to work after this, I am giving plenty of notice and entitled to extend if thats possible.

I will still be in the same situation 16 hours and can only work on my partners days off which change every week.

Would like your written response for my work coach.

Kirsty"

(46) In his reply of 29 March 2021, Mr Campbell stated as follows:

"Hi Kirsty,

We are happy to support your request for the extension of your maternity leave.

Unfortunately, I can't work your 16 hours per week around your partners shift each week, we need flexibility when developing the weekly rotas.

Thanks,

Matthew"

(47) On 11 August 2021, the claimant received an email from Anne Marie Hannah, payroll manager at Accounting & Taxation

Services, 21 West Nile Street, Glasgow, G1 2PS, copied to Matthew Campbell, in the following terms:

"Subject: BR Fast Foods Limited

Hello Kirsty

I have been asked to contact you regarding starting back to work with BR Fast Foods.

Your maternity leave ended on Friday 16th April, I believe you requested a 3 month extension which has now come to an end.

We would now like to offer you hours of work commencing 16th August, could you please let us know the days you would be available.

Kind regards,

Anne Marie Hannah

Payroll Manager"

(48) The claimant was surprised to receive this email from Ms Hannah which arrived "***out of the blue"***, and which was in error as regards the claimant's maternity leave dates. While it referred to her maternity leave having ended on 16 April 2021, the claimant stated that it had ended on 4 April 2021, which is why she had been seeking an extension from the respondents.

(49) Further to the claimant's email correspondence with Anne Marie Hannah, payroll manager, on 12 August 2021, copy produced to the Tribunal at pages 86 to 88 of the Bundle used at this Final Hearing, the claimant emailed Ms Hannah again, on 23 August 2021, as per the copy email produced to the Tribunal at pages 85 to 88 of the Bundle, in the following terms:

"Hi Anne,

My repisentative [sic] has gotten back to me and under advice from them I am still proceeding with the Tribunal case, as Matthew stated he couldn't cater for my individual personal circumstances before a Tribunal was launched and now saying he can cater after a case has been lodged and accepted is not fair. Its not fair that I have been left a month and a few weeks after my original return date with no income and in limbo where I stood.

I also launched a formal grievance which was ignored about my rights from maternity and disability. I did inform of my choice to take it to a second Tribunal and was ignored.

The first time I was dismissed during maternity and threatened by the owner over the phone, this has never been addressed, I was told not to return to the shop or any shops and will leave me in a vulnerable position if I return.

I cancelled the previous Tribunal under that my request were made to then have a few weeks later something else mentioned to stop me returning.

This has felt very personal, I have passed my number to Matthew to discuss everything and explain my situation further to no avail.

I have been advised to safe guard myself as if I return I could receive the same treatment and faults could be found to dismiss me.

As of my position at the moment to safe guard myself, my mental health, I am scared of what would happen if I did return.

Kind regards,

Kirsty Blyth"

(50) The claimant received no response back from Ms Hannah, nor Mr Campbell, nor anybody at BR Fast Food Ltd to that correspondence, or her earlier formal grievance. In her evidence to the Tribunal, the claimant stated that she did not know if the respondents' had a company grievance procedure, as she did not get any written contract from her employer.

(51) In addition to that email exchange between the claimant and Anne Marie Hannah, there had been an earlier email exchange between the claimant and Matthew Campbell, when the claimant had intimated a formal grievance, following termination of her employment on 29 November 2020, and subsequent reinstatement and return to the respondents' payroll.

(52) It also emerged, in evidence at this Final Hearing, that the claimant had brought two earlier Tribunal claims against the respondents.

(53) The chronology of those earlier events was as follows:

(54) On 29 November 2020, the claimant attended at work, and she was handed by Nicky, the manager, and Andrew, the head chef, a letter from Matthew Campbell, a copy of which was produced to the Tribunal at page 56 of the claimant's Bundle used at this Final Hearing, with a further copy reproduced again at page 113.

(55) That letter from Mr Campbell stated as follows:

"Dear Kirsty,

I am writing to you as the director of BR Fast Foods. I have recently taken of [sic] *the operational running of several Black Rooster franchises. Part of that takeover includes Black Rooster Coatbridge. I have been made aware that you are currently on maternity leave. Unfortunately because of the current climate and the impact COVID has had on the business*

and hospitality sector as a whole, we can no longer afford to pay your weekly maternity pay.

I know this may cause you some concern, can I ask you to contact the benefit agency for advice and support. I have tried to support this as long as financially possibly, but we are currently making an operational loss. If you require any further information or if I can provide further support, please contact me on mathewcampbellbr@gmail.com

Kind regards,

Matthew"

(56) After her receipt of that letter, the claimant, in a state of panic, went to show it to her father, and seek his support. On 29 and 30 November 2020, the claimant, unable to contact Mr Campbell by email, as his letter gave an incorrect email address, posted direct (private) messages on the Black Rooster Peri Peri Facebook page, copies of which were produced to the Tribunal at pages 57 to 63 of the Bundle used at this Final Hearing.

(57) In her message at 17:21 on 29 November 2020, as reproduced at pages 57 and 58 of the Bundle, the claimant stated as follows:

" Former employer on SMP and just been told im sacked and handed a letter than you can no longer afford my maternity pay, for one this is actually illegal, even if you cease trading you've to still pay me my maternity until it ends, which is april, you cannot dismiss me on maternity leave because you cant pay my maternity pay, as its unfair dismissal, ive looked on citizens advice & maternity action, you claim it back through hmrc so my money is there. The email doesn't exist which is pretty funny, I asked for michaels number was refused over & over, this is also

against the law as ive to discuss this with my employer ? then told to leave the shop? While standing with my 9 week old baby all because I wanted my employers number ? Spoken to like crap all turned once ive been sacked as stated, im due a weeks notice even on maternity leave btw so I want that as well, cannot afford my maternity due to covid but can open a new shop ? Can do black Friday deals as well, and could also give way £1000 with clyde 1 ? But cant pay me ? please find attachments of screenshots of proof of my points, and one is even on lawyers website."

(58) When Nicky and Andrew handed the claimant Mr Campbell's letter, they advised her that they could no longer afford to pay her, they had to sack another employee as well, and when the claimant asked to speak to the owner, Michael Kennedy, this was refused, and when the claimant challenged that, she was told to "***go fucking hame***" by Andrew, and told to leave with her nine week old daughter in her arms.

(59) Nicky and Andrew watched the claimant break down and worry about money as this was just before Christmas. The claimant was told to email the main Black Rooster page which she did, and in return, she got phone calls from No Caller IDs. When she answered, she was met with abuse from the restaurant owner, Kevin Bell.

(60) The claimant stated that Mr Bell repeatedly stated that she was owed nothing, and when she tried to explain what HMRC had told her, she was to "***shut up"*** and that was not the case. When the claimant received another call, again from No Caller ID, she had her partner record that call.

(61) The claimant's partner filmed it on his mobile phone, on 30 November 2020, when the claimant was on her phone at home speaking with Kevin Bell after he phoned her. In that call, Kevin

Bell told the claimant that she would get "***fuck all***", and her child would have ***"a shite Christmas".*** A video of that call was played at the Final Hearing before the Tribunal.

(62) The claimant confirmed, after the recording was played, that it was her and Kevin Bell. She advised the Tribunal that, even now, she is "***terrified***" to answer any No Caller ID call in case it is Kevin Bell.

(63) While in her evidence to the Tribunal the claimant described the call from Mr Bell as "***threatening"***, the claimant stated that she did not report it to the Police, explaining that she did not think she was in good standing with the local Police, given the case involving her ex-partner.

(64) On 15 January 2021, Michael Kennedy emailed the claimant, a copy of which was produced to the Tribunal at page 67 of the Bundle used at this Final Hearing. He stated as follows:

"You received every penny owed to you through the furlough scheme, as explained by myself on several occasions you received the money as soon as we received it. You also had that confirmed by HMRC.

Unfortunately due to the impact of of [sic] *COVID, the business wasn't and isn't in the position to continue to pay your maternity pay. We will happily liaise with HMRC regarding the matter.*

Thanks,

Michael"

(65) The claimant replied to that email, again on 15 January 2021, a copy of which was produced to the Tribunal at pages 69, 70 and 71 of the Bundle used at this Final Hearing. In her email, the claimant advised Michael Kennedy as follows (sic):

"Ive passed on the information I have received from HMRC, I done what was stated on the letter and Universal Credit and Maternity Allowance passed me onto ACAS and HMRC themselves.

States if the company is still operational then they are liable to pay my SMP, it's a statutory payment, this has came from ACAS, HMRC and Maternity Allowance, theyre is two ways claim back or claim the funding if you cant afford to pay me.

I have tried and tried to sort this nicely, however I haven't been treated nicely.

I am only doing what is instructed, I have been left without money, no where will pay me as Im meant to receive SMP, I cant be left without any money with a baby, house to up keep.

I was yes I was scared I would lose my job if I said anything.

I ended up with a new phone and lost everything that's why I no longer have the number.

The staff are being hired for Coatbridge, thats where I worked.

The email from Matthew, I didnt know that a mistake and couldnt ask as I received those phone calls and told to stop mailing.

I was sacked, the word was used over and over, by Nicky and Andrew, more upset that this was all done when I had my daughter with me, and asked to leave when I wanted to speak to yourself.

ACAS have issued me with a certificate for the case for the tribunal, I have no other choice, I cant be left without money with my daughter to support, I did try to do this nicely and without the tribunal involved."

(66) By email to the claimant on 2 February 2021, copy produced to the Tribunal at page 72 of the Bundle used at this Final Hearing, Matthew Campbell advised the claimant as follows:

"Hi Kirsty,

I haven't received any information from the Tribunal.

Kirsty I have now had an opportunity to review all the information in relation to the issues you have highlighted. There seems to be some discrepancies in some of the information, I was under the impression you had resigned, I never sacked you from your role. As you will see from the original letter, I never stated your employment was coming to an end.

To bring this matter to a conclusion and not cause you anymore stress, I'm proposing to pay your backdated maternity pay in one payment. I will restate you onto payroll and continue to pay your weekly maternity pay into your bank account if you provide me with your bank details. You will then have your employment position to return to when you return from maternity.

I have informed Daniella at ACAS of my proposal."

(67) On 3 February 2021, by email to Mr Campbell, copy produced to the Tribunal at pages 74 and 75 of the Bundle used at this Final Hearing, the claimant advised Mr Campbell as follows:

"Hi Matthew,

Thank you for your reply its appreciated. I walked into the shop on 29/11/2020 like every Sunday I did, and then I was handed that letter and told I was sacked and my P45 was in it (it wasn't) by the person who gave me wages, I was getting that week before I was still my pay date. I had asked for a number for Michael, I was then asked to leave the shop with my 9 week old

daughter at the time into the freezing cold without any answers. I never resigned…."

(68) By further email to the claimant, on 5 February 2021, a copy of which was produced to the Tribunal at page 73 of the Bundle used at this Final Hearing, Mr Campbell asked the claimant to tell him what she was owed that was outstanding to that date and he would arrange for that to be paid ASAP into her account, and he would then arrange for the remainder of her maternity pay to be paid into her account on a weekly basis.

(69) As per the copy email from Matthew Campbell to the claimant, on 29 March 2021, a copy of which was produced at page 75 of the Bundle used at this Final Hearing, Mr Campbell confirmed that he was happy to support the claimant's request for an extension of her maternity leave, but unfortunately, he could not work her 16 hours per week, as they needed flexibility when developing the weekly rotas.

(70) In her reply at 15:12 on 29 March 2021, the claimant advised Mr Campbell, as per the copy email produced at page 76 of the Bundle used at this Final Hearing, that:

"Due to coming back off maternity I have enhanced rights with this as im returning to my role the way it was my days changed every week, I have been in this role for two years."

(71) On 17 May 2021, as per copy email produced to the Tribunal at page 76 of the Bundle, Mr Campbell emailed the claimant, advising her that *" You* [sic] *hours changed previously based on the needs of the business, we can't work rotas around individual staff personal circumstances unfortunately."*

(72) In the claimant's email reply to Matthew Campbell, on 17 May 2021, copy produced to the Tribunal at page 77 of the Bundle used at this Final Hearing, Mr Campbell stated as follows:

"Subject: re: My dismissmal [sic] *and maternity pay*

Hi Matthew,

Mental health is the reason I work 16 hours per week and I have a child, my partner works four days on and four days off but wont be the same days every week because of my partner's shifts. All I am asking is for the company to be flexible with the days I work, when my partner is off so would mean that the days change one day ahead, wouldn't be able to when he's working as I have my daughter.

Kind regards,

Kirsty"

(73) In her evidence to the Tribunal, the claimant stated that, by this stage, "***I felt it was falling on deaf ears with him"*** (being Mr Campbell).

(74) By email to Matthew Campbell, on 9 June 2021, copy produced to the Tribunal at page 78 of the Bundle used at this Final Hearing, the claimant stated that : "*With regards to previous email, it was to ask what is happening with my job as my return date would have been 03/07/2021. If I am not returning will I be paid off?."*

(75) By this stage, the claimant advised the Tribunal, in her oral evidence, that she had contacted the Citizens Advice Bureau for assistance. She had tried and tried with Mr Campbell, but there was just no reply from him.

(76) With the CAB's assistance, by email entitled ***"formal grievance"***, the claimant emailed Matthew Campbell on 20 June 2021, at 16:21, as per the copy email produced to the Tribunal at pages 83 and 84 of the Bundle used at this Final Hearing, stating as follows:

"Hi Matthew,

I would like to know what is happening with my employment.

I have contacted my ACAS coach and local citizens advice since I have been ignored and

under the maternity regulations act, to return to my previous contract (i.e. no set days but 16 hours is a term of my contract), this is in fact by law should be met, if this role is no longer available I should be offered a simular [sic] *job with the same conditions and terms, if this cannot be provided then no other options I should then in fact be made reduydant [*sic]. *This should be a fair redudancy [sic] and isn't due to my maternity, child or my personal (mental health) that restricts my working.*

If flexibility cannot be met for my mental health this is in fact disability discrimination, if flexibility cannot be met due to me returning from maternity to original contract this is infact classed as maternity discrimination.

I have felt since the day I was dismissed by Nicky and Andrew Ive been stonewalled about returning, not wanted back and made to feel like a piece of crap, threatened on the phone the lot and let that all go because I was listened to now no more excuses, if I am selected for redundancy and as I have worked for the company for two years I will be due 2 weeks notice period, 1 weeks wage for every year worked, and 2 years holiday pay.

I would like your reply to see where we go from here and what will happen.

Kind regards,

Kirsty"

(77) By further email to Mr Campbell, on 2 July 2021, a copy of which was produced to the Tribunal at page 80 of the Bundle used at this Final Hearing, the claimant stated as follows:

Subject: Re: Formal Grievance

"Hi Matthew,

Last day of maternity leave tomorrow,

However you have ignored me so this is a email to say I have launched another case with ACAS, as I need to inform you.

Kind regards,

Kirsty"

(78) In another email of that date, the claimant advised Mr Campbell:

"Hi Matthew,

I have no choice to go through ACAS again. You have left me with no income and in limbo with a job.

Kirsty"

(79) Despite notifying ACAS on 2 July 2021, the claimant got no reply from the respondents, so she brought her Tribunal claim presented on 1 August 2021, having been issued with her ACAS early conciliation certificate on 28 July 2021.

(80) Arising from the claimant's evidence at this Final Hearing, there was produced to the Tribunal, and added to the claimant's Bundle, copy papers relating to two previous Tribunal claims brought by the claimant, as follows:

(i) On 15 January 2021, under case number **4100231/2021**, the claimant brought a claim against BR Fast Food Limited (BR Manpower Limited), following ACAS Early Conciliation under certificate R100225/21/69,

complaining that her employment with the respondents as a waitress had ended on 29 November 2020.

(ii) She complained of unfair dismissal, discrimination on grounds of pregnancy or maternity, and claimed that she was owed notice pay, holiday pay, and other payments, including the rest of her statutory maternity pay, she stating that she had only been paid for 21 weeks, when she was due the full 39, and she still had 18 weeks left to be paid for.

(iii) That claim was withdrawn by the claimant on 8 February 2021, and a **Rule 52** dismissal judgment dated 15 February 2021 was issued on 22 February 2021 by the Tribunal.

(iv) The claimant produced to the Tribunal, as a further additional document to add to her Bundle used at this Final Hearing, a copy of her email of 8 February 2021 to the Glasgow ET, reading as follows:

"Dear Sir/Madam,

My name is Kirsty Anne Blyth. I am writing to ask that my case against BR Fast Food / BR Manpower can be cancelled, today I had the backdated maternity money paid to myself, he will also be continuing to pay my weekly maternity pay until the 39th week, until I am due back at work, my position is still there and no longer dismissed.

Everything has been resolved & no longer need to pursue my case against my employer, I have also sent this to my employer stating I have written and requested to cancel.

Kind regards,

Kirsty Blyth"

(v) On 28 July 2021, the Glasgow Employment Tribunal received a further claim from the claimant, under case number **4110567/2021**, against Black Rooster Peri Peri, 244 Whifflet Street, Coatbridge, ML5 4RX, and referring to ACAS Early Conciliation certificate R152587/21/37, showing ACAS Early Conciliation between 2 and 28 July 2021, with BR Manpower / BR Fast Food as the prospective respondent. The claimant stated that she was employed as a waitress in a continuing employment relationship, and she complained that she had been discriminated against on grounds of disability, and pregnancy or maternity, and that she was owed holiday pay.

(vi) As her ET1 claim form had a different name of the respondents from that on the ACAS Early Conciliation certificate, her claim was rejected by the Tribunal, and returned to her. The claimant emailed the Glasgow ET on 31 July 2021, and on 1 August 2021, as per the copy papers from the Tribunal, added to the claimant's Bundle at this Final Hearing, saying that she was having "***panic attacks and financial difficulties due to this crook of an employer"***, and that she had lodged a fresh claim with the proper employer's name.

(vii) The claimant apologised that "***in my upset and anger, I have filled in the wrong part with their details"***, and on referral to an Employment Judge, confirming that she was submitting a new claim, that claim (which had been rejected) was closed by the Tribunal.

(81) From the information provided to the Tribunal, in the claimant's evidence, and in her Bundle, it appears that Kevin Wallace Bell,

and Michael Hugh Kennedy, are directors in various companies, including **Black Rooster Franchising Limited**, (company number SC635071), having its registered office address at 21 West Nile Street, Glasgow, G1 2PS, the same address as the registered office for the respondents in these Tribunal proceedings, being BR Fast Food Limited.

(82) The claimant produced, at page 17 of the Bundle used at this Final Hearing, a screen shot from the Rangers FC website, with a comment by Kevin Bell, described as the owner of Black Rooster, announcing a partnership with the football club and that business, and at page 21, a screenshot from Michael Kennedy's Twitter account stating that Black Rooster Peri Peri were delighted to be working with Rangers FC as their official restaurant partner.

(83) The claimant sought to argue that this showed that her previous employers are in fact still in operation of the Coatbridge business, and very much still involved with that business.

(84) The nature and extent of the business relationship (if any) between Matthew Campbell, and Messrs Bell and Kennedy, was not explored at this Final Hearing, and it is accordingly unknown to the Tribunal.

(85) In his ET3 response for the respondents, BR Fast Food Limited, presented on 30 August 2021, Matthew Campbell had stated that:

"Back in August 2020, Kirsty's previous employer went into liquidation. I then was offered the opportunity to take over the running of the premises that they operated from. I made the moral decision that I would employ the current workforce including Kirsty who was on maternity leave at the time. As you will be aware, there was no legal responsibility for me to employ the staff including Kirsty, it was a difficult time to open a new

business during a pandemic when the hospitality industry was struggling."

(86) From the information before the Tribunal, it appears that **Black Rooster Peri Peri Coatbridge Limited** (company number SC587615) was the company that went into compulsory liquidation, following a winding up petition on 21 January 2020, as that company was unable to pay its debts.

(87) However, on the evidence available to the Tribunal, the claimant continued to work at the Coatbridge restaurant, as before, there being a TUPE transfer of the business.

(88) Since the claimant's employment with the respondents ended, on 3 July 2021, she has been unemployed and in receipt of State benefits, while making some attempts, but without success, so far, to secure new alternative employment. She lives with her partner, Dean Housley, who is in other employment, as a rope access technician, working 4 days on, 4 days off, and her daughter, in a local authority rented house. Her daughter was born on 23 September 2020.

(89) The claimant produced, at page 197 of the Bundle used at the Final Hearing, and reproduced again at pages 201 and 203, vouching evidence of her receipt of Personal Independence Payment (PIP) from the Department for Work & Pensions, to show her entitlement to £58.70 standard rate per week to help with her daily living needs from 2 March 2020 to 8 October 2022, and an enhanced rate of £61.20 per week between those same dates to help with her mobility needs. The claimant advised the Tribunal that her PIP has been extended to July 2023, and she waits the relevant confirmation from DWP.

(90) Further, the claimant has been in receipt of Universal Credit, from 7 August 2021 to 7 March 2022, as vouched by the document produced at page 198 of the Bundle, and reproduced

again at pages 202 and 204. Also, at pages 207 to 215, the claimant produced to the Tribunal some proof of jobs applied for, some where she personally handed CVs into stores, and others where she had applied, on the Indeed website, with friends passing her on details.

(91) That list of jobs applied for augmented what the claimant had already supplied to the Tribunal, with copy to Mr Campbell for the respondents, by her email of 28 February 2022, at 16:33, enclosing her reply to orders of the Tribunal made on 21 February 2022, as reproduced at pages 185 to 196 of the Bundle used at this Final Hearing, where she detailed (a) what she seeks in remedy; (b) compensation and what's included; (c) details of benefits received; (d) summary of jobs applied for; and (e) details on how she has tried to minimise her financial loss.

(92) For ease of reference, that detail provided by the claimant is referred to for its full terms, as reproduced in the Appendix to this Judgment, at pages 99 to 106 below, and held to be incorporated herein for the sake of brevity.

(93) In her evidence to the Tribunal, the claimant stated that she is still looking for a job, but it is very difficult for her, due to child care, as there are no private nurseries locally for children under the age of 2 years, but her daughter will be going to nursery in September 2020, when she is 2 years old.

(94) That statement of financial loss, submitted to the Tribunal, on 28 February 2022, where the claimant now seeks **£26,499** (with interest at 8%) superceded the earlier version provided by the claimant, on 26 October 2021, a copy of which was produced to the Tribunal at pages 143 to 148 of the Bundle used at the Final Hearing.

(95) In her evidence to the Tribunal, the claimant stated that in preparing her statement of financial loss, her father helped her with the calculations, and a friend who is studying law at Glasgow University also helped her with some calculations. She further advised that the CAB had given her the figure of **£9,100** as middle band compensation for injury to feelings, and **£500** for loss of statutory rights.

(96) Further, in her evidence to the Tribunal, the claimant stated that she has had no other job since 3 July 2021, and no income from any other job, casual or temporary work, or self-employment. If she cannot find another job, she advised that she will maybe look at going back to college for a beauty therapist course, as she described feeing "***scarred***" by her time with the respondents in the hospitality business. She stated that she had lost her love for it, but she will apply for other jobs, and hopes a new employer will be different than the respondents.

(97) As regards her claim for holiday pay, the claimant referred to her further particulars supplied in reply to Judge Kemp's orders, and that as she did not receive any written contract from the respondents, she did not know what her contractual holiday entitlement was with the respondents.

(98) She stated that she sought 2 years' holiday pay, which she had calculated as being **£1,632.29**, as also 2 weeks' notice pay at **£279.04**, as shown in her calculations produced at pages 146 and 195 of the Bundle used at the Final Hearing.

(99) Further, in her evidence to the Tribunal, the claimant stated that Kevin Bell had told her that staff were not entitled to holidays, and Nicky, the manager, had told her that she would not be paid if she took a day off.

(100) As regards calculation of her notice pay, the claimant advised me that she had calculated **£279.04** on the basis of £8.72 (national minimum wage) x 16 hours = £139.52 x 2.

(101) In closing her evidence to the Tribunal, the claimant stated that she was extremely proud of herself. They had treated her horribly, and she had thought that they were her friends, and people she could trust, but she was not treated well. It was unfair, and she was picked on.

(102) When she got a new car, they congratulated her, but when she went in, they were slagging her off. They stood and held her daughter, and Nicky and Andrew pushed her to the side, and chucked her out into the rain. Kevin's comments had hurt her, and he had no empathy for another human, and no regard for her.

(103) On a scale of zero to 10, the claimant stated that her injury to feelings was a 10. She thought she had made friends, but they talked about her behind her back. Her experience with the respondents has terrified her to go into another job, and she asks herself will it be the same?

(104) She is fearful of No Caller ID phone calls, and he considers her treatment by the respondents has made her PTSD much worse. She stated that she had been going to get discharged from referrals to the mental health nurse, but she did not, her medication has increased, and the mental health team phone her regularly, as there are still no in person consultations due to Covid.

(105) The claimant further advised the Tribunal, in giving her evidence at this Final Hearing, that she had told the respondents about her mental health, and the respondents took a chance with her, and she was delighted with that, but they turned out not to be true friends.

(106) The claimant stated that Nicky, the manager, told the other staff that the claimant had PTSD, when the claimant thought that was confidential. Further, she stated, she was the only smoker, and Kevin and Nicky had an issue with smokers, whom they did not like.

(107) When she told Nicky that she was pregnant, she advised the Tribunal that Kevin and Jodie said that would not be them, and when her morning sickness, and toilet visits increased, the claimant advised the Tribunal that the respondents never did any risk assessment.

(108) The claimant cited one incident, where she was asked to hoover the back stairs, but she refused to do so, and she was shouted at by Nicky, at somewhere about 12 weeks' pregnant, so before March 2020, and told "***you're pregnant, not disabled***".

(109) Further, the claimant recalled, when she went in to pick up her money, work colleagues did not ask how she was, on maternity leave, but one of them (she could not recall who) had commented, in relation to her baby daughter, "***let's hope she doesn't turn out like you***".

(110) The claimant understood that, after 3 July 2021, her job was filled by somebody else, so she advised the Tribunal that she was withdrawing her claim for a redundancy payment, and she further advised the Tribunal that she understands that the respondents have a high turnover of staff, and she thinks that staff there are scared to speak up as they fear for losing their job if they do so. While the restaurant is still there, and people come in to eat and / or take way, the claimant added that customers don't see how the staff are treated.

Tribunal's assessment of the evidence led at the Final Hearing

43. In considering the evidence led before the Tribunal, at this Final Hearing, I have had to carefully assess the whole evidence heard from the claimant, and her father, as the only witnesses led before the Tribunal, and to consider the many documents produced to the Tribunal in the Bundle lodged and used at this Final Hearing, as also the additional documents lodged during the course of the Final Hearing, which evidence and my assessment I now set out in the following subparagraphs:

(1) **<u>Mr John Blyth, the claimant's father</u>**

(a) Mr Blyth, aged 54, was the first witness for the claimant, and he was questioned by the claimant herself. After affirming, he spoke clearly and confidently, under reference to some of the documents produced in the claimant's Bundle used at the Final Hearing, and he was fairly clear and articulate in answering the questions put to him by his daughter, the claimant.

(b) While he was not cross examined by the respondents, on the basis that they were neither present, nor represented, he was asked some questions of clarification by me as the presiding Judge. Overall, I was satisfied that Mr Blyth was giving the Tribunal a full recollection of events, as best he could remember them, and he came across to the Tribunal as a straightforward, plain-speaking person, and as a wholly credible and reliable witness.

(c) He spoke of the impact of certain matters upon his daughter, the claimant, occurring during her employment, or arising from the termination of her employment, with the respondents, and in particular her receipt of the letter dated 29 November 2020 from Matthew Campbell (produced at page 56 of the Bundle), and the Coatbridge non-work WhatsApp group chat at

the Black Rooster Peri Peri restaurant (produced at pages 22 / 29 of the Bundle, in particular the claimant's message on 28 February 2020 (at page 27).

(d) Being close to his daughter, and being in her confidence, Mr Blyth spoke to what she had discussed with him about the way she was being treated by the respondents as her former employer. The claimant had come to him and showed him Mr Campbell's letter, and he described it's receipt as having a "***really bad***" effect on the claimant. Nicky, the manager, had given her the letter, told her to leave, along with her child, out into the cold, and he stated that the claimant had panicked, and come to him.

(e) Mr Blyth further stated that the claimant started withdrawing into herself, being rejected, and with no contact from her employer to help her, and it was "***really terrible"*** where the claimant was being treated while pregnant, and with a child to feed.

(f) Further, Mr Blyth spoke about the Coatbridge Non-work group chat, and with reference to that chat, he stated that he was "***really angry***" that his daughter had had to discuss previous miscarriages, when that matter should have been confidential. He stated that he felt that the group chat was designed to try and get the claimant to quit, and he commented that he felt the respondents did not care about the claimant's mental health.

(g) He described the claimant as being "***sad and angry***" about the situation, and he described how she loved being in hospitality, and she was previously always chirpy, but things gradually got worse and worse, during her employment there, she withdrew into herself again,

and she felt, with the staff group chats, that other staff were picking on her, including the manager, Nicky.

(h) Mr Blyth also described, but without any detail, how the claimant had been assessed as having PTSD, prior to her employment at the Coatbridge restaurant in April 2019, and after an incident with her previous boyfriend, and how she didn't trust anybody.

(i) When, as the Judge, I stated, at that point, that I might have to consider making an anonymisation order under **Rule 50**, the claimant stated that she was happy that matters should be made public, and she sought no restrictions on reporting, or what goes into the public judgment register.

(j) The claimant gave evidence on her own behalf, on day 2, and she detailed what had happened to her by her ex-partner, subsequent criminal proceedings, criminal injury compensation, etc, which she described as part of the background of what had happened to her.

(k) While, at first, she felt shame, the claimant advised me that she had come though that, and while her ex-partner had a not proven verdict after the criminal trial, she further advised me that it does not matter to her if it is referred to in this public Judgment, and she did not invite me to make any **Rule 50** order about privacy / disclosure of information.

(l) Mr Blyth further stated that he understood Michael Kennedy and Kevin Bell owned about 7 Black Rooster stores, and he commented that he found it difficult to understand why Michael Campbell had told the claimant that they could not afford to pay her maternity pay, when

the business was in some partnership with Rangers FC football club.

(m) Overall, I found Mr Blyth's evidence to the Tribunal persuasive, and compelling, and it was delivered in a calm, measured tone, supportive of his daughter, but not overstated, nor embellished, for dramatic effect.

(2) <u>Ms Kirsty Blyth, the claimant</u>

(a) The claimant gave her own oral evidence, on affirmation, at the close of her father's evidence to the Tribunal. She spoke clearly and confidently, under reference to many of the documents produced to the Tribunal in the Bundle and additional documents used at the Final Hearing. She was fairly clear and articulate in answering questions put to her by myself, as the presiding Employment Judge, in the absence of any representative acting on her behalf, seeking to elicit her evidence in chief by structured and focused questions.

(b) While the claimant was not cross examined by the respondents, on the basis they were neither present, nor represented, she was asked some questions of clarification by me as the presiding Judge, as and when her answers to evidence in chief questions required clarification. Overall, I was satisfied that she was giving the Tribunal a full recollection of events, as best she could remember them, and she came across to the Tribunal as a wholly credible and reliable witness.

(c) The claimant spoke of what had happened to her in the course of her employment with the respondents, and how she had been treated by the respondents as her former employer. She came across to the Tribunal as an honest and reliable historian of events, and she recalled

the impact on her as an individual of those events relating to her employment.

(d) While some matters she spoke of in evidence were not referenced in her ET1 claim form, or PH Agenda, her evidence on them arose from me asking her an open final question, was there anything further she wanted to say that I had not already asked her about. Her evidence in that regard was spontaneous, and had the ring of truth to it, she telling it as she recalled things from the past.

(e) In completing her ET1 claim form, on 1 August 2021, the claimant had stated that her employment was continuing, and that it had started on 27 April 1995. As was to emerge at this Final Hearing, that start date was clearly written in error, as it was before she was even born.

(f) At this Final Hearing, she advised that her employment at the Coatbridge restaurant had started on 24 April 2019, and it had ended on 3 July 2021. While one of the respondents' documents provided by Mr Campbell, in his evidence pack of 29 November 2021, had stated 3 April 2019, there was no confirmatory evidence to support that date, and so I preferred to accept the claimant's date of starting as being the more likely.

(g) Further, in her ET1 claim form, although complaining of disability discrimination, at section 8.1, the claimant had completed section 12.1 to state that she had no disability. Again, as was made clear in her evidence at this Final Hearing, she advised as indeed she had done earlier in the course of these Tribunal proceedings, when lodging her PH Agenda on 28 September 2021, that her disability is post-traumatic stress disorder (PTSD).

(h) In that regard, I noted that the claimant had submitted her disability impact statement , and medical evidence, on 26 October 2021, and those documents were copied to Mr Campbell for the respondents who, despite Judge Kemp's orders of 6 October 2021, did not respond clarifying whether or not the respondents accepted the claimant as a disabled person for the purposes of the Equality Act 201, and whether or not it argued that, if so, the respondents did not have actual or imputed knowledge of that at the material time. I deal with my decision on this preliminary issue later in these Reasons under "***Discussion and Deliberation***."

Issues for the Tribunal

44. There was no jointly agreed List of Issues prepared in this case while both parties were participating in these Tribunal proceedings. At the Case Management Preliminary Hearing, held before Employment Judge Kemp, on 28 September 2021, when the claimant appeared on her own behalf, and Matthew Campbell attended as a director of the respondents, parties were left to consider seeking legal or other advice on whether TUPE might be relevant, the respondents denying that they had any responsibility for events prior to an earlier employer going into liquidation, after which the present respondents employed the claimant and other staff ; and the claimant's status as a disabled person was not admitted by the respondents, likewise the issue of respondents' knowledge was disputed.

45. On 28 September 2021, the claimant had sent to the Glasgow ET her completed Preliminary Hearing Agenda, a copy of which was produced at pages 121 to 139 of the claimant's Bundle used at this Final Hearing. In that PH Agenda, at section 2.1, the claimant stated that she was making a complaint under the Equality Act 2010 about "***direct discrimination, victimisation, discrimination arising from disability, maternity***

discrimination." Further, at section 4.1, she had stated, when identifying the issues that she considered the Tribunal would have to determine, they were "***discrimination by maternity, discrimination by disability (mental health), bullying, confidentiality."***

46. In schedule 1 to her PH Agenda, at section S4, the claimant complained of **direct discrimination**, identifying the less favourable treatment she said she had suffered as being "***direct discrimination when questioned about my pregnancy scans – Thursday 28th February 2020, Direct discrimination when sacked during maternity leave 27/11/2020."***

47. In her PH Agenda, the claimant provided some additional information. At section S8 (**victimisation**), the claimant stated that the protected act described in **Section 27(2) of the Equality Act 2010** that she had carried out was: ***"I complained about being sacked during maternity leave.***" Asked about the disadvantage she says that she has suffered as a result of doing that protected act, she stated : ***" I recieved*** *[sic]* ***abusive phone calls from the owner kevin bell 30/11/2020, I also sent a video with proof he was calling me."*** Asked why she considered that this was because she had done a protected act, the claimant stated : "***Because I kept emailing the main page (as instructed) he wasn't happy I was still persuing*** [sic] ***and not just walking away so thought threats were nessary*** [sic] ."

48. In schedule 2 to her PH Agenda, at section D1, the claimant identified the physical or mental **impairment** that she considers affects her as being **PTSD** (post-traumatic stress disorder). She explained the way that impairment had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities at section D2 as follows : " ***Takes me 30/40 minutes before I leave the house. I have fear of men shouting or being abusive towards me, I cant shop alone, work was an escape as no one knew expect*** [sic] ***employer (until it was discussed as gossip) I was different there, still nervous but I loved the job until nicky got made manager she turned nasty."***

49. Further, in her PH Agenda, at section D5, about her complaint of **discrimination arising from disability**, the claimant, in reply to the question asking her in what way she says that the respondents treated her unfavourably because of something arising as a consequence of her disability, answered stating that: "***wouldn't be flexible with my hours (said my hours would change because of the needs of the business, however I have always stayed at 16 hours as anything above that cause me to have anxiety, panic attacks, so not having the kindness or right attitude towards me caused me further stress."***

50. Finally, in relation to her complaint of the respondents' **failure to make reasonable adjustments**, the claimant provided the following responses:

D.6 *Do you complain that:*

(i) A provision, criterion or practice applied by or on behalf of the respondent placed you at a substantial disadvantage in comparison with people who are not disabled? If so, what is the provision, criterion or practice?

Yes as everyone else is working the same hours before lockdown, everyone else was fine to pick & choose (but I was different)

D.7

What is the substantial disadvantage at which you say you were placed?

hours (contract conditions)

D.8

Do you say that the respondent knew or could reasonably be expected to know that you were likely to be placed at the substantial disadvantage?

Yes

D.9

What are the steps which you say it would have been reasonable for the respondent to take?

Same hours & not set days & discussed owners behaviour, managers behaviour

D.10

In what way would those steps have prevented the substantial disadvantage which you believe has arisen?

I would have been hopefully back working my same job.

And maybe no so scared of repercussions [sic] ***of being fired or owner making good on threats.***

51. There was flagged up by Judge Kemp that with regard to the claimant's PH Agenda confirming she made claims under **Sections 13, 15, 20, 21 and 26 of the Equality Act 2010** (and maybe victimisation under **Section 27**), as some of the matters founded upon by the claimant date prior to 2 April 2021, being a date 3 months before she commenced early conciliation, whether those matters are within the jurisdiction of the Tribunal would depend on the terms of **Section 123** of the Act, which in turn depends on whether there was conduct extending over a period and, if so, what period, and if appropriate, whether it is just and equitable to allow a claim otherwise out of time to proceed. I pause here to note and record that the claimant's PH Agenda made no complaint of harassment in terms of **Section 26**, and section S7 in her PH Agenda was left uncompleted, consistent with her Agenda section 2.1 not identifying any harassment complaint.

52. As an unrepresented party litigant, since the respondents' ET3 response was struck out, and they were then barred from further participation in these proceedings (except to the extent that I might allow), the claimant had not prepared any List of Issues and, as such, as presiding Employment Judge, I needed to clarify the issues for judicial determination at this Final Hearing, which I list here, as follows:-

(1) was the claimant dismissed, actually or constructively, by the respondents? If so, with effect from what date as the effective date of termination of employment ?

(2) was the claimant a disabled person within the meaning of the Equality Act 2010, and did the respondents have knowledge of her disability?

(3) which, if any, of the alleged discriminatory acts complained of by the claimant are time-barred ?

(4) if any such complaints are time-barred, is it just and equitable to allow them to proceed, and be determined on their merits by the Tribunal?

(5) are any of the discrimination complaints well-founded ? if so, which complaints?

(6) if so, what remedy should be awarded by the Tribunal ?

(7) is the claimant owed any notice pay, or holiday pay, by the respondents?

(8) if so, in what amount should the Tribunal order the respondents to make payment to the claimant?

(9) with reference to the other heads of complaint, allowed by the Tribunal granting leave to the claimant to raise them at this Final Hearing, are any of them well-founded and, if so, what remedy should be awarded by the Tribunal?

Claimant's Closing Submissions

53. At the close of evidence, I invited the claimant to make such closing submissions as she felt appropriate. With the claimant being an unrepresented, party litigant, and the respondents not participating, I was not addressed on the relevant law by either party. Nonetheless, in earlier case management of the case, the claimant had given some indication as to the legal basis of her claim, in her PH Agenda returned to the Tribunal on 28 September 2021, the terms of which I have noted above earlier in these Reasons : see paragraphs 45 to 50 above.

54. In her short oral submissions to me, at this Final Hearing, on the morning of day 2, Tuesday, 22 March 2022, the claimant made a few points which I have taken into account in coming to my decision, as follows:-

(a) She stated that she sought a finding from the Tribunal that she was the subject of discrimination on the grounds of disability, and pregnancy / maternity, and that she is owed holiday pay and notice pay.

(b) While she had ticked a claim for redundancy pay, she was withdrawing that, as her job was not made redundant, and it was filled by somebody else, and the Coatbridge restaurant is still operating as a business.

(c) She stated that she was leaving it to the Tribunal to work out compensation payable, and interest, and invited the Tribunal to consider her whole evidence about no written particulars of employment, no itemised pay slips, etc,

(d) While not raised as specific complaints in her ET1 claim form, she asked the Tribunal, given here evidence at this Final Hearing, to allow her to pursue them, by giving her leave to amend her claim before the Tribunal.

(e) I drew her attention to **Section 12A of the Employment Tribunals Act 1996**, about a financial penalty against the respondents, and

the claimant invited me to consider, in reviewing the evidence led by her, whether there were any aggravating features which might allow for a financial penalty to be imposed on the respondents.

(f) At the close of the Hearing, the claimant stated : "***Thanks for letting my voice be heard."***

Reserved Judgment

55. When proceedings concluded on the morning of day 2, Tuesday, 22 March 2022, I advised the claimant that Judgment was reserved, and it would be issued in writing, with Reasons, in due course after private deliberation by the Tribunal. With limited opportunity that afternoon, my private deliberation has once taken place recently, and I apologise to both parties for the delay in issuing the Judgment, occasioned the need to carefully consider the case, and impacted by other judicial business, and periods of annual leave, when the Tribunal administration's target is to try and have Judgments issued within 4 weeks of close of a Hearing.

Relevant Law

56. As is the usual practice, with unrepresented, party litigants, I explained to the claimant that it was my responsibility, as presiding Judge, to apply the relevant law to the facts as I might find them to be in reviewing the evidence led before this Tribunal. As such, I have required to give myself a self-direction as regards the relevant law impacting on this claim before this Tribunal. In discussing and deliberating on this case, in the following section of these Reasons, I have taken the opportunity to give a concise statement of the relevant law.

Discussion and Deliberation

57. In carefully reviewing this evidence in this case, and making my findings in fact, and then applying the relevant law to those facts, I have had to consider the questions identified above, at paragraph 52 of these

Reasons, being the list of issues for this case. I now deal with each of them, in turn, as follows:

(1) was the claimant dismissed, actually or constructively, by the respondents? if so, with effect from what date as the effective date of termination of employment ?

58. The claimant has proceeded on the basis that her employment is no longer continuing, and she has regarded 3 July 2021 as the end date of her employment with the respondents. She has stated that she did not resign, and she has further stated that she has not been dismissed by the respondents. For their part, the respondents' position is less clear. The answers given in the ET3 response lodged are confused and confusing.

59. The ET3 response admitted that the claimant's hours of work were correct, as were her earnings, as specified in the ET1 claim form, being 16 hours per week, and £142 per week normal take home pay. However, it did not confirm a start or end date of employment, but it did state that her employment was not continuing, notwithstanding Mr Campbell's narrative that "***Kirsty position is still available."***

60. The respondents, in that ET3 response, accept that they are / were the claimant's employer, but only from around August 2020, and they have paid her maternity pay up to 22 May 2021. That seems to be so, notwithstanding the claimant's email of 7 March 2021 to Mr Campbell, as referred to earlier in the findings in fact, asking to take the last 13 weeks maternity leave, after 4 April 2021, unpaid. No P45 has been received by the claimant giving a leaving date, and the respondents have not set forth any end date in their ET3 response. They have not averred that they dismissed the claimant, nor that she resigned.

61. In these particular circumstances, it appears to the Tribunal that the claimant's reference in correspondence with the respondents to being "***in limbo***" is apt. Neither party appears to have taken any proactive steps to formally document the end of the employment relationship, yet the

claimant has not been working for the respondents since going on maternity leave on 5 July 2020, and remaining on same until 3 July 2021, even although she has not been paid by them since 24 May 2021, according to her copy bank statements produced to this Tribunal.

62. It is clear to the Tribunal that whatever the legal position, both parties now regard the former employment relationship as at an end. As such, I have decided to answer this question (1) in the affirmative. Given this answer, and in the absence of any other date having been suggested by the respondents, I have taken as the end date of employment the claimant's stated end date of 3 July 2021.

(2) was the claimant a disabled person within the meaning of the Equality Act 2010, and did the respondents have knowledge of her disability?

63. Disability is a protected characteristic as defined in **Section 4 of the Equality Act 2010.** I have also considered **Section 6(1) of the Equality Act 2010**, which provides that a person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

64. **Schedule 1 to the Act** applies to a person who has a disability, and it makes supplementary provisions, including a definition of long-term effects at **paragraph 2**. Further the general interpretation provisions, at **Section 212(1)** define "***substantial"*** as meaning "***more than minor or trivial***". Finally, so too have I considered the statutory guidance issued by the Minister in 2011 on matters to be taken into account in determining questions relating to the definition of disability.

65. Having done so, and having considered the claimant's oral testimony, and the various documents provided in that regard, I am satisfied that the claimant has established that she is a disabled person in terms of **Section 6 of the Equality Act 2010**, on account of her Post Traumatic Stress

Disorder (PTSD), and that she was a disabled person at all material times during her employment with the respondents, and that the respondents were aware of her disability.

(3) which, if any, of the alleged discriminatory acts complained of by the claimant are time-barred ?

66. The claimant alleges discrimination on grounds of both disability, and pregnancy and maternity. Both are protected characteristics as defined in **Section 4 of the Equality Act 2010.**

67. Specifically, as per her PH Agenda, submitted on 28 September 2021, the claimant has complained of direct discrimination, victimisation, discrimination arising from disability, and maternity discrimination, as also failure to make reasonable adjustments. Each of these types of discrimination has its own statutory definition.

68. **Section 13 of the Equality Act 2010** deals with direct discrimination. It states that (subject to **Section 18(7)**) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Further, **Section 23** provides that on a comparison of cases for the purposes of **Section 13**, there must be no material difference between the circumstances relating to each case, and the circumstances relating to a case include a person's abilities if on a comparison for the purposes of **Section 13**, the protected characteristic is disability.

69. **Section 15 of the Equality Act 2010** deals with discrimination arising from disability. It states that a person (A) discriminates against a disabled person (B) if—(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

70. **Section 18 of the Equality Act 2010** deals with pregnancy and maternity discrimination in work cases. It provides as follows:

Pregnancy and maternity discrimination: work cases

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

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

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

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

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

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

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

(b) it is for a reason mentioned in subsection (3) or (4).

71. **Sections 20 and 21 of the Equality Act 2010** deal with the duty to make adjustments, and failure to comply with that duty. Where the Act imposes a duty to make reasonable adjustments on a person, in a work case (**Part**

5) **Sections 20, 21 and 22** and **Schedule 8** apply; and for those purposes, a person on whom the duty is imposed is referred to as A. The duty comprises three requirements. In the present case, only the first is relevant.

72. The first requirement is a requirement, where a provision, criterion or practice (known as a "PCP") of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

73. Under **Section 22**, it is provided that a failure to comply with the first, second or third requirements is a failure to comply with a duty to make reasonable adjustments, and A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

74. **Section 27 of the Equality Act 2010** deals with victimisation. It states as follows:

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

75. **Section 136 of the Equality Act 2010** deals with the burden of proof. So far as material for present purposes, it provides as follows:

> **Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> …
> (6) A reference to the court includes a reference to—
> (a) an employment tribunal;…

76. **Section 123 of the Equality Act 2010** deals with time limits. In particular, **Section 123(1)** provides that, subject to **Section 140B** (extension of time limits to facilitate conciliation before institution of proceedings), proceedings on a complaint within **Section 120** may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

77. **Section 123(3)** provides that for the purposes of that section—(a) conduct extending over a period is to be treated as done at the end of the period; and (b) failure to do something is to be treated as occurring when the person in question decided on it.

78. **Section 140B** provides as follows:

> ***Extension of time limits to facilitate conciliation before institution of proceedings***
>
> (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

79. During the course of this Final Hearing, and now in writing up this Judgment, I am reminded of the guidance from the then President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Chandhok v Tirkey [2015] IRLR 195**, about the importance of the ET1 claim form, where each party requires to know in essence what the other party is saying, so they can properly meet that case, and that the giving of fair, advance notice is at the heart of the Tribunal system. The essentials of the claim need to be in the ET1 claim form, and not elsewhere, for example in a document, in a Bundle, or in a witness statement.

80. While "*pleadings"* are relatively informal in this Tribunal, as compared to the civil courts, the ET1 should set the parameters of the dispute before the Tribunal. It is not appropriate to allow a claimant, even an

unrepresented, party litigant, to build a case on shifting sands, and raise the case which best seems to suit the moment from their perspective. In conducting this Final Hearing, I was conscious of that, and that there is always a balance to be struck between avoiding unnecessary formalism and ensuring the fairness of the Tribunal process to both parties.

81. The fact that the ET3 response has previously been struck out by the Tribunal does not mean that the claimant thereby automatically wins outright, as the Tribunal still requires to be satisfied, on the available evidence, as to which heads of complaint the claimant can succeed on before the Tribunal, whether in whole, or in part. I am reminded that, in the EAT judgment of His Honour Judge Auerbach, in **Miss M Limoine v Ms R Sharma [2019] UKEAT0094/19/RN**, it was held that it is an error of law to enter Judgment under **Rule 21(2)** simply on the basis that a claim is undefended. The Judge must first consider, and be satisfied, treating what is asserted in the claim as uncontested, that the essential factual elements of it are properly made out on the material presented to the Tribunal.

82. The claimant, not being a represented party, and not being familiar with the applicable law, nor the Tribunal's practices and procedures, has understandably done her best to present her own case. I make that as an observation, and not as a criticism of her, for I was impressed by her tenacity and persistence in pursuing her claim, despite all the surrounding circumstances, entering a legal forum unknown to her, a respondent not participating, as well as the pressures of normal domestic / family life, including her own PTSD.

83. In these circumstances, the Tribunal, as the independent and objective decision maker, has had to tread carefully between clarifying the claimant's case, and not entering the arena and running her case for her. That is not the Tribunal's role in our adversarial system of justice. It is for the claimant to present such evidence as she thinks necessary to prove

her case, and for the Tribunal to adjudicate and come to a final decision based on the evidence led and available to it at the Final Hearing.

84. The claimant, in her evidence to this Tribunal, and in her PH Agenda, at section S4, focused on direct discrimination when questioned about her pregnancy scans on Thursday, 28th February 2020, and direct discrimination when sacked during maternity leave on 27 November 2020. The latter date appears to be wrong, and I have taken it to be 29 November 2020, on the basis of the evidence available to me at this Final Hearing.

85. Further, as regards her victimisation claim, as per her PH Agenda (at section S8) she focuses upon receiving abusive phone calls from Kevin Bell on 30 November 2020. She gave evidence on that matter, including showing me the video call taken by her partner, and played to me at this Final Hearing. More generally, in her evidence to this Tribunal, she complained that she had been victimised by the respondents' treatment of her after she took steps to vindicate her legal rights by going to ACAS and CAB, lodging a formal grievance, and instituting ET proceedings against the respondents.

86. With her complaint of discrimination arising from disability, as per section D5 of her PH Agenda, and in her oral evidence to me at this Final Hearing, she refers to the respondents not being flexible with her hours, and from the evidence led at this Hearing, I can date that to Mr Campbell's email of 17 May 2021, and his statement then that ***"we can't work rotas around individual staff personal circumstances unfortunately."***

87. As the respondents did not participate in this Hearing, and no evidence was led or produced on their behalf, other than Mr Campbell's "***evidence pack***", the Tribunal did not have any contradictor to what the claimant was saying, and, as regards the **Section 15** complaint, it had no evidence or argument from the respondents that its position about how them not fitting

the claimant into staff rotas was a proportionate means of achieving a legitimate aim.

88. Finally, as regards her complaint about failure to make reasonable adjustments, the claimant's PH Agenda (at sections D6 to D10) lacks any stated timeframe, but, from the evidence led at this Hearing, I can similarly date that to Mr Campbell's email of 17 May 2021.

89. In these circumstances, the complaints to the Tribunal which are more than 3 months before the date of the ET1 presentation, on 1 August 2021, or 3 months before the ACAS early conciliation notification on 2 July 2021, are those dealt with by her as her complaints of direct discrimination in February and November 2020, and victimisation in November 2020, and the other matters spoken of by her in her evidence all appear to be within the applicable time limit, and thus not time-barred.

(4) if any such complaints are time-barred, is it just and equitable to allow them to proceed, and be determined on their merits by the Tribunal?

90. As detailed above, **Section 123 of the Equality Act 2010** deals with time limits, and it is subject to **Section 140B** (extension of time limits to facilitate conciliation before institution of proceedings). In the present case, **Day A** is 2 July 2021, when the claimant notified ACAS, and **Day B** is 28 July 2021, when ACAS issued her with her early conciliation certificate No. R152587/21/37.

91. As time limits are a jurisdictional provision that parties cannot waive, this Tribunal must, if a claim is out of time, and it cannot be brought within any statutory formula allowing for an extension of time, refuse to hear the case, as being outwith the Tribunal's jurisdiction.

92. The statutory test for an extension of time in a discrimination complaint is to be found in **Section 123 (1) of the Equality Act 2010** and it is known as the "***just and equitable***" test, and it is broader than the "***reasonably practicable test***" found in the **Employment Rights Act 1996**. It is for the claimant to satisfy the Tribunal that it is just and equitable to extend the time limit and the Tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule – per **Robertson v Bexley Community Centre [2003] IRLR 434.**

93. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it **: Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 per Sedley LJ at [31-32]**.

94. In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. At paragraph 25, Lord Justice Auld stated:

> *"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that*

it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

95. In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17: "…*the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and equitable to exercise it in the claimant's favour."*

96. The Tribunal may have regard to the checklist in **Section 33 of the Limitation Act 1980** as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT:**

i. The length and reasons for the delay.
ii. The extent to which the cogency of the evidence is likely to be affected by the delay.
iii. The extent to which the party has cooperated with any requests for information.
iv. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.
v. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

97. However, in the applying the just and equitable formula, the Court of Appeal held in **Southwark London Borough v Alfolabi 2003 IRLR 220** that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, *'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'*.

98. This was approved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** when the Court noted that *"factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

99. The Tribunal must therefore consider:

a) The length and reasons for the delay ;
b) The extent to which the cogency of the evidence is likely to be affected by the delay ; and
c) The prejudice that each party would suffer as a result of the decision reached.

100. I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19 A** simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

101. **Section 123 of Equality Act 2010** does not make reference to either the **Limitation Act 1980** or the **1973 Act**. It does not seek to define itself by reference to either statutory model.

102. As the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

> "….*There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"*

103. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence : **Redhead v London Borough of Hounslow UKEAT/0086/13/LA per Simler J at [70].**

104. The judgment of the Court of Appeal in **Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ. 1853 ; [2002] IRLR 116 ; [2002] ICR 713** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing. The fact that the claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative : **Apelogun-Gabriels at [16].**

105. As the respondents are debarred, and they did not participate in this Final Hearing, I have heard nothing from them on this point, although I note it was a matter flagged up by Judge Kemp at the Case Management PH where Mr Campbell attended for the respondents on 28 September 2021. The claimant made no specific submissions to me on this matter.

106. Taking all of these factors into account, I consider the length of delay to be significant in relation to events from February and November 2020. I also bear in mind, of course, that the claimant did raise her first Tribunal claim on 15 January 2021, subsequently withdrawing it the following month, having apparently resolved matters with the respondents. In such circumstances, it would not be appropriate to re-open those matters now, although they do form part of the factual background to this case, and as such I have referred to them in my findings in fact earlier in these Reasons.

107. The claimant has a clear recollection of those matters so, at least as far as she is concerned, it does not seem that the cogency of her evidence has been affected, but I cannot say anything about the recall of witnesses for the respondents, as the respondents have not participated in this Final Hearing, and I have had no representations from them, other than what is in their ET3 response, and Mr Campbell's "***evidence pack***."

108. In these circumstances, I find that the discrimination heads of complaint raised by the claimant, relating to alleged direct discrimination and victimisation in February and November 2020, are time-barred, and, as such, those heads of complaint are not allowed to proceed, on the basis that it is not just and equitable to allow them to proceed, and the Tribunal refuses to grant the claimant an extension of time in terms of **Section 123 of the Equality Act 2010**. The other discrimination heads of complaint are not time-barred, and the Tribunal allows them to be considered on their merits.

(5) ***are any of the discrimination complaints well-founded ? if so, which complaints?***

109. Turning then to look at the merits of the remaining discrimination complaints, and the evidence led before me by the claimant at this Final Hearing, I have decided that it is appropriate to make judgment in her favour, on the following basis:

110. Firstly, I am satisfied that the claimant has shown that the respondents unlawfully discriminated against the her, on the grounds of her disability, contrary to **Section 15 of the Equality Act 2010,** by treating her unfavourably because of something arising as a consequence of her disability, namely refusing to allow her to return to work after maternity leave on the basis of 16 hours per week, and I also find that that refusal constituted a failure by the respondents to make reasonable adjustments for the claimant's disability, contrary to **Sections 20 and 21 of the Equality Act 2010**.

111. Secondly, I am satisfied that the claimant has also shown that the respondents unlawfully discriminated against her, on grounds of pregnancy and maternity, contrary to **Section 18 of the Equality Act 2010**, during the protected period, by failing to allow her to return to work after maternity leave on the basis of 16 hours per week.

112. Thirdly, I am further satisfied that the claimant has shown that the respondents victimised her, contrary to **Section 27 of the Equality Act 2010**, by subjecting her to a detriment by failing to allow her to return to work after maternity leave on the basis of 16 hours per week, because she had done a protected act, on 15 January 2021, namely the bringing of proceedings under that Act in her earlier Tribunal claim against the respondents, in case number **4100231/2021**, and on 20 June 2021 she had submitted a formal grievance to Matthew Campbell, director of the respondents, making allegations that the respondents had contravened legislation, which grievance was ignored, leading the claimant to bring the present claim against the respondents, presented on 1 August 2021, after ACAS early conciliation between 2 and 28 July 2021.

(6) if so, what remedy should be awarded by the Tribunal ?

113. **Section 124 of the Equality Act 2010** deals with remedies if a Tribunal finds that there has been a contravention of **Part 5** (work) of the Act.

Section 124(2) provides that the Tribunal may (a) make a declaration as to the rights of parties, (b) order the respondent to pay compensation to the claimant, and (c) make an appropriate recommendation.

114. **Section 124(3)** provides that an appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate. Accordingly, for this reason, there must still be a continuing employment relationship.

115. The Tribunal must not, under **Section 124(5),** make an order for compensation unless it first considers whether to make a declaration under **Section 124(2)(a)** or an appropriate recommendation under **Section 124(2)(c).** Finally, under **Section 124(6),** the amount of compensation which may be awarded corresponds to the amount which could be awarded by the county court or, in Scotland, the sheriff under **Section 119**.

116. Further, **Section 119(4)** provides that an award of damages may include compensation for injured feelings, whether or not it includes compensation on any other basis.

117. A declaration is appropriate, and I have included that in my Judgment above. A recommendation is not appropriate, as there is no continuing employment relationship, but I would take this opportunity, in writing up this Judgment, to suggest to the respondents that they reflect carefully on what has happened in this case, and review their practices and procedures.

118. In particular, I draw to the attention of the respondents that guidance is available from ACAS. The ACAS framework for positive mental health at work outlines how employers, managers and employees should share responsibility for positive mental health and wellbeing in the workplace. It can be accessed online at https://www.acas.org.uk/acas-framework-for-positive-mental-health-at-work.

119. That leaves the matter of compensation. In this regard, I need to consider separately any financial loss, and any injury to the claimant's feelings. Looking at financial loss, I start with the claimant's statement of financial loss / her schedule of loss as produced to this Tribunal, and set out, for ease of reference, in the Appendix to this Judgment.

120. In that document, the claimant has sought what appears to be a basic award for unfair dismissal, assessed at 17 weeks x £142.56 = **£2423.52.** It is not stated what is the 17-week period referred to. The dates given 3/7/21 to 21/2/22 are more than 17 weeks, being 33 weeks.

121. A basic award for unfair dismissal (in terms of **Section 119 of the Employment Rights Act 1996**) is based on age, length of service, and gross amount of a weeks' pay. The claimant, aged 26 years, with 2 years' service, and earning £142 per week, would have a basic award entitlement of £284, not the £2423.52 stated, if the Tribunal were to have found that she was unfairly dismissed by the respondents.

122. She has also sought a compensatory award (presumably in terms of **Section 123**), and under "***future losses***", she identified that she had an ongoing loss of **£142.56** weekly, but there is no assessment of past loss from 3 July 2021 to date of this Tribunal Hearing ended on 22 March 2022, a period of some 37 weeks.

123. Further, the claimant has estimated this future losses figure would not be changing anytime soon, and she has estimated this would last at least 9 months, as she stated that her circumstances would take her longer to find a job. As such, the claimant has assessed her total future loss as 9 months x £617.76 (monthly) = **£5,559.84.** Her monthly figure is, I have worked out, £142.56 x 52 weeks / 12 months.

124. At this Final Hearing, the claimant relied upon the figures given in her revised statement of financial loss, provided on 28 February 2022, where she stated that her "***statutory weeks pay***" was £142.56, and she used the same calculations as she had provided on 26 October 2021 when

complying with Judge Kemp's case management orders. Both calculations are at odds with her ET1 stated pay of £142 per week.

125. The claimant did not make a complaint of unfair dismissal to this Tribunal as part of her ET1 claim form presented on 1 August 2021, and as such, there is no such head of complaint before this Tribunal.

126. Such a complaint, had it been pursued, would have been addressed under reference to **Part X of the Employment Rights Act 1996** (Unfair Dismissal), and involved consideration of the right not to be unfairly dismissed, the circumstances of dismissal, and whether any such dismissal was fair or unfair, having regard to **Sections 94 to 98**.

127. In the event of success with any such unfair dismissal head of complaint, the Tribunal would have required to consider the matter of possible remedies, at **Sections 111 to 126**, **Section 126** providing that for acts which are both unfair dismissal and discrimination, a Tribunal shall not award compensation under either of the **Employment Rights Act 1996** or **Equality Act 2010** in respect of any loss which has been taken into account under the other Act in awarding compensation on the same or another complaint in respect of that act.

128. In her statement of financial loss / schedule of loss, the claimant has sought sums for basic award, compensatory award, and loss of statutory rights, all being heads of compensation in an unfair dismissal claim. I have not considered them any further, as the claimant has not brought a live unfair dismissal complaint before this Tribunal.

129. Instead, what I have done is to look at the claimant's financial losses from 3 July 2021 to the close of this Final Hearing, on 22 March 2022, a period of 37 weeks, and then look forward as to when it is likely she will be able to obtain new employment paying her what she earned while employed at the respondents.

130. On the evidence I have heard, I do not consider it likely that she will obtain fresh employment within the next 6 months, so in addition to awarding her past loss of 37 weeks, being £142 x 37 = **£5,254**, I consider it appropriate to award her future loss for a further period of 26 weeks, being £142 x 26 = **£3,692**, giving a **grand total of £8,946**.

131. Turning now to injury to feelings, it will be recalled how, in her response to Judge Kemp's orders, and as set forth in her email reply of 26 October 2021, the claimant addressed her claim for injury to feelings assessed by her (with assistance from the CAB) as being the **Vento** middle band of £9,100.

132. It is appropriate to recall what she said then, and which she re-iterated in her oral evidence to me at this Final Hearing, as follows:

> ***"I propose the middle band of £9,100, as i have been devastated with not working and not bringing an income into my household. I feel worthless and stressed and a complete failure to my daughter not being able to provide. Me and my partner have had strain on our relationship had non stop arguements about bills and this case. Came to the point i was sleeping on the couch and he was upstairs. We have nearly seperated over this and how ive became extremely angry and stressed all the time, i just feel like a complete failure to my daughter & partner and worthless about myself."***

133. In her evidence to this Tribunal, as recorded earlier in the findings in fact, at (103), on a scale of zero to 10, the claimant stated that her injury to feelings was a 10.

134. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162.** Awards for injury to feelings are compensatory. They should be just to both parties. They should

compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

135. I remind myself of the sage judicial guidance given to Tribunals in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."***

136. Lord Justice Mummery said (when giving guidance in **Vento**) that "***the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…… tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson."***

137. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

138. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, and, until ET Presidential Guidance was issued, the amount appropriate for the lower

band was then £660 to £6,600 and the amount appropriate to the middle band was then £6,600 to £19,800. The amount appropriate for the top band was then £19,800 to £33,000.

139. More recently, account has now to be taken of the position adopted by Employment Judge Shona Simon, the Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET(England & Wales), originally first issued on 5 September 2017, and updated by annual addenda, most recently, for the purposes of the present case, by the fourth addendum issued on 26 March 2021.

140. In respect of claims presented on or after 6 April 2021, the **Vento** bands are as follows: a **lower band of £900 to £9,100** (less serious cases); a **middle band of £9,100 to £27,400** (cases that do not merit an award in the upper band); and an **upper band of £27,400 to £45,600** (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

141. In deciding upon an appropriate amount, I first of all have had to address the appropriate band as per **Vento.** It is my judgment that this is a case that appropriately falls into the lower band, although the claimant has assessed it differently, as being in the middle band. In my judgment, however, this is a less serious case and it clearly falls within the lower **Vento** band, but within the upper quartile.

142. In this case, there was not any concerted campaign against the claimant, but equally it was not an isolated incident, as there were issues on the way she was treated throughout her employment with the respondents. However, I am here looking only at the established acts of discrimination and victimisation found as well-founded in this Judgment.

143. As per the EAT judgment in **Base Childrenswear Ltd v Miss N Lomana Otshudi**, a judgment by Her Honour Judge Eady QC, as she then was (now Mrs Justice Eady, a High Court judge, and the new President of the EAT), as reported at **[2019] UKEAT/0267/18,** I readily accept that my

focus must be on the impact of the discriminatory acts on the claimant. Equally, as the EAT observed, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety.

144. At this Final Hearing, I have heard in oral evidence from the claimant, as also her father. I have reminded myself of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12,** which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings.

145. Here, I had the claimant's own evidence, supported by her father's evidence, but no GP's medical report, nor any evidence from any other person with knowledge of the precise nature and extent of the claimant's injured feelings, such as her mental health nurse, so it has been difficult for me to differentiate between any stressors caused by the respondents, any other stressors, such as the stress that any family will suffer due to a lack of regular money coming into the household, and any additional stressors caused by the claimant's decision to prosecute her claim before the Tribunal, a feature common to all litigants.

146. In deciding this matter, I have also borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer.

147. The claimant provided credible and reliable first-hand evidence about her treatment by the respondents, and the manner of it, and how that had affected her, and I found her testimony in that regard compelling and convincing. I have no doubt , having heard the claimant's evidence, that she felt, and still feels, hurt about the respondents' treatment of her.

148. Applying a broad brush, doing the best I can, having regard to the available evidence, and judicial guidance from the higher courts and Tribunals, I assess the claimant's injury to feelings at **£6,285**, and that is the amount that I have awarded her in terms of my Judgment.

149. Accordingly, I now turn to the question of interest. The Tribunal is empowered to make an award of interest upon any sums awarded pursuant to the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.** The rate of interest prescribed by **Regulation 3(2)** is the rate fixed for the time being, currently an amount of 8 *per cent per annum* in Scotland.

150. By **Regulation 6**, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. In the case of other sums for damages or compensation and arrears of remuneration, interest shall be for the period beginning with the mid-point date and ending on the day of calculation.

151. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in **Regulation 6(1) and (2),** it may, under **Regulation 6(3),** calculate interest for a different period, as it considers appropriate.

152. I received no submission to that effect from either party, and , in any event, I do not consider it appropriate to do so. I cannot, of course, alter the interest rate of 8%, as that is prescribed by law, and it is a matter in respect of which I have no judicial discretion to vary the interest rate, only the period to which that rate refers. Accordingly, the appropriate interest rate is 8%.

153. In working out interest payable, the day of calculation is today's date, that is to say, Wednesday, 18 May 2022, being the date of this Judgment. Financial losses have been assessed at **£8,946**. The period from 3 July 2021 to 18 May 2022 is 320 days. Applying mid-point, that is **160 days**.

My calculation of the interest payable is **£8,946 x 0.08% = £715.68 x 160 / 365 days = £313.72.**

154. Further, I also order that the respondents shall pay to the claimant the appropriate sum of interest upon the injury to feelings award of **£6,285** calculated at the appropriate interest rate of 8% p.a. for the period between 3 July 2021, being the date that the claimant's employment with the respondents ended, and today's calculation date, being 18 May 2022, being the date of this Judgment, a period of **320 days.** My calculation of the interest payable is **£6,285 x 0.08% = £502.80 x 320 / 365 days** = **£440.81.**

(7) is the claimant owed any notice pay, or holiday pay, by the respondents?

155. In her ET1 claim form, at section 8.1, the claimant complained that she was owed notice pay and holiday pay. At section 9.2, she asserted that she was due holiday pay of £2,794.04, using the Government calculator, and notice pay of £285.12, stated to be two weeks wages, albeit, at section 6.2, she had asserted that her normal take home pay was £142 per week. It was not transparently explained how she had calculated either amount as claimed by her.

156. At this Final Hearing, she relied upon the figures given in her revised statement of financial loss, provided on 28 February 2022, where she stated that her "***statutory weeks pay***" was £142.56, and she claimed holiday pay totalling £1,632.29, and 2 weeks notice at £279.04. These were the same calculations as she had provided on 26 October 2021 when complying with Judge Kemp's case management orders. Both calculations are at odds with her ET1 stated pay of £142 per week.

157. In her calculations, the claimant set forth her quantification as follows:

2 years Holiday Pay

1st Year

16 hour work weekly, calculated on hours

98.8 hrs x £7.70 = £770.76

2nd Year

16 hour work weekly, calculated on hours

98.8 hrs x £8.72 = £861.52p

Total = £1,632.29p

2 weeks notice = £279.04p

158. The issue for me, in deciding this case on the basis of the evidence led at the Final Hearing, is whether or not the claimant has a valid claim for either of these heads of claim and, if so, in what amount.

159. Failure to pay notice pay is a complaint in terms of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** (SI 1994 / 1624) for a claim that arises or is outstanding on the termination of an employee's employment. I have found that the effective date of termination was 3 July 2021, and the ET1 claim form was presented on 1 August 2021. No issue of time bar arises.

160. In terms of **Section 86 of the Employment Rights Act 1996**, provision is made for statutory minimum period of notice. In the absence of any contractual provision, and none was evidenced to the Tribunal, the claimant's minimum statutory notice would be 2 week's pay, based on her length of service with the respondents.

161. The claim for holiday pay can be pursued by a claimant either as a complaint of unlawful deduction from wages, contrary to **Section 13 of the Employment Rights Act 1996**, or a breach of **Regulation 30 of the Working Time Regulations 1998**. As an unrepresented party litigant, the

claimant has not pled her case in terms of its legal basis, but simply pled it on her factual averment that she is owed holiday pay by the respondents.

162. **Section 13 of the Employment Rights Act 1996** deals with the right not to suffer unauthorised deductions from wages. Under **Section 27(1)(a),** wages include holiday pay. So far as relevant for present purposes, Section 13 provides that:

> ***Right not to suffer unauthorised deductions***.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

163. Where a worker alleges that his employer has made an unlawful deduction from wages, a complaint can be brought to the Employment Tribunal under **Section 23**. If well-founded, the Tribunal can make a

declaration under **Section 24**. However, there are time limit provisions, and, in the circumstances of the present case, I need to address those statutory provisions.

164. So far as relevant for present purposes, **Section 23** states that:

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments, or
>
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
>
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
>
> (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

165. The **Working Time Regulations 1998** contain a similar time limit provision at **Regulation 30.**

(8) if so, in what amount should the Tribunal order the respondents to make payment to the claimant?

166. I am satisfied that the claimant is due 2 week's statutory minimum period of notice, and I have awarded her that, but not at the sum claimed by her of £279.04. On the undisputed evidence that her weekly pay was £142, that computes as **£284**, and that therefore is the amount that I have ordered the respondents to pay to her for that head of claim.

167. Doing the best I can, on the information available to the Tribunal, I do not know what the claimant's holiday year was, nor whether she took any leave, although that seems unlikely, based on the evidence she gave to me, and her claim for two years' holiday pay. On the information available, I am satisfied that she is due holiday pay from the respondents.

168. I have looked at the GOV.UK online calculator for holiday entitlement, and based on an employee working 16 hours per week, over 2 days, that shows a statutory entitlement of **89.6 hours holiday**. In her calculations, the claimant quoted 98.8 hours. I do not know where she got that figure from.

169. Looking at the claimant's calculations, I see also that there are, in any event, arithmetical errors. For the 1st year, she shows ***98.8 hrs x £7.70 = £770.76.*** In fact, the proper amount is £10 less being ***£760.76.*** For the 2nd year, she shows ***98.8 hrs x £8.72 = £861.52p.*** In fact, the proper amount is ***£861.53,*** a difference of one pence.

170. Recalculating, using **89.6 hours** per year, I compute that the claimant is due 89.6 hrs x £7.70 = **£689.92** for her first year, and 89.6 hrs x £8.72 = **£781.31** for her second year, being a grand total of **£1,471.23**, and that is therefore the amount that I have ordered the respondents to pay to her in terms of my Judgment for holiday pay.

(9) with reference to the other heads of complaint, allowed by the Tribunal granting leave to the claimant to raise them at this Final Hearing, are any of them well-founded and, if so, what remedy should be awarded by the Tribunal?

171. I note and record here that while, in her ET1 claim form, at section 8.2, the claimant referred to "**flexible working**", she did not bring any complaint against the respondents in terms of **Part VIIIA of the Employment Rights Act 1996**, in particular the statutory right under **Section 80F** to request a contract variation for a change in her terms and conditions of employment relating to the hours and times when she was required to work for the respondents as her employer.

172. Having made that observation, I turn now to those additional heads of complaint that I have allowed the claimant to pursue at this Final Hearing by granting her oral application for leave to amend, as made by her to me at this Final Hearing.

173. In her evidence at this Final Hearing, as I have recorded earlier in my findings in fact, the claimant stated, after reference to her payslips from Fusion Payroll Limited, showing net payment of £125.56 per week, she got paid £123.00 cash, and there was therefore a shortfall of £2.56 per week not paid to her which, when she queried it, she says she was advised it was a deduction for national insurance (NI).

174. On the evidence available to the Tribunal, I cannot find that that was an unlawful deduction from wages, as a deduction for NI is permissible. As such, I find that that part of her claim is not well-founded, and so it is dismissed by the Tribunal.

175. In respect of the respondents' failure to provide the claimant with itemised pay statements, contrary to **Section 8 of the Employment Rights Act 1996**, the Tribunal, in terms of the its powers under **Sections 11 and 12 of the Employment Rights Act 1996**, makes a declaration to that effect,

but there is no further monetary award made, as the Tribunal has already ordered the respondents to pay to her the total amount of unlawful deductions from her wages in respect of holiday pay.

176. In her evidence, the claimant often referred to the fact that she had received no written contract of employment, nor any written particulars of the terms and conditions of her employment. None were produced by Mr Campbell when he provided the Tribunal with his "***evidence pack***".

177. As the claimant did not expressly complain of this failure by the employer in her ET1 claim form, on one view, there is no such complaint formally pled and before this Tribunal, and further as she did not include it in her details of compensation sought from the respondents, it could be thought that it is a matter that the Tribunal should not consider any further.

178. However, I reject that highly technical approach, because the Employment Tribunal does not operate on the basis of formal written pleadings, but, in terms of its overriding objective under **Rule 2** to act fairly and justly in dealing with any claim.

179. The Tribunal must avoid unnecessary formality, and be flexible in its procedure, so far as compatible with a proper consideration of the issues before it, and so, in the same way as the higher Courts (e.g. the Employment Appeal Tribunal in **Langston v Cranfield University [1998] IRLR 172**) have allowed Employment Tribunals to consider as a matter of course certain standard points in a unfair dismissal claim, whether or not specifically pled by a claimant, I take the view that a similar, pragmatic approach should be taken here, where, on the clear and unequivocal evidence before this Tribunal, the respondents, as an employer, have failed to address a basic statutory duty to provide written particulars of employment to an employee.

180. To fail to take this significant breach of employment law into account will result in a windfall saving to the respondents, and no additional award for the claimant. That is both unjust and inequitable, and it does nothing to

address the statutory mischief that Parliament clearly intended, in enacting the **Employment Act 2002**, that Employment Tribunals should be able to address in cases before these Tribunals.

181. As the claimant has been successful before this Tribunal on many of her heads of complaint brought against the respondents, an award of additional compensation is open to the Tribunal under **Section 38 of the Employment Act 2002**, and so, acting on my own initiative, for it is in the interests of justice to so do, I have decided to make an additional award in favour of the claimant. On the evidence before me, there are no exceptional circumstances which would make such an award unjust or inequitable.

182. Specifically, I have decided to award the higher amount of 4 weeks' gross pay to the claimant for that failure, being satisfied that it is just and equitable for me to make such an additional sum in the amount of £**568**.

183. As the respondents continue to operate and thus employ staff, the Tribunal trusts that, in light of their failures in this case, they will take steps to review their employment practices and procedures, and ensure proper and timeous compliance with issuing employees with statutory written particulars of employment, and itemised pay statements.

184. As regards the respondents' apparent failure to issue a P45 to the claimant, this Tribunal has no power to order the respondents to provide her with a P45, so if she has not yet received it, through the respondents, or their accountants, the claimant should pursue that matter direct with the respondents, and / or with HMRC as the relevant body for her tax affairs.

Financial Penalty

185. Although the respondents did not attend, or be represented, at this Final Hearing, and they made no application to be allowed to participate, they are still a party to these Tribunal proceedings and, as such, they are

entitled to a copy of this Judgment and Reasons. It is being issued to them, along with a copy sent to the claimant herself.

186. In light of my judgment, I have found that the respondents have breached the rights of the claimant and, in these circumstances, and as it may be that this case has one or more aggravating features, such that a financial penalty might be imposed against the respondents, under **Section 12A of the Employment Tribunals Act 1996**, before I consider whether to issue such a penalty and, if so, in what sum, I have decided to give the respondents 14 days in which to make written representations as to why I should not do so or, if I decide to do so, what amount the penalty ought to be, having regard to all the circumstances of the case, and the respondents' ability to pay such an award, all as provided for in **Section 12A** itself.

187. A financial penalty can be one half of the award made by the Tribunal. When replying to the Tribunal, **within the next fourteen days**, the respondents should also confirm whether or not payment of the sums awarded to the claimant in terms of this Judgment have been paid to her, which is another factor that may be taken into account.

188. Following the expiry of that 14 days from date of issue of this Judgment, I wish to make it plain that if the respondents do not make any written representations to the Tribunal, I will proceed to make a reserved decision, without any further delay, and without the need for any attended Hearing. I will deal with the matter in chambers, and on the available papers.

Employment Judge: **G Ian McPherson**
Date of Judgment: **18 May 2022**
Entered in register: **19 May 2022**
and copied to parties

APPENDIX

This is the Appendix referred to in finding in fact (92) at page 50 being a reproduction of the claimant's email of 28 February 2022, at 16:33, enclosing her reply to orders of the Tribunal made on 21 February 2022, as reproduced at pages 185 to 196 of the Bundle used at this Final Hearing, where she detailed (a) what she seeks in remedy; (b) compensation and what's included ; (c) details of benefits received; (d) summary of jobs applied for; and (e) details on how she has tried to minimise her financial loss.

Financial Loss (amended)

03/07/2021
21/02/2022

Age 26

Number of years Service
2 years

Statutory weeks pay - £142.56

17 weeks x £142.56 = £2423.52

Compensatory Award

I am still looking for work, however have been
Unsuccessful up until now.

Other Benefits

Universal Credit - £210 per month

£86 drop due to covid increase
£124 a month
Wont recieve next month as partner has taken
overtime (reduces the more you earn).
(I have not currently added this to my total)

Child Benefit - £80 a month (for daughter)
SCP - £40 a month (for daughter)

Personal Independance Payment
£490.20 per month
For mental health and to help with daily
Living needs.
My pip has been extended to July 2023.

Total = £610.20

Future Losses

I have an ongoing loss of £142.56 weekly if i was still working my 16 hours per week & not set days.

I estimate this will not be changing anytime soon as i am finding it difficult to find another job with the same conditions as my previous job. The job market on the lead up to christmas is temp jobs and fixed hours/days, i can not commit to those due to childcare, my mental health & my partners hours. I do have a range of skills over many sectors and thought this would be an advatage however i estitmate it will last at least 9 months, as my circumstances will take me longer to find a job.

Total Future loss (9 months x £617.76 (monthly) Total = £5,559.84

However at this stage it is still an ongoing loss and i dont know how much longer this will continue.

Loss of Statutory Rights

I will have to work my full two years again to regain my statutory rights of protection from unfair dismissmal, descrimination at work, Statutory Maternity Pay if i have another child in the furture, i submit it would be appropriate to award £500 to reflect my loss.

Remedy

I seek compensation as a remedy for the events & from my employer.

The compensation is made up of, loss of earnings, injury to feelings, holiday pay, future losses & ongoing losses, loss of staturory rights and interest.

Number of years Service
2 years

Statutory weeks pay - £142.56

17 weeks x £142.56 = £2423.52

Compensatory Award

I am still looking for work, however have been
Unsuccessful up until now.

Future Losses

I have an ongoing loss of £142.56 weekly if i was still working my 16 hours per week & not set days.

Total Future loss (9 months x £617.76 (monthly) Total = £5,559.84

However at this stage it is still an ongoing loss and i dont know how much longer this will continue as i am activtly looking for employment.

Loss of Statutory Rights

I will have to work my full two years again to regain my statutory rights of protection from unfair dismissmal, descrimination at work, Statutory Maternity Pay if i have another child in the furture, i submit it would be appropraite to award £500 to reflect my loss.

2 years Holiday Pay

1st Year
16 hour work weekly, calculated on hours

98.8 hrs x £7.70 = £770.76

2nd Year
16 hour work weekly, calculated on hours

98.8 hrs x £8.72 = £861.52p

Total = £1,632.29p

2 weeks notice = £279.04p

While calculating this we have found i was underpaid my rate while on furlough from april until i was due to leave on maternity.

I had indepent advice on some of these and have worked them out to the best of knowledge, with everything calculated,

£26,499 is what i seek this is with interest added at 8%.

Benefits

Universal Credit - £210 per month
£86 drop due to covid increase
£124 a month
Wont recieve next month as partner has taken overtime (reduces the more you earn).
(I have not currently added this to my total)

Child Benefit - £80 a month (for daughter)
SCP - £40 a month (for daughter)

Personal Independance Payment
£490.20 per month
For mental health and to help with daily Living needs.
My pip has been extended to July 2023.

Total = £610.20

Jobs applied for (ammened)

Bothwell Dental Practice Receptionist
applied 29 July 2021
Handed cv & cover letter into reception
Haven't heard assume to be unsuccessful

Sales Assistant Celtic Store
Unsuccessful

Sales Assistant La grande boutique
Hasn't been viewed

Veternary Receptionst Campbell & Galloway vets - couldnt pass the assessements

Office junior splash inflatables
Ignored

Waitress ill pranzo
Couldn't accomadate hours round daughter
Mostly weekend work, did explain my situation
Before this was stated

Waitress Gondalina
Asked for my number never contacted me

Retail assistant Screwfix
Moved to next process wasnt selected

Handed cv to Kirkwoods clothes for christmas staff. Hoping to hear back my hours can be worked.

Telesales Staff 4icg
Not selected

Telesales Staff Homesealed
No contact as of yet

Receptionist babyscanning
Not selected

Sales Assistant Boo20
Not selected

Sales Assistant Dress2party
Not selected

Sales Assistant Policy Expert

Not selected

Sales Assistant Capital Hair

No contact as of yet

Sales Assistant bubbles childrenswear

Not selected

Cashier Amusement Arcade

Not contact as of yet

Waiting Staff HFD Grill

Not selected

Waiting Staff Boh Cuncina

Not selected

Waiting Staff Cutfish

Not selected (due to childcare)

Sales Assitant Claires

No contact as of yet

Sales Assitant CEX

No contact as of yet

Olympia Chipshop

Handed number & cv into shop

No contact as of yet

Sales Assistant Currys

No contact as of yet

Minimise Financial Loss(ammended)

My partner works full time, however during covid his shifts were reduced and no overtime available so my maternity money was needed. I didnt qualify for help due to the fact i was entitled to my maternity money, statuory maternity payment.

Now with me not returning, a month later overtime was now available as covid restrictions were lifted and my partner has taken that to cover me not working, i claimed universal credit to cover me not working, now covid increase has dropped so i loose £86, however with my partner now taking overtime i will not recieve any universal credit as it reduces the more you earn. I have borrowed money from my friends and family to minimise my loss, i will eventually need to pay that back. I receive PIP for my mental health to help with my daily needs, its not classed as a benefit or income however £250 of that goes straight to rent so i can still make a payment.

I have been applying for jobs, asking friends if there works are looking, handed cvs out (old fashioned sometimes the best way) i have tried to minimise my financial loss and so has my partner, we soley pay our bills and buy for our daughter.

I am still activitly looking for work, i am finding it hard to find an employement role that works round my daughters childcare needs. As my partner works 4 on 4 off, however i still apply for all roles in the hope that it can be worked, its returned as not selected or cannot work round childcare.

I have been searching for nurseries, in my area no nurseries take children under the age of 2, my mental health restricts me from travelling out with certain areas or without family members, my daughter is on a waiting list for September start that myself & partner will need to pay and it is lower band expense of £22.50 for half days. The nursery is set in uddingston, thats when kharah will be in set days, so i will then know what days i can commit to. i have searched child minders and cannot afford the prices asked for.