Case No: 3311610/2021

EMPLOYMENT TRIBUNALS

Claimant Mrs B Malik

Respondent v (1) MW Electrical (Midlands) Limited (2) Ms N Payne

Heard at: Cambridge **On:** 8, 9, 10 August 2022

Before: Employment Judge Tynan

Members: Ms J Schiebler and Mr D Hart

Appearances:
For the Claimant: Mr Mace, Claimant's Father
For the Respondent: Mr Nadin, Solicitor

JUDGMENT having been sent to the parties on 14 September 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The First Respondent is a small family owned and managed electrical business which started life as a partnership approximately 30 years ago but in more recent years has traded as a limited company. It employs approximately 11 electricians and engages a further number of sub-contractors.

2. The Claimant is a member of the family. She commenced employment with the Respondent as an Administrator in January 2015. She resigned her employment with immediate effect on 20 May 2021 and claims to have been constructively dismissed. Her complaints are as follows:

    - Wrongful dismissal – she pursues a claim for damages in respect of her notice pay;
    - Unfair dismissal pursuant to s.98 of the Employment Rights Act 1996 ("ERA 1996");
    - Automatically unfair dismissal pursuant to s.99 of ERA 1996;
    - That her rights under the Maternity and Parental Leave Regulations 1999 were infringed;

- That she was discriminated against and subjected to a detriment because of pregnancy and because she availed herself of maternity leave;
- That she was victimised; and
- That she is owed statutory maternity pay.

3. The Claimant presented her Claim to the Employment Tribunals on 13 June 2021 following ACAS Early Conciliation. The Issues to be determined in the proceedings were identified by Judge Mason at a case management preliminary hearing on 8 February 2022. They are set out at pages 42 to 45 of the Hearing Bundle.

4. The claims are denied by the Respondents. Only the discrimination (including victimisation) and detriment complaints can be pursued against the Second Respondent, the other complaints are against the First Respondent as her employer. In fact, the Particulars of Claim confirm that the detriment claim is only pursued against the First Respondent.

5. There was a single Hearing Bundle running to some 157 pages. The Claimant and Second Respondent gave evidence, as did their aunt, Barabara Harwood, their cousin, Rhona Faulkner, and the Claimant's uncle, Michael Waterfield. Reference was made to other family members in the course of the Final Hearing, some of whom attended the hearing. It is clear that this case has divided the family and caused emotions to run high.

Findings of Fact

6. There is a Contract of Employment at page 46 onwards of the Hearing Bundle, albeit not signed by the First Respondent. It confirms the Claimant's job title and that she reported to the Second Respondent, her cousin. It also documents that she was required to work 40 hours per week, though the parties agree that this is incorrect. Having commenced with the First Respondent working 8 hour per week, the Claimant's hours increased to 28 hours per week following her return to work after the birth of her first child.

7. In a case that concerns the Respondents' alleged treatment of the Claimant, specifically whether they were influenced in their treatment of her by the fact that she was pregnant and / or that she took or sought to take maternity leave, we note that the First Respondent was content to increase the Claimant's hours at her request following her first period of maternity leave in 2018 and that the Claimant did not challenge the Second Respondent's evidence, in particular at paragraphs 11 – 15 of her witness statement, that the First Respondent was flexible in accommodating the Claimant's needs as a mother at this time, including flexing her hours when her sleep was disturbed by her young child.

8. By February or March 2020, the Claimant was aware that she was expecting a second child. She shared her news with the Second Respondent very early on, when she was perhaps just a matter of weeks into the pregnancy. That evidences to us the close relationship, as well as the trust, that then existed between the two cousins.

9. The expected date of birth was 17 November 2020, though in the event the Claimant's daughter arrived early on or around 31 October 2020.

10. The Claimant's pregnancy coincided with the initial months of the Coronavirus pandemic, when the risks or otherwise to expectant mothers and their unborn children were essentially unknown. Over the course of March 20220 there was a significant downturn in the First Respondent's volume of business which not only impacted the work for its electricians, but inevitably the related administrative tasks that were undertaken by the Claimant. However, we accept the Second Respondent's evidence that the First Respondent's primary concern as a family run business was for those who were vulnerable or who had children or other caring responsibilities, and that this included the Claimant who we find was relieved to be placed on furlough leave at the time. As we shall return to, the Claimant suffers with anxiety and the pandemic understandably served to elevate her anxieties. In the event, only the Second Respondent and James Faulkner, one of its qualified electricians, remained at work full time throughout 2020.

11. Various of the First Respondent's customers responded to the challenges of the pandemic by implementing paperless processes, further reducing the Claimant's previous administrative workload.

12. The impact of the pandemic upon the First Respondent's business continued throughout 2020 and into 2021. Indeed, the company continued to make full use of the Coronavirus Job Retention Scheme until the Scheme was finally wound down in September 2021. Happily, it has avoided making any of its staff redundant notwithstanding they were not always fully utilised.

13. With effect from 20 March 2020, the Claimant was on furlough leave. For the following 16 weeks the First Respondent topped up her furlough pay to her full pay. It did not do this for its other furloughed staff. In other words, the Claimant was treated more favourably than others were treated, notwithstanding she was pregnant. We find that is consistent with how she was treated in the period following her return from her first period of maternity leave and evidences to us both the company's and the Second Respondent's positive intentions towards her.

14. There was some suggestion that the Claimant returned to work in response to the First Respondent's decision to no longer top up her furlough pay. In fact, her return to work seems to have coincided with changes to the Coronavirus Job Retention Scheme, specifically the introduction of flexible furlough. Whilst the Claimant's recollection is that she worked one or one and a half days per week, she did not actively challenge Ms Payne's more precise analysis of her working arrangements through to 20 October 2020 when she took a short period of leave prior to her planned formal commencement of maternity leave on 30 October 2020. Ms Payne calculates that the Claimant worked 10 days in total during her flexible furlough working period (paragraphs 28 and 29 of her witness statement), using annual leave to top up her pay. Those 10 days equate to less than one day per week, on average. By taking annual

leave to top up her pay, the amount of the Claimant's pay remained constant over that period.

15. Pizza was ordered in on the last day before the Claimant went on maternity leave. Whilst it was a small, inexpensive gesture, it further evidences to us an ongoing friendly working environment with no concerns or resentments on either side.

16. The Claimant was aware that her cousin, Rhona Faulkner would be covering her duties during her absence and we find that she had no concerns about the arrangements and did not object to them.

17. As noted already, the Claimant's daughter was born early. For the first six weeks of her maternity leave the Claimant was paid 100% of her normal pay in circumstances where her statutory right was to receive 90% of her pay. Again, it evidences to the Tribunal that the First Respondent was endeavouring to do the right thing. It certainly does not indicate that anyone at the First Respondent, certainly with the ability to make or influence decisions in respect of the Claimant, perceived her pregnancy or planned period of maternity leave negatively.

18. With effect from 14 December 2020, the Claimant received 80% of her pay. Texts messages from this time, in particular at page 68 of the Hearing Bundle, suggest that she received £199.49 per week after tax as against £151.20 per week before tax, had she only been paid statutory maternity pay.

19. We have to determine as a preliminary issue whether the Claimant remained on maternity leave, namely within her protected period following that exchange of text messages in December 2020 and, indeed, through to 20 May 2021 when she resigned her employment (Issue (2) – page 43 of the Hearing Bundle). We note in this regard that when the Claimant first queried her status with the Second Respondent on 21 December 2020, the Second Respondent responded,

> *"Maternity started last week. Week 37."* (page 64 of the Hearing Bundle)

20. Whilst there is no explanation as to why that might have been the case, other than it coincided with the reduction in the Claimant's pay from 100% to 80% of her normal pay, the Second Respondent went on to say,

> *"Now that it's week 7, your wages will be paid as furlough which is 80% of your wages."* (page 67 of the Hearing Bundle)

21. The Second Respondent did not state in terms that the Claimant's maternity leave was ending, but in any event that was not her decision to take. In any event, later in the same text message she wrote,

> *"You can claim furlough whilst on maternity".*

In other words, she acknowledged that the Claimant was on maternity leave. The Claimant's response at page 69 of the Hearing Bundle, in which she said she didn't realise she was back on furlough, has to be

viewed in that context. It was not an unequivocal statement or acknowledgment by the Claimant that her maternity leave had ended or was ending.

22. It seems that the next interaction between the Claimant and the Second Respondent was some weeks later in March 2021. In the intervening period the country had entered its second national lockdown. This would have been a challenging time for the Claimant who then had a young child and a very young baby to look after, but was isolated from family and friends, as well as the wider network of support services and activities otherwise available to parents with young children. The Claimant's email of 8 March 2021, at page 70 of the Hearing Bundle, can be seen in that further context. Whilst, in ordinary circumstances, it might be thought unusual for an employee, particularly a family member in a family business, to contact their employer about their return to work some five or so months ahead of their planned return date, the Claimant was isolated and, even if this was not known or understood by the wider family, she has a diagnosed anxiety disorder. We conclude that at a time when she was isolated and experiencing feelings of heightened anxiety, she was seeking certainty and reassurance. Whilst that is our assessment of the situation with the benefit of hindsight, this would not have been apparent to the Second Respondent who would not have been alive to the fact that the Claimant's anxiety would cause her to worry and to perceive situations through an anxious lens.

23. The Claimant's email of 8 March 2021 is the first in a limited number of interactions between the Claimant and the Second Respondent that led to misunderstanding between them and which has ultimately resulted in these proceedings and to a wider schism within the extended family. The Claimant and the Second Respondent spoke briefly on 9 March 2021. The Claimant's account of that meeting is at paragraph 8 of her witness statement, the Second Respondent's account is at paragraph 39 of her witness statement. There is some common ground between them insofar as the Second Respondent accepts that she told the Claimant there would not be enough work for her to work 28 hours per week, but that she expected her to be able to work at least 8 hours per week. What was left undiscussed was whether the Claimant would therefore return on flexible furlough, as was the case prior to her maternity leave, or whether the reduction in her hours might involve a longer term change to her working arrangements. It is not the Claimant's evidence that it was suggested by the Second Respondent or that she understood her at the time to be saying that this change might become a permanent arrangement.

24. The Claimant emailed the Second Respondent on 10 March 2021. Her email is at page 71 of the Hearing Bundle. She wrote,

> *"Thank you for calling me to discuss my return to work. Please can you confirm the changes of my hours in my Contract, including expected days and hours on my return."*

If she believed that a longer term change to her working arrangements was being proposed, this initial email did not say so.

25. After a further exchange of emails the same day, the Claimant wrote,

> *"Regarding the meeting, is this to discuss changes to the terms and conditions of the Contract including hours and reasons why? As my workload has been split across the other members of staff in the office and my maternity cover is staying on, I would like to clarify if the reduction of hours is across the board for those who carry out the same work as me, or is it just my hours that have been affected?"*

She went on to observe that they had plenty of time to iron out any details before her return to work.

26. Whatever the nature of the Claimant's concerns, they were not expressed as clearly as they might have been even if they are now all too clear given the issues that we have to determine in these proceedings. Even if the email might have alerted the Second Respondent to the possibility that certain issues or anxieties were beginning to play on the Claimant's mind, her specific concerns were not spelled out, nor were they seemingly pressing given the Claimant's comments about there being plenty of time to iron out any details. In any event, the Second Respondent did seek to reassure the Claimant when she replied,

> *"We want to be as flexible as possible when you do return, like we have always been around your nannying jobs and childcare, but I also need to be realistic about what hours we will be able to give you, which won't be as much as three days a week, but we can go over everything in a new Contract in our meeting."*

The Second Respondent's reference to a new contract could have been expressed more clearly, since it signaled to the Claimant that the Second Respondent had in mind a potentially longer term change to her working arrangements. If that was the Claimant's understanding, there is nothing in the exchange that suggests this would be other than following discussion, as was the case when she had returned following her first maternity leave and agreed an increase in her hours.

27. The Second Respondent took the obvious sensible course on 10 March 2021, namely she proposed to the Claimant that they meet to discuss her return to work.

28. There was a lost opportunity for the Claimant to secure essential clarity on the issue insofar as she failed to ask any questions at her subsequent meeting with the Second Respondent on 23 March 2021. We find that they were somewhat at cross-purposes when they met and indeed in their respective emails at the time, and that each of them failed to fully appreciate the points being conveyed by the other and to ask essential questions that might have elicited a clearer understanding on both their parts.

29. We do not think that the wider family, by which we mean the older family members, helped the situation by gossiping and speculating about what was happening, causing the Claimant, the Second Respondent and Ms Faulkner to begin to question one another's motives and intentions.

30. In the absence of any questions from the Claimant on 23 March 2021, the Second Respondent used the meeting to reiterate what she had said on 9 March 2021 and confirmed in her email of 10 March 2021. Once again, the Claimant's follow up email at 2.32pm on 23 March 2021 (page 77) was a missed opportunity for the Claimant to articulate her concerns more clearly. The Second Respondent's response, which is also at page 77 of the Bundle, confirms that they remained somewhat at cross-purposes, and that the Second Respondent was focused on the Claimant's hours of work rather than the fact that Ms Faulkner might be staying on at the company. Equally, however, for her part the Second Respondent failed to clarify whether any potential reduction in the Claimant's hours of work would be a short term or permanent arrangement. That essential clarity was subsequently provided by the Second Respondent in an email sent on 19 May 2021 which, the Claimant accepted at Tribunal, confirmed that she would initially return from maternity leave on the same flexible furlough working arrangements that had been in place in the three or so months prior to her maternity leave and, further, that at the end of September 2021, assuming the Coronavirus Job Retention Scheme was not then further extended, she would return to her established contractual 28 hours per week.

31. The Claimant acknowledged in the course of her evidence at Tribunal that had the 19 May 2021 explanation been provided earlier that would have been an end to the matter. However, as we have noted already, she did not ask any questions of the Second Respondent on 23 March 2021. She said that she had been in a state of anxiety. Her evidence at Tribunal was that she was not thinking straight during the meeting. That inevitably has some bearing on our assessment on what was said during the meeting and leads us to prefer the Second Respondent's account of the meeting. Instead of seeking clarification at the meeting or in a follow up email, for example, by asking the Second Respondent specifically whether she would remain on flexible furlough (and if so, for how long) or whether any reduction in her hours would be a long term arrangement, the Claimant instead accessed the First Respondent's email system and, in the course of doing so, read two emails passing between her cousins on 24 March 2021 a few hours prior to the email she received from the Second Respondent in response to her own email of 23 March 2021.

32. The Claimant claims to have accessed the First Respondent's email system in order to locate missing payslips. We do not find that explanation to be a credible one. If the Claimant required copies of her payslips she might simply have asked the Second Respondent for these. In any event, we think it is too great a coincidence that, having accessed the First Respondent's email system, she then chanced upon this particular email exchange, the title and date of which did not obviously relate to her payslips. Questioned by Mr Nadin, she accepted that she should not have read the emails even if she had stumbled upon them by chance. We find that the Claimant accessed the First Respondent's email system with the specific intention of finding and reading emails about her absence and planned return to work. We further find that the Claimant's anxiety, exacerbated by the pandemic and the unhelpful intervention of other family members, had led the Claimant to have worries and concerns about the Respondents' intentions. Perhaps in a less anxious state of

mind and at a less vulnerable time in life and in the world, she might have been able to take a step back and to have considered whether the Second Respondent, who hitherto had been fully supportive of her, was now likely to be acting against her interests or that her other cousin, Ms Faulkner would want to take on the Claimant's duties, not least given she had her own childminding business and a long standing interest in teaching and caring for children rather than any particular interest in working in the family business.

33. The emails of 24 March 2021 between the Second Respondent and Ms Faulkner were the focus of much of Mr Mace's cross examination. In Ms Faulkner's words, she and the Second Respondent were thinking aloud in those emails. If, and we stress if, the Second Respondent had at the back of her mind that the changes brought about by the pandemic might have a lasting, long term impact upon the Claimant's workload and hours, she did not share any such thoughts with the Claimant when she emailed her at 4.39pm on 24 March 2021. Instead, her email was focused on the nearer term, even if she might have been more explicit in that regard.

34. As regards Ms Faulkner's email timed at 1.19pm on 24 March 2021, we find that the Claimant has read into her email a meaning that does not bear scrutiny. When Ms Faulkner wrote,

> *"I don't want her to think I am taking her job away from her"*

she was expressing her desire and concern that there should be no misunderstanding on the Claimant's part. Had her intention been to assume the Claimant's responsibilities but to conceal this from the Claimant, as the Claimant has interpreted her comments, she would have said, 'I don't want her to <u>know</u> I am taking her job away from her…' We conclude that the Claimant effectively substituted the word 'know' for *"think"* in her mind and thereby came to a mistaken view as to what was happening. On her own evidence, she was not thinking straight. She was suspicious, went looking for evidence and when she found the emails she read them in a way that reaffirmed her suspicions.

35. Ms Faulkner could not in any event have concealed anything from the Claimant since, but for her resignation, the Claimant would have returned to work following her maternity leave in August 2020. It would then have been immediately apparent to the Claimant if aspects of her work had been retained by Ms Faulkner. We accept Ms Faulkner's evidence that she did not and has not taken on the Claimant's duties as she is strictly limited in the amount of hours that she can work for the Respondent given her other work commitments. As she said on 24 March 2021, and we find remains the case, Ms Faulkner became a shareholder in the business and as a result has assumed certain banking and other responsibilities previously performed by Mrs Harwood, who has stepped back from day to day involvement in the company's affairs.

36. On 24 March 2021, Ms Faulkner, not unreasonably, thought it would complicate matters if the Second Respondent referred to the fact that Ms Faulkner would be remaining with the business following Mrs Harwood's decision to step back. Ms Faulkner's concerns were borne out by the

Claimant's reaction and mis-understanding on reading an email that was never intended for her. It is a salutary lesson for the Claimant in the perils of intruding into the privacy of other's communications.

37. The Claimant contacted ACAS on 3 April 2021 and an Early Conciliation Certificate was issued on 15 May 2021. She contacted ACAS again on 27 May 2021 to commence Early Conciliation in relation to the Second Respondent, with a further Early Conciliation Certificate being issued on 1 June 2021.

38. We have already referred to the Second Respondent's email of 19 May 2021. The Claimant resigned her employment the following day. Her resignation email is at pages 81 – 83 of the Hearing Bundle. In it, the Claimant summarised the background, as she saw it, and referred to the emails that had passed between her cousins. Having done so, she went on to say that she had been denied her statutory rights by being taken off maternity leave and, further, that the Respondent had sought to vary her terms and conditions of employment to facilitate Ms Faulkner's continued performance of her duties.

39. As regards the alleged denial of statutory rights, neither the Claimant nor her father could articulate to the Tribunal what statutory rights had been denied to her. We return in a moment to how the claim of constructive dismissal was recorded at the hearing on 2 February 2022. However, whereas the List of Issues documents four claimed breaches of contract, just two breaches were referred to by the Claimant at the time as evidencing her loss of trust and confidence (page 82 of the Hearing Bundle).

40. In the final paragraph of her letter of resignation, the Claimant requested that her resignation should be treated as a formal grievance. Save in relation to one matter, it is not necessary for the Tribunal to make further detailed findings as to events following the grievance or how it was dealt with by the First Respondent, since they do not give rise to specific complaints within these proceedings. The grievance was handled by Mr Waterfield. His detailed grievance outcome letter is at pages 86 – 93 of the Hearing Bundle. At the fifth page of the letter (page 90 of the Hearing Bundle), Mr Waterfield addresses the issue of the Claimant having accessed and read the 24 March 2021 emails. He expressed concern at the Claimant's actions and stated that the company would be inviting the Claimant to attend an investigation meeting to discuss how, when and why she had accessed the relevant email account and read the emails in question. He then went on to address the content and relevance of the emails. He made no mention of any concerns in relation to the First Respondent's compliance with the GDPR or other Data Protection Laws by reason of the Claimant's actions. Any alleged concerns in that regard were only subsequently communicated to the Claimant on 30 July 2021 in a letter from Mrs Waterfield (page 104 of the Hearing Bundle), by which date, the Claimant had already presented her Claim to the Employment Tribunals.

Law and Conclusions

Preliminary Issue - Section 18 of the Equality Act 2010 ("EqA 2010")

41. S.18(2) of EqA 2010 provides as follows:

> "(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably–
>
> (a) because of the pregnancy, or
> (b) because of illness suffered by her as a result of it."

42. S.18(5) of EqA 2010 goes on to provide:

> "(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).

43. In this case the Tribunal is required to determine as preliminary issue when the Claimant's 'protected period' ended and whether, as the Respondent asserts, this was on or around 14 December 2020.

44. S.18(6)(a) of EqA 2010 provides that the protected period in relation to a woman's pregnancy begins when the pregnancy begins and ends, if she has the right to ordinary and additional maternity leave (which is the case here), either at the end of the additional maternity leave period or, if earlier, when she returns to work after the pregnancy. The statutory requirement is that she must return to work before the end of her additional maternity leave in order for the protected period to come to an end before that date.

45. Return to work is entirely a decision for the employee. It is not a matter in respect of which the employer can act unilaterally, since the primary decision does not rest with it, even if it can delay a woman's return where insufficient notice has been given of their intended early return from maternity leave. In our judgement, by her words and/or actions, the employee must unequivocally indicate her intention to return. There is no such indication in any of the Claimant's text messages. On the contrary, they indicate both parties' understanding at the time that the Claimant was on maternity leave, albeit being paid the equivalent of furlough pay which was potentially at a higher rate than her maternity pay.

46. In our judgement, therefore, the Claimant continued to be in her protected period' up to and including 20 May 2021 when she resigned her employment.

Unfair Dismissal/Automatically Unfair Dismissal and Wrongful Dismissal

47. Subject to any qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer (section 94(1) of the

Employment Rights Act 1996). In certain circumstances an employee's dismissal is automatically unfair. Section 99 of the 1996 Act provides that a dismissal is automatically unfair if the reason or principal reason for the dismissal is of a prescribed kind and relates, amongst other things, to pregnancy, childbirth or maternity leave. Section 99 must be read in conjunction with regulation 20 of the Maternity and Parental Leave etc. Regulations 1999. Regulation 20(1) of the 1999 Regulations provides that an employee is to be regarded as unfairly dismissed if, inter alia, the reason or principal reason for the dismissal is of a kind specified at paragraph (3). The kinds of reasons specified in paragraph (3) include reasons connected with the pregnancy of the employee (regulation 20(3)(a)), the fact the employee has given birth to a child (regulation 20(3)(b)), and the fact an employee has taken, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave (regulation 20(3)(d)).

48. Employees additionally enjoy protection under s47C of ERA 1996 against detrimental treatment for the essentially same reasons, though in order for a complaint under s.47C to succeed it is not necessary that any of the prescribed reasons are the reason or principal reason for the detrimental treatment in question. They need only be a material factor in the employee's treatment. We shall return to this.

49. In order to succeed in a complaint under §.98 or 99 of ERA 1996, an employee must establish that they were dismissed. S.95 of ERA 1996 sets out the range of circumstances in which an employee is dismissed, including where the employee terminates the contract under which she is employed (with or without notice inn circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct (s.95(1)(c)).

50. The Claimant asserts that she was constructively dismissed. The List of Issues identifies that she relies upon the implied term of trust and confidence. The existence of an implied term of trust and confidence derives from the House of Lords decision in Malik v BCCI SA [1997] IRLR 462. The implied term is that neither the employer nor the employee will, without reasonable and proper cause, conduct themselves in a manner that is either calculated to, or likely to, destroy or seriously damage the essential trust and confidence of the relationship. There are two fundamental elements to the implied term. The conduct in question complained of must be destructive or seriously damaging of trust and confidence and it must lack reasonable and proper cause.

51. The four claimed breaches relied upon by the Claimant are pleaded at paragraph 17 of her Details of Claim at page 19 of the Hearing Bundle. The first claimed breach is the Second Respondent's alleged decision to amend the Claimant's working hours on her return from maternity leave. It will be clear from our findings above that the Claimant's working hours were not amended by the Second Respondent or anyone else, rather a misunderstanding arose on the Claimant's part which regrettably was not cleared up for some weeks as a result of miscommunication and further misunderstanding between herself and the Second Respondent. Even had the proposed continuation of the flexible furlough arrangements

constituted an amendment to the Claimant's working arrangements, we consider that the Respondents acted with reasonable and proper cause in proposing a continuation of the arrangements that were in place prior to the Claimant's maternity leave. When the Claimant first contacted the Second Respondent on 8 March 2021 about her return to work, the country was still in its second national lockdown. When the Second Respondent wrote to the Claimant on 19 May 2021 significant restrictions remained in place whilst the national vaccination programme was rolled out. It remained a time of considerable uncertainty for individuals and businesses alike. As the Second Respondent confirmed in her email of 19 May 2021, the company remained affected by the pandemic with a significantly reduced workload. In our judgement the Second Respondent acted with reasonable and proper cause when she indicated to the Claimant that she would likely return to work in August 2021 on reduced hours as part of a flexible furlough arrangement but that the situation would remain under review given that the Claimant was not due to return for several more weeks. In our judgement, in circumstances where the country and economy were just starting to open back up, that was the only sensible position that could be taken. The Claimant's complaint that trust and confidence was breached is not well founded.

52. The Claimant's second complaint is that the Second Respondent failed to provide reassurance to her when she expressed concern that her terms and conditions were being altered and that her maternity cover was staying on. Her complaint is pursued with reference to the Second Respondent's email of 10 March 2021 (page 73 of the Hearing Bundle). The complaint is not well founded. It is clear on the face of the email that the Second Respondent was seeking to provide reassurance in response to the Claimant's concerns as she reasonably understood them. They may well have been at cross-purposes, but the Claimant must accept her own responsibility for any misunderstanding that arose in failing to communicate her concerns more clearly. The Second Respondent was not acting without reasonable and proper cause in terms of how she sought to address the Claimant's email, including by suggesting a face to face meeting. Looked at objectively, the tone, tenor and content of her email evidenced her desire to understand and address any concerns then being raised; they were the actions of someone acting reasonably and with proper cause, and we cannot see how it can reasonably be suggested that what the Second Respondent wrote to the Claimant was destructive of trust and confidence.

53. The Claimant's third complaint is that when the Claimant explained on 23 March 2021 she would struggle with a reduction in her hours, the Second Respondent proceeded to confirm that she would only have 8 hours initially, but with the prospect of additional hours if the Second Respondent was away or work increased. That is essentially a reiteration of the second complaint above. As we have set out in our findings above, on 23 March 2021 the Second Respondent reiterated what she had said on 9 March 2021; the words may not have been identical, but the essence of what she said was the same. In our judgement, any ongoing misunderstanding between them does not strike at the heart of the relationship of trust and confidence. We do not think it appropriate to say they were each culpable in the matter, as that imports blame into the

situation. Instead, they had a shared responsibility in terms of how they communicated with one another . It is regrettable that the Claimant failed to engage with the Second Respondent on 23 March 2021 and to ask basic but important questions that might have served to clarify her concerns and highlight the particular issue that she wanted addressed, namely whether the Respondent envisaged a long term reduction in her hours of work. For her part, we are satisfied that the Second Respondent acted with reasonable and proper cause when she reiterated what she had said before, in circumstances where the Claimant was not actively engaging with her. The Claimant's complaint is not well founded.

54. The Claimant's fourth complaint that her role was absorbed by Ms Faulkner is also not well founded. Her role was not absorbed by Ms Faulkner, rather, Ms Faulkner covered certain of the Claimant's duties during her maternity leave, but with no understanding or intention on her part or on the part of others that this arrangement should continue once the Claimant returned from maternity leave. The First Respondent plainly acted with reasonable and proper cause in arranging maternity cover for the Claimant.

55. Given that the Claimant has failed to established conduct on the part of the First Respondent, whether acting through the Second Respondent or otherwise as she alleges, that strikes at the heart of the relationship of trust and confidence, she has necessarily failed to establish that she resigned her employment in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct (s.95(1)(c) of ERA 1996). In the circumstances her complaints under s.98 and s.99 of ERA 1996 (which are conditional upon there being a dismissal), together with her complaint that she was wrongfully dismissed, do not succeed and shall be dismissed.

Discrimination complaints

56. We shall deal with the Claimant's remaining complaints slightly out of the order in which they are set out in the List of Issues. There are three complaints which may conveniently be categorised as pregnancy and maternity leave discrimination complaints, namely under §.13 and 18 of EqA 2010 and s.47C of ERA 1996 (the latter to be read in conjunction with Regulation 19 of the Maternity and Parental Leave etc Regulations 1999). The Claimant's complaints are based on essentially the same two matters. Firstly, she alleges that on 10 March 2021 the Second Respondent informed her that she was not able to return to work from her additional maternity leave on her usual contracted working hours of 28 hours per week (we believe the date has been incorrectly recorded in the List of Issues and that the Claimant is in fact relying upon her telephone conversation with the Second Respondent on 9 March 2021). It is not in dispute that this is effectively what the Second Respondent said to her (paragraph 39 of the Second Respondent's witness statement), even if the situation was to remain under review. Secondly, the Claimant alleges that on 24 March 2021, the Second Respondent stated that the Claimant would only have one day's work per week, that is to say 8 hours. As we have said already, the Tribunal is satisfied that effectively the same message was communicated to the Claimant by the Second Respondent

on 9 and 23/24 March 2021.

57. As to whether the two matters complained of amount to detriments, we note the recent decision of the Employment Appeal Tribunal in Warburton v Chief Constable of Northamptonshire Police [2022] EAT 42 in which the EAT adopted the reasoning of the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. The question therefore is whether the treatment complained is such that a reasonable worker would, or might, take the view that in all the circumstances it was to his or her detriment.

58. We are satisfied that being told that they will, or even might, not be able to return to work on their normal full contracted hours, even if this does not represent a change to the arrangements in place immediately before their maternity leave, could reasonably be regarded as being to a worker's detriment since the worker would in those circumstances be unable to resume their previously established, normal pattern of work, with the structure and certainty that entails. Reduced hours would also afford the worker fewer opportunities to interact with others and to maintain workplace relationships, as well as to practice existing skills and learn new skills, all of which are particularly important considerations when a worker returns to work following a period of maternity leave. In our judgement, the detriment test is more than met here. The Respondents subjected the Claimant to that detriment. We return below to the reason why.

59. In order for the Claimant's s.13 EqA 2010 complaint to succeed the Tribunal must conclude that she was treated less favourably than the Respondent treated or would have treated others who were not pregnant in the same or not materially different circumstances. Unsurprisingly, the Claimant is unable to identify a direct comparator in terms of her treatment. The closest hypothetical comparator we can identify is a man or woman availing themselves of paternity or other family leave, for example a male cousin taking a second period of adoption leave. We are in no doubt that any such individual would have experienced the same treatment in the same or similar circumstances and that the series of misunderstandings and miscommunications would have played out in exactly the same way. We cannot identify any facts or other matters that support any other conclusion. We have looked, for example at whether discriminatory language was deployed or whether the Respondents failed to provide a sufficient explanation for unreasonable conduct. In circumstances where we have already concluded that the First Respondent did not act without reasonable and proper cause in respect of the four specific matters complained of, there is no obviously unreasonable conduct in respect of which an explanation needs to be provided but has not been provided. For the reasons already set out, we do not consider that the emails of 24 March 2021 provide a basis for inferring that there may have been less favourable treatment. The s.13 complaint is not well founded and shall be dismissed.

60. We can deal with the §.18 and 47C complaints together. Arguably, the Respondents' burden under s.47C is more clearly and explicitly defined, in so far as s.48(2) of ERA 1996 provides that once a detriment is established in the context of pregnancy or maternity, and once it is

established that the employer has subjected the employee to that detriment, it is then for the employer to show the ground upon which its actions were done.

61. The operative causal test under s.18(2) EqA is *"because"*. In Nagarajan v London Regional Transport [2000], Lord Nicholls when giving Judgment in an appeal in a race discrimination case under the Race Relations Act 1976, said,

> "*Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."*

62. Nagarajan was referred to by the Supreme Court in R(E) v Governing Body of JFS(SC)(E) [2010]. In that case Baroness Hale observed,

> *"The distinction between the two types of "why" question is plain enough: one is what has caused the treatment in question and one is its motive or purpose. The former is important and the latter is not."*

63. S.18 of EqA 2010 is distinct from s.13 of EqA 2010 in that a complainant under s.18 need only establish that they have experienced unfavourable treatment on the prohibited ground as opposed to less favourable treatment. It is not a comparative exercise that requires the identification of actual, hypothetical or evidential comparators. The Tribunal is concerned with the reason(s) why, if she was treated unfavourably, the Claimant was treated as she was. That requires some consideration of the Respondents' mental processes; the Claimant's claims do not succeed simply because she was pregnant and thereafter took maternity leave, and experienced unfavourable treatment. Nor do they succeed simply because but for being pregnant and taking maternity leave she would not have experienced unfavourable treatment, though the two facts in combination will generally call for an explanation from the employer.

64. There is seemingly no Appellant Case Law that directly considers the test for causation under s.47C of ERA 1996, though we proceed on the basis that the Tribunal is applying the 'reasons why' test identified in Nagarajan, namely examining the mental processes of the alleged discriminator,

65. §.18 and 47C do not involve a comparative exercise. Whilst we are not concerned with how the Respondent treated others or might have treated them, the fact is that the Claimant was not treated differently to her colleagues, who were also furloughed and then brought back into work under flexible furlough arrangements. Where there is evidence of treatment related to the Claimant's pregnancy and maternity leave, it points to the Claimant being treated more favourably than colleagues, for example by her furlough pay being topped up to full pay. That is important evidential material that informs our conclusions as to what was in the

Second Respondent's mind on 9 and 23 / 24 March 2021 and indeed during the intervening period. Whilst her email of 24 March 2021 hinted as to what the long term might hold, namely that there might need to be a permanent reduction in her hours if work levels did not recover, in our judgement that does not give rise to any adverse inference or mean that the Respondents have necessarily failed to discharge their burden under s.48(2) of ERA 1996. Any ambiguity on the matter was put to bed on 19 May 2021 when the Second Respondent provided an unequivocal commitment in respect of the Claimant's statutory maternity rights.

66. The question ultimately is why the Respondents treated the Claimant as they did? Why was she subjected to detriment/treated unfavourably? The answer is that between March and May 2021 the Respondents anticipated that the First Respondent would be unable to support the Claimant's return to work in August that year on her contracted hours but instead that it would need to continue to avail itself of the Coronavirus Job Retention Scheme, through ongoing flexible furlough working arrangements. This was because of the ongoing reduction in levels of business and the Claimant's associated administrative workload caused by the ongoing impacts of the Coronavirus pandemic. It was not because she had been pregnant or been on maternity leave or for related reasons. The need to place her on flexible furlough existed independently of her pregnancy and maternity leave, and in spring 2021 was again genuinely identified as a likely ongoing requirement, as was the case for other members of staff. The Respondents have satisfied us that they came to this view entirely independently of the fact the Claimant had been pregnant and then on maternity leave.

67. For all these reasons, the Claimant's complaints under §.13 and 18 of EqA 2010 and s.47C of ERA 1996 are not well founded and will be dismissed.

Alleged breach of the 1999 Regulations

68. Whilst the Details of Complaint refer to Regulation 18 of the Maternity and Parental Leave etc Regulations 1999, they do not confer free standing claims, rather they are relevant in terms of the Claimant's complaints under §.13 and 18 of EqA 2010 and §.47C and 99 of ERA 1996. In any event, for all the reasons set out above, the First Respondent was not, as the Claimant asserts and the List of Issues records, seeking to amend her terms and conditions of employment, except perhaps insofar as it wished to correct the error in the Claimant's Contract of Employment that stated she worked 40 hours per week.

Victimisation

69. S.27(1) of EqA 2010 provides as follows:

> "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.

70. It is not in dispute that the Claimant's resignation email was a 'protected act' within the meaning of s.27(2) of EqA 2010. She was plainly "making an allegation (whether or not express) that [the Respondents] had contravened" the Act. Whilst we are less clear that her emails with the Second Respondent were protected acts, as she claims, we proceed for these purposes on the assumption that they were.

71. The detriment relied upon by the Claimant is the statement in Mr Waterfield's grievance outcome letter (page 90 of the Hearing Bundle), that the company would be inviting the Claimant to attend an investigation meeting to discuss how, when and why she had accessed emails and read email correspondence. Applying the Warburton and Shamoon test referred to above, that statement by Mr Waterfield was unquestionably a detriment; in our judgement, a reasonable worker would regard an invitation to attend an investigation meeting as being to their detriment, particularly in circumstances where they had already resigned their employment. The further question is whether the Claimant's protected act(s) had a significant influence on Mr Waterfield's/the First Respondent's actions. In our judgement, the Claimant has established primary facts from which the Tribunal could infer, in the absence of any further explanation, that she was victimised. Firstly, the employment relationship had ended. It is not clear, therefore, why Mr Waterfield or the First Respondent believed she should be required to attend an investigation meeting to provide an account of her actions. Secondly, as we have noted in our findings above, there is no mention of the GDPR as the providing the basis for the company's alleged concerns. Thirdly, there is no obvious reason why Mr Waterfield needed to address the Claimant's actions, or to do so in such detail, in arriving at a conclusion in respect of her grievance. The substance of her grievance was addressed in the fourth paragraph of the section of his letter that dealt with the emails that had passed between the cousins. Finally, we note that Mrs Waterfield's letter of 30 July 2021 effectively sought to reposition the issue and inaccurately suggested that it had been communicated to the Claimant previously that the company was investigating a potential personal data breach. In the intervening period, the Claimant had complained as part of her grievance appeal that she had been victimised and we conclude that Mrs Waterfield's letter was a crude attempt to reposition the First Respondent on this issue, recognising that Mr Waterfield had responded and reacted adversely to the complaint of discrimination by seeking to threaten her with an investigation.

72. The burden of proof is on the First Respondent to show that the Claimant's protected act had nothing whatever to do with the statement of intent to conduct an investigation into the matter. It has failed to discharge its burden in the matter. In a victimisation claim, the protected act need not be the sole or the principal reason for the detriment. It is sufficient if it is a significant or material influence. We conclude that even if the First Respondent had genuine concerns as to how and why the Claimant had accessed and read emails, Mr Waterfield's letter was effectively warning the Claimant off from pursuing matters further, Early Conciliation having by then concluded. His letter evidences an emotional response to the

discovery of the Claimant's actions. In that moment the First Respondent, acting through its directors and shareholders, was required to act lawfully and dispassionately in compliance with its obligations under the Equality Act 2010. It did not do so and instead victimised the Claimant.

73. We think that the injury to feelings occasioned by the threat in Mr Waterfield's letter was likely short lived and resolved by 19 August 2021 when the Respondent's Solicitors wrote to the Claimant's Solicitors to confirm that this particular aspect was regarded as closed. They thanked the Claimant on their client's behalf for her co-operation. However, we shall need to hear further evidence from the Claimant on the matter and allow Mr Nadin a further opportunity to cross examine her before we can determine her Remedy, since whilst her witness statement addresses the claimed impact upon her of the Respondents' other actions it is otherwise silent as to the impact upon her of this particular aspect of her treatment.

Outstanding Statutory Maternity Pay

74. That then leaves the Claimant's complaint that she may be owed statutory maternity pay. The claim is not advanced in positive terms to enable either the Tribunal or the First Respondent to understand it. It is expressed in the briefest of terms in paragraph 28 of the Details of Claim (page 21 of the Hearing Bundle):

> "In the event that the First Respondent has not paid sufficient salary in respect of statutory maternity pay, the Claimant will claim in this regard."

75. The First Respondent calculates that during the entirety of the Claimant's maternity leave period, it has paid £21.34 in excess of what it was required to pay. Its calculation has not been challenged by the Claimant. Mr Mace did not question the Respondents' witnesses about this and the Claimant's witness statement is silent on the matter. There is no contrary calculation that we can identify in the parties' evidence, in the pleadings or in the Hearing Bundle. We accept the First Respondent's calculation and accordingly find that the Claimant was overpaid by a small amount. Her complaint in that regard fails.

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Employment Judge Tynan

Date: 18 January 2023

Judgment sent to the parties on

19 January 2023

For the Tribunal office