EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Victoria Kiesel	v	Check4Cancer Limited

Heard at: Cambridge
On: 27, 28 February 2023
1, 2 March 2023 (Hybrid via CVP)

Before: Employment Judge Tynan

Members: Ms K Omer and Mr K Rose

Appearances:
For the Claimant: In person
For the Respondent: Mr Julian Allsop, Counsel

JUDGMENT having been sent to the parties on 25 March 2023 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

1. The Claimant presented a claim to the Employment Tribunals on 6 April 2021 following ACAS Early Conciliation between 13 February 2021 and 27 March 2021. She pursues complaints as follows:

    1.1 that she was constructively unfairly dismissed, contrary to s.98 and s.99 of the Employment Rights Act 1996 ("ERA 1996");
    1.2 that she was subjected to detriments contrary to s.47C of ERA1996; and
    1.3 that she was unlawfully discriminated against contrary to s.18 of the Equality Act 2010 ("EqA 2010").

2. The complaints are resisted in their entirety by the Respondent.

3. Throughout the Hearing and in coming to a Judgment, we have worked with the draft List of Issues prepared by the Respondent for the Final Hearing, as marked up by the Claimant.

4. The Claimant gave evidence at Tribunal. She had filed and served a

detailed witness statement in support of her complaints.

5. On behalf of the Respondent, we heard evidence from:

   a. Professor Gordon Wishart, Chief Medical Officer;
   b. Louise Mills, Clinical and Operations Director; and
   c. Steve Ward, HR Manager.

   They had each made a witness statement.

6. There was an agreed Hearing Bundle running to some 372 numbered pages, supplemented by several documents that were produced in the course of the Hearing. The page references in these written reasons are to the corresponding pages of the Hearing Bundle.

Introduction

7. We remind ourselves of the limits to our jurisdiction. The matters upon which we may adjudicate are prescribed by statute. Provided that an employer acts in accordance with its obligations as an employer, whether comprised within its staff contracts or implied or imposed by Law, it is not the function of a Tribunal to substitute its own view as to the strategic, operational or, in this case, clinical decisions taken by the employer's Board or senior leadership. If either party has come to this process hoping to be vindicated for example in terms of the risks, or otherwise, associated with the 'MyBreastRisk' test offered by the Respondent, including by reason of the information regarding the test available on the Respondent's website, or in terms of whether any perceived risks should have been reported to any relevant regulator, they will leave the process disappointed. Such operational and regulatory matters are not within the remit, nor indeed the professional competence of this Tribunal. We are concerned with how the Respondent, as the Claimant's employer, discharged its responsibilities to her, specifically as set out in the List of Issues.

8. As regards the issues in these proceedings, seven matters have been identified by the Claimant as repudiatory breaches of contract which caused her to resign her employment. The same seven matters are also said to constitute unfavourable treatment and detriments respectively within s.18 of EqA 2010 and s.47C of ERA 1996. They are as follows:

   a. The Claimant alleges that she was excluded from strategic planning throughout the latter half of 2020 –

      The Claimant's specific complaints are that she was excluded from the decision to appoint a Senior Genetics Advisor to the Respondent's Clinical Advisory Board, including the recruitment of Professor Andrew Beggs in this regard in 2020, and further that she did not receive monthly financial accounts for the Respondent's subsidiary, Genehealth UK Ltd ("GHUK").

   b. The Claimant alleges that she was also excluded from decisions relating to the Respondent's new website –

The specific decisions in relation to the new website from which the Claimant was allegedly excluded have not been clearly articulated by her in the course of these proceedings, including in the course of her evidence to the Tribunal. Her complaint, as it emerged during the Final Hearing, is that the implementation of the new website was poorly executed, with insufficient clinical input or oversight.

c. The Claimant believes the Respondent's 'MyBreastRisk' test was marketed to all patients against the Claimant's explicit advice in October 2020.

d. The Claimant alleges that she was excluded from discussions regarding a change of testing laboratory at the end of November 2020.

e. The Claimant believes that her job role was altered –

This is one of three additions made by the Claimant to a draft List of Issues prepared by the Respondent for the Final Hearing. It does not in fact add anything further to issues (a) – (d) above since there are no further specific matters about which the Claimant makes complaint that are said to have resulted in her job role being altered.

f. The Respondent's actions led to a reduction in the Claimant's status within the company –

This is the Claimant's second addition to the draft List of Issues. Again, it does not add anything further to issues (a) – (d). The Claimant is referring to what she believes to have been the consequences of the Respondent's alleged actions at paragraphs (a) – (d) above, rather than identifying any further specific acts or omissions by the Respondent.

Nevertheless, in coming to a judgment in this case, we have considered whether any of the matters complained of in paragraphs 1(a) to (d) of the List of Issues caused the Claimant's role to be altered or led to a reduction in her status.

g. The Claimant asserts that the Respondent failed to provide her with a written statement of particulars of her employment within two months of commencing employment with it, in accordance with s.1 ERA 1996 then in force –

Whilst there is no need for the Claimant to plead a breach of s.1 in order for the Tribunal to make an additional award in her favour pursuant to s.38 of the Employment Act 2002, where such alleged breach is claimed to amount to unfavourable or detrimental treatment (for the purposes of s.18 of EqA 2010 and s.47C of ERA 1996) this must be included in any claim filed with the Tribunal (or in any permitted amendment to the claim). There are no such complaints within the original ET1 form or the amended Claim Form

at page 38 of the Hearing Bundle and no such complaints were identified in the Case Summary following the Preliminary Hearing on 30 March 2022. The inclusion of these matters within the Claimant's mark-up of the draft List of Issues that was prepared for the Final Hearing does not serve as a further amendment to her claim. Applying Chandhok v Tirkey [2015] ICR 527 EAT, her complaints are to be found in the ET1 form and any permitted amendments to it. We are satisfied that there are no such complaints before the Tribunal and accordingly, in the absence of any application to further amend her claim, that Issue 1(g) is not a matter in respect of which we have any jurisdiction. As noted already, we are not precluded from making an award in favour of the Claimant pursuant to s.38 of the 2002 Act if any of her other complaints above succeed.

Findings of Fact

Background

9. The Claimant and Professor Wishart were professional colleagues for over eleven years. There is no suggestion prior to the alleged events with which we are concerned, that they enjoyed other than a mutually respectful and productive working relationship. Indeed, it is the Claimant's evidence that she and Professor Wishart worked together closely on various projects and guidelines, that they socialised when attending conferences and that she believed she was respected by Professor Wishart for her professional input.

10. The Claimant has six children and two step children. She was engaged as a consultant by the Respondent's predecessor, International Health Technology Limited ("IHT") before becoming an employee of the Respondent in 2014, after it effectively took over IHT's projects and work. We were not told why IHT ceased trading, or why the Claimant's work status changed in 2014, though nothing turns on this. The Claimant's evidence at Tribunal was that she had three pregnancies during her time as a consultant with IHT and one previous pregnancy whilst employed by the Respondent. She and Professor Wishart worked together during that time. It is not suggested by the Claimant that she encountered detrimental or unfavourable treatment for any reasons relating to pregnancy, childbirth or maternity, during any of those earlier pregnancies or as she raised her family, including as it grew in size, though the Claimant makes the point that she did not take maternity leave whilst a consultant (possibly because she had no rights in that regard) and that she took just six weeks maternity leave following the fourth pregnancy. She makes the further point that she did not experience pregnancy related illness during any of those pregnancies.

The Claimant's employment with the Respondent

11. In her completed ET1 form, the Claimant states that her employment with the Respondent commenced on 29 January 2014 (pages 8 and 35). That was in fact the date the Respondent was incorporated as a company. We find that the Claimant's employment with the Respondent did not

commence until 30 June 2014, shortly after GHUK was incorporated. The Claimant's email exchange with the Respondent's then CEO, Troels Jordansen on 11 March 2014 was produced by the Claimant in the course of the Final Hearing and evidences that they were still discussing the terms on which the Claimant might join the Respondent on that date (pages 374 and 375). There is no reference to the Claimant's job title or the ambit of her authority in those discussions. Their focus instead was the level of the Claimant's proposed equity stake in GHUK and areas of strategic focus that would enable the company to grow. Amongst other things, it was noted that,

> *"TJ to support VK in all marketing activities but otherwise to play a background role".* (page 375)

We find that reflects their tentative understanding that the Claimant would provide operational leadership and drive GHUK's initial growth phase. Whilst there is no explicit reference to strategic or clinical leadership, the fact that Mr Jordansen listed out proposed actions in some detail evidences to us that he was taking and would continue to take the lead on identifying and articulating strategy, even if his intention was that the Claimant would drive the strategy for GHUK forward should she join the Respondent.

12. A contract of employment was issued to the Claimant on 24 June 2014 (pages 70 – 75). The Claimant has sought to qualify the significance of that document, particularly by reference to the fact that it was created from a template that had been used for other employees. Whilst we do not know whether it was signed by the Claimant (the copy in the Hearing Bundle is not signed by her), we find that it was issued to the Claimant prior to her commencing employment with the Respondent and that she did not raise any issues with it. We conclude that it accurately reflects the principle terms and conditions which the parties agreed would form the basis of their working relationship. That is further confirmed insofar as the Claimant later received an additional 3% equity stake in GHUK pursuant to the 'Shares' provisions of the contract.

13. The Claimant was employed with the job title of Genetic Director. She was not appointed a statutory director of the Respondent or GHUK, nor was she appointed to the Respondent's Senior Management Team. Notwithstanding her title and 5% equity stake in GHUK, the Claimant was not employed as part of the Respondent's senior leadership. That reinforces our view that she was not responsible for determining strategy as she has claimed, even if she was focused on GHUK's strategic direction. In terms of her job role, her main duties were stated in her contract to be to,

> *"provide advice on advances in genetic testing and counselling to be performed by the company".* (page 70).

Whilst the counselling was in fact undertaken within GHUK, the Claimant's documented duties reflected and were consistent with the March 2014 discussions and emails, in that she was focused on growing the business and optimising its revenues in accordance with the strategic direction that

had been identified by Mr Jordansen.

14. When it was pointed out to the Claimant in cross examination that the role in relation to genetic testing and counselling was expressed in her contract to be an advisory one, the Claimant said,

> *"rightly or wrongly I believed I was the only person qualified to make decisions on genetic testing".*

On her own evidence, this was her subjective perception in the matter. We find that her perception does not align with the objective contractual reality.

Genetics strategy

15. We were told by the Claimant that over several years there had been a number of changes of laboratory provider, though it was not clear which of these changes occurred when the Claimant was working as a consultant for IHT (when she may have been working under different terms of engagement). We understand there to have been three changes of laboratory provider during Mr Jordansen's period of leadership. We accept the Claimant's evidence that she effectively led each of those three projects and that the skills and experience she acquired as a result were subsequently brought to bear in the genetic strategy document that she drafted in 2019 (pages 143 – 151). She acknowledged in that document that the optimal position for the Respondent would be to have a UK based laboratory provider. However, in the absence, she said, of an independent UK based provider offering a low cost, rapid genetic testing service, she identified a US based organisation, 'Invitae' as a potential laboratory partner.

16. An email at page 142 of the Hearing Bundle evidences that the draft genetic strategy document was circulating within the Respondent by 30 April 2019. Ms Mills, to whom the Claimant reported, described it at the time as a *"really good document"*. The timing in this regard is at odds with how the chronology seemed to be understood and presented by both sides at Tribunal. What is now clear, we find, is that the draft genetic strategy was already in circulation when the Respondent's SMT met on 11 June 2019 and Professor Wishart was mandated to source a Senior Genetics Advisor for the Respondent's Clinical Advisory Board (page 79). It is unclear from the SMT meeting minutes to what extent the draft strategy was discussed on 11 June, though the minutes record that it was to be formally discussed on 2 July 2019. The minutes further record that Professor Wishart would be writing a one-page genetic strategy document. It is unclear whether this was intended to provide an executive summary of the Claimant's draft or would develop the draft strategy further. The Claimant did not explore this issue further with Professor Wishart at Tribunal. Nevertheless, what it evidences to us is that although the Claimant had been tasked with preparing a draft genetic strategy document, the SMT, including Professor Wishart, regarded the genetics strategy as a matter ultimately for themselves. That is further supported insofar as the Claimant had submitted the draft strategy to Ms Mills, as her Line Manager, and that Ms Mills had reviewed and provided input to the

document. It is also supported by the document content – for example, in the executive summary the Claimant's use of the word *"should"* denotes to us that she was making various recommendations for consideration by the SMT and the Board.

17. The minutes of the SMT meeting of 2 July 2019 are not included in the Hearing Bundle to enable us to know what was discussed at that subsequent meeting, but certainly as at 11 June 2019, rather than the Claimant's draft strategy document overriding the proposal to appoint a Senior Genetics Advisor, as the Claimant suggests, the authority conferred on Professor Wishart was in full knowledge of the draft strategy.

18. The Claimant attended for part of a Board meeting on 16 July 2019 at which the draft genetic strategy was presented by her and during which key issues were discussed. There is no reference in the minutes of that meeting to Professor Wishart's proposed one-page strategy document or to the appointment of a Senior Genetics Advisor to the Clinical Advisory Board. Nevertheless, we accept that Professor Wishart had an ongoing mandate to recruit a Senior Genetic Advisor, even if this information was seemingly not shared with the Claimant who attended The minutes of the Board meeting confirm that the Board discussed key strategic issues in a number of areas, including Genetics. We infer that the Claimant and other non-Board members who had attended for parts of the meeting were not present during those discussions. In any event, the fact that the Board discussed key strategic issues, which included Genetics, reinforces that any decision as to whether the Claimant's draft strategy should be adopted in whole or part, or even not at all, rested with the Board. In terms of documented follow up actions, Professor Wishart and Lorraine Lander (the Respondent's Chief Finance Officer) were tasked with meeting with the Claimant to finalise and implement an action plan. In other words, the Claimant remained subject to their direction and oversight even if she had done the "heavy lifting" in terms of putting the draft document together and presenting the strategy to the Board. Whilst we note that neither the Board nor the SMT made the Claimant aware of the proposal to appoint a Senior Genetics Advisor, even as a simple courtesy to her, especially given her work to date, as well as her potential ability to offer insights as to potentially suitable candidates, plainly this had nothing to do with the Claimant's pregnancy the following year. Ultimately, we find it evidences nothing more than that strategic issues were reserved to the senior leadership, even if the Claimant and others contributed to their thinking and discussions.

19. Having reviewed the draft strategy document, we cannot readily identify any material clinical input to it. Whilst there is a brief reference to GHUK's clinical integrity, the Claimant's focus was otherwise on strategic and commercial imperatives, indicating to us that any clinical evaluation of any proposed laboratory provider would need to be undertaken as part of due diligence once a potential laboratory was identified.

20. We accept Professor Wishart's evidence that over the course of the following 12 months he made approaches to two individuals regarding the Senior Genetics Advisor role, but that they did not progress. In June 2020, Professor Andrew Beggs, a Professor of Cancer Genetic & Surgery

in the Institute of Cancer and Genomic Science at the University of Birmingham was identified by Professor Wishart as a further potential candidate. We shall return to this.

'MyBreastRisk'

21. The third issue we must determine is whether 'MyBreastRisk' was inappropriately marketed to clients / patients in October 2020 against the Claimant's explicit advice. The background to this issue is set out at paragraphs 13 – 18 of the Claimant's witness statement. Her account of a 'MyBreastRisk' incident in 2019 was not challenged, even if Mr Allsopp clarified and highlighted that it was Professor Wishart who initially discovered that risks were being calculated incorrectly. When the error came to light, Ms Mills conducted a Root Cause Analysis ("RCA") (pages 87 – 95). Her analysis noted various actions that had already been taken by the company and identified six further specific actions that were to be taken forward and implemented. The fourth documented action point was:

> *"Any test launched which has a genetic component must involve the Genetics Director".* (page 95)

The Claimant's job description and contract of employment were not amended in light of this action point. It is capable of being, and has been, understood and interpreted differently by the parties.

22. In contrast to the third action point in the RCA, which refers to any "new" SMP testing, the fourth action point does not state that any test launch should be a "new" test launch. Nevertheless, we find that the wording is ambiguous and that it has led to a genuine and legitimate difference of opinion between the parties as to whether it was intended to mandate the Claimant's involvement if there was a change of laboratory provider, even if that provider continued to use established testing methods. The action point does not identify the point at which the Genetics Director should be involved in any test launch.

23. At paragraph 18 of her witness statement, the Claimant refers to a recommendation in the RCA that a new paragraph should be added to the Respondent's website to provide clearer information regarding 'MyBreastRisk' and its suitability as a test (in fact, the final paragraph of page 92 evidences that action had already been taken in this regard by the time of the RCA). The wording in question was wording that the Claimant and Professor Wishart had agreed in or around April 2018 should be included on the website (page 172) and which had been actioned at the time but, as the Claimant states, "for some reason" had subsequently been removed from the website. Two points arise from this:

    a. Firstly, it evidences to us that Professor Wishart proactively recommended the relevant wording and was in full agreement with the Claimant on the matter in 2018. Insofar as the Claimant asserts that 'MyBreastRisk' was inappropriately marketed in October 2020, she does not identify who at the Respondent was responsible for this state of affairs. However, the fact that she raised the matter at the time with Ms Mills and Ms Haley, the Respondent's Marketing

Executive, rather than with Professor Wishart (indeed, not even copying him into her email with them (pages 171 and 172)) further evidences to us that as of October 2020 she considered it to be a matter for them rather than Professor Wishart. We find that she included Professor Wishart's email from 2018 in her email to them because she believed she would have his continued support for the relevant wording to be reinstated to the website. She evidently felt it was not something that she needed to explicitly check with him. We shall return to this.

b. Secondly, the Claimant's reference in her witness statement to the wording having been removed in 2019 *"for some reason"* evidences to us that she believed at the time that it had been removed in error rather than intentionally. As we shall also come back to, we are satisfied that when the wording (or a link to the wording) was not included on the 'MyBreastRisk' web page of the new website when it went live in September 2020, this too was in error.

The Claimant's 2020 pregnancy and initial consultation exercise

24. In April 2020 the Claimant discovered that she was pregnant, with an estimated due date of 18 January 2021.

25. The Claimant has been diagnosed with a benign brain tumour which can cause seizures. It had not given rise to any issues in her previous pregnancies but caused complications during the 2020 pregnancy, which was assessed as being high risk.

26. By the time the Claimant learned in April 2020 that she was pregnant, the country was in the early weeks of the Coronavirus pandemic. The Respondent furloughed a number of its staff, altered the duties of other staff and significantly reduced the fees it paid to its Clinical Advisors (this did not impact the Claimant given her employment status). Unaware that the Claimant was pregnant, the Respondent commenced a consultation process with her on 5 June 2020 about reducing her contracted hours from 15 to 7.5 hours per week. Ms Mills had prepared a business case in this regard (pages 114 and 115), which noted that revenues had reduced significantly across the company and were anticipated to remain suppressed for the remainder of 2020. The Respondent was exploring ways that costs could be reduced to protect the business. We accept the Respondent's witness evidence that the company was "*in survival mode*". The proposal to reduce the Claimant's hours by 50% was based upon Ms Mills' analysis that four specific matters were impacting her workload, including that plans to move genetic testing to an alternative laboratory were on hold. We accept this was Ms Mills' genuine objective assessment of the situation, subject to the Claimant's representations in the matter.

27. The Claimant's undisputed evidence is that she was hospitalised from 15 to 24 June 2020 with seizures, secondary to her brain tumour, which had been triggered by her pregnancy. An exchange of messages at page 257 of the Hearing Bundle evidence that Ms Mills was aware of the Claimant's pregnancy by 15 June 2020, since her first message to the Claimant on 16 June 2020 asked whether the Claimant had bad morning sickness. In the

absence of evidence that they were in contact by some other means on 16 June 2020, we find that the Claimant had shared the news of her pregnancy with Ms Mills on 15 June 2020. By 9.08pm on 16 June 2020, the Claimant additionally shared with Ms Mills that she had had a seizure. She did not link this to her pregnancy, though equally she did not say it was unrelated. Ms Mills seems to have assumed the two were unrelated.

The approach to Professor Beggs

28. On 16 June 2020, Professor Wishart reached out to Professor Beggs on LinkedIn. The message is at page 96 of the Hearing Bundle. It evidences that Professor Wishart had approached Professor Beggs to connect on LinkedIn and that Professor Beggs had accepted his invitation in that regard, though the timings in that regard are not indicated in the message. Professor Wishart wrote,

> *"Hi Andrew. Thanks for connecting – you have a very interesting job title with surgery and genetics! With the background in clinical research as a breast surgeon, I founded 'Check4Cancer' in 2014 to deliver best practice cancer screening, diagnostics and genetics to the private, insured and corporate sectors. Our cancer genetic service (breast, ovary, prostate, bowel) is delivered via a network of Genetic Counsellors led by Vicki Kiesel.*
>
> *My Board is keen that we explore recruitment of a more Senior Geneticist to our Clinical Advisory Board and I wondered if you would be interested to have a chat about that. I understand that you would be extremely busy with your various roles, but this is more an advisory and strategic role. I look forward to hearing from you.*
>
> *Best wishes.*
> *Gordon."*

His reference to the Board's interest in recruiting a more Senior Geneticist to its Clinical Advisory Board provides further evidence, independent of the parties' testimony in these proceedings, that he had indeed been mandated by the Board to identify a suitable candidate for the Clinical Advisory Board. Furthermore, we note that Professor Wishart referred to the Claimant by name and described her as leading the cancer genetic service, something he might not have done if he was somehow seeking to exclude her or to reduce her role or if he thought that she might not have a long term future at the Respondent.

29. The precise timings of Professor Wishart's communications with Professor Beggs are not available to the Tribunal as the LinkedIn message above was extracted as part of a series of communications collated by Professor Wishart in connection with the Claimant's grievance. We do not accept, as the Claimant has sought to infer, that there has been any attempt on either his part or on the part of the Respondent to conceal relevant information. We find that her suspicions reflect a lack of trust in the Respondent rather than being objectively well-founded concerns as to their honesty and integrity in the matter.

30. In his closing submissions, Mr Allsopp observed that the Claimant's

evidence and her cross examination of the Respondent's witnesses focused almost exclusively on alleged clinical differences and her complaint that she was constructively dismissed. She did not ask Professor Wishart any questions regarding his thoughts about her 2020 pregnancy or the fact that she is the mother / step mother to eight children and whether, for example, that may have influenced or altered his perception of her performance and contribution. The Claimant did not ask him about equality, diversity and inclusion. Critically, she did not ask him when he first became aware of her pregnancy and that she was suffering ill health that was potentially related to her pregnancy. Notwithstanding she is not legally represented, we find that somewhat surprising. Nor did the Claimant explore this aspect with Ms Mills. Instead it was left to the Tribunal to ask Ms Mills when she may have made Professor Wishart aware that the Claimant was pregnant. Ms Mills could not recall, which is perhaps unsurprising given the passage of time. The Claimant pursues her complaint essentially on the basis that it cannot be a coincidence that Professor Wishart reached out to Professor Beggs on 16 June 2020, something however she did not explore with Professor Wishart during her cross examination of him. She did not put it to him that he had reacted to the news of her pregnancy, within hours at most, by seeking to secure a new appointee to the Clinical Advisory Board or afford him the opportunity to explain why he might have reacted in that way when there was no suggestion that he had reacted adversely to her previous pregnancies or been other than supportive of her. Our fact-finding task as a Tribunal is necessarily rooted in evidence. In that regard, Professor Wishart was tasked by the Board in 2019 to recruit a more Senior Geneticist to the Clinical Advisory Board. When he approached Professor Beggs he had previously made approaches to other potential candidates. He was open and transparent with Professor Beggs regarding the fact the Claimant led the genetic service. Those basic facts do not support an inference that Professor Wishart was acting in bad faith or in haste or that his actions were tainted in some other way. As we say, his explicit reference to the Claimant in his first message to Professor Beggs does not support an inference that he was acting improperly or with an hidden agenda. The Claimant has not advanced a positive case regarding Professor Wishart's state of knowledge. We find that Professor Wishart was unaware that the Claimant was pregnant both when he sought to connect with Professor Beggs and thereafter when he reached out to him on 16 June 2020. We conclude that it is pure happenchance that this coincided with the Claimant disclosing her pregnancy to Ms Mills. We are satisfied that on 16 June 2020 Professor Wishart was acting solely in pursuance of the mandate given to him in 2019 and that he was not influenced in any way by the fact the Claimant was pregnant as he was then unaware of the pregnancy.

<u>The ongoing consultation process</u>

31. The consultation regarding the proposed reduction in the Claimant's hours was paused in light of her pregnancy and ill-health. Mr Ward's letters at pages 112 and 113 of the Hearing Bundle, as well as the company's actions in putting the consultation process on hold, were appropriate and supportive. The consultation process did not resume until 24 August 2020.

32. We accept the Respondent's evidence that by summer 2020 the proposal to explore a change of laboratory provider to Invitae was on hold. We do not accept the Claimant's evidence, at paragraph 36 of her Witness Statement, that Professor Wishart was by then already discussing a change of laboratory provider with Professor Beggs. That is pure supposition on her part and has no evidential basis, notwithstanding her assertion that Professor Wishart was "speaking to Professor Beggs about changing the lab". She was not privy to their conversations yet purports to know what they discussed. Likewise, she suggests that Ms Mills was aware by this time that a "lab move was underway" as she says Ms Mills was part of Board Meetings, the inference being that this was also being discussed by the Board. Again, there is no basis for her evidence in that regard. We reject her unattractive and entirely unfounded assertion that Ms Mills was making a *"blatantly untrue"* statement i.e, one which Ms Mills knew to be untrue, when she reiterated to the Claimant during their meeting on 24 August 2020 that any plans to move to an alternative laboratory were on hold and that this was one of the reasons why the Respondent was proposing to reduce the Claimant's hours. Ms Mills not only believed that any plans to change laboratory provider were on hold, they were in fact on hold.

33. During the consultation meeting on 24 August 2020 the Claimant was able to articulate why she believed the Respondent should not proceed with its proposal in relation to her hours. In preparation for the meeting on 24 August 2020, the Claimant had requested copies of GHUK's accounts from Ms Mills (page 118). Whilst she said that she had not received copies recently, she did not suggest this was impacting her role or strategic contribution in any way. Ms Mills responded to say that she believed there were no separate accounts for GHUK but brought Ms Lander into copy to confirm the position. Ms Mills had already provided the Claimant with an extract from the management accounts for GHUK. We find that it was only the ongoing consultation process that caused the Claimant to identify that she may not have been receiving management accounts for GHUK. It seems that she had either not previously noticed that she had not been receiving them or, if she was aware she was not receiving them, that this had not prompted her to request copies. It does not support her complaint in these proceedings that she was excluded from strategic planning. She does not identify the relevant management accounts she says she did not receive or the strategic issues in respect of which she was hampered from providing strategic input as a result of not having the accounts. She has failed to establish the primary facts upon which any complaints might be based.

34. When the Claimant, Ms Mills and Mr Ward met again on 17 September 2020, Ms Mills confirmed that the consultation process was being brought to an end and that there would be no reduction in the Claimant's hours. The Claimant portrays this as a cynical move on the part of the Respondent. We disagree. We find that it reflects the fact that the Respondent had engaged in a genuine consultation process, during which it had kept its proposals under review, particularly in light of the rapidly evolving circumstances of the Coronavirus pandemic, including as the country came out of lockdown. We conclude that the Claimant's

perception reflects a fixed narrative on her part, rather than being objectively well-founded. As we have touched upon already, neither Ms Mills nor Mr Ward were asked questions by the Claimant about their thoughts regarding the Claimant's pregnancy or attitudes more generally regarding pregnancy and maternity or the performance and contribution of working mothers and parents. We find that Ms Mills and Mr Ward's attitudes and thinking are reflected in Ms Mills' supportive messages already referred to and in both their actions in deferring the consultation process to give the Claimant a reasonable opportunity to recover her health without the added pressure of a consultation process.

The new website

35. Three days earlier, on 14 September 2020, Professor Wishart emailed the Clinical Advisors, including the Claimant, to advise that a new 'Check4Cancer' website had been officially launched (page 128). On her own evidence, the Claimant was aware that this project was underway; this is evidenced in an email dated 5 March 2020 at page 373 of the Hearing Bundle which confirms that Ms Haley provided the Claimant with copies of the 'More Information' pages from the genetics website and asked the Claimant to check through each document to ensure the information was correct and up to date, using track changes as appropriate to indicate where changes were required. Other tasks were identified in Ms Haley's email. It is therefore not the case, as the Claimant alleges at paragraph 41 of her Witness Statement, that she was *"completely excluded"*. What the 5 March 2020 email further evidences is that the website changes were being progressed as a marketing exercise, with Ms Haley having the day to day lead on the project. We find that it did not have a strong clinical focus, even if the email evidences that clinical input was sought. Ms Mills acknowledged in her evidence at Tribunal that the project timing was far from ideal, in that it commenced shortly before or in the early days of the pandemic, and the new website was launched in September 2020, meaning that there were limited opportunities for face to face interactions. The Respondent had committed material resources to the project and in the context of its financial challenges in 2020, we can understand why the Board resolved to press ahead. That was a business decision for the Board rather than a matter for this Tribunal. There are various references in the Hearing Bundle to Ms Haley needing to make a decision in June 2020 when the Claimant was hospitalised, though further details are not available to us as to what that decision related to. However, we accept that it would have been entirely inappropriate to expect or even to ask the Claimant to provide input in relation to the website at a time when she was pregnant and in hospital either because of seizures or because she was at risk of seizures. In the same way that the consultation was put on hold, the fact that certain decisions may have been taken without the Claimant's input reflects the Respondent's concerns for the Claimant rather than evidence of a discriminatory mindset or disregard for its obligations to her.

36. At 12.59 on 16 September 2020, the Claimant emailed Ms Haley and Ms Mills expressing concern that the website had gone live *"without any input from me"*. She might more accurately have said, *"without any <u>further recent</u> input from me"*. She questioned why Sara Beck had given input

and then outlined her specific concerns regarding the content. Ms Mills provided a substantive response within 30 minutes. She addressed certain of the Claimant's concerns directly, including the suggestion that the Claimant had been excluded from the process. In other respects she asked the Claimant to clarify the nature of her concerns in order that they might be more clearly understood and acted upon. There is no evidence in the Hearing Bundle that the Claimant responded to Ms Mills and she does not say in her Witness Statement that she responded. The impression therefore is that she was unimpressed by the website launch and, in particular, by the work that had been done by Ms Haley, but that other than point out shortcomings she did not identify any specific action points that might have addressed any concerns she then had. We certainly do not accept the Claimant's description of Ms Mills as having been dismissive of her concerns or that the Claimant was ignored. The fact that she makes those assertions in the face of the emails in the Hearing Bundle, which demonstrate that Ms Mills was far from dismissive, evidences her lack of objectivity in relation to this aspect and undermines our ability to rely upon her evidence on this issue more generally, including her assertion that she was to be involved again before the website went live, as well as her further assertion at paragraph 47 of her Witness Statement that she was *"completely side lined and ignored and excluded"* (an assertion she did not make at the time). As we say, the project was a marketing led exercise. We find there is no particular reason why the Claimant in particular should have been consulted or notified before the website went live. If the Claimant believes that there was insufficient clinical input, this is something that touched upon the position of all seven Clinical Advisors rather than the Claimant as a pregnant woman. In any event, we find that she was not excluded from discussions in relation to the website and that her concerns were not disregarded.

37. On 1 October 2020, the Claimant reviewed the 'MyBreastRisk' section of the new website and identified that the warning that she and Professor Wishart had identified in 2018 should be included on the website, seemed to be missing. In fact it was still on the website, albeit not on the 'MyBreastRisk' web page. She states that this meant 'MyBreastRisk' was being inappropriately marketed to all patients and that the recommendations in the RCA were not being implemented / followed. She emailed Ms Mills at 11.43am on 1 October 2020, copying in Ms Haley (page 171). As we have noted already, she did not copy in Professor Wishart but included Professor Wishart's previous instruction from 2018 in relation to the matter in her email to Ms Mills and Ms Hayley.

38. As regards the Claimant's complaint that this state of affairs was unfavourable and / or detrimental treatment, she was at pains during the Final Hearing to emphasise that Ms Mills was always supportive of her. Even when she alleged that, when asked in August 2020 if she would have a position to come back to, Ms Mills had said that the company would otherwise find itself in Court (a comment which Ms Mills had no recollection of making and believed it was unlikely she would have said), the Claimant went on to say that,

> *"I have no doubt that Louise personally supported my maternity leave."*

We can see no reference or assertion anywhere to Ms Haley having a discriminatory mindset.

39. We find that the omission of the relevant wording/information from the 'MyBreastRisk' web page and its positioning elsewhere on the website, was a marketing / presentational issue that, at most, reflected Ms Haley's lack of clinical knowledge and training. It was not, as the Claimant frames it, that 'MyBreastRisk' was being inappropriately marketed against her explicit advice. As with Issue (b), the Claimant has failed to establish the essential primary facts that form the basis of her complaint. There is no evidence that Ms Haley was even aware of the 2018 instruction (we do not know whether she worked for the Respondent at that time), let alone that she disregarded it. According to the Claimant, Ms Mills, who was responsible for the RCA, failed to understand the implications of the relevant wording/information not being included on the 'MyBreastRisk' web page. If the Claimant is right in that regard, it seems to us highly unlikely that Ms Haley would have had the requisite understanding.

40. The Claimant highlights that it may have taken some time, possibly until April 2021, for the relevant webpage to be updated in light of her concerns. If so, that does not form part of the legal complaints she pursus in these proceedings. She resigned in February 2021 and pursues Issue 1(c) with reference to and reliance upon the matters that had come to her attention in October 2020, rather than with reference to any later alleged acts or omissions.

<u>Discussions regarding a potential change of laboratory provider</u>

41. The fourth issue is whether the Claimant was excluded from discussions surrounding a potential change of laboratory provider in November 2020. She was. We accept Professor Wishart's evidence on this issue, namely that the opportunity arose fortuitously in the course of his discussions with Professor Beggs about joining the Clinical Advisory Board. Professor Beggs had been introduced to the Board on 5 October 2020. The discussions had progressed slowly since he and Professor Wishart's initial contact in June 2020. This was because Professor Beggs was contracted to the University of Birmingham and it was by no means certain that the University would be amenable to him having a commercial relationship with the Respondent. We accept Professor Wishart's evidence that it was a sensitive situation and that he believed he needed to maintain Professor Beggs' confidence in the matter regardless of the fact the Claimant had been involved in various confidential matters over the years. After 5 October 2020, the discussions progressed such that it was identified that consideration might be given to moving the Respondent's genetic testing to Professor Beggs' laboratory by the end of 2020, consistent with the previously identified strategy of having a UK based provider in order to reduce turnaround times, customs delays and prices. We find that this further proposal was shared with Ms Mills and Ms Lander in November 2020 and thereafter with the Claimant on 16 November 2020 by copying her into what we find was a confirmatory email to Ms Mills (pages 184 and 185). Professor Wishart envisaged a move of laboratory by the end of the year, a timeframe that he now recognises to have been overly optimistic on his part.

42. Professor Wishart has been consistent in his explanation as to why the Claimant was not brought into his confidence sooner. Indeed, when the Claimant first expressed disappointment at 5.32pm on 17 November 2020 that she had not been involved in the discussions, by 9.27am the following morning Professor Wishart was explaining that confidentiality had been maintained with a view to protecting Professor Beggs whilst a contract was negotiated with the University of Birmingham. He also wrote in his email to the Claimant,

> *"You can rest assured that we will be exploring the clinical details of an opportunity that only came to fruition on Monday of this week."* (page 187)

Significantly, that confirms, as we find, that the laboratory opportunity crystalised as late as Monday 16 November 2020, meaning that Professor Wishart brought the Claimant into his confidence as a trusted colleague the same day, even though she was not on the Board or a member of the Respondent's SMT. He did not bring others into his confidence in the same way.

43. The Hearing Bundle evidences that from 16 November 2020 the Claimant was able to contribute her thoughts and suggestions, even if Professor Wishart was frustrated by what he perceived at the time to be her negativity in the matter. In response to a question from Mr Allsopp, the Claimant accepted that his frustration with her, whether or not warranted, was the reason for his initial curt responses to her and his subsequent decision that further communications should be through Ms Mills. The Claimant had sensed at the time that their pattern of communications had altered and this was confirmed to her as a result of disclosure in these proceedings. However, whilst it provides background and context, and may not reflect entirely positively on Professor Wishart, it is not said by the Claimant to have been a factor in her decision to resign her employment.

44. The Claimant commenced her maternity leave on or around 1 January 2021. She resigned her employment by letter dated 14 February 2021 (pages 205 and 206). It is a relatively short but nevertheless eloquently expressed letter that refers to the express and implied terms of her contract and why she said that these had been breached, such that she was entitled her to resign her employment. She did not make any reference in her resignation letter to having been treated unfavourably or subjected to detriments for a prescribed reason. That is a particularly notable omission on her part. We find it reflects the fact that she did not then have in mind that she had been discriminated against. We find that her view of the situation had not changed by 6 April 2021 when she presented her claim to the Tribunal. That does not of course mean that she was not discriminated against, but coupled with how she conducted the Final Hearing, specifically her particular focus on issues of clinical difference, it reinforces that from beginning to end she has primarily viewed this as a case of constructive dismissal.

45. Although Mr Ward gave evidence, there was nothing in his evidence or the Claimant's cross examination of it that has any bearing upon our findings

or the issues left to be determined.

Law and Conclusions

46. For the reasons set out above, in so far as complaints are pursued with reference to the allegations in paragraphs 1(b) and (c) of the List of Issues, those complaints cannot succeed as the Claimant has failed to establish the primary facts upon which her complaints are based. For the same reason, any complaints pursued with reference to paragraph 1(a) of the List of Issues cannot succeed in so far as the Claimant alleges that she did not receive monthly financial or management accounts for GHUK. Nevertheless, we have gone on to consider whether the launch of the new website breached trust and confidence or otherwise contravened the Claimant's legal rights.

47. In so far as the Claimant alleges that she was excluded from the decision to appoint a Senior Genetics Advisor to the Respondent's Clinical Advisory Board, as that decision was taken in 2019 it cannot have been because of her subsequent pregnancy in 2020 and accordingly any complaint about the matter pursuant to s.18 of EqA 2010 or s.47C of ERA 1996 (in conjunction with Regulation 19 of the Maternity and Parental Leave etc Regulations ("MAPLE") 1999) cannot succeed.

48. In so far as the Claimant alleges that she was excluded from the specific approach that was made to Professor Andrew Beggs, when Professor Wishart reached out to him on 16 June 2020 he was unaware that the Claimant was pregnant. Accordingly, his initial approach to Professor Beggs was not because she was pregnant or had a pregnancy related illness.

<u>Constructive Unfair Dismissal – s.98 and s.99 of ERA 1996</u>

49. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996).

50. S.99 of ERA 1996 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. S.99 is to be read in conjunction with Regulation 20 of MAPLE 1999.

51. 'Dismissal' includes "where the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct" (section 95(1)(c) of the Employment Rights Act 1996).

52. The Claimant claims that she resigned by reason of the Respondent's conduct. The last matter identified in the List of Issues as having been relied upon by the Claimant is her alleged exclusion from discussions surrounding a change of laboratory provider at the end of November 2020 (paragraph 1(d) of the List of Issues). In fact, having regard to our findings above, the Claimant's complaint can only relate to the confidential discussions prior to 16 November 2020.

53. The Claimant relies upon the matters in paragraph 1 of the List of Issues as breaches of the express terms of her contract of employment, alternatively as breaches of the implied term of trust and confidence.

54. The Claimant must have relied upon the alleged conduct in resigning her employment. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach (or matters collectively complained of) must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then, the employee must actually resign in response to the breach and not delay unduly in relying upon the breach as bringing the employment relationship to an end.

55. It is an implied term of all contracts that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the essential trust and confidence of the employment relationship.

Section 47C of the Employment Rights Act 1996

56. S.47C of ERA 1996 provides that as an employee has the right not to be subjected to an detriment by his employer done for a prescribed reason. This includes reasons prescribed under Regulation 20 of MAPLE 1999.

Section 18 of the Equality Act 2010

57. S.18(2) EqA 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."

58. 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."*

59. 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."

We are satisfied that the causal test under s.18(2) of EqA 2010, namely 'the reason why' test, is the same causal test as applies under s.47C of ERA 1996.

60. S.18 EqA 2010 is distinct from s.13 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. We are concerned with the reasons why, if she was treated unfavourably, the Claimant was treated as she was. That requires some consideration of the Respondent's mental processes; the Claimant's claims do not succeed simply because she was pregnant/suffered illness as a result of pregnancy and experienced unfavourable treatment. Nor do they succeed simply because but for being pregnant/suffering illness as a result of pregnancy she would not have experienced unfavourable treatment.

Conclusions

61. Under the terms of her contract of employment with the Respondent, the Claimant's defined role included providing advice on advances in genetic testing and counselling. In our judgement she had a duty to provide advice where her advice was sought, but she did not enjoy an absolute or unqualified contractual right to proffer her advice. In our judgement, whether acting though its Board or SMT, the Respondent was not under any obligation to actively seek the Claimant's advice or to act upon any advice proffered by her. Likewise, she did not have any contractual right to the final say on decisions regarding genetic testing, including as to the selection or appointment of any laboratory provider. Such matters were reserved to the Board and/or the SMT. We have set out in our findings above why we have concluded that such strategic issues and decisions were matters for them. Accordingly, the Respondent did not breach the express terms of the Claimant's contract: in so far as she was not involved in the decision to appoint a more Senior Genetic Advisor to the Clinical Advisory Board or the specific approach to Professor Beggs in June 2020; in so far as it may be suggested by the Claimant that there was insufficient clinical oversight around the implementation of the new website in 2020, including the omission of information agreed with Professor Wishart from the 'MyBreatRisk' web page; or in so far as she was not privy to the confidential discussions with Professor Beggs, including once these evolved to include discussion of a possible change of laboratory provider

62. As to whether there was any breach of the implied term of trust and confidence, in our judgment trust and confidence was not breached by the Respondent's failure to share with the Claimant that Professor Wishart had been tasked with identifying a Senior Genetic Advisor who might be appointed to the Clinical Advisory Board. Nor was trust and confidence breached by the Respondent's actions in initially keeping the laboratory discussions with Professor Beggs confidential. In each case, these were

strategic matters for the Board and SMT. The issue is not whether the Claimant would or might have wanted to have been informed sooner, rather it is whether the Respondent acted without reasonable and proper cause in those matters and, if so, whether that was destructive or seriously damaging of trust and confidence. In our judgement, the Respondent's Board and/or SMT were entitled to the view that they wished to strengthen the Clinical Advisory Board through the appointment of a more senior level geneticist and they had a legitimate discretion as to whether and, if so, when this information might be shared more widely, particularly given that approaches to potential candidates needed to be handled sensitively and in confidence. The fact the Claimant prepared the draft genetic strategy document does not alter our view of the matter. The decision to entrust the task to Professor Wishart confirms both the importance and sensitivity attaching to the matter rather than indicating that the Claimant or others could not be trusted with confidential information. In our judgement, the Respondent acted with reasonable and proper cause in handling the matter as it did, bringing the Claimant into its confidence at the earliest reasonable opportunity on 16 November 2020 once it had reached agreement in principle with Professor Beggs. Professor Wishart's actions in bringing the Claimant into his confidence evidence an employer acting with trust and confidence rather than in fundamental breach of contract. The Claimant's role and status were unaffected.

63. The Respondent did not breach trust and confidence in September 2020 by failing to include on the 'MyBreastRisk' web page of the new website the wording, or a link to the wording, that had been discussed and agreed between the Claimant and Professor Wishart in 2018. We have already said that if relevant information was not included in the place where it might optimally have been included, this was, at most, human error or inexperience in the matter in circumstances where the website project was a marketing led exercise. In our judgement, if information pertaining to 'MyBreastRisk' was not included in the optimum place on the website, this cannot reasonably be said to have been destructive or seriously damaging of trust and confidence. The evidence suggests to us that by September 2020 the Claimant was seeking to find fault rather than concerned to identify practical solutions. As above, her role and status were unaffected.

64. We have given careful thought to whether the Claimant has established primary facts from which we might properly conclude that she was discriminated against such that the burden shifts to the Respondent to prove that her pregnancy or illness suffered as a result of the pregnancy played no part whatever in her treatment. In our judgement, she has not. In any event, we have kept in mind throughout the Hearing and in our discussions that we are concerned with the reasons why the Claimant was treated as she was. By the time the Respondent was aware in June 2020 that the Claimant was pregnant, nearly a year had elapsed since the Board had tasked Professor Wishart with recruiting a Senior Genetics Advisor to the Clinical Advisory Board. In our judgement, his ongoing efforts to reach agreement with Professor Beggs and/or the University of Birmingham were not informed by the Claimant's pregnancy or any illness suffered by reason of it, they were in pursuance of the mandate he had been given and which, coincidentally, began to come to fruition on the day that the Claimant was admitted to hospital. Whilst the Claimant's case is

not explicitly pursued on the basis that the discussions with Professor Beggs continued because she was pregnant and experiencing pregnancy related illness, we are clear that these matters played no part in Professor Wishart's or the Respondent's decision to continue with a dialogue. Instead, they had identified someone who was genuinely considered to be a strong candidate for appointment to the Clinical Advisory Board and they wished to secure his services. By October 2020, the opportunity had evolved such that it additionally offered the potential for the Respondent to secure its long term aim of a UK based laboratory provider. This, rather than the Claimant's pregnancy or any illness suffered as a result of it, or any planned maternity leave, provided further impetus to the discussions and reinforced the need for confidentiality. For these reasons, the Claimant's complaints pursuant to s.18 of EqA 2010 and s.47C of ERA 1996 in respect of Issues 1(a) and (d) are not well-founded.

65. The Claimant has failed to establish primary facts to support the specific complaints recorded at paragraphs 1(b) and (c) of the List of Issues. In any event, we have explained already why we consider that any issues that arose in relation to the new website reflected the particular circumstances in which the project was taken forward, namely the Coronavirus pandemic, as well as the fact that it was a marketing led project, and that human errors or inexperience may have been factors in its launch. None of this had anything whatsoever to do with the fact the Claimant was pregnant or experiencing pregnancy related illness, or that she was seeking to exercise her rights to maternity leave. The Claimant's complaints pursuant to s.18 of EqA 2010 and s.47C of ERA 1996 in respect of Issues 1(b) and (c) are not well-founded.

66. For all the reasons we have set out, the Respondent did not breach the express and implied terms of its contract with the Claimant, and did not treat her unfavourably or subject her to detriment(s) because she was pregnant or had experienced illness as result of her pregnancy or otherwise because she had exercised or sought to exercise her rights to maternity leave. In the circumstances, we conclude that she was not constructively dismissed by the Respondent such that she can pursue dismissal based claims under s.98 or s.99 of ERA 1996, a detriment based dismissal claim under s.47C of ERA 1996 or a discrimination based dismissal claim under s.13 of EqA 2010. In all the circumstances, the complaints comprised within the Claimant's claim to the Tribunal will be dismissed.

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Employment Judge Tynan

Date: 31 May 2023

Judgment sent to the parties on

6 June 2023

GDJ
For the Tribunal office