# EMPLOYMENT TRIBUNALS

**Claimant:** **Storm Botha**

**Respondent:** **White Lake Cheeses Ltd**

**Heard at:** **Bristol** **On:** **24, 25, 26, 27 and 28 July 2023 and 31 July 2023, in chambers**

**Before:** Employment Judge Street
D England
E Bees

**Representation**
Claimant: in person
Respondent: Mr L Wilson, counsel

# RESERVED JUDGMENT

1.1. the Claimant succeeds in her claims of pregnancy discrimination, contrary to the Equality Act 2010, section 18, that is unfavourable treatment including dismissal during the protected period because of pregnancy or pregnancy-related illness, of detriment for a reason related to pregnancy contrary to section 47C of the Employment Rights Act 1996, and victimisation contrary to section 27 of the Equality Act 2010.

1.2. In the alternative, if we are wrong in seeing the events after 2 December as implementing decisions made in the protected period, the Claimant succeeds in her claim of sex discrimination because of pregnancy in the detriment caused by the persistent correspondence and then the dismissal following a meeting which she was unable to attend or participate in while suffering a pregnancy-related illness.

1.3. She succeeds in her claim of automatically unfair dismissal for the principal reason of pregnancy.

1.4. The claims in respect of protected disclosure, including both detriment and dismissal (sections 47B and 103A of the Employment Rights Act 1996), of automatically unfair dismissal on the grounds of health and safety concerns

(section 100 of the Employment Rights Act 1996) and failure to provide a written statement of terms and conditions are dismissed.

# REASONS

## 2. Background

2.1. This is a claim principally in respect of pregnancy and sex discrimination, whistleblowing and automatically unfair dismissal. The claim was made on 2 February 2022. The Claimant contacted ACAS on 30 November 2021 and the certificate was issued on 10 January 2022.

2.2. The Respondent makes cheeses. The Claimant worked as an assistant cheesemaker at the Respondent's premises and later in the office in marketing and administration, with some hands-on assistance in affinage and wrapping, until she went off sick on 5 October 2021. She suffered a miscarriage on 19 November and was dismissed on 13 December with effect from 19 December 2021.

## 3. Evidence

3.1. The Tribunal heard from the Claimant, from her witnesses, Mr Nathan Marchant (remotely), her more recent line manager, Ms Lynn Solman, former Sales Manager and Mr David Harbourn, formerly the Bookkeeper with the Respondent. For the Respondent, the Tribunal heard from Mr Roger Longman, Managing Director, and Mrs Sandra Hamilton, Office Manager. The Tribunal read the witness statement of Mrs Patricia Botha, the Claimant's mother. The Tribunal read the documents in the bundle that were referred to and the additional documents that the parties were permitted to submit.

## 4. Issues

4.1. It was agreed that although unfair dismissal is included in the issues, there was no jurisdiction for the Tribunal to consider unfair dismissal unless the two year qualifying period did not apply. The Claimant did not have two years' service. The issues set out in respect of an "ordinary" redundancy dismissal are not therefore included in the list of issues to be decided.

4.2. The claim in respect of wrongful dismissal had been dismissed on withdrawal.

4.3. As explained below, a sex discrimination claim was added in the course of the hearing to reflect the issues raised in the claim form.

4.4. A date has been corrected at 4.1.1 and a date and a figure at 5.1.1.

4.5. The remaining issues are as set out in the Order of EJ Midgley made on 18 October 2022 and are as follows:

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Whether the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Protected disclosure ('whistle blowing')**

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The

Claimant says she made disclosures on these occasions:

2.1.1.1 On 26 July 2021 informing Mr Longman, Sandra Hamilton, in writing of the fatal and catastrophic implications should a Listeria Mono contamination occur within the cheese produced in the factory

2.1.1.2 on 26 July 2021 informing Mr Longman, Mrs Hamilton and others in an email of the Claimant's finding the risk of Listeria Mono contamination from the Brining Room floor through the drainage system which ran through the entire factory

2.1.1.3 on 2 August 2021, orally and in writing in the form of a hygiene action plan, repeating the concerns above at a team meeting

2.1.1.4 on 9 August 2021, orally and in writing in the form of a hygiene action plan, repeating the concerns above at a meeting

2.1.1.5 on 30 September 2021, informing the Respondent that it could not release cheese that did not meet the legal microbiology testing limits

2.1.2 Were the disclosures of 'information'?

2.1.3 Did the Claimant believe the disclosures of information were made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did the Claimant believe that the information tended to show that:

2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;
2.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer?

3. **Dismissal (Employment Rights Act s.99, 100, 103A)**

3.1 Was the principal reason for the Claimant's dismissal:

3.1.1 a reason or set of circumstances relating to the Claimant's

pregnancy?

3.1.2 Any of the protected disclosures?

3.1.3 Because the Claimant brought to the Respondent's attention, by reasonable means, circumstances connected with her work, which she reasonably believed were harmful or potentially harmful to her health or safety [namely, working as an Assistant Cheesemaker in the wrapping and affinage department]?

3.2 The Claimant did not have at least two years' continuous employment and the burden is therefore on the Claimant to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was one of the matters above.

4. **Detriment (Employment Rights Act 1996 section 47B/C)**

4.1 Did the Respondent do the following things:

4.1.1 On 21 September 2021, Mr Longman inform the Claimant that she could no longer work as a Marketing Assistant, but would have to return to a role as an Assistant Cheesemaker, and that her rate of pay would be reduced from £11 an hour to £9.50 an hour and that she had 14 days to decide whether to accept the reduction in pay or leave, [and thereafter paying the Claimant reduced pay]

4.1.2 in the period between 22 September and approximately 22 October 2021, requiring the Claimant to work in the affinage and wrapping department, requiring the Claimant to turn, wash and lift heavy cheeses in a refrigerated room;

4.1.3 On or about 5 October 2021, refusing the Claimant's request to provide her with her work laptop, to enable her to work from home when she was suffering from morning sickness;

4.1.4 in the period between 12 November and 13 December 2021 repeatedly emailing and writing to the Claimant requiring her to attend redundancy consultation meetings, notwithstanding the Claimant's presentation to the Respondent of fit notes indicating she was unfit for work as a consequence of suffering a miscarriage of the 19th November 2021.

4.1.5 dismissing the Claimant on the sham grounds of redundancy on 19 December 2021

4.1.6 Conducting the meeting at which the Claimant was dismissed in her absence.

4.2 By doing so, did it subject the Claimant to detriment?

4.3 If so, was it done on the ground that the Claimant had made the protected disclosures set out above or on the prescribed reason, namely pregnancy?

5. **Pregnancy and Maternity Discrimination (Equality Act 2010 s. 18) and direct sex discrimination (s. 13)**

5.1 Did the Respondent treat the Claimant unfavourably by doing the following things:

5.1.1 On 21 September 2021, informing the Claimant that her rate of pay would be reduced from £11 an hour to £9.50 an hour and that she had 14 days to decide whether to accept the reduction or leave, [and thereafter paying the Claimant reduced pay]

5.1.2 On 22 September 2021, requiring the Claimant to stay at home and take a PCR test

5.1.3 On 5 October 2021, informing the Claimant that she would need to take sickness absence to avoid spreading her 'sickness bug', when the Claimant informed the Respondent that she had morning sickness and could not attend work that day

5.1.4 On or about 5 October 2021, refusing the Claimant's request to provide her with her work laptop, to enable her to work from home when she was suffering from morning sickness

5.1.5 in the period between 12 November and 13 December 2021, repeatedly emailing and writing to the Claimant requiring her to attend redundancy consultation meetings, notwithstanding the Claimant's presentation to the Respondent of fit notes indicating she was unfit for work as a consequence of suffering a miscarriage on the 19th November 2021

5.1.6 dismissing the Claimant on the sham grounds of redundancy on 19 December 2021

5.2 Did the unfavourable treatment take place in a protected period?

5.3 If not, did it implement a decision taken in the protected period?

5.4 Was the unfavourable treatment because of the pregnancy?

5.5 Was the unfavourable treatment because of illness suffered because of the pregnancy?

5.6 In respect of sex discrimination, the Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. The Claimant relies upon a hypothetical comparator.

5.7 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sex?

6. **Victimisation (Equality Act 2010 s. 27)**

6.1 Did the Claimant do a protected act as follows:

6.1.1 On 21 September 2021, raising a grievance complaining that the Respondent has required her to accept a pay reduction or leave her employment as a consequent of disclosing that she was pregnant

6.1.2 On 21 October 2021, appealing against the outcome of her grievance

6.2 Did the Respondent do the following things:

6.2.1 In the period between 22 September 2021, Mr Longman required the Claimant to stay at home and take a PCR test

6.2.2 On 23 September 2021, Mr Longman confirming the reduction in pay and change of role detailed above.

6.2.3 On 5 October 2021, informing the Claimant that she would need to take sickness absence to avoid spreading her sickness bug, when the Claimant informed the Respondent that she had morning sickness and could not attend work that day

6.2.4 Failing to engage with and respond to the Claimant's grievance appeal reasonably, impartially, and fairly [detail to be provided]

6.3 By doing so, did the Respondent subject the Claimant to detriment?

6.4 If so, was it because the Claimant had done the protected acts?

7. **Remedy**

<u>Unfair dismissal</u>

7.1 The Claimant does not wish to be reinstated and/or re-engaged

7.2 What basic award is payable to the claimant, if any?

7.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

7.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.4.1 What financial losses has the dismissal caused the claimant?
7.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
7.4.3 If not, for what period of loss should the Claimant be compensated?
7.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
7.4.5 If so, should the Claimant's compensation be reduced? By how much?
7.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
7.4.7 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?
7.4.8 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

Detriment (s. 47B)

7.5 What financial losses has the detrimental treatment caused the claimant?

7.6 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

7.7 If not, for what period of loss should the Claimant be compensated?

7.8 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

7.9 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

7.10 Is it just and equitable to award the Claimant other compensation?

7.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

7.12 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the Claimant's compensation? By what proportion?

7.13 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the Claimant's compensation? By what proportion,

up to 25%?

Discrimination or victimisation

7.14 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.15 What financial losses has the discrimination caused the claimant?

7.16 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.17 If not, for what period of loss should the Claimant be compensated for?

7.18 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.19 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.20 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.21 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

7.22 Should interest be awarded? How much?

Schedule 5 Employment Act 2002 cases

7.23 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

7.24 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

7.25 Would it be just and equitable to award four weeks' pay?

## 5. Findings of Fact

*References are to the page numbers in the bundle, hard copy followed by digital, and to witness statements as "ws". "SAF" refers to the statement of agreed facts.*

*These are the primary findings of fact of the Tribunal. Further findings based on analysis and interpretation, resolving conflicts in the evidence or based on inference drawn from the facts are discussed in the Reasons.*

**2020**

5.1. White Lake Cheese Ltd is a cheese manufacturing and selling company. It is a small company employing fewer than 17 members of staff. The Managing Director is Roger Longman. He is described as a third generation farmer continuing his family business. As Sandra Hamilton puts it, "He runs the business and makes the decisions." (ws para 20).
5.2. The Claimant applied for the temporary cheese-making assistant role with White Lake Cheeses Ltd in September 2020. (SAF) (112/117).
5.3. She is a graduate with a degree in media communications. She was interested the role, having been made redundant elsewhere, but had also an interest in working in administration or in marketing, if that possibility arose.
5.4. She started work on 1 October 2020 (SAF)(114/119).
5.5. No written statement of terms and conditions was issued, nor any written confirmation of the role, job description, pay or main terms. There is no record of the discussions.
5.6. Given the size of the firm, staff are required to operate flexibly and undertake a range of roles. All office staff helped out in affinage and wrapping as needed, without any change in their rate of pay.
5.7. Miss Botha's temporary work was due to come to an end at the end of December.

**Storm Botha 's permanent role**

5.8. Before the end of December 2020, the Claimant had started to work in the office, doing marketing and other work. She negotiated a salary of £11.00 an hour for that work, making that proposal on 9 December by reference to the work she was already doing (115/120). Initially, she was still needed by the cheese-making operation. It was agreed that she would also work in the cheese room at £9.00 per hour while assistant cheesemakers were recruited.
5.9. Again, no written confirmation of those terms was issued and there is only incidental record of the discussion, in Storm Botha 's email of her proposal of £11.00 per hour.
5.10. Over time, Miss Botha focused more on marketing and administrative activities to the exclusion of the cheese-making assistant role (SAF and oral evidence ).
5.11. That transitional period came to an end at some point between January and March. She did not work in the manufacture of cheese after March 2021, after new assistants had been recruited; that is the oral evidence of both Miss Botha and Mr

Longman. She tells us, “He looked at me directly and said now you can stay in the office.”

5.12. From then on, she was solely and permanently employed in the office doing marketing and various administrative tasks together with microbiological testing. Sporadically, as did other office staff, she would step in to work in wrapping and affinage when needed, with no reduction in pay from the £11.00 per hour paid for her office work.

5.13. She was provided with a macbook for her work, that being the technology she was familiar with. A PR (public relations) course was suggested to her. She took the free course and asked to go on a fee-paid one. She sent the link and the details to Mr Longman, who approved it, he says, without reading. The cost was some £2,000.

5.14. No written statement of terms and conditions was issued.

5.15. She got busier when an office administrator, Andrew, left in April 2021.

5.16. She was never full-time just in marketing but she was full-time in the office before Andrew left. She was given additional duties as time went on, including covering parts of his role.

5.17. It was suggested to her by Roger Longman that she take on the SALSA accreditation (Safe and Local Supplier Approval) and audit compliance for the company when Andrew left, but she declined because she understood it to be a demanding, time-consuming and critical role for the business that was outside her skill set. She says it was a business critical role, one that Andrew had struggled with and properly one for a senior member of staff:

> “I was happy doing microbiology. It was just the accreditation, that was never intended to be part of my role. Huge responsibility, everything from accreditation to health and safety, an extensive, a large, role” (oral evidence).

5.18. An office manager, Sandra Hamilton, was appointed and took up her role in June 2021. She had experience in management and in handling food sales in a public house, but not with the management of cheeses or the control of bacteriological pathogens.

5.19. Storm Botha describes her role in her grievance appeal (224/229) as it was in September 2021:

> “My job role isn't solely digital and marketing”.

5.20. She lists,

- design production of flyers and leaflets,
- microbiology testing and monitoring results,
- training Sandra Hamilton to do the micro biology testing
- managing red tags and releasing cheese
- reviewing micro limits for each style of cheese using the SCH Handbook
- technical help and design for the labels and label printer;

- maintenance and content updates on the website,
- social media content and interaction.
- customer queries
- interacting with other businesses in the industry
- monthly newsletters for retail, trade and wholesale customers
- recipe content on the website
- promotions
- retail shop management as one of the main roles
- working on an eco-packaging and biodegradable wrapping and boxing project
- the PR course
- developing endorsements and collaborations
- creating submissions for cheese awards

5.21. She also did ordering, as also did Sandra Hamilton, and helped out as needed in affinage and wrapping.

**Protected disclosures**

5.22. When test results showed failures, she reported that to Roger Longman in the course of her employment as well as identifying any cheeses affected through a red tag process.

5.23. She started doing the testing before she was trained, taking over from the previous administrator (ws 8). She was not certain what had to happen about samples that failed the testing. In April 2021, seeing antibiotic residues in milk, she was told by a colleague the cheese made from it should be thrown away. She reported it and did not then know how Mr Longman handled it He tells us that it was resolved and that cheese was not and could not be made with milk with antibiotic residues.

5.24. An example is given of a similar report of antibiotic residues in June.

5.25. In July, she started work on a staff handbook; there was none.

5.26. In July, there were test results coming through following swabs taken from equipment and the floor. The certificates of analysis reported on 22 July, from a swab taken on 14 July, showed Listeria in the Brining room, taken from the sheep tank floor and the goat tank floor (128, 129/ 133, 134).

5.27. She shared the results with Roger Longman. She has not explained what she said to him or produced any other document or report of that.

5.28. On 2 August 2021, Storm Botha attended her first training course, a SALSA course on “Food Microbiology – the Essentials”, held at the premises of White Lake Cheese. She has not given evidence as to any disclosure made on that occasion (131/137). What she understood after a conversation with the trainer was that,

> “WLC had a massive problem with hygiene, and also with Listeria Mono bacteria,…. an outbreak waiting to happen” (ws para 12).

5.29. In August, she produced a paper headed “Microbiology Investigation Strategy” (135/140) that she presented at a staff meeting on 9 August 2021. She gave an oral presentation as well as sharing the paper. Mr Longman was not there but Sandra Hamilton was and took part in the discussion of hygiene practices that needed to be addressed.

5.30. Storm Botha was prompted by her concerns and by the lack of any material for staff reference,

> “I created a hygiene plan of action investigation document for distribution at a staff meeting on 9 August 2021. This was vitally important as nothing existed for staff to reference until this point, and when discussing fatal pathogens and contamination, it was of great importance that the staff had information available to them. I'd raised alarms with management and routinely kept them up to date with the environmental swab results from around the factory.” (ws para 13).

5.31. This was in relation to pathogens not antibiotic residues.

5.32. The opening paragraph of the paper explains that it is part of an ongoing investigation regarding high E coli and entero test results. The report sets out that the company has a hygiene issue and explains the proper control of bacteria. It then sets out additional hygiene measures to be adopted across all departments. It also points out and contamination of Listeria Mono on the brining room floor. She writes that,

> “Listeria Mono is a dangerous and deadly pathogen contamination that travels through water droplets and by having this bacteria in our brine room, it causes a high possibility of contamination to our products which would likely result in temporary closure and recall of products.”

She highlights that there is a current problem, requiring additional effort to control,

> “By getting high readings of E coli and enteros, this confirms that we have a hygiene issue. While there are other factors to consider, having this problem last as long as it has indicates a clear hygiene issue, which as part of this investigation does need to be reviewed and hygiene has to be improved across the board.…..
>
> We can also make the clear that distinction of a hygiene issue when the raw milk samples have below 10 readings for both E coli and enteros, but post heat treatment are showing contamination.” (136/141).

5.33. She makes recommendations about the Brining Room cleaning schedule and warns against use of a high pressure hose because Listeria Mono travels via water droplets, “Thus making it more likely to spread the bacteria to our brine tanks and/or cheese” (142/147).

5.34. Her final point is that amongst the three most common cross contamination points one which is a high possibility in their setting due to relaxed hygiene measures is transfer from person to product.

5.35. There followed a discussion about hygiene practices, the care to be taken over protective clothing, walking or leaving different areas. A number of people joined in, exchanging good practice. Sandra Hamilton expressed concern about the Brining room being used as a walkway, so people were walking through, and about people popping out for a cigarette and back again without taking the necessary steps to prevent spread of bacteria.

5.36. Mr Longman was not at that meeting. He did see Miss Botha's paper at some stage: Mrs Hamilton says she would have discussed it with him within a week. His oral evidence was that he did not read it at the time. He seems now not to consider it was wholly accurate or based on proper understanding of management of bacteria or the risk of contamination, but some measures from it were adopted. It is not denied that there was Listeria contamination.

5.37. The report headed Microbiology Investigation Strategy and the oral report given at the meeting is accepted as a protected disclosure, as explained below.

**Pregnancy**

5.38. In August 2021, Storm Botha told Mr Longman that she and her partner were trying for a baby, concerned about her job security.

5.39. She had shared that with Lynn Solman who said, she reports,

> "I thought you were happy here, why would you jeopardise that by having a baby?".

5.40. It is a comment Lynn regretted, and it caused some tension between them for a couple of weeks.

5.41. On 7 September 2021, Storm Botha told Sandra Hamilton that she was 5 weeks pregnant.

5.42. Exactly what words she used is not clear. The Claimant says that she gave her news and then added that this was not common knowledge with the staff and words to the effect that she did not want it to be.

5.43. Sandra Hamilton understood that. She knew it was in confidence, at least so far as the staff were concerned.

5.44. Almost immediately, within 90 minutes, Sandra Hamilton sent a WhatsApp to Lynn Solman saying,

> "So…
> want to hazard a guess who's 5 weeks pregnant?
> Not that I've told you obviously"

5.45. The reply was

> "That would explain why she has been so happy! Now the troubles start! So she was already pregnant when she spoke to Roger?"

5.46. From Sandra Hamilton,

> "I thought that too, on several levels.
> First scan will be around 22 September. I did manage to be nice about it though.
>
> Looking forward to seeing Roger's face when I tell him next week!" (151/156).

5.47. In spite of sharing it immediately with Lynn, as she agrees contrary to Storm Botha 's express wish, Sandra Hamilton tells us that she did not tell Mr Longman. That is contested.

5.48. At this date, he was on holiday. Both are clear that they do not communicate over work matters when on holiday.

**Advice from the Specialist Cheesemaker Association**

5.49. On 8 September, Sandra Hamilton emailed the advice line at the Specialist Cheesemaker Association,

> "We have a member of staff who is now pregnant – good news for her, obviously. However, we make over 20 different soft and hard goat, sheep and Guernsey cow milk cheeses, which invariably involve a number of different moulds. I am wondering, as her employer, if it is now safe for her to work in affinage or wrapping as I would hate for her and her baby to be put at risk." (153/158).

5.50. The response was,

> "While the NHS has published guidance on foods to avoid during pregnancy (including mould-ripened cheeses) due to risk of Listeriosis, there is no specific guidance on avoidance of moulds in general. We are not aware of any specific contraindications either in national guidance or peer-reviewed scientific literature.
> On the subject of mycotoxins, the presence of moulds able to form these substances at a level likely to cause harm an capable of both growth and toxin formation under the conditions encountered in a ripening room would be highly undesirable in a food. Toxin formation by moulds is normally limited by a number of factors, including temperature control. The SCA has recommended a ripening temperature below 15 degrees Celsius.

> It is important to note though that the SCA is not qualified to provide advice on medical matters and if these concerns were raised by the employee, we would recommend that a medical opinion is obtained."

5.51. In the week commencing 13 September, the Claimant worked in the affinage department for two days. (It is not agreed whether she was sent or volunteered when the request came through for help by someone from the office). She says this,

> "Sandra knew I was pregnant in September and proceeded to send me to affinage department without any conversation, heavy lifting and working with chemicals. I think week commencing 13 September, 2 full days. And I was lifting racks of cheeses. 12 kg, in a day you could do that 50 times and you did it from different heights, or you could be lifting from a height and placing it higher or low, there was no discussion of pregnancy" (oral evidence)

giving this further account,

> "Racks can have about 35 soft lactics, heavier at the start, then they become lighter. The racks themselves were quite heavy, the biggest role is in affinage, and in the Rachel room, big racks, 2 kgs cheese, to be washed and turned, and other hard cheeses, 1.5 to 2 kgs, and these racks are stacked around the Rachels so you would have six on the racks, you would wash, flip, wash, do all the cheeses and then move the rack…."

and,

> "(They were) done in batches, lined up in a process of maturation, oldest at one end, washed with brine or a cider vinegar or brandy, whatever the washing solution is, wash all six, lift the rack … and then stack to about chest height, so lifting from low to a height or lifting from a height to lower."

5.52. It was put to her that she did not need a risk assessment to tell her that she should not lift racks outside her capacity.

> "I have not been pregnant before. Tasked with a job, I got on with it. Naïve of me to expect my employer to defer sending me into another department without a risk assessment."

**14 to 20 September 2021**

5.53. Mr Longman returned from holiday on 14 September, Tuesday, having taken part in a course remotely from Rome on 13 September.

5.54. He went to the farm to deal with an emergency there and was busy for the next couple of days.
5.55. There would have been the opportunity for Sandra Hamilton to tell him Storm Botha's news, in the course of that week.
5.56. On 15 September 2021, there was a WhatsApp exchange between Sandra Hamilton and Storm Botha over headaches associated with early pregnancy.
5.57. The Claimant went to a cider festival on 17 September 2021 and returned to work on 21 September 2021 (SAF).
5.58. On 20 September, Storm WhatsApped Sandra,

> "Hello Sandra, hope you're well? I've had a call from the maternity unit, my 8 week appointment is on Thursday this week. 2 pm was the latest she could book me in. I hope that's OK?" (156/161)

**21 September 2021**

5.59. On 21 September, Storm Botha was asked to attend a meeting with Mr Longman in his house, in the kitchen, with Sandra Hamilton. That was not unusual. What was unusual was that she was not told what it was about,

> "Normally, it would be, come, bring your stuff relating to this, we are going to discuss…" (oral evidence).

5.60. Their routine meetings did not involve note takers. Sandra Hamilton attended as a note taker, positioning herself as that and did not participate as would usually be the case.
5.61. The meeting opened with some criticisms of Ms Botha's marketing work from Mr Longman. Amongst his complaints were that cheese was being sold cheaply on the internet. He was not impressed by the posts. He did not like the picture of women wearing t shirts with the firm's name and logo. He said she had not done a newsletter,
5.62. What happened next is in dispute.
5.63. What the Respondent's handwritten meeting notes written at the time by Mrs Hamilton show is,

> "R- bring in web designer. Going to be short staffed until Xmas. Move to production."
> Storm Botha – pregnant
> moving to wrapping and washing £9.50. £11.00 testing hours
> Default manufacturing
> What works for company
> New year – clear on expansion and push on marketing
> 3.5 months – 95% of time wrapping
> Dec probably box cheese" (160, 161/165,166).

5.64. And later,

> "Talk to Storm Botha later in week re testing schedule …..
> All ordering will move to Sandra"
>
> "Biggest concern lack of people to wrap cheese"

5.65. The Claimant says that at that meeting she was told she was being moved to a different department at a lower rate of pay, £9.50 instead of £11.00. She was asked if she understood and she was pressed to agree to the change. In the end, she did agree, not knowing what else to do and feeling under pressure.

5.66. What Mr Longman says is that it was a meeting to discuss a possible move.

> "I explained marketing was not a priority at the moment and that I wanted her to move into wrapping" (ws para 29)
>
> "I asked the Claimant if she understood what I was saying so that she could go away and consider what I was requesting of her and that I needed everyone to be flexible. I explained that this was not a fait accompli" (ws para 33)

5.67. Sandra Hamilton says the same,

> "It was a relaxed and informal discussion about the potential ways forward, in my view," (ws para 25).

5.68. Both say Miss Botha was not under pressure to agree anything. Mr Longman tells us he was thinking ahead, the real need in wrapping and affinage came from mid-October.

5.69. Sandra Hamilton says it was not a consultation but it was a discussion.

5.70. There is no suggestion of that in the handwritten notes from Mrs Hamilton. It is not recorded that Storm Botha was being given time to think about it, or that it was not a fait accompli.

5.71. No letter was issued following the meeting to clarify what had been said and how things were left. No time limit for a response is recorded or further meeting booked.

5.72. The Claimant was distressed. She sent a WhatsApp message after the meeting to her partner, saying,

> "For the next 3.5 months, Roger is putting me back into production on £9.50 an hour.
> And I can't leave or look for anywhere else to work because I'm pregnant."

5.73. That evening, she sent two emails that evening, one questioning, one in strenuously critical terms as a grievance.

5.74. The first email, to Mr Longman, opens,

> "I won't lie, I was rather taken aback this morning in the meeting, and generally very surprised and left a bit speechless.
>
> I like to think that we get on well at work and communicate well too, having had some time to process the conversation, I'd just like to get some clarity please."

5.75. She goes on to mention her expectation that she would be working in marketing given the conversations that had taken place, even from the outset when she started in cheese making on a temporary basis. She had taken on much of Andrew's work to keep on top of things, had not had a pay increase for inflation, and now felt underappreciated for her hard work during a very difficult time. She had also taken on the lab testing permanently without complaint.

5.76. She mentioned the PR course she was doing which had a project element involving a press release and campaign with the company. She would need to work that into her office hours and asked if she could have a schedule of when she would be allowed in the office so that she could manage her office time efficiently.

5.77. She goes on,

> "I just wanted to voice myself as I didn't have much time to process that this morning.
> As you said, it's only for three months until after Christmas: it just came as a shock, especially as I'm pregnant and with Christmas coming up, it's not great to learn that my wages will be reduced. And I'm sure you can understand how it's left me feeling rather distressed" (162).

5.78. She adds,

> "Will I be returning to my position in marketing after Christmas?"

5.79. That email was sent at 4.47 pm.

5.80. At 9.20 pm, she sent a Formal Grievance letter, to both Mr Longman and Sandra Hamilton.

> "While White Lake cheese does not have a structured procedure for raising a grievance, I am writing this e-mail to raise a formal grievance.
> I have a problem with how the meeting regarding my position and hourly rate was conducted on the morning of Tuesday 21 September 2021 and the outcome of the meeting."

5.81. She then lists some 14 criticisms including the lack of warning or consultation in advance of the meeting, that she was not asked if she wanted someone present with her, that she was given no written notice either of the meeting or of the proposed reduction in pay, that she has no written contract, and the following,

- "I was caught off guard and left speechless while being told the terms of my employment and deduction of pay as though it were agreed and repeatedly asked to agree without knowledge of the implications, in an intimidating and unfair manner;
- while other members of staff have been moved to different departments for assistance, I am the only person receiving a deduction in pay;
- this is clear discrimination towards me as I am the only member of staff who is pregnant, being demoted to a different department and receiving a decrease in hourly pay;
- the effect of the ambush meeting has left me distressed and anxious, concerned about the security of my job." (163/168).

5.82. She raises here, in writing, her pregnancy.

5.83. She does not at this stage refer to any other reasons for the conduct towards her.

5.84. Both the email and the grievance shows that she had understood it the change to have been imposed, for it to be immediate and that she had felt that she had been bullied into agreeing.

**22 September 2021**

5.85. Sandra Hamilton tells us that she did not see the grievance e-mail that night but that she did see it the following morning. She was on annual leave. She tells us that she telephoned Mr Longman and advised him to consult the National Farmers Union (NFU).

5.86. Mr Longman did not respond to reassure Storm and explain that she had misunderstood, that this was a proposal for discussion only, rather than a settled decision to move her to a lower paid role temporarily.

5.87. On 22 September, Storm Botha sent a WhatsApp message to Mr Longman saying that,

> "Good morning Roger, I hope you're well. I'm not well at all. I've had a migraine all night and wave after wave of panic attacks that kept me from being able to sleep. I still have this migraine and won't be in today (sad face emoji). I'm sorry, I was asked to help Shelley today. Hopefully I'll be able to rest off this migraine and be back at work tomorrow." (165).

5.88. Mr Longman replied,

> "Sorry to hear that. I suggest you get a COVID test too as you went to a festival."

5.89. The Claimant had attended a festival over the weekend, taking the Friday and Monday off to do so.

5.90. She said,

> "I had a negative COVID test already on Monday before returning to work."

5.91. He said,

> "That's great but still prefer you to get a PCR."

5.92. PCR tests were not widely available to those without the accepted symptoms. Although she agreed, she had some difficulty in getting one, having already had a negative lateral flow test and having been permitted to attend work for the day on Tuesday, but she persuaded the testing staff to do one when she explained the context, "Once I explained the grievance issue to them…." (166), as she then explained to Mr Longman. She said she would work from home (167). She again mentioned her distress from the meeting on Tuesday.

5.93. She had to wait for the result before being able to return to work, since at that stage, she was unvaccinated.

5.94. Mr Longman did not use this exchange to reassure her that she had misunderstood what was said to her at the meeting on 21 September.

**23 September 2021**

5.95. The PCR was negative. The result came through on 23 September and Storm Botha returned to work.

5.96. Mr Longman had asked her to meet him to discuss the PR course she was on,

> "I need to talk to you about this PR course which I thought was just a one or two day online thing. Let me know when we can talk or when you are coming into work." (167/172).

5.97. She asked to have another member of staff present and Lynn Solman attended to support her and took notes (168).

5.98. The meeting was recorded.

5.99. It opens with Storm Botha asking, "Is this the consultation that should have happened before the meeting on Tuesday or is this following the grievance letter?" (169).

5.100. Mr Longman responded,

> "This is a meeting about some other bits and pieces, then we will talk about consultation."

5.101. He raised an issue over the cost of antibiotic testing and over the PR course that she had been attending. They had been charged £280 for an antibiotic residue

test, and he had expected tests to cost “two or three quid”. Storm Botha said she had checked with Abigail.

5.102. He said he had misunderstood what the PR course was, when they spoke originally, he thought it was just a little thing. He agreed he had been consulted but he hadn't appreciated what was involved or that it was taking a lot of time. She said the course was due to finish in October, that she was doing well having scored 92 on her topic submission. She explained what she was working on and he asked her to push through it as quickly as possible.

5.103. The meeting had again begun with a note of criticism.

5.104. Mr Longman then said perhaps he hadn't phrased things as well as he could on the previous meeting,

> “I apologise, perhaps I didn't phrase things in a better format for you to understand."

5.105. He said that her main job after she left cheese-making had been “Instagram and stuff like that”, that she had taken on a range of other stuff when the former office administration worker left which was now for Sandra to do.

5.106. He confirmed with her that she was not comfortable doing “HACCP and stuff like that”.

5.107. HACCP is a management system addressing food safety by the analysis and control of hazards including biological and other hazards.

5.108. She confirmed she had not been willing to “have SALSA put on me”. Mr Longman said that Sandra Hamilton would be doing that.

5.109. They agreed Miss Botha’s main role was marketing “and what have you” and he added,

> “Now we’re in a situation where I need more staff in the packing room and we’re actively recruiting… and I’m not convinced marketing is required at the moment and realistically not until we've got a new cheese room to give us the ability to sell more cheese, so and I'd like to move you to packaging when you're ready.”

5.110. The construction of the cheese room had been expected to be complete by September 2021 but was seriously delayed. The change initially proposed on 23 September as for three and a half months was now presented as more long-standing.

5.111. In response, she said,

> “So, thank you. Even now I can feel myself shaking, I'm very uncomfortable over what happened and I've cried more in the last 48 hours than I have all year….
> I feel that on Tuesday I was taken round in circles until I said OK which would have counted then as me agreeing and not understanding what I was agreeing to…”

5.112. Having carried out some research, she said that she should have had other options presented, whether a change of department or redundancy, but if she was being moved to work elsewhere, risk assessments should have been carried out. In that context, she raised both the weight of working in affinage lifting cheeses and her exposure to mould ripened cheese. She was not happy with going down to a lower wage. If she had known that this might happen, she would have looked for a more secure job before becoming pregnant. Any maternity pay was now at risk if she changed job.

5.113. Mr Longman said she would qualify for maternity pay from week one (which is incorrect). Miss Botha said Mrs Hamilton should have been on top of things when she told her she was pregnant, at which point Mr Longman said,

> "My understanding from talking to Sandra afterwards is that you told her you were pregnant in confidence"

and added that he had not known that she was pregnant. This was in the context of the discussion on 21 September.

5.114. He added that her pregnancy was fine from a business perspective, not an issue, because she got her maternity pay, they got the money back and it didn't cost them anything, and they kept her job open for her.

5.115. He went on, at the moment,

> "I don't need marketing, I need people in packaging" (170)

> "It is really... From my perspective, it's really that simple, I understand that you sort of felt that the previous meeting was a fait accompli, I think that the misunderstanding is that I always felt that you were employed to flex between the two jobs anyway to an extent."

5.116. Storm Botha replied,

> "I was under the impression that when you had hired more people for the cheese room and you looked at me and said now Storm can stay in the office, that that was officially then my position."

> Mr Longman,

> "… and this is where the miscommunication comes in…"

> Ms Botha,

> "Well if I had had a contract then obviously that would have been laid out clearer in there."

> Mr Longman,

> "Yes, that is a big regret, it's not been done, we will be getting contracts done ASAP when Sandra comes back."

5.117. He gave her two weeks for, "A decision from you as to what you would like to do." The only option put to her had been the move to wrapping and affinage at a lower rate of pay. What alternative there might be is not stated.
5.118. She asked and he agreed to put things in writing. She asked for a formal reply to her grievance. Mr Longman agreed to that and to provide risk assessments.
5.119. Miss Botha confirmed she was willing to move departments but was not agreeing to a reduction in pay (177/183 and 171/176).
5.120. Mr Longman in effect told her to get the PR coursework finished in the next two weeks because,

> "Hopefully in two weeks' time, you'll be doing something else and you won't have time to do that, so basically I'm saying for the next two weeks do your testing and do your PR course."

5.121. No letter confirming the outcome of that meeting, or the earlier meeting, was sent.
5.122. Miss Botha was by now consulting solicitors and beginning to look at job vacancies.

**Her request for risk assessments**

5.123. On 23 September, Miss Botha asked for risk assessments in respect of the proposed role. She initially assumed that there would be general risk assessments in existence, given the nature of the business.
5.124. She has said in August that there was Listeria Mono on the floor of the Brining Room.
5.125. She had concerns about the sufficiency of the safeguards in place in terms of managing bacterial contamination.
5.126. She had concerns about lifting.
5.127. She says,

> "Affinage involves turning cheeses weighing between 1.5 kg and 2 kg. They are on racks. Six cheese per rack . They or the racks need to be moved up or down. There is not a lot of space" (oral evidence).

5.128. She describes turning each cheese and then moving the whole rack.
5.129. Roger Longman tells us that that was unnecessary, that each cheese could be moved separately, and using a rack at floor-level allowed extra space.
5.130. There may well have been adjustments that could have been made that would make the routine standing, lifting and bending manageable for a pregnant woman, but while Miss Botha had done some days in affinage since 7 September, nothing had been discussed with her.

5.131. No risk assessment was produced at this stage. There were no general risk assessments in this company at this stage, notwithstanding the context.

5.132. On 30 September, there were exchanges about test results. Miss Botha was still doing the microbiology testing and reporting, including by entering the Brining Room. Mr Longman had expressly asked her to carry on doing the testing for the next two weeks from 23 September.

**October 2021**

5.133. On 5 October, Storm Botha reported morning sickness and that she would not be in that morning. Sandra Hamilton initially sent a note of commiseration and that she hoped Storm might be able to come in later. A couple of hours later she rescinded that, on the basis of advice from Roger Longman that Storm Botha could not come in for 48 hours, having vomited (182 and 29 ws). Storm Botha sent a link to information showing that that did not apply in respect of morning sickness and Sandra Hamilton then conceded that she could come in the next day. In the meantime, Storm Botha had offered to work from home and asked if her partner could collect her laptop. That was refused: Sandra Hamilton said they would like the laptop to stay in the office and for her to rest.

5.134. Also on 5 October, Mr Longman issued an invitation to a grievance meeting to be held on 8 October (186). Storm Botha asked for it to be rescheduled to allow her to be accompanied by Lynn Solman and for time to prepare, and it was moved to 13 October (188).

5.135. Storm Botha saw her doctor on 6 October and submitted a fit note on 7 October, with effect from 6 to 20 October, citing work-related stress.

5.136. She did not return to work.

**13 October 2021**

5.137. The grievance meeting took place on 13 October. Storm Botha was signed off sick but she had read the ACAS advice that grievances should be dealt with quickly and attended.

5.138. Both parties recorded the meeting which took place in Mr Longman's dining room. Mr Longman was present with Sandra Hamilton. Storm Botha had Lynn Solman with her. Mr Longman opened the meeting by saying that this was Storm's meeting to discuss her grievances.

5.139. Storm explained how distressed she's been by the meeting on 21st September (193),

> "At the end of the day, it's taken a lot of courage for me to come in here today to your home and have this meeting. Basically what I would like to say is that the meeting really, really affected me in a horrible way. Even now I can feel myself shaking. I'm trying to fight back tears. I have had sleepless nights, waves of anxiety, I am terrified for what's going to

> happen to my job. Am I going to be on unemployment? I've got a baby on the way, all of those things in that meeting have affected me in a really bad way, hence the letter. I'm just about holding myself together. This is affected me in such a horrific way.
> I don't know what you want me to say other than that letter outlined my grievances very, very clearly and I was under the impression you would be addressing those in this meeting."

5.140. Mr Longman said that his understanding was that it was for her to outline her grievances and they would then go away and send a formal reply.
5.141. By agreement, Storm read her grievance letter. There were no questions and the meeting came to an end.

**The grievance outcome**

5.142. The grievance outcome was issued on the 15th of October ( 194).
5.143. Mr Longman accepted that Miss Botha should have had the opportunity to be accompanied at the first meeting by a companion. The rest of her grievance was dismissed.
5.144. He said this was an early stage of the process and he was not expecting her to agree anything straight away, it was simply an initial consultation. At that early stage, advance notice to her was not needed.
5.145. He did acknowledge that the nature of the discussions may have come as a shock but she was not asked to agree to anything in the meeting.
5.146. The potential reduction in the hourly rate was merely a point for discussion. The role that she was being offered attracted a lower rate of pay, however, no final decision had been made,

> "You were initially offered a role in production, however, you then informed me that you were pregnant. Therefore production would not be a viable option due to the very physical nature of the work and a role in affinage and wrapping was offered instead."

5.147. Mr Longman went on to say that her current role was no longer required by the business and that he had offered her the opportunity to move to a different department.

> "You have also specifically requested not to work on SALSA or continue with the ordering and therefore your workload has decreased significantly."

5.148. He added,

> "In no way did I intend for this meeting to be viewed as an ambush, as it was an initial consultation, and I am sorry that you are distressed and anxious."

5.149. He reiterated that he had not known that she was pregnant until the meeting of 21 September,

> "You spoke to Sandra in confidence about your pregnancy and that information had not been passed on to me. Sandra was not aware of the meeting in advance or of the nature of the meeting." (195).

5.150. Towards the end of the letter was an invitation to a consultation meeting on 19 October, to discuss the change to her role and the options available.
5.151. Miss Botha did not take in that that was not intended to be a further discussion about the grievance, but a discussion about the change in her role.
5.152. She was given the right of appeal.

## 19 October 2021 Change of Role Consultation

5.153. On 19 October, Storm Botha was still off sick. She attended the meeting. She had not asked not to attend or to delay the meeting until she was in better health.
5.154. She had not understood that the meeting was about her job role. That information is given, on the second page, in between two paragraphs dealing with the grievance. She had missed it.
5.155. The meeting was attended by Mr Longman, Sandra Hamilton, with Lynn Solman as Miss Botha's companion.
5.156. Mr Longman reiterated that the company was not planning to do any marketing for the foreseeable future. They no longer required anyone in the marketing role. He offered the role in packing and affineuring at £9.50 an hour.
5.157. He said they had spoken to the SCA about "Moulds and spores and things like that with regard to pregnancy and general health and all that for anyone and they said that as far as they are concerned, there are no issues". Mr Longman was relying on the response referred to above from the SCA on 10 September; no other advice has been referred to or presented (152/158). They were commissioning an occupational health and safety survey for all staff. No other advice was sought although she had now raised an issue about her safety as a pregnant woman.
5.158. There had as yet been no risk assessments.
5.159. She asked for the proposals in writing. (There was as yet only one proposal.) She asked for the risk assessments she had requested and said she would not be making decisions until she had those. She was told they would be available in shortly.
5.160. She then tried to respond to the grievance outcome letter, but was told that that was not what this meeting was about and that she had failed to appeal.
5.161. Miss Botha had not at this stage said she was not well enough to attend meetings. She had been attending in respect of the grievance, she said, on the basis of the ACAS advice that a grievance should be dealt with promptly. She explains that,

> "I was signed off with stress, I did not want to discuss my job role, I said I was not agreeing anything and I had not had any risk assessments or hazard documents available."

5.162. She was angry and distressed at that meeting. She said the proposed appeal hearing,

> "Will be quite an interesting meeting for me to point out exactly what you have said in the past and the proof that I have that points out exactly how much you're lying and demonstrating your character in that letter. But that's fine, we will keep that then for another meeting."

5.163. She appealed the grievance outcome on 21 October 2021.

**Job role consultation outcome**

5.164. On the same day, Mr Longman sent her a letter confirming the outcome of the meeting of 19 October (200/205): they were not planning to do any marketing for the foreseeable future and,

> "The temporary work that you took on when Andrew left is now being completed by Sandra. This, unfortunately, leaves your current role obsolete"

5.165. The letter confirms the offer of a role in affinage and wrapping at £9.50 per hour, for 40 hours a week, working to a required standard,

> "I know you are more than capable of achieving this standard as you have done so on many occasions when working in there temporarily."

As to the pay,

> "Whilst this is a lower rate of pay than you are currently receiving, the job requires a different skill set to what you are doing currently, and the wage offered is commensurate with others within the team." (200/205)

5.166. The letter confirmed that an occupational health risk assessment was due to be completed across the company.

5.167. Her continuing with testing is not mentioned.

5.168. She was asked to respond within seven days of receiving the risk assessments.

**Risk assessments**

5.169. On 20 October, Miss Botha was sent the risk assessments carried out by Sandra Hamilton (201/206).

5.170. They had not been discussed with her first.

5.171. Miss Botha was concerned knowing the background of high readings of e.coli and enteros on which she reported in August and the Listeria Mono on the Brining Room floor, and her earlier concern about the risk of spread (135). By late October, she had read about the implications of Listeriosis for a pregnant woman and her unborn child (218).

5.172. The NHS guidance (103) identifies that Listeriosis is usually caused by eating food containing Listeria bacteria, and is mainly a problem with certain foods including unpasteurised milk, dairy products made from unpasteurised milk and soft cheeses, like camembert and brie. It can also be passed on by eating food that someone who has Listeriosis and has handled without washing their hands properly. The reassuring advice given does not apply to pregnant women to whom Listeriosis can cause serious problems. They are encouraged to get medical advice if they think they have Listeriosis (103).

5.173. While that advice is contained in the bundle of evidence, it is not clear that either party was aware of it at the time.

5.174. The risk assessments cited the information from the Specialist Cheesemakers Association of 10 September and advised that appropriate PPE was provided for all staff (203/208).

5.175. Miss Botha had also raised the question of lifting, in a job requiring standing, lifting and bending. There are two risk assessments, giving slightly different information about the approach to lifting weights. One proposes that racks of cheese that were too heavy should not be lifted. It is not suggested that the cheeses could be moved separately from the racks. The second risk assessment suggests a colleague could lift the racks.

5.176. Miss Botha had worked in affinage and wrapping since disclosing her pregnancy but the approach to handling the racks of cheeses was not discussed with her at any stage. She says the room is small and the worker usually worked alone.

5.177. Mrs Hamilton told us the risk assessments were not complete and were to be discussed, but that Miss Botha was off work sick. She agreed she had not told Miss Botha that they were issued for discussion with her.

5.178. They were, however, the basis on which Storm Botha had to consider the job offer, with the seven day deadline.

**Health**

5.179. Miss Botha supplied a fit note for the period from 20 October 2021 to 3 November 2021, again in respect of stress at work (245).

5.180. A scan carried out on 20 October showed the baby to be small and Miss Botha was losing blood (294/299).

**Grievance appeal**

5.181. The reasons Miss Botha gave for appealing were that several points in the response were inaccurate and dishonest; there had been a failure to address the poor way she had been treated, on which she had further evidence, and the outcome was wrong (214/219).

5.182. On 22 October, Miss Botha was invited to attend an appeal hearing in person on 26 October (214/219)

5.183. She prepared carefully for the appeal and attended the hearing on 26 October which both sides recorded (216, 218/221,223).

5.184. The hearing was chaired again by Mr Longman, with Mrs Hamilton and Ms Solman present. Miss Botha highlighted again how distressed she was at being there and at the impact of the meeting that was the subject of her grievance on her:

> "The extent of distress, that this internal situation has caused is frankly horrific. I've had to be signed off from work by my GP who is concerned at the level of stress being caused by the situation. I have never been signed off from stress from work due to stress in my life. Every time I have a meeting to attend at White Lake, I'm unable to sleep. I have wave after wave of panic attacks coming my anxiety goes through the roof. All this while being signed off from work. I've made sure to attend these meetings.... even now I'm shaking being here is extremely distressing." (219/224).

5.185. She went through the points of disagreement with the grievance outcome letter.

5.186. She challenged the assertion that her workload reduced because of her reluctant to do SALSA or ordering:

> "With regard to SALSA, I have never worked on Salsa for the company so that has not affected my workload. The company SALSA accreditation should be done by a senior member of staff. It was originally done by Pete when he was a partner/ director. You put it on Andrew and that along with his workload was too much and he could not do it. I'm already not paid for doing the microbiology testing and SALSA is further outside my pay grade. I do not have the knowledge to take on that task and was honest from the beginning. I've openly offered my assistance where I could.
>
> With regard to ordering, I was more than happy doing the ordering."

5.187. She explains in some detail the work that she had been doing and which she contends did not reflect any reduction in workload. She drew out the difference between the current offer and the original proposal, including that initially the

proposal had been temporary, to include testing and allowed her some scheduled days in the office.

5.188. She confirms that the only reason she told Sandra that she was pregnant was because Sandra was her manager and the HR person. She did not accept that Mr Longman did not know of the pregnancy before the meeting on 21 September.

5.189. She raised her concern about potential exposure as a pregnant woman to listeriosis.

5.190. There were no questions.

**Statement of Terms and Conditions and Handbook**

5.191. On 31 October 2021, Miss Botha was sent a written statement of employment particulars. It sets out that she was employed as a trainee cheesemaker and marketing assistant. The job description is,

> "Assisting the cheesemakers making our goat, sheep and Guernsey cow milk cheeses, including moulding and turning cheeses, washing the cheese room and associated equipment.
> Part-time role in marketing to include creating regular posts for social media; creating regular newsletters to be sent to customers, updating the website when necessary.
> You may also be required to undertake additional tasks or duties from time to time as necessary to meet the needs of the business." (230/235)

5.192. It included a £9 rate of pay for that work as well as the £11 for the office work as marketing assistant on the basis that she would be doing both, at different pay rates during the week.

5.193. It includes a probationary period of three months from 1 November 2020.

5.194. Also on 31 October, a Handbook was issued to all staff (239/244)).

**Grievance Appeal outcome**

5.195. On 27 October, the grievance appeal outcome was issued (227).

5.196. The outcome letter is a reiteration of the points in the grievance outcome letter. Mr Longman agreed, as before, that Miss Botha should have had the chance to have someone with her at the initial meeting of 21 September and that there should have been a written contract.

5.197. Mr Longman said again that she was not asked to agree to anything in the meetings on 21 September or 23 September; he says the formal offer of a new role was delayed until after the grievance process and the consultation meeting of 19 October.

5.198. He reasserted that Sandra Hamilton did not know of the content of the 21 September meeting in advance and he had not known Storm Botha was pregnant before that meeting.

5.199. It was not unreasonable to ask her to do SALSA or testing and they had paid for the appropriate courses to skill her up. He said that she had repeatedly said she did not want to do testing and that had been taken away and given to someone else

5.200. Miss Botha had continued to do testing until she went on sick leave.

5.201. The effect of that is to blame her for the loss of her office job because of her reluctance to do the work proposed for her.

**Early November –redundancy consultation**

5.202. On 19 October, Miss Botha had been offered the role in affinage and wrapping, on the basis that her marketing role had come to an end.

*5.203.* An email was issued on 1 November 2021, warning her that she was at risk of redundancy,

> "….our current situation means that we are not planning to do any marketing for the foreseeable future and the temporary work that you took on has been taken over by someone else.
>
> Your current role has become redundant, and you have chosen not to accept an alternative role within the business." (240/245).

5.204. They were considering making the very difficult decision to make her marketing position redundant.

5.205. She was invited to a consultation meeting on 5 November, to explore whether there were options available other than redundancy, inviting her proposals.

**Exchange of correspondence with solicitors**

5.206. A without prejudice email was sent on 2 November 2021, by Ms Botha's solicitors, which we have not seen. It raised a number of points including discrimination. Mr Longman replied, in an open letter on 3 November, rebutting the points made. He said,

> "Storm was employed by us as a trainee cheesemaker with a small part-time element in marketing. It was never our intention for her to take on a full-time role marketing as we are only a small company and have no requirement for someone to work 40 hours a week solely doing that. She did, however, move into the office when a colleague left, and she temporarily took on some of the jobs performed by them whilst we recruited a permanent replacement. The replacement started with us in June and has steadily been taking on the work over the subsequent months. This has inevitably led to a substantial reduction in Miss Botha's workload" (242/245).

5.207. That is not an accurate history. She had moved into the office in part by December 2020. Mr Longman agreed that she had not worked in production since March at the latest. Her full-time move into the office took place before the date when the office administrator left.

5.208. Mr Longman goes on to address many of the concerns that had already been canvassed. He reiterated that the meeting of 21 September was an informal consultation meeting only, that he had no prior knowledge of Ms Both's pregnancy, that Mrs Hamilton had no prior knowledge of the purpose of the meeting. Sales were outstripping demand and marketing was no longer required. The only role available was at a slightly lesser rate.

5.209. He set out with regard to Listeriosis, that the only way for her to catch it was for her to eat infected food. NHS guidance was that pregnant women avoid eating soft cheeses and dairy produces made from unpasteurised milk. She would be handling those cheeses in affinage and wrapping but full PPE (personal protective equipment) was provided. She was not expected to go into the Brine room**,** the only location in the business with an issue with Listeria. No cheeses had tested positive for Listeria for a considerable period of time (243/248). As she would need to ingest infected cheese to become unwell, it was not deemed relevant to the risk assessment.

5.210. Miss Botha had alerted them to concerns about Listeria as testing was part of her role at the time, cleaning regimes were enhanced to eliminate the problem and Miss Botha was not treated detrimentally at any time.

5.211. She had been excluded from work in accordance with guidance when she first reported vomiting from morning sickness but allowed to return when she assured them she did not have an infection.

5.212. Mr Longman offered an online meeting and asked if the letter of 2 November represented a formal resignation from the business (244/249).

5.213. On 3 November, Miss Botha presented a one month fit note again citing stress at work (245/250).

**Job application**

5.214. On 10 November, Miss Botha submitted an application for a role elsewhere as a Customer Support Specialist (S29/524).

5.215. On 16 November, she was interviewed for that role and on 20 November she was offered the role, subject to vetting.

5.216. The offer was confirmed on 20 December.

**Later November**

5.217. Ms Botha's solicitors had reported that she was unable to attend the meeting proposed for 5 November in the email of 1 November (248/253).

5.218. The letter warning her she was at risk of redundancy was reissued to her on 12 November 2023, now proposing a meeting on 17 November by Zoom.

5.219. On 16 November, Miss Botha in an email to Sandra Hamilton asked that all letters and communications be directed to her legal representative (250/255).

5.220. Mrs Hamilton wrote to Ms Botha's solicitors on 16 November, attaching the email of 12 November and rescheduling the proposed meeting from 17 to 19 November (251/256).

5.221. On 17 November, Mrs Hamilton forwarded to the solicitors a letter from Mr Longman to Miss Botha, explaining that the meeting had been postponed to 19 November, not having heard from her, the delay being in the interests of enabling her to attend, saying,

> "I am also aware that you have been signed off with workplace stress and having this matter hanging over you cannot be beneficial to your recovery or resolving matters. It was on 21 September 2021 when the issue of your ongoing role and the need to look to find an alternative was raised with you. This is almost two months ago."
>
> .

5.222. He refers to a letter newly received from her solicitors which he quotes as saying,

- "[she] does not wish to engage in any further meetings;
- [she] no longer wishes to continue employment with the Company; and
- she is also against options of redundancy, as this is not a genuine redundancy situation" (254/259)

5.223. In his letter, Mr Longman referred to a new role that had become available. Lynn Solman, the Sales Manager, had given in her notice. The role of Sales Assistant was being advertised. Selection would be by competitive interview, with external applicants. Miss Botha was told she was very welcome to apply. The salary was £10 per hour for a full-time, permanent post, 37.5 hours per week.

5.224. The affinage and wrapping role appeared no longer to be a consideration, since they were not willing to increase the pay for it and she had turned it down. Mr Longman in his witness statement said,

> "By this point, we had filled the temporary roles in wrapping and affinage, so this was no longer available."

5.225. The role offered had not since 23 September been referred to as temporary.

5.226. With that letter, Mrs Hamilton sent an email headed "URGENT - DEADLINES INCLUDED". She asked for an expression of interest in the alternative role of Sales Assistant by 5 pm on 18 November 2021 and confirmation of attendance at the meeting scheduled for 2 pm on 19 November. The email was sent at 9.33 pm on 17 November.

5.227. Both emails warned that if Miss Botha did not attend the meeting, a decision might be made in her absence. Mr Longman explained that he cannot keep postponing these meetings without reasonable cause.

**Miscarriage**

5.228. On 19 November, Miss Botha had a miscarriage.
5.229. Her solicitors notified the firm, saying,

> "Our client is willing to co-operate but unfortunately, she is currently too unwell to attend meetings or discuss this matter due to her very recently experiencing a miscarriage.
> As you can appreciate, this is a very difficult and distressing time for Ms Botha. We understand our client intends to provide medical evidence to support the fact that she cannot currently attend or participate in meetings shortly." (260/265)

5.230. They also protested at the short deadline issued for an expression of interest in the sales role by 18 November as unreasonable.
5.231. A fit note was provided dated 19/11/21, certified on the basis of miscarriage and stress at work.
5.232. On Tuesday 23 November, Sandra Hamilton replied, postponing the meeting without setting a new date, expressing sympathy, extending time for Miss Botha to ask to be considered for Sales Assistant role to 26 November, but pointing out that there had been previous postponements and it was "almost three months" since the issue about her role was first broached (262/267). This was an active vacancy, with a number of applicants already, and it needed to be filled quickly for the needs of the business.
5.233. On 26 November, Miss Botha attended a social event with friends and a former colleague.

**December 2021**

5.234. Miss Botha's fit note expired on 3 December if not renewed.
5.235. On 1 December, Mr Longman wrote to her, pointing that out and rebooking the meeting for 6 December, the Monday on which she would be due to return to work if no further note was issued (265/270). He said,

> "I have left contacting you until this time to allow you time to rest and recuperate."

5.236. She need not attend work before that. There would be a mental health first aider attending remotely from their solicitors.
5.237. Mr Longman now offered the affinage and wrapping role and referred to the sales role, while noting that the time limit had expired for an expression of interest. He offered the opportunity for her to have a different colleague with her since Lynn Solman had now left the business, and to provide time for that colleague to meet her so they could offer support. It would be a remote meeting.

5.238. On 6 December, Miss Botha supplied a further fit note for the period 3 December to 17 December, certified on the basis that she had suffered a complete miscarriage and stress at work (269/274). Her solicitors notified Mr Longman that she was unable to attend the proposed meeting.

5.239. Mr Longman wrote to her (through her solicitors) that day, moving the meeting to 13 December. He said,

> "When I met with you on 21 September 2021, I explained that we felt we did not need a marketing role. The basis of this discussion was that we are over capacity. We will not meet the orders we have. We cannot take more orders. So, we do not see any point in marketing our produce with a dedicated role. This remains the case now and in the foreseeable future. Rest assured this is not a reflection on you, or your capabilities in the role. As you know, I supported you in this role, but as a small business, upon review, I felt this role could be removed from our structure."

5.240. 272 He said he had held open the permanent role in affinage and wrapping. albeit that, "The need in this department is reducing." That role was hers without interview or selection process provided she accepted it no later than 12 noon on Friday 10 December.

5.241. If not accepted, there were no other vacancies at this time. The offer of the Sales Administrator role would also be withdrawn. There were no other options that would save the need for her redundancy (273/278).

5.242. A decision would be made in her absence on 13 December if she did not attend.

5.243. Provision was offered for written representations and for a mental health first aider to be available online.

5.244. Mr Longman explained this in his oral evidence. Cheese dispatch increases to four times its normal levels in the run up to Christmas. He had indeed, earlier filled this role, but he was offering it again, although it would shortly cease to be so busy.

**Dismissal**

5.245. On 13 December, Miss Botha did not attend the meeting, nor did anyone attend on her behalf.

5.246. On 14 December, an email was sent to her via her solicitors terminating her employment by reason of redundancy with effect from 19 December 2021 (279/284).

5.247. The dismissal letter opens, "I hope you are keeping well".

5.248. Mr Longman goes on to explain that the dedicated marketing role was not needed and she had not pursued the other options put forward. He could not have her fit note expire with her seeking a return to work but with no role available.

5.249. The letter was also sent direct to Miss Botha that afternoon.

## 6. Law

### Protected Disclosure

6.1. The provisions relating to protected disclosure are set out at sections 43A to 43K of the Employment Rights Act 1996 (ERA 1996).

6.2. By section 43B,

> "In this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject… *and*
> (d) That the health of safety of any individual has been, is being or is likely to be endangered…."

6.3. By section 43C, a qualifying disclosure is made, where the worker makes the disclosure to his employer. Further provisions govern disclosures made to other persons.

6.4. A qualifying disclosure will have sufficient factual content and specificity to be capable of pointing to one of the qualifying categories in section 43B *(Kilraine v Wandsworth LBC [2018] EWCA IRLR 846).* The Tribunal must take into account the context and background. There is no rigid distinction between the provision of information on the one hand and the making of an allegation on the other (*Simpson v Cantor Fitzgerald Europe CA [2021] IRLR 238).*

6.5. The public interest requirement is considered in *Chesterton Global Ltd v Nurmohamed* ([2017] EWCA Civ 979CA). There are four factors to be taken into consideration: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

6.6. Guidance is given from *Blackbay Ventures Ltd (Chemistree) v Gahir UKEAT/0449/12/JOJ* on the steps to be taken by the Tribunal.

> 1. Each disclosure should be identified by reference to date and content.
> 2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be, should be identified.
> 3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.
> 4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified
6. The Tribunal must then consider whether or not the Claimant had the reasonable belief referred to in section 43B(1) and whether it was made in the public interest.

6.7. By section 47B(1),

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the employer done on the ground that the worker has made a protected disclosure."

6.8. "Worker" has the extended meaning given by section 43K.
6.9. By section 47B(1A),

> "A worker ("W) has the right not to be subjected to any detriment by any act, or any deliberate failure to ack, done –
>
> (a) By another worker of W's employer in the course of that other worker's employment, or
> (b) By an agent of W's employer on the ground that W has made a protected disclosure.

6.10. In such a case, the detriment is treated as done by the employer (section 47B(1B).
6.11. Where the Tribunal finds a protected disclosure and detriment, the question is whether or not the detriment was "on the ground that" the worker has made the protected disclosure. The question there is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. *(Fecitt and others and Public Concern at Work v NHS Manchester, [2011] EWCA Civ 1190, [2012] IRLR 64.*
6.12. By section 103A, an employee is to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee made a protected disclosure. The burden is on the Respondent to establish the reason for the dismissal *(Kuzel v Roche Products Ltd [2008] ICR 799).* If the employer fails to do so, it is open to the employment tribunal to find that the reason is that asserted by the employee, but it is not bound to do so. The identification of the reason or principal reason turns on direct evidence and permissible inferences from it.

**Direct Discrimination - section 13 Equality Act 2010**

6.13. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(1):

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

6.14. By section 39(2) of the EA 2010,

> 'An employer (A) must not discriminate against an employee of A's (B)
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.'

*6.15.* The words "because of" mean that the protected characteristic must be a cause of the less favourable treatment, but it does not need to be the only or even the main cause. For it to be a significant influence or an effective cause is enough (*Nagarajan v London Regional Transport [1999]ICR 877, HL).*

6.16. The Tribunal is required to identify the factual criteria applied by the Respondent as the basis for the alleged discrimination. Motive or intention is not required. A benign motive is not relevant.

6.17. This is addressed by the Supreme Court in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors ([2010] IRLR 136, SC)*. If there is no dispute about the factual criterion applied by the respondent, it may be obvious why the complainant received the less favourable treatment. If the criterion or reason is based on a prohibited ground, directed discrimination will be made out, as in *James v Eastleigh Borough Council [(1990] ICR 554, HL)*, where the test of free access to a swimming pool was determined by reference to pensionable ages, and so women benefited from an earlier age. That can be summarised as the "but for" test, useful principally where some kind of criterion has been applied that is indissolubly linked to a protected characteristic, so readily seen to be discriminating. Nonetheless, what matters are the facts that were determinative for the decision maker when making the decision.

6.18. In other cases, the reason for the less favourable treatment is not immediately apparent. There it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind. That requires an examination of all the relevant circumstances of the case, with a view to determining the actual reasons, not simply those put forward.

6.19. Again, from Lord Nicholls in *Nagarajan* (above), this means that,

> "Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of

> the decision will have to be deduced, or inferred, from the surrounding circumstances."

6.20. This is explored further by Mr Justice Linden in *Gould v St John's Downshire Hill ([2021] ICR 1, EAT),* explaining,

> "The logic of the requirement that the protected characteristic …must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied — but for the protected characteristic or step the act complained of would not have happened — and/or where the protected characteristic …forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic …itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment… As Mr Justice Underhill said in *Amnesty International v Ahmed* ([2009] ICR 1450, EAT)… "The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment".

6.21. It is essential to enquire why the employer acted as it did.

6.22. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> "Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence." *(Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)*

6.23. As the Equality Act Statutory Code of Practice on Employment (the "Code of Practice"), explains, at paragraph 3.5:

> 'It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.'

*The comparator*

6.24. Essential to the consideration of less favourable treatment is the question of comparison.

6.25. By section 23 of the EA 2010,

> "On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

6.26. This is dealt with by the Code of Practice at paragraphs 3.22 onwards.
6.27. The other approach is to say but for the relevant protected characteristic, would the Claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

**Pregnancy and Maternity Discrimination**

6.28. By section 18 (2) of the EA 2010,

> "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".

6.29. By section 18(5), "for the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period)."

6.30. The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins and ends –

(a) If she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of two weeks beginning with the end of the pregnancy.

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

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

6.31. For discrimination claim to succeed under section 18 of the Equality Act, the unfavourable treatment must be "because of" the employee's pregnancy or maternity leave. The approach to the reason and whether it is discriminatory is as set out above in relation to direct discrimination.
6.32. In considering whether there has been pregnancy or maternity discrimination, the employer's motive or intention is not relevant and neither are the consequences of pregnancy or maternity leave.
6.33. Such discrimination cannot be justified.

6.34. A claim of pregnancy and maternity discrimination under section 18 of the Equality Act does not require a comparator. A woman who alleges she has been discriminated against on the grounds of pregnancy need not compare her treatment with that of a man.

6.35. The consequences of pregnancy for the employer, financial or otherwise, are irrelevant in considering whether there has been pregnancy or maternity discrimination.

6.36. The provisions of the EA 2010 are supplemented by the Maternity and Parental Leave etc Regulations 1999, ("the MPL Regulations").

6.37. The Equality and Human Rights Commission (EHRC) has produced guidance on the Equality Act in the form of a statutory "Code of Practice on Employment " (2011).

6.38. There can be no discrimination if the employer does not know that the woman is pregnant. The employer must know, believe or suspect that she is pregnant whether formally or informally (code 8.18 ).

6.39. At paragraph 8.22 of the Code, the following examples are given of reasons for unfavourable treatment that will amount to pregnancy or maternity discrimination:

- "The fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed term contract;
- the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;
- the cost to the business of covering her work;
- any absence due to pregnancy related illness;
- her inability to attend a disciplinary hearing due to morning sickness or other pregnancy related conditions performance issues due to morning sickness or other pregnancy related conditions
- failure to consult a woman on maternity leave about changes to her work or about possible redundancy;
- disciplining a woman for refusing to carry out tasks due to pregnancy related risks;
- assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result;
- depriving a woman of her right to an annual assessment of her performance because she was on maternity leave;
- excluding a pregnant woman from business trips

6.40. In *Brown v Rentokil Ltd ([1998] I CR 790, ECJ)*, the European Court ruled that EU law prohibits the dismissal of a woman at any time during her pregnancy where the dismissal is based on her absence due to incapacity for work that is caused by and thus arising from her pregnancy. The dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform the duties that she is contractually employed to do.

6.41. Steps taken to protect pregnant workers' health and safety should not result in them being treated unfavourably. The employer is under a duty to include an assessment of risks to women who have are pregnant, have recently given birth or are breastfeeding in their general health and safety risk assessments.
6.42. An employer does not discriminate against a man where it affords a woman special treatment in connection with childbirth and pregnancy.

**Detriment (Regulation 19 of the Maternity and Parental Leave etc Regulations 1999 and section 47C of the ERA 1996**

6.43. Both the ERA 2010 and the Maternity and Parental Leave Regulations make it unlawful for an employer to penalise or dismiss an employee for exercising rights afforded to her in relation to pregnancy, childbirth, maternity or maternity leave.
6.44. By section 47C of the ERA 1996,

> "An employee has the right not to be subjected to any detriment by any act or any deliberate failure to act, by the employer, done for a prescribed reason"

6.45. A prescribed reason is one which relates to pregnancy, childbirth or maternity. Detriment is adverse treatment but does not include dismissal which is dealt with under section 99.
6.46. The claim is brought under section 48. The employer bears the burden of showing the grounds on which any act or deliberate failure to act was done.
6.47. The same prohibition against detriment is contained in regulation 19 of the Regulations. which confers a statutory right on an employee from being subject to any detriment (other than dismissal) by an act or any deliberate failure to act, by their employer if it is done for a prescribed reason which relates to pregnancy, childbirth or maternity including that she took maternity leave.

**Automatic Unfair Dismissal – Regulation 20 Maternity and Parental Leave etc Regulations 1999 and section 99 ERA 1996**

6.48. Section 99 (1) of the ERA 1996 provides that an employee shall be regarded as having been unfairly dismissed if the principal reason for the dismissal is of a prescribed kind or the dismissal takes place in prescribed circumstances. Those circumstances or reasons include reasons relating to pregnancy, childbirth or maternity.
6.49. Regulation 20 (1) of the MPL Regulations provides that an employee who is dismissed is regarded as unfairly dismissed under section 99 if the reason or principle reason is a reason connected with the pregnancy of the employee. That includes taking or seeking to take time off for antenatal care or miscarriage.
6.50. An employee will also be regarded as unfairly dismissed if she is selected for redundancy for any of those reasons.

**Risk Assessments – Management of Health and Safety at Work Regulations 1999**

6.51. Regulation 16 states that where a woman of childbearing age works in an undertaking and the work is of a kind which could, by reason of her condition, involve risk to the health and safety of a new or expectant mother board that of her baby, the risk assessment must include an assessment of that risk. The risk assessment referred to is the general risk assessment required of every employer under regulation 3 of those regulations, that is a suitable and sufficient assessment of the risks to the health and safety of its employees to which they are exposed while they are at work, for the purpose of identifying the measures the employer needs to take to comply with its statutory health and safety duties.

6.52. Where, following a risk assessment under regulation 16, risks are identified, the employer does not have any specific obligation to take action to avoid those risks until it has been notified in writing that an employee is pregnant, has given birth within the previous six months or is breastfeeding - see regulation 18.

6.53. Although an employer's failure to carry out a risk assessment under the 1999 regulations can entitle a pregnant worker to bring a complaint of pregnancy discrimination under section 18 of the Equality Act, a finding that a regulation 16 risk assessment has not been carried out will not inevitably amount to pregnancy discrimination. That is because the unfavourable treatment complained of must arise because of the pregnancy. It is not sufficient for the pregnancy to be merely the background or context for unfavourable treatment.

6.54. Furthermore if the unfavourable treatment relied on is the failure to carry out a pregnancy specific risk assessment pursuant to regulation 16, that obligation must be shown to have actually been triggered and the Claimant to be at particular risk, given the nature of her job the hazards she is likely to encounter

6.55. There is no general obligation to carry out a risk assessment on pregnant employees with the result that failure to carry out such an assessment was discrimination per se. The obligation is triggered where the following preconditions are met:

(a) the employee notifies the employer that she is pregnant in writing;

(b) the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her

(c) the risk arises from either processes or working conditions or physical, biological, or chemical agents in the workplace at the time.

6.56. The requirement is to inform a pregnant worker of the results of the risk assessment, and to provide the employee with comprehensive and relevant information on the risks to their health and safety identified by the assessment. A meeting with the employee is good practice.

**Victimisation - section 27 EA 2010**

6.57. Section 27(1) of the EA 2010 provides that:

> "A person (A) victimises another person (B) if A subjects B to a detriment because –
> B does a protected act . . ."

6.58. A protected act includes bringing proceedings under the Act, giving evidence or information in connection with proceedings under the Act, doing any other thing for the purposes of or in connection with th Act, or making an allegation (whether or not express) that any person has contravened the Act (s27(2)).

6.59. There is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation, there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.

**Burden of proof – Equality Act 2010**

6.60. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

6.61. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a Claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the Respondent will have to prove, on balance of probability, that they did not act unlawfully. If the Respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

6.62. For the burden of proof to shift, the Claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA)*, remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the Respondent has committed, or is to be treated as having committed, the unlawful act of

> discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the Respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld (Peter Gibson LJ, para 17*, Igen*)

6.63. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

6.64. In *Hewage v Grampian Health Board [2012] UKSC 37*, the application of the *Barton/Igen* guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

6.65. In *Laing and Manchester City Council and others, 2006 IRLR 748*, the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
>
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (or other) discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'There is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'."

6.66. The nub of the question remains why the Claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246*).

6.67. In that case, in a judgment later approved by the Supreme Court in *Hewage*, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show, "That the acts which are alleged to be discriminatory never

happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

6.68. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations (see *Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12*.)

6.69. The presence of discrimination is almost always a matter of inference rather than direct proof. Even after the change in the burden of proof, it is still for a Claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

6.70. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25)*. It may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

6.71. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities

- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

- if it is necessary to resort to the burden of proof in this context, S.136 EA 2010 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

*6.72.* Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor ([2006] ICR 1519, EAT).*

6.73. In *Glasgow City Council v Zafar ([1998] ICR 120, HL*), Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that,

> 'It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

6.74. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation (*Rice v McEvoy [2011] NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

6.75. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself

> mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, *Chief Constable of Kent Constabulary v Bowler (EAT 0214/16)*

6.76. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, an* unjustified sense of grievance does not point to less favourable treatment.

6.77. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

**Time Limits: Equality Act 2010**

6.78. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

6.79. Proceedings on a complaint within section 120 may not be brought after the end of:

> (a) the period of 3 months starting with the date of the act to which the complaint relates or
> b) such other period as the employment tribunal thinks just and equitable.

That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done.

6.80. By section 123(3),

> " For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

6.81. By section 123(4)

> "In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or

> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

6.82. In *Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686*, in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

> "The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

6.83. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

6.84. In *Hale v Brighton and Sussex University Hospitals NHS Trust (EAT 0342/16),* it was held that a decision to commence a disciplinary investigation was not to be treated as a one off act where it led to disciplinary procedures and ultimately dismissal. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

6.85. However, citing Hendricks, Choudhary P in *South Western Ambulance NHS Foundation Trust v King [2020] IRLR 168 warned* '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The Claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

6.86. The time limits for bringing claims are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

6.87. Section 140B sets out that extension, as follows.

> "In this section—
>
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

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

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

6.88. The day on which the Claimant complies with the requirement to provide information to ACAS is ("Day A"). The period between the day after Day A and ending with the day on which the Claimant receives or is treated as having received the conciliation officer's certificate ("Day B") is not counted in computing time for the purposes of time limits.

6.89. If the time limit has expired before Day A, there is no extension of time under these provisions.

6.90. If a time limit would otherwise expire during the period, beginning with Day A and ending one month after Day B, the time limit expires one month after Day B, on the corresponding day.

*6.91.* In that case, the Claimant has at least one calendar month to present the claim after early conciliation has ended. "One month" means on the 'corresponding date' so where day B is 30 June, the time limit will expire on 30 July *(Tanveer v East London Bus & Coach Co Ltd [2016].*

6.92. If the time limit would otherwise expire after the period of one month after day B, then time is extended by a period equivalent to the early conciliation period – that is, the period from the day after Day A and ending with Day B.

**Time Limits - Employment Rights Act 1996**

6.93. The time limit for bringing an unfair dismissal claim is set out in section 111 of the Employment Rights Act 1996. The claim must be brought before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the time limit expired.

6.94. Time limits in the Employment Tribunal are strictly applied.

6.95. Where an employee is summarily dismissed, the effective date of termination is the date of dismissal (Employment Rights Act s97(1)).

6.96. The time limit for bringing a claim runs from the date of the original dismissal, the effective date of termination, even where there is an internal appeal. The appeal does not extend the time limit.

6.97. That means the complaint must be made to the Tribunal within three months counting the date of dismissal – so the time limit ends one day earlier in the third following month.

6.98. So, for example, if a dismissal is effective on 19 December 2022, the time limit expires three months later on 18 March 2023, subject to ACAS early conciliation.

6.99. With the passage of time since unfair dismissal legislation was introduced and the publicity given to unfair dismissal cases, a Claimant is unlikely to be able to show that it was not reasonably practicable for him to present a complaint because of ignorance of the right to claim *(Porter v Bandridge Ltd 1978 ICR 943).* Where an employee has knowledge of the right to claim, there is an obligation on him to seek information or advice about the enforcement of those rights, and so ignorance of time limits may not be reasonable in the absence of enquiry *(Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488).*

6.100. The time limit for bringing a claim of detriment in relation to protected disclosure (s47B) or leave for family or domestic reasons (47C) is the same, that is, the claim must be brought before the end of the period of three months beginning with the date of the act or the failure to act to which the complaint relates. Where the act or failure to act is part of a series of similar acts or failures, the time limit runs from the last of them. The same provision applies for an extension of time where it was not reasonably practicable to bring the claim in time.

6.101. Changes to time limits to accommodate conciliation procedures through ACAS are in ERA 1996 at section 207B. The same rules apply as set out above in relation to the effect of early conciliation in discrimination claims.

## 7. Submissions

7.1. Both parties provided written submissions and the Respondent's counsel spoke briefly to his. Ms Botha chose not to add to hers. Both submissions were considered with equal care.

## 8. Reasons

**Preliminary matters**

*Change in issues*

8.1. The claim form shows that the Claimant attributed her dismissal to her pregnancy, amongst other claims. What was not clear to a lay person considering the issues was that there is a protected period that applies in respect of a section 18 claim. The letter issuing the decision is dated 13 December. The protected period came to an end on 2 December.

8.2. While the claim was drafted by solicitors, and the issues had been considered at two preliminary hearings, nothing indicated that the Claimant had elected to claim only under section 18 or was aware that the later events relied on in her claim here fell outside the protected period. We equally cannot be clear that she understood or was aware of the distinction between decisions taken after the end of the protected period and those implementing decisions taken during the protected period.

8.3. We consider this was overlooked in drafting and discussing the issues. Why it was overlooked is not of course clear, but it is more often than not the case that once started, the protected period continues until the end of maternity leave or a return to work. The probability is that the effect of the miscarriage in bringing the protected period to an end had not been noticed. If so, it would be unfair to dismiss the claim on the basis that the final events lay outside the protected period, including the decision to dismiss.

8.4. The Judge proposed including in the issues a sex discrimination claim to meet the way the claim was framed and to avoid later dispute over whether the issues in the claim had been fully resolved. Mr Wilson did not object, on the grounds of fairness.

**Protected disclosures**

8.5. The Claimant has claimed that she made protected disclosures and those on which she relies are two incidents on 26 July, one on 2 August, one on 9 August and one
on 30 September.

8.6. She has not produced evidence in support of those, save for that of 9 August. We take them in turn.

*On 26 July 2021 informing Mr Longman and Sandra Hamilton in writing of the fatal and catastrophic implications should a Listeria Mono contamination occur within the cheese produced in the factory. (2.1.1.1)*

8.7. No document is produced in support of this. Document 30 is a report of Listeria detected in an environmental swab on that date, but she has not produced the report that she relies on having made in writing of 26 July and it is not dealt with in her witness statement (127/132).

*On 26 July 2021 informing Mr Longman, Mrs Hamilton and other in an email of the Claimant's finding the risk of Listeria Mono contamination from the Brining Room floor through the drainage system which ran through the entire factory*

8.8. No reference to this has been found in the evidence. The email is not produced.

*On 2 August 2021 orally and in writing in the form of a hygiene action plan repeating the concerns above at a team meeting 4.1.1.3*

8.9. On 2 August, the Claimant attended a course on "Food Microbiology – The Essentials" held on White Lake Cheese premises. She says that hygiene issues became very clear to her and that in relation to the Listeria Mono identified on the floor of the brining room and in the drainage system in the cheese making room, the trainer declared that if not taken care of, it was "an outbreak waiting to happen". There is no reference to the specifics of the oral account, the written account, the

team meeting or the hygiene action plan at this date. She fails to identify the disclosure of information relied on or to whom it was made.

*On 30 September 2021 informing the Respondent that it could not release cheese that did not meet the legal microbiology testing limits. (2.1.1.5)*

8.10. We have not found this report. We have the test results from 30 September, showing that the Claimant was still doing testing but no such report is included in the documents or referred to in the witness statement or oral evidence. The email on page 180 simply reports levels of e-coli:

> "123 RAC is out of spec on E.Coli at 12,200."

8.11. In the exchange that follows with Mr Longman, he asked what the limit was,

> "Thought raw milk cheese was 20,000 for ecoli"

8.12. She responded,

> "Our company limit is 10,000. No legal limit"

8.13. She said that she had proposed to revise the limits based on the SCA handbook but that Sandra wanted to do that, so the limits had not been changed.

8.14. No other correspondence is produced. There is no report in the terms of her claim.

8.15. Her witness statement also includes a discussion of a course that she attended on 13 September. It was a remote course, attended by Sandra Hamilton and Roger Longman and a couple of cheesemakers, on the cheese manufacturing process, and it included identifying risks. She says that she discussed incidents openly regarding E.Coli limits in cheese and animal antibiotics in milk, but this is not an occasion that she has relied on in relation to making a protected disclosure (ws para 14).

8.16. The protected disclosure that we accept she made was that of 9 August 2021 in her presentation of the Microbiology Investigation Strategy document. That was plainly a disclosure of information, addressing a number of areas of risk and of contamination found. The Claimant believed it was in the public interest given risks to staff and the public from error in hygiene management. In the light of the training she had received and the research she had done that was a reasonable belief. In her belief, the information tended to show that the company was failing to comply with legal obligations and that the health and safety of individuals was being or was likely to be endangered and that was a reasonable belief in the context of food manufacture involving potentially harmful moulds and bacteria with potential for risks to members of staff and members of the public.

8.17. We understand that Mr Longman does not accept that her report is wholly accurate or that the risks were as she represented them but that is not the issue.

We do not have to decide whether her analysis was right only that her beliefs were reasonable.

8.18. We find that she was energetically trying to address what she saw as a serious risk to individuals, the public and indeed to the company through failure of bacterial control.

8.19. We find that on 9 August 2021, Miss Botha made a protected disclosure to her employer in her Microbiology Investigation Strategy document and at the team meeting with her presentation of the difficulties of managing bacterial contamination and the evidence of on-site contamination including E.Coli, enteros and Listeria Mono .

**Knowledge of pregnancy**

8.20. We have deliberated carefully over the question as to whether Roger Longman knew before meeting on Tuesday 21 September that Storm was pregnant.

8.21. Sandra Hamilton knew. She, however, was not the decision-maker. Roger Longman was the decision-maker, in general and on this occasion.

8.22. He and Sandra Hamilton are clear in their evidence that he did not know and that she did not tell him that Miss Botha was pregnant.

8.23. They both present well in giving evidence, clear and articulate, consistent and unswerving on this point. Mr Longman has said ever since 23 September that he had not known that she was pregnant until the meeting on 21 September.

8.24. There is no direct evidence that he knew.

8.25. He presents a reasoned explanation for making the change to her role based on the demands of the business. It is an explanation that does not itself prompt a question as to whether pregnancy or protected disclosures have been a factor in his reasoning

8.26. On his account, he learned of the pregnancy on 21 September , but, only after he had announced that Storm's role and pay was to change.

8.27. If he did not know that she was pregnant, then the decision or proposal to move her to affinage and wrapping on 21 September could not be on the ground that she was pregnant.

8.28. Her case is that he did know and that that influenced the decision and his announcement of it on 21 September.

8.29. She cannot give evidence of what he knew; we have to evaluate whether or not she is likely to be right.

8.30. It is clear that Roger Longman and Sandra Hamilton work closely together in a relationship of trust. Both, for example used "we" often in explaining what happened.

8.31. In a small company, the pregnancy of an individual worker is likely to be of significance.

8.32. This is a company in which Mr Longman takes the decisions and bears the responsibility. He needed to know once the pregnancy had been disclosed to his office manager.

8.33. Sandra Hamilton said she intended to tell him, and promptly. That comes from her WhatsApp message to Lynn Solman on 7 September, when she said was going to tell Mr Longman "next week" . That would be on or after his return from holiday on 14 September.

8.34. Mrs Hamilton needed to tell him. It would be a failure on her part if something happened and he had not been aware of the pregnancy. Even without that, she would be courting criticism from him if she did not report it to him.

8.35. This is a site where there are known risks from bacterial contamination of some risk to pregnant women, albeit managed. Sandra Hamilton was a relatively new employee of some three months standing, with no previous experience of the field or of bacteriological risk management; she was newly trained and not routinely doing the microbiology testing. She does not say she was unaware of those risks. Even without detailed knowledge about risks to pregnant women, she had been at the discussion on 9 August and knew of the general concerns about failures in hygiene management. It has to be unlikely that she would take the risk of failing to inform Mr Longman that he had a pregnant woman on site.

8.36. Mrs Hamilton took the safety issues associated with the Claimant's pregnancy seriously, contacting the Specialist Cheese Makers Association by email of 8th September ( the day after she was told by the claimant) for advice. It seems inconsistent to have raised the issue of a staff member's pregnancy with an external third party but not have advised Mr Longman at the earliest opportunity. Taken with her WhatsApp message of of 7 September indicating her intention to tell him on his return, and that he was available from 15 September, it is highly likely that she did tell Mr Longman before 21 September.

8.37. It would in any case be routine that on or shortly after his return, he would ask if anything had happened while he was away. It is hard to think that Sandra Hamilton would not mention this pregnancy. That is perhaps the more so given that it was clearly known that Storm was both trying to get pregnant and had told Mr Longman and others that.

8.38. Sandra Hamilton was due to be on holiday from 22 September 2021 to 4 October herself, some 10 days. If she did not tell him before she left, it would be close to a month after Miss Botha's report to her before she passed on that report, if she is right when she says that she and Mr Longman did not communicate with each other when either was on holiday.

8.39. We have reservations about that evidence, however. Mrs Hamilton told us that she would not contact Mr Longman when he was on holiday unless there was something absolutely critical, for example, "The factory was on fire". In contrast, she did contact Mr Longman on the first day of her holiday, 22nd September, to discuss the Claimant's grievance. That suggests that they might well be in contact during holiday periods, when the occasion arose.

8.40. Miss Botha reported on 15 September that she was having headaches, associated with early pregnancy (151). Later on, she reported morning sickness. It was foreseeable that during Sandra Hamilton's absence on holiday, Mr Longman would need to know about the pregnancy. He would not welcome finding out in the course of a similar phone call or message.

8.41. Miss Botha reported on 20 September that she had her first antenatal on 23 September 2021 (151). She would be leaving the office during working hours. Sandra Hamilton would not be there. Roger Longman would need to know that Miss Botha had authority to be absent and why.

8.42. Asked about whether she had told Mr Longman, Sandra Hamilton says that Storm had not given the information to her officially. That is difficult. She does not say they were close friends, so the obvious reason for Storm to tell her is that Sandra was her manager. Storm was entitled to rely on that communication as one to her employer. Storm Botha herself assumed Mr Longman knew – she thought this might be something he wanted to speak to her about when he called the meeting unexpectedly on 21 September (160).

8.43. Sandra Hamilton agrees that she did not ask Storm when she would like Roger Longman to be told or whether she would be reporting the pregnancy on a more formal basis at some point in the future or whether she wanted to make that report to him herself.

8.44. On that basis, there is little justification for Mrs Hamilton's account that the information was not given to her "officially".

8.45. Sandra Hamilton did know that the information was not to be widely shared. She cannot confidently remember the words used by Storm, but she acknowledges that when she told Lynn it was in breach of confidence, and she did that virtually as soon as she had the news: "Not that I've told you, obviously" (151). It was more important that Mr Longman knew than that Lynn knew. That too points to it being unlikely that Sandra Hamilton held back from telling Mr Longman, even knowing that Miss Botha had not wanted it shared with other staff.

8.46. Other people knew. Miss Botha told others. The evidence is that it was quickly common knowledge within the office and known by some others, for example in affinage and wrapping.

8.47. If Sandra Hamilton did not tell him, there was a risk that he would find out from someone else or accidentally, and that would not be a comfortable position for her to be in. It is even possible that that happened.

8.48. Sandra Hamilton's notes of the meeting on 21 September are brief. She does not record any reaction when Storm Botha mentioned her pregnancy – the notes are too brief to clarify whether or not that was news to Mr Longman. However, we have Ms Botha's notes. They are typed and headed "21/09/21 – Meeting with Roger Longman and Sandra Hamilton."

8.49. They end,

> "I've made these notes today following a conversation with Pregnant then Screwed. As this meeting was not recorded, and I wasn't given the option to have anyone else present, I think it's important to document what happened."

8.50. They are not perfect. It is agreed that the proposed move was suggested to be for 3.5 months, a temporary arrangement until after the Christmas rush. That is not there. They do however substantially echo the shorter notes Sandra Hamilton

made, with additional detail. They are not verbatim but they are closely contemporary; we accept that they were made that day.

8.51. Miss Botha notes specifically state the following,

> "I said to Roger, I'm pregnant, I can't work in the Cheese Room". Roger replied immediately, "I know, that's why you will be working in wrapping. Oh and congratulations."

8.52. The relevant section from Sandra Hamilton's notes is,

> "Move to production."
> "SB – pregnant
> "moving to wrapping and washing"

8.53. Ms Botha's notes represent contemporary evidence that Mr Longman acknowledged already knowing that she was pregnant, evidence she supported orally. It was challenged, as an embellishment, and she responded,

> "No, I remember it, he said "I know" then almost stopped himself, I think he slipped up.

8.54. Mr Longman and Mrs Hamilton have been clear in their evidence that Mrs Hamilton did not know what the meeting on 21 September was about in advance. Although she was his office manager, and Miss Botha worked alongside her in the office in a small team of four, they both say he did not consult her about this move. However, Storm Botha in these notes reports this,

> "I did however ask Sandra if she knew what the meeting was about so that I may be prepared for any topics to come up. Sandra said she didn't, but it was nothing to worry about."

8.55. If she said that, it meant she had some knowledge of what was about to happen.

8.56. Miss Botha also noted that on arrival, she was asked to sit in a more formal arrangement facing Mr Longman and Ms Hamilton, and Mrs Hamilton took the role immediately of note-taker, rather than participant, contrary to usual practice. This is a company that in general operates informally, as evidenced by the lack of documentation, such as written terms and conditions, risk assessments or notes of meetings. It appears to be unusual to have a formal notetaker at a meeting that the Respondent describes as informal.

8.57. The Claimant's account makes sense: while Mr Longman does appear to act impulsively, he is often not in the office. Sandra was his office manager, working closely with her assistant Abigail, with Lynn and with Storm. The change he proposed would affect the work all of them did. Some degree of consultation seems necessary and inevitable.

8.58. That too points to Mrs Hamilton having known more about the meeting in advance than she is admitting now.

8.59. It is in our judgment altogether improbable that Mrs Hamilton did not tell Mr Longman in the week after his return from holiday, that Storm Botha was pregnant. It is also likely that she knew what this meeting was going to be about. We accept Storm Botha's note and account as accurate on this.

**The meeting of 21 September**

8.60. There is an added element to this evaluation. Storm Botha describes the meeting of 21 September as an ambush. She says she was wholly unprepared for it and found herself facing without warning a decision to move her back to unskilled production work in affinage and wrapping, away from her office role, and with a reduction in pay. She says she was put under repeated pressure to agree.

8.61. Both Mr Longman and Mrs Hamilton are very clear that the meeting on 21 September was informal, a relaxed introduction to a discussion about Storm Botha's job. It was not a consultation, but a meeting with a view to discussion.

8.62. They wholly disagree with her account that the move was a fait accompli, that she was told she would be moving to the lower paid role.

8.63. The notes that Mrs Hamilton took do not support that. There is no hint of this being proposed as a point for discussion.

8.64. To save cross-referencing to what is set out earlier, these are the relevant notes:

> "R- bring in web designer. Going to be short staffed until Xmas. Move to production.
> SB – pregnant
> moving to wrapping and washing £9.50. £11.00 testing hours
> What works for company
> New year – clear on expansion and push marketing
> 3.5 months – 95% of time wrapping
> Dec probably box cheese….
> Talk to SB later in week re testing schedule"

8.65. There is no reference to giving her time to think or that a further meeting might be arranged to consider the proposal, or of a deadline for agreement. It reads as if she was told she was moving.

8.66. Sandra Hamilton never wrote up her notes. Mr Longman did not write to Storm Botha to confirm what had been said at the meeting.

8.67. There is no doubt about Ms Botha's understanding of what was said from her WhatsApp to her partner on the morning of 21 September: "For the next 3.5 months, Roger is putting me back into production on £9.50 an hour."

8.68. Miss Botha made her understanding clear to Mr Longman in her first email of 21 September and in the grievance: she was being moved to a lower paid role. If she was wrong on that, and if it was only a proposal, up for discussion, Mr Longman could have corrected that impression, either by email or at the meeting on 23 September. He might have been prompted to do that not only by the

evidence of misunderstanding but by the distress and anger she disclosed. That is not simply from the two emails of 21 September, but her WhatsApp of 22 September when she referred to a sleepless night and panic attacks. He did not.

8.69. If she was wrong in her understanding, a reasonable employer would have sought quickly to reassure her, himself or through his office manager. Mr Longman did not do that; he did not correct her.

8.70. What he said, after canvassing a number of other matters, was, "I am getting rid of that role effectively and I would like you to move to packaging when you are ready." That tends to support her account that the move had been decided upon.

8.71. The meeting of 21 September is a meeting that she describes in the grievance as intimidating and unfair, when she felt forced to agree a reduction in pay. It cannot also be friendly and informal.

8.72. It was the way the meeting of 21 September was conducted that prompted the emails including the grievance.

8.73. We are wholly satisfied that the meeting on 21 September was not an informal discussion to explore options with Storm Botha. Mr Longman told her she was to move to affinage and wrapping, away from office work and for lower pay, apart from the testing. His own evidence, "I always felt that you were employed to flex between the two jobs anyway to an extent" supports that.

8.74. That means that both Sandra Hamilton and Roger Longman have calculatedly sought to mislead over the nature of the meeting.

8.75. Repeatedly in later correspondence, the meeting is described in the way that Mrs Hamilton describes it in her witness statement,

> "It was a relaxed and informal discussion about the potential ways forward in my view"

8.76. Mr Longman presents it as an "initial consultation" (194, 15 Oct, 227, 27 Oct), an "informal consultation meeting" (243, 3 Nov), a "preliminary conversation trying to find a resolution" (ws para 51).

8.77. They are, together, presenting a false picture of that first meeting.

8.78. It has the effect of seriously undermining their credibility and lends weight to the interpretation above.

8.79. The evidence that Mr Longman did not know of the pregnancy is that Miss Botha did not tell him directly, and otherwise comes from Mr Longman and Mrs Hamilton agreeing that she did not tell him. That is against the probability that she would tell him and contrary to her declared intention to tell him when he got back from holiday. If they are, as we find, colluding to misrepresent the meeting on 21 September, it is both possible and more likely that they are colluding in saying that Mr Longman was unaware of the pregnancy.

8.80. Taking all of that together, we are satisfied that Mr Longman knew of Ms Botha's pregnancy before the meeting on 21 September.

8.81. We also find that Mrs Hamilton knew of his plans before the meeting too.

8.82. The meeting on 21 September was not a relaxed, informal meeting presenting issues over the future of Storm's role. It was a meeting in which criticisms were

made of her work and it led to the announcement of a decision already made to move her to a different, lower paid role, on a short-term basis.

8.83. While we are confident of our findings, if it were the case that we are wrong over Mr Longman's knowledge of the pregnancy before the meeting on 21 September, he certainly knew of it from that meeting.

**The meeting of 23 September**

8.84. There is no suggestion anywhere in the evidence of unhappiness with Ms Botha's work or role before 21 September. Mr Longman denies any discussion with Ms Hamilton. There has been no performance review. We are taken to no assessment of the role or her performance in it.

8.85. At the meeting of 21 September, Storm Botha was told that she would be moving from the office to work in wrapping and affinage at £9.50 per hour, for 3.5 months, but keeping on the testing at £11.00 per hour. There would be a push on marketing after Christmas.

8.86. At the meeting on 23 September, the proposal was different. Mr Longman said,

> "I'm getting rid of that role (marketing) effectively."

8.87. There is no mention of her doing testing at the higher rate of pay. There is no mention of a push on marketing after Christmas.

8.88. One of her queries in her first email was about doing the PR coursework on eco-packaging and scheduling office time for it. She has been told to get that done in the next two weeks, and Mr Longman's intention on 23 September is that after that she will be in the other role, that is, out of the office,

> "Hopefully in two weeks' time, you'll be doing something else and you won't have time to do that, so basically I'm saying for the next two weeks do your testing and do your PR course."

8.89. He gives her two weeks to decide what she would like to do, but offers no other options. The implication is that if she does not accept the proposal, she could leave or face dismissal.

8.90. His presentation is confused. He suggests that her terms permit him to move her between production and the office,

> "I always felt that you were employed to flex between the two jobs anyway to an extent"

8.91. But that she could not expect the office rate of pay because, "You would be changing jobs". It is fair to acknowledge that that had been the basis for her office and cheesemaking roles before March 2021, albeit not since.

8.92. By 23 September, a temporary move until Christmas, while retaining testing, has become the loss of her office role for the foreseeable future.

8.93. Mr Longman's oral evidence reflected the confusion in that he told us the move was always to be temporary; he said the removal of any reference to it being temporary was an "administrative error". That sits very awkwardly with what later happened. The reference to an "administrative" error in this context is unpersuasive.

8.94. He did agree that there is no later presentation of the proposal that refers to a temporary job change.

8.95. We are satisfied that the move was not presented to Miss Botha as temporary on or after 23 September.

8.96. It bears pointing out that if it had been a temporary move to meet a temporary need, there would have been little basis for dismissing her for redundancy from her office role with effect from 19 December on the basis that she was refusing to move to wrapping and affinage.

**Grievance outcome**

8.97. After that meeting, Mr Longman invited Miss Botha to a grievance hearing, with Mrs Hamilton taking notes. Given that it is his conduct that was complained of, there was no wider investigation of the grievance and he says nothing about it during the hearing.

8.98. By the time of the grievance hearing on 13 October, Miss Botha was off work sick with work-related stress and had been since 6 October.

8.99. The grievance outcome letter dismisses the complaints made, save that Mr Longman recognises that it would have been helpful for her to have a companion with her on 21 September and to have the contract terms in writing.

8.100. Mr Longman opened that meeting by saying that the initial discussion of 21 September was an early stage of the process, and that he was not expecting her to agree to anything straight away. She had not been asked to agree a reduction in pay.

8.101. He explained again that her current role was no longer required. He had offered the opportunity to move to a different department. She had, he said, requested not to work on SALSA or to continue with the ordering and therefore her workload has decreased significantly.

8.102. This is inaccurate. There had of course been reference to HACCP and SALSA on 23 September, when it had been agreed that those were things that she had not wanted to take on earlier.

8.103. Work on those had not been offered to Miss Botha since discussions when the previous office administrator left. Miss Botha was then relatively new to the firm and had seen him struggling with the requirements of that work: she told us that was why she felt inadequate to undertake the role and reluctant to take it on. Her understanding was that it involved ensuring licensing requirements were met and so it was critical for the business. She saw it as appropriate to someone senior and more experienced, work originally done by a co-director.

8.104. She had not been doing the SALSA work, so her workload had not reduced for that reason.
8.105. She had not objected to doing the ordering.
8.106. Mr Longman denies knowledge of her pregnancy until after 21 September, a statement we have found to be untrue.
8.107. In the grievance, Storm Botha raises that she is the only person being demoted to a different department and given a lower rate of pay; she raises a doubt about her job security and puts in the context of her pregnancy,
8.108. The content of the letter giving the grievance outcome is undermined by a series of inaccuracies. It did not reflect genuine engagement with the points raised in the grievance.

**Change of Role consultation**

8.109. Within the grievance outcome letter, Mr Longman invited Miss Botha to a change of role consultation on 19 October. That highlights for us the close connection between Miss Botha raising a grievance and Mr Longman deciding to make her redundant. Mr Longman himself confirmed the connection in the grievance appeal outcome when he said that the formal offer of a new role was delayed until after the grievance process and the consultation meeting of 19 October (227/232, 4.197 above). The change of role had been decided on in September before addressing the grievance but the formal offer was delayed until after the grievance outcome.
8.110. What was on offer to her at change of role consultation meeting is what was on offer on 23 September.
8.111. Mr Longman put that in the context that they were not planning to do any marketing in the foreseeable future and, “The temporary work that you took on when Andrew left is now being completed by Sandra. This, unfortunately, leaves your current role obsolete.”
8.112. That is inaccurate. Miss Botha had been working part-time in the office since December 2020. She had not worked in production since March 2021. She had covered some of Andrew’s work but had her own role full-time role in the office before he left.

**Grievance Appeal**

8.113. At the grievance appeal on 26 October, Mr Longman again listened to Ms Botha. He made no response or comment.
8.114. The outcome was the same as after the grievance outcome.
8.115. In relation to SALSA, he said it was not unreasonable for her to do that work, and that they had paid for the appropriate courses to skill her up.
8.116. That is not something that had been said before.
8.117. Mr Longman said about testing that it was not unreasonable for her to do that work but because of her reluctance, that had been taken away from her and given to someone else.

8.118. That is not accurate. She was asked to continue testing on 21 September, she was told to continue with it for a fortnight on 23 September, she was doing it on 30 September before going off sick on 5 October. It had been part of her role and she had been happy to do it.

8.119. The effect is to suggest her role was in part redundant because she had refused reasonable requests as to what she would undertake. There is no contemporary evidence that that happened. It is inaccurate.

8.120. He again said he had not known of the pregnancy until 21 September, an account we have not accepted.

8.121. On 3 November, Mr Longman wrote to Ms Botha's solicitors. He describes her role as a part-time cheesemaker with a small part-time element in marketing.

8.122. That is inaccurate: she had been a cheesemaker part-time until March 2021 when he sent her into the office full-time, having recruited others to work in the cheese room.

8.123. Mr Longman then said, "She did, however, move into the office when a colleague left and she temporarily took on some of the jobs performed by them whilst we recruited a permanent replacement.

8.124. That is inaccurate: Miss Botha was full-time in the office by March, Mr Burt left in April. She was busier through trying to cover Mr Burt's role and supporting and training Sandra Hamilton, including in testing, but she was not moved into the office to take on Mr Burt's role temporarily.

8.125. Mr Longman again put forward that the meeting on 21 September was an informal consultation meeting only.

**Redundancy Consultation**

8.126. On 12 November, Mr Longman invited her to attend a redundancy consultation meeting on 17 November. In response to a letter from her solicitors, he wrote to her through her solicitors on 17 November moving the meeting 19 November to enable her to attend (253/258). She is warned that a decision may be made in her absence: this may well be the final meeting regarding her role.

8.127. He set out that she had refused the wrapping and affinage role, due to the level of pay.

8.128. Nothing in the letter suggests that that role was temporary.

8.129. In his witness statement he says that by this time they had filled the temporary role that had been available, and he confirmed that in his oral evidence.

8.130. He had not presented the role in wrapping and affinage as temporary, save at the first meeting on 21 September.

8.131. In this letter, the option open to her is in Sales, Lynn, the Sales Manager, having given notice. The role presented was Sales Assistant. It was not ring-fenced pending an expression of interest from Storm Botha. The job was to be advertised to external applicants and the successful applicant would be appointed after a competitive interview. In oral evidence, Mr Longman told us that they would not have had time for the interviews before Christmas.

8.132. He asked for an expression of interest by 18 November. The email is dated 17 November and was sent at 9.33 pm.

8.133. There was no business reason for the urgency.
8.134. Ms Botha's solicitors said on 19 November that she was too ill to attend meetings or discuss matters and the sick note produced showed both miscarriage and work-related stress.
8.135. A further email was sent on 23 November, now after Ms Botha's miscarriage. That deferred the redundancy consultation meeting without fixing a new date, and extended the time limit for the expression of interest in the sales role to 26 November, the end of that week. She is told she need not submit a cv. She was not guaranteed an interview.
8.136. On 1 December, she was invited to a further consultation meeting to take place on 6 December, her GP fit note expiring on 3 December.
8.137. The suggestion in that letter is that the wrapping and affinage post was available, contrary to what was said on 12 November, and that she would have refresher training for it on her return to work (267/272).
8.138. It is noted that no expression of interest had been received for the sales role.
8.139. Her sick note arrived on 6 December, with notification by the solicitors that she was ill and unable to attend the meeting planned.
8.140. A final email was sent to her rebooking the meeting for 13 December. Mr Longman now said that the wrapping and affinage post was available to her provided she accepted it no later than midday on 10 December.
8.141. The sales role would also be withdrawn at that time, although it is not clear whether the deadline for an expression of interest had been extended – the last deadline had been 26 November.
8.142. It is not clear what the point of the meeting would be, if she had to accept the alternatives presented before it. It is not clear what the business justification for those deadlines was: by this date, the demands in wrapping and affinage were reducing and the interviews for Sales Assistant were not likely to take place until January.
8.143. She did not attend the meeting on 13 December and was dismissed.

**The reason for dismissal**

8.144. The reason put forward is redundancy.
8.145. Mr Longman's difficulty in presenting this as a redundancy derives in part from his lack of clarity about what Miss Botha was employed to do. In the absence of a statement of terms and conditions, or even a letter offering outline terms or a job description, there is no record. Mr Longman himself describes the role in various different ways.
8.146. The statement of terms and conditions sent out in October 2021 refers to her as a part-time cheesemaker, as he himself does in November 2021. On his evidence, she had not worked in the manufacture of cheese since March. If that was her job, there was no redundancy in respect of that part of her role: they were hard pressed to make enough cheese for the Christmas orders.
8.147. To the extent that she was required to be flexible and to work in affinage and wrapping, there was no redundancy.

8.148. Mr Longman is repeatedly inaccurate in describing the history and nature of Ms Botha's employment. Each email gives a somewhat different account and introduces new inaccuracies.

8.149. Mr Longman was entitled to discontinue the marketing. We accept that was a significant part of her role even though he said at one point that it was only a small part-time element.

8.150. We see no fair evaluation of the work she was doing.

8.151. The reasons proposed for regarding the rest of her role as redundant do not stand up to scrutiny because he relies repeatedly on misrepresentations.

8.152. He suggests, incorrectly, that her office role was never more than temporary cover.

8.153. He explains her role is redundant relying on the SALSA role that she had never undertaken and had not recently been asked to undertake and the testing role that she continued to carry out.

8.154. Mrs Hamilton supports that by saying Miss Botha had not wanted to do the testing role, so she had taken it over. She had not taken it over at the point when Miss Botha went off sick.

8.155. There are a range of things that Mr Longman does not include in his assessment of Ms Botha's office role. We know for example of her work in producing a staff handbook, work on which Sandra Hamilton built in producing it on 31 October; she had seen the need for herself and staff to understand more fully the management of hygiene and the microbiology risks in cheesemaking and researched, prepared and presented her report; it is agreed that she had been involved in sales and customer enquiries. She had, she says, recently been asked to do the presentations for cheese awards.

8.156. While the documents show Ms Botha's work to have been well integrated with that of the other office staff, it is Mr Longman's account that there was no review or discussion of how things would be adjusted if her role was removed.

8.157. There were a range of possibilities that might have been considered had Mr Longman been willing to do so and Miss Botha able to participate.

8.158. Given a proper assessment of what her job had been, there might well have been scope to reorganise and retain parts of it, particularly given a plan for Sandra to undertake the SALSA accreditation tasks in the New Year.

8.159. There could have been a pay protection period to allow a review.

8.160. There were other options. The proposal on 21 September was for her to move temporarily. They apparently then recruited temporary workers for that role. She could have been asked to transfer on a short-term basis, with her salary protected, either for the duration of the busy period or while they recruited. They could have considered dividing her role between the office and affinage and wrapping or looked at training her to undertake other office duties, given in particular the range of tasks she had undertaken and that by mid-November they knew that Lynn Solman was leaving.

8.161. Mr Longman himself agreed in his oral evidence that there could have been other ways for the business to deal with the pressures on wrapping and affinage.

8.162. This is not an unfair dismissal claim based on unfair redundancy. We are not required to consider the fairness of the process. We do however have to consider

the reasons put forward for what was done and in particular for the dismissal. Was the reason for dismissal redundancy?

8.163. A genuine redundancy consultation could have been deferred until Storm Botha was fit to participate.

8.164. She was off work with work-related stress from 6 October. That was exactly the time that Mr Longman had earlier indicated that marketing would not be high priority. There was no urgency from the point of view of the business to resolve her role. She was the only person who was being placed at risk of redundancy, so there would be no impact on others by extending a period of uncertainty for them. She was only in receipt of statutory sick pay so costs to the business were low. Where stress is described by the GP as work-related, particular care is needed to avoid making things worse.

8.165. From that point and in particular after the miscarriage, when her solicitors gave clear and repeated indications that she was unfit to address matters or attend meetings, it would have been reasonable to allow her time to recover and it was unreasonable not to do so.

8.166. Mr Longman pressed ahead with the grievance. Miss Botha attended, but her distress was clear from the audio clip we heard and transcripts we saw.

8.167. Mr Longman pressed ahead then with a job role consultation. She did not attend those meetings. There was no point at which he recognised that such a discussion was inappropriate while the employee was off work with mental health difficulties and in particular she was said to be too ill and distressed to engage.

8.168. When he suggests that that is what he has done, on 1 December, she had been off work with work-related stress for close to two months, and had also suffered a miscarriage within the previous fortnight. His letter is just a week after the previous letter and he booked a future meeting and imposes a new deadline only days ahead.

8.169. The insistence on an expression of interest within hours in respect of the sales assistant role is not consistent with a meaningful attempt to support or continue her employment. The Sales Manager had not yet left and no interviews would take place until the New Year. The deadline was not dictated by business concerns and would not be reasonable even for someone in good health.

8.170. The pace at which the job consultation and redundancy process was conducted suggests other factors to have been at play than the simple business reorganisation that Mr Longman proposed.

8.171. That is supported by the conflicting accounts of what her role was and why it was redundant. They do not point to a genuine appraisal of what she had been doing or of the needs of the business.

8.172. The fluctuations as to whether the alternative role in affinage and wrapping was temporary or permanent and the failure to review the proposal for redundancy in the light of Lynn Solman's resignation point in the same direction.

8.173. This was not a business decision based simply on the decision to give up a dedicated marketing role.

8.174. We do not accept the reason put forward by the employer for the dismissal.

8.175. We do not accept either that the reason was what is known as "some other substantial reason", as proposed in closing submissions. That might have been

based on the without prejudice letter from the Claimant's solicitors in early November. What we have to consider however is the reason in the employer's mind and we look to the evidence to identify it. There is little if any evidence to point to that as the operative reason.

**When was the decision made?**

8.176. On the face of it, the decision to dismiss was made on 13 December. It must have been clear that Miss Botha was likely to be unable to participate in that meeting. Her sick note had not expired. Her solicitors had by now repeatedly said that she was unable to attend or engage.

8.177. In her absence, if the meeting proceeded, dismissal was inevitable.

8.178. The meeting of 13 December had been rescheduled from 6 December, when she was too ill to attend. That in turn was rescheduled from 19 November, postponed because of the miscarriage. That had been rescheduled from 17 November, and the 17 November meeting had been rescheduled from 5 November, when she was too ill to attend. The 5 November meeting had been presented as a redundancy consultation following Ms Botha's refusal of the wrapping and affinage role at a lower rate of pay at the meeting on 19 October, a meeting she attended while off sick, in some distress and under a misapprehension. That meeting was termed a change of role consultation.

8.179. The change of role consultation had been deferred while the grievance of 21 September was dealt with. What was to be considered was the role proposed on 23 September, that is, a change of role for the foreseeable future from office to production-related work in affinage and wrapping. The decision to proceed with the change of role consultation was part and parcel of the grievance outcome.

8.180. Looking at that history, there was an inevitability to the process from 23 September.

8.181. It was then that it was first suggested that her reluctance to undertake HACCP and SALSA, for which she was not qualified and which had not been part of her role, meant that there was no office based role for her.

8.182. While the meeting closed with an opportunity for her to decide what she wanted to do, only one option was put to her, the wrapping and affinage role.

8.183. The unspoken message behind that was that if she did not take it, there was no job for her. She faced dismissal if she did not leave.

8.184. That was the position between 23 September and 17 November, when the sales assistant role was presented, but with a deadline of less than a day for an expression of interest. While the deadline was extended, it was not expressly extended beyond 26 November, and withdrawn altogether on 10 December – notwithstanding that there was no intention to interview before January, on Mr Longman's oral evidence.

8.185. In our judgment, the decision to dismiss was not taken on 13 December. It was implemented on 13 December but the intention from 23 September was that Storm Botha would take the affinage and wrapping role at reduced pay, or be dismissed.

**The reason why**

8.186. The Respondent relies on redundancy. We have explained why that is not obviously well-founded.

8.187. On 21 September, the proposal was a temporary change of role, at reduced pay. It is quite clear that the proposal related to a period of 3.5 months, as Mr Longman confirms in his witness statement (ws para 31).

8.188. On 23 September, the proposal was a long-term move, until the cheese room was ready. By 19 October, that was "for the foreseeable future" and that remained the way the proposal was presented.

8.189. Nothing had changed in that time, in terms of the needs of the business. Mr Longman in his witness statement linked it to the delays over the construction of the cheese room, but those were well-known and long-standing.

8.190. What had happened is that Storm Botha had challenged the decision made to move her. She had done so vigorously. She related it to her pregnancy.

8.191. We could simply find that Mr Longman had had second thoughts about the needs of the business, but that is not his evidence. His evidence is that he thought hard about his plans for the business while on holiday.

8.192. No explanation has been put forward as to why the proposal changed as it did. Mr Longman denies that there was that change. We are satisfied that the proposal changed: there was no error leading it to be presented as long-term when it was temporary. That is inconsistent with the later correspondence and the redundancy itself.

8.193. In our judgment, the natural explanation is that Miss Botha had raised a grievance. She had not accepted the change in role but challenged it and did so in terms that related to the pregnancy. It was that that prompted the decision to move her for the long-term to affinage and wrapping, discontinuing her office roles.

**The proposal of 21 September**

8.194. The question that then arises is why Mr Longman gave the decision he did on 21 September.

8.195. Miss Botha says it was either because of the pregnancy or the protected disclosures, or both.

8.196. In relation to the protected disclosures, she has simply failed to support most of the claims she made with evidence. The one we find established is that of 9 August.

8.197. It is clear from the meeting notes that Mrs Hamilton engaged in the discussion at that meeting in a way supportive of the recommendations Miss Botha had made. She was not challenging the analysis or the need for substantially more conscientious hygiene management.

8.198. Mrs Hamilton tells us that she would have shown Mr Longman that report within a week and that they discussed it. He tells us he did not read it at the time. It seems that he was not impressed by all of it, but that some recommendations were accepted.

8.199. We do not really know his reaction to the report, but we do not have evidence before us that we find to be persuasive that he reacted adversely to Miss Botha making that report. The unfavourable treatment she describes on 21 September, of springing on her a significant change of role with a reduction of pay is six weeks later, with nothing to establish a link to 9 August.

8.200. We do not find that that protected disclosure led to the decision presented on 21 September.

8.201. That meeting and the way it was conducted does demand explanation and we have not found it in those he advances. It was a contract change, demotion, reduction in pay by 14%, announced without warning.

8.202. On Mr Longman's oral evidence, the need for extra hands in wrapping and affinage was foreseen in September but arose in mid-October, so there was no urgency that meant fair procedures had to be dispensed with.

8.203. The removal of the office role, even on a short-term basis, is not based on any proper appraisal of what Ms Botha's role had evolved to be. He denies discussing it with Ms Hamilton. He has repeatedly misrepresented it and failed to refer to known elements of her work in his account.

8.204. We have found his account of the meeting of 21 September to be inaccurate and his denial of any knowledge of the pregnancy to be dishonest.

8.205. The meeting took place within a few days of him learning, as we have found, that Miss Botha was pregnant. That raises a question.

8.206. He says that that is not a problem for the business.

8.207. Ms Solman dealt with that neatly,

> "I have been assistant manager in a couple of farm shops and the news is never taken lightly when women fall pregnant. Never taken well."
> "In this enlightened world, there will be workplaces where it is?"
> "Well, I have yet to find one." (oral evidence)

8.208. That is not the evidence we rely on, but it expresses the issue succinctly.

8.209. Mrs Hamilton hints at the same – "Looking forward to seeing Roger's face when I tell him next week!" (151/156)

8.210. Miss Botha was one of four in the office. In the longer-run, there would have to be adjustments to cope with her projected absence on maternity leave. In the more immediate future, there would be ante-natal appointments, possibly morning sickness or other pregnancy-related absences.

8.211. In our judgment, it is consistent with that meeting, the way it as conducted and the intended outcome that Mr Longman was reacting to the news that Miss Botha was pregnant. We do not simply find that he is an unreasonable and impulsive manager with little knowledge of good employment practice, although that is also what the meeting on 21 September reflects.

8.212. It is far more likely that his thinking was tainted by the unwelcome knowledge of the pregnancy.

8.213. In our judgment, the sudden and poorly justified demotion based on no adequate assessment of the role and business need or of alternatives, following on the news of the pregnancy, in the context of inaccurate, inconsistent and false

explanations, are sufficient that the burden of proof passes. The Claimant has proved facts from which, in the absence of explanation, the Tribunal is able to find discrimination.

8.214. The Respondent has not put forward any convincing explanation that rebuts the Claimant's case that the decision communicated on 21 September was made in the knowledge of her pregnancy and motivated by it.

8.215. This is discrimination on the grounds of pregnancy.

**The proposal of 23 September**

8.216. If we are wrong on that in respect Mr Longman's knowledge and decision-making on 21 September, by 23 September, he agrees he knew of the pregnancy.

8.217. What we then have is a significant development as between 21 September and 23 September. Instead of a temporary demotion with Miss Botha continuing in testing, it becomes a long-term demotion, without the testing. That does not sit with the reasoning on 21 September, when there would be a push in marketing in the new year. It does not sit with the need for testing, which Sandra Hamilton was new to and which he had been confident Miss Botha could handle. It does not sit with the previous plans for Storm Botha's work.

8.218. His own confusion over whether it or the need for extra hands in affinage and wrapping was temporary undermines his account.

8.219. Given the contradictions, we cannot be clear about his motivation, but he might well have seen the merit of having his pregnant employee in a role that was unskilled, where she was readily replaceable, as against integrated into a small office team with her own designated roles.

8.220. We are satisfied that his actions on 23 September, in the change of plan from a temporary to a longer-term demotion, was prompted by the grievance and that the knowledge of her pregnancy was a significant effective cause, a material influence on Mr Longman's thinking.

**What was the reason for the dismissal?**

8.221. Revisiting the history, we find a pregnancy-related decision to demote Miss Botha on 21 September, followed by the decision to make that longer-term on 23 September, prompted both by the pregnancy and the grievance, an unwelcome and angry challenge to Mr Longman's decision-making.

8.222. The start of a formal change of role consultation was deferred, as Mr Longman himself explained, to allow the grievance to be dealt with. From 23 September, it is implicit that either Miss Botha accepted the wrapping and affinage role at a reduced rate of pay, or the job would terminate. No other option was put forward: if she did not accept it, either she left or would be dismissed.

8.223. We do not find the redundancy to be genuine. It was not the reason for the dismissal, for the reasons discussed above.

8.224. We are clear that this analysis is not undermined by either the fact that she attended a social event with friends in November, shortly after the miscarriage, or the fact that she was successful at very much the same time in applying for, interviewing for and being offered a new role.

8.225. Neither show that she was dishonest about her fitness for work. The certification in relation to stress was work-related. It did not preclude her, under financial pressure, from being able to look for and present herself well for different employment. Or from having an evening out, with support from friends and her partner, as she describes.

8.226. The analysis is not undermined by her failure to express interest in the sales assistant role. There is, as discussed, some doubt about the genuine nature of that as an alternative. It was not ring-fenced for her. It was being advertised for open competition and she was not guaranteed an interview. The indication given to us by Mr Longman was that she was not a good candidate for a role involving numeracy rather than creativity. She would not have seen the short deadlines or the competitive nature of the process for a known candidate facing redundancy as an encouragement to apply.

8.227. Mr Wilson suggests that the reason for dismissal was in effect "some other substantial reason" rather than redundancy, reflecting the indication from Ms Botha's solicitors (in a letter we have not seen) that she no longer wished to work for the company. We do not find that in Mr Longman's evidence. The course of conduct towards her did not change as a result of that letter: she had been given one option and that remained the only serious option. The unspoken alternative was leave or be dismissed.

8.228. We find that the Respondent's decisions on 21 and 23 September were on the grounds of the pregnancy, and on 23 September by the grievance, and from then on, the Respondent was embarked on a course of conduct directed at securing her consent to accept demotion to the unskilled manual job in affinage and wrapping at lower pay, or terminating (or prompting the termination of) her employment.

## 9. **Judgment on the Issues**

9.1. We take the issues in turn, albeit not in the same order as presented.

*Time limits*

9.2. The earliest event complained of took place on 21 September 2021. The Claimant contacted ACAS on 30 November 2021 and the certificate was issued on 10 January 2021. The claim was brought on 2 February 2022.

9.3. In considering time limits, the initial period of three months is extended under the early conciliation provisions. The period beginning 1 December and ending 10 January is not counted. That is a period of 41 days.

9.4. The time limit had not expired before the Claimant contacted ACAS. It would have expired during the period of conciliation in respect of the events from 21

September, but for the provision that means conciliation period does not count. The time limit is therefore extended by one month from 10 January and so expired on 10 February.

9.5. These claims were all in time.

*Protected disclosure ('whistle blowing')*

9.6. As explained above, we find that on 9 August 2021, Miss Botha made a protected disclosure in her Microbiology Investigation Strategy document and at the team meeting with her presentation of the difficulties and risks of managing bacterial contamination and the evidence of on-site contamination with Listeria Mono . That was a disclosure of information about contamination and hygiene risks, made to her employer, made, in her belief, in the public interest; that was a reasonable belief given potential risks to the safety of food for sale and the protection of staff and the public from harmful bacteria; she reasonably believed that the information tended to show failure to comply with a legal obligation with regard to the safe manufacture of food for public sale and consumption and that the health and safety of individuals, including staff and members of the public was or was likely to be endangered.

9.7. The other protected disclosures relied on are not established by the evidence.

9.8. The one that is dealt with in part in the witness statement is that of 2 August. Reading between the lines, she may be relying on disclosures made in the course of her questions to the trainer during that course, which may have been conducted at the Respondent's premises and in the presence of the employer. The evidence for it is weak. But if we are wrong to exclude that as a protected disclosure, it does not alter the reasoning below.

*Detriment (Employment Rights Act 1996 section 47B)*

9.9. The Claimant relies on the following as detriments on the grounds of protected disclosure.

4.1.1. On 21 September 2021 Mr Longman informing the Claimant that she could no longer work as a Marketing Assistant, but would have to return to a role as an Assistant Cheesemaker, and that her rate of pay would be reduced from £11 an hour to £9.50 an hour and that she had 14 days to decide whether to accept the reduction in pay or leave, [and thereafter paying the Claimant reduced pay]

4.1.2. in the period between 22 September and approximately 22 October 2021 requiring the Claimant to work in the affinage and wrapping department, requiring the Claimant to turn, wash and lift heavy cheeses in a refrigerated room;

4.1.3. On or about 5 October 2021 refusing the Claimant's request to provide her with her work laptop, to enable her to work from home when she was suffering from morning sickness;

4.1.4. in the period between 12 November and 13 December 2021 repeatedly emailing and writing to the Claimant requiring her to attend redundancy consultation meetings, notwithstanding the Claimant's presentation to the Respondent of fit notes indicating she was unfit for work as a consequence of suffering a miscarriage of the 19 November 2021.

4.1.5. dismissing the Claimant on the sham grounds of redundancy on 19 December 2021

4.1.6. Conducting the meeting at which the Claimant was dismissed in her absence.

9.10. Save for the dismissal, these are capable of being detriments, but the issue is whether they were done on the ground that the Claimant had made the protected disclosure found.

9.11. The Claimant says that it was when she made the protected disclosures (including those unsupported by evidence) that the Respondent started thinking about getting rid of her. We accept that may be her belief, but we do not have evidence to support it.

9.12. We do not find that the detriments pleaded were on the grounds of the protected disclosure of 9 August 2021.

9.13. The protected disclosure was the presentation of the Microbiology Investigation Strategy report. Mrs Hamilton took it seriously at the time, taking part in the discussion about the management of risks. Mr Longman told us he had not read it at the time, although he had since. He is confident of the procedures in place for risk management. He did implement some of the recommendations, including introducing foot baths.

9.14. There was no immediate response to the report in terms adverse to Ms Botha. It is right that there is a history of her raising concerns about the test results, but that was the nature of her job: that was the point of testing. Earlier reports made routinely had not had repercussions for her. There is nothing to point to either detrimental treatment because of that or the buildup of frustration over it.

9.15. The first detriment pleaded is the communication made on 21 September. That is six weeks later. There is nothing in the evidence to relate the decision Mr Longman had made to the disclosure of 9 August.

9.16. We do not find that Mr Longman took detrimental action against Miss Botha because she made that report.

9.17. The Claimant relies on being told to work in the affinage and wrapping department between 22 September and 22 October.

9.18. She has got her dates wrong. She was off sick from 6 October. It is agreed that she worked in affinage for a couple of days in the week commencing 13 September. It is not agreed that she worked there between 22 September and 6 October, but she says she did some days there after Sandra knew she was pregnant.

9.19. The office staff helped out in affinage and wrapping as needed. Whether or not she volunteered when the request was made, helping out there was part of her job, she did the work at a time when the employer knew that she was pregnant

and in the absence of a risk assessment being carried out.

9.20. Nothing, however, points to her doing that work, or being sent to do that work, because of her protected disclosure. It was a routine part of her job.

9.21. Refusing to provide her with her work laptop to enable her to work from home when she was suffering from morning sickness was a detriment. She lost pay for not working that day. However, we do not see a basis for attributing that conduct to the protected disclosure made.

9.22. Given that the evidence does not point to the events on 21 September being on the ground of the protected disclosure in August, there is no reason to attribute the repeated correspondence between 12 November and 13 December 2021 to the protected disclosure. The references in the evidence to the management of hygiene or the microbiology of cheese-making includes the routine testing report of 30 September, which is not shown to provoke any reaction or response. The link between these events and the protected disclosure on 9 August is not there.

9.23. The same applies in respect of the decision to conduct the meeting of 13 December in her absence. There is not the evidence to relate the reports of 9 August to the decision to proceed with that meeting in December without her.

9.24. Where the detriment is dismissal, section 47B does not apply and the dismissal must be considered under section 103A, dealt with below.

9.25. We do not find that the pleaded detriments were on the ground of the protected disclosure.

*Dismissal (Employment Rights Act s100, 103A)*

9.26. The question is whether the principal reason for the Claimant's dismissal is either the protected disclosure or that the Claimant brought to the Respondent's attention circumstances harmful to her health and safety, namely, working as an Assistant Cheesemaker in the wrapping and affinage department.

9.27. The Claimant fails to establish, on balance of probability, that her protected disclosure was the principal reason for her dismissal. That is for the reasons set out above in relation to the grounds for the pleaded detriments.

9.28. In relation to the health and safety report, her reason for not moving to wrapping and affinage was at least initially the pay, not the risks she was exposed to.

9.29. Miss Botha raised the question of risk to her in her request for risk assessments on 23 September, referring to concerns both about the physical nature of the role, the weights she had to lift, and the exposure to moulds. She raised the issue again 19 October and she raised the issue of and of her vulnerability as a pregnant woman to Listeriosis at the Grievance Appeal on 26 October.

9.30. In our judgment, the Respondent was by then already embarked on the course leading to her dismissal. That dates from 21 and 23 September, the decision given on 23 September having been reached before the meeting started and the question of risk was raised.

9.31. We do not conclude that the concerns she raised over her health and safety were the principal reason for her dismissal. It may have been a factor, but it was not the principal reason.

*Pregnancy and Maternity Discrimination (Equality Act 2010 s. 18) and direct sex discrimination (s. 13)*

9.32. The Claimant relies on the following conduct as unfavourable conduct because of her pregnancy or an illness suffered by her as a result of it:

12.1.1 On 21 September 2021 informing the Claimant that her rate of pay would be reduced from £11 an hour to £9.50 an hour and that she had 14 days to decide whether to accept the reduction or leave, [and thereafter paying the Claimant reduced pay]

12.1.2 On 22 September 2021 requiring the Claimant to stay at home and take a PCR test

12.1.3 On 5 October 2021 informing the Claimant that she would need to take sickness absence to avoid spreading her 'sickness bug', when the Claimant informed the Respondent that she had morning sickness and could not attend work that day

12.1.4 On or about 5 October 2021 refusing the Claimant's request to provide her with her work laptop, to enable her to work from home when she was suffering from morning sickness;

12.1.5 in the period between 12 November and 13 December 2021 repeatedly emailing and writing to the Claimant requiring her to attend redundancy consultation meetings, notwithstanding the Claimant's presentation to the Respondent of fit notes indicating she was unfit for work as a consequence of suffering a miscarriage of the 19th November 2021

12.1.6 dismissing the Claimant on the sham grounds of redundancy on 19 December 2021

9.33. We find that informing her that her rate of pay would be reduced from £11.00 to £9.50 per hour was unfavourable treatment. The fourteen days' notice was not given until 23 September but was unfavourable treatment. We have found, as discussed above, that the decision and notification that her pay was reducing was influenced by her pregnancy as was the notification that she had 14 days to accept the change. That is because we have found the conduct and decisions of Mr Longman on 21 and 23 September to have been influenced by and motivated by her pregnancy.

9.34. The requirement that the Claimant was to take a PCR test and to stay at home until the outcome was unfavourable treatment. At that time, PCR tests were not generally available. She had tested negative with a lateral flow test. She had difficulty getting the PCR.

9.35. However, we find that that was not on the grounds of her pregnancy. We do not have medical evidence that her symptoms were pregnancy related – the sleeplessness and panic attacks most obviously arise by reason of the conduct of the meeting on 21 September. The fact that that conduct was influenced by

knowledge of pregnancy does not mean that the requirement for the PCR was also so influenced. Mr Longman had a concern to protect other workers, given that Miss Botha had been at a festival and so potentially exposed to infection. It is more likely to be carelessness or ignorance in specifying what he wanted that led to the request for a PCR rather than malice. He has shown himself to be impulsive, erratic and readily and easily inaccurate. In our judgment, there is no good reason to consider the request for the PCR to be on the ground that Miss Botha was pregnant.

9.36. The guidance on 5 October to stay at home for 48 hours when she had morning sickness was unfavourable treatment. Mrs Hamilton consulted Mr Longman and followed the usual advice for vomiting. Neither checked whether that applied in relation to pregnancy-related sickness. That guidance did not apply. Once Miss Botha sent the link giving the correct guidance, she was allowed to return to work the following day. This is inadvertence on the part of the Respondent, but it was a response to the fact that Miss Botha was suffering a pregnancy-related illness. She lost pay for any days she did not work, and she was not necessarily unfit for work throughout the day. She was told to stay at home because of a pregnancy-related illness.

9.37. Refusing to allow her her laptop when she was unable to attend work because of morning sickness was unfavourable: she lost pay. Her inability to attend work was because of the illness suffered because of the pregnancy.

9.38. We can see that the Respondent was telling her to rest and that might have been appropriate, but she was holding herself out as fit to and ready to work once the morning sickness had abated. She may well have been able to work if she had been allowed to have her laptop collected for her. She was not entitled to full pay when off sick. She was treated as if she was ill, rather than suffering morning sickness. She was upset and offended by that. This was unfavourable treatment because of her pregnancy and pregnancy-related illness.

9.39. In relation to the repeated letters and emails inviting her to redundancy consultation meetings between 12 November and 13 December, that was unfavourable treatment. We have found that course of conduct to have been pursued by the Respondent in response to her pregnancy, a course embarked on from September.

9.40. The Claimant was dismissed with effect from 19 December 2021, in a decision put in place on 13 December. In our judgment, while that was the date of the decision, it reflected and confirmed a decision made much earlier that if she did not accept the affinage and wrapping role, her job would terminate. That decision was made on 23 September following the earlier decision to demote her on 21 September and we find both to have been motivated in part by the disclosure of her pregnancy. The decision of 13 December was in implementation of that earlier decision.

9.41. In relation to that list, therefore, we have found unfavourable treatment on the grounds of pregnancy or a pregnancy-related illness contrary to the Equality Act 2010 in respect of:

- The notification that her pay was reducing

- The notification that she had 14 days to decide whether to accept the change
- The requirement (later lifted) to stay at home for 48 hours because of morning sickness
- The refusal to allow her her laptop so she could work from home
- The repeated emails and letters between 12 November and 13 December
- The dismissal.

9.42. Those decisions were taken in the protected period, including the dismissal, given that it implemented decisions taken in the protected period, that is the decision of 21 September 2021 to demote and move her to a lower paid, manual job and the decision of 23 September 2021 to make that demotion long-term.

9.43. The sex discrimination claim was added at the initiative of the Employment Judge in recognition that if the dismissal were held to have been decided upon on 13 December, the claim as identified would fail, because that date is outside the protected period, contrary to the case brought by the Claimant that this was a pregnancy dismissal. In the event, the conclusion of the Tribunal is that the dismissal was decided on during the protected period and only implemented by the decision of 13 December.

9.44. If we are wrong on that, however, we make the following findings. The dismissal itself made at a meeting that the Claimant was unable to attend because of a pregnancy related illness, on the express assumption that if she did not participate by attending or in writing that she had nothing further she wished to say, was discrimination on the grounds of sex as was the detrimental conduct immediately prior to that in continuing the repeated emails in relation to the proposed meeting while she was off sick having suffered a recent miscarriage. No comparator is required, given that the issue relates to pregnancy.

*Detriment (Employment Rights Act 1996 section 47C)*

*9.45.* The issue here is whether the pleaded detriments were on the prohibited ground of pregnancy. The pleaded detriments are the same as pleaded for the protected disclosure detriments, with which they were grouped, as follows:

*On 21 September 2021 Mr Longman inform the Claimant that she could no longer work as a Marketing Assistant, but would have to return to a role as an Assistant Cheesemaker, and that her rate of pay would be reduced from £11 an hour to £9.50 an hour and that she had 14 days to decide whether to accept the reduction in pay or leave, [and thereafter paying the Claimant reduced pay]*

9.46. This is virtually the same as pleaded in respect of pregnancy discrimination and we make the same finding, save that this time the issue includes “and thereafter paying the Claimant reduced pay”. We have not found that the Claimant started work in wrapping and affinage or that her pay was reduced before she went off sick.

9.47. In respect of that issue, therefore we find that informing her that her rate of pay

would be reduced from £11.00 to £9.50 per hour was a detriment The fourteen days' requirement was not imposed until 23 September but was a detriment, in that it put her under additional pressure. We have found, as discussed above, that the decision and notification that her pay was reducing was influenced by her pregnancy as was the notification that she had 14 days to accept the change. That is because we have found the conduct and decisions of Mr Longman on 21 and 23 September to have been influenced by and motivated by her pregnancy.

9.48. This was detriment on the grounds of pregnancy.

*In the period between 22 September and approximately 22 October 2021 requiring the Claimant to work in the affinage and wrapping department, requiring the Claimant to turn, wash and lift heavy cheeses in a refrigerated room;*

9.49. While the dates the Claimant gives are not reliable, and whether or not she volunteered for this work when the request was made, it was part of her routine duties. She was expected to do that work if it was needed. She did work in affinage and wrapping after 7 September, at a time when the employer knew that she was pregnant and in the absence of a risk assessment being carried out. She was not given guidance as to how to handle the racks of cheeses safely when lifting and moving them from different heights. This was a detriment on the grounds of pregnancy.

*On or about 5 October 2021 refusing the Claimant's request to provide her with her work laptop, to enable her to work from home when she was suffering from morning sickness;*

*9.50.* For the reasons set out above, this was a detriment on the prohibited ground of pregnancy. She was not treated as someone suffering morning sickness but as someone ill.

*In the period between 12 November and 13 December 2021 repeatedly emailing and writing to the Claimant requiring her to attend redundancy consultation meetings, notwithstanding the Claimant's presentation to the Respondent of fit notes indicating she was unfit for work as a consequence of suffering a miscarriage of the 19th November 2021.*

9.51. In relation to the repeated letters and emails inviting her to redundancy consultation meetings between 12 November and 13 December, that was detriment on the prohibited ground of pregnancy. We have found that course of conduct to have been pursued by the Respondent in response to her pregnancy, a course embarked on from September. The decision to pursue a change of role goes back to the September decisions, although the formal steps were deferred until the grievance had been dealt with, save for the appeal. It reflected a settled course of action, pursued with consistency and determination, at a pace unrelated to demonstrable business need. The original decisions on 21 and 23 September were prompted by knowledge of her pregnancy and so this course of conduct is also on the ground of pregnancy.

*Dismissing the Claimant on the sham grounds of redundancy on 19 December 2021*

9.52. By regulation 19 of the M & PL Regulations, a dismissal is not to be treated as a detriment, where it falls within the scope of section 99 of the ERA 1996.

*Conducting the meeting at which the Claimant was dismissed in her absence.*

9.53. It is surprising that the Respondent expected the Claimant to attend a meeting to discuss her job role or potential redundancy while she was on certificated sick leave, having recently suffered a miscarriage and with a history of work-related stress limiting her capacity to work since 6 October 2021.

9.54. This was a very early stage in a sickness absence: the employer had not obtained any occupational health assessment or any assessment of the prognosis and likely duration of illness. The time might have come when it was reasonable to proceed on the basis that the Claimant would not be well enough within a reasonable time to participate in job-related discussions but that was not the stage reached.

9.55. As to why the Respondent proceeded in that way, we have only the reference in the letters to her that the meeting could not keep being postponed without reasonable cause, that if she did not attend without reasonable explanation, it would proceed in her absence (268/273) or that if she did not attend or provide written representations, it would be assumed that she had nothing further to add (274/279).

9.56. Being off work through ill health is very often reasonable cause and a reasonable and sufficient explanation for not attending a meeting or providing written representations.

9.57. There may be reasons when it is necessary or appropriate for a redundancy consultation to proceed even though the employee is signed off sick – where an organisation is in financial difficulties and cost-savings are urgent, where a number of employees are at risk of redundancy and there is a need to reduce the uncertainty for all staff impacted, where the individual has been signed off sick for a significant period, with no indication of a return date. No such reason has been demonstrated here, and, by contrast, she was the only person impacted by the potential redundancy, there was little ongoing cost to the employer in retaining her, and she had within the last fortnight suffered a miscarriage.

9.58. We do not accept the submission that, while she was not capable of work, that that does not mean that she was incapable of taking part in a discussion about her work with her employers. Any such approach would have to be based on proper enquiry and evaluated with great care, particularly given the reference to work-related stress.

9.59. So the approach taken in deciding to proceed in her absence is not a fair or reasonable one. The approach taken appears predicated on the assumption that the Claimant was able to attend and choosing not to, rather than that she was unfit to attend and so unable to.

9.60. The question again is prompted as to what was the reason behind the

Respondent's conduct.

9.61. We come back to the reasons earlier found: the process was directed at dismissing Miss Botha if she did not accept the demotion and reduced pay, and that course was prompted by knowledge of her pregnancy.

9.62. In any event, at this stage, she had recently suffered a miscarriage and that was one of the reasons for being unfit for work. To require her to attend a meeting about redundancy and her job role, or at the least to put in written submissions about it, with a declared assumption that if she did not do so, she would be taken as having nothing further to say, is a detriment for a reason related to pregnancy.

9.63. In our judgment, conducting the meeting at which the Claimant was dismissed in her absence was a detriment on the prohibited ground of pregnancy, or pregnancy-related illness.

9.64.

*Dismissal (Employment Rights Act s.99)*

9.65. The issue here is whether the principal reason for the Claimant's dismissal was a reason or set of circumstances relating to the Claimant's pregnancy.

9.66. We have found that redundancy was not the reason for the dismissal, and it is fair to call it a sham.

9.67. We have found that the original decisions that led to the dismissal were those of 21 and 23 September and that they were prompted by the pregnancy, and in the case of 23 September, by the lodging of the grievance.

9.68. The question then is whether the reason was the pregnancy or the grievance that was the principal reason for the dismissal. It was the pregnancy that set off the train of events. It was the grievance that led to the hardening of the approach to her.

9.69. Because of her pregnancy, she was told she would be demoted. When she did not accept that, the decision became that she would be demoted for the longer-term, and if she did not accept that, then the employment would be terminated. The reason for that change was that she had lodged a grievance. It was that that triggered the decision to make the demotion longer-term.

9.70. The challenge to that decision led the Respondent to the position repeatedly demonstrated that either Miss Botha accept the demotion on offer or the employment would end. There was no other option.

9.71. So it could be said that the grievance was the operative, the principal cause.

9.72. Against that, in Mr Longman's view, the grievance was dealt with, largely dismissed and the outcome confirmed in the letter of 15 October. That did not alter the course of events. At that point, Mr Longman began the formal change of role consultation in pursuit of the decisions made before the meeting on 23 September.

9.73. In our judgment, while the grievance was the effective cause of a hardening of the attitude towards her, it was the pregnancy that set the train of events in motion and that remained a factor throughout, including in the end by dismissing her while she was suffering a pregnancy-related illness.

9.74. In our judgment, the principal reason for the dismissal was pregnancy.

*Victimisation (Equality Act 2010 s. 27)*

9.75. The first question is whether the Claimant did a protected act.
9.76. It is agreed that the grievance is a protected act, given that it raises very specifically the question of discrimination on the grounds of pregnancy.
9.77. It is not agreed that the grievance appeal is a protected act. We are satisfied that it is. The grievance appeal is against the outcome of the grievance, in which her allegation of pregnancy discrimination is dismissed.
9.78. During the grievance appeal hearing, she raised more than once the impact of her pregnancy on the way she had been treated.
9.79. We accept both as protected acts.
9.80. The Claimant pleads the following as victimisation by the Respondent, that is, as the detriment because of the protected acts:

*In the period between 22 September 2021 Mr Longman required the Claimant to stay at home and take a PCR test.*

9.81. We make the same finding here as in relation to pregnancy discrimination above. It is more likely to be carelessness or ignorance on Mr Longman's part in specifying what he wanted that led to the request for a PCR rather than malice or victimisation. He has shown himself to be impulsive, erratic and readily and easily inaccurate. In our judgment, there is no good reason to consider the request for the PCR to be on the ground that Miss Botha had lodged a grievance.

*On 23 September 2021 Mr Longman confirming the reduction in pay and change role detailed above.*

9.82. We find that Mr Longman confirmed the reduction in pay and change in role and extended the duration of the change in role on 23 September because of the grievance, as explained above.

*On 5 October 2021 informing the Claimant that she would need to take sickness absence to avoid spreading her sickness bug, when the Claimant informed the Respondent that she had morning sickness and could not attend work that day*

9.83. We have found this to be a detriment on the ground of pregnancy-related illness.
9.84. The evidence does not prompt a causal connection being found between this and the lodging of a grievance nearly two weeks earlier.

*Failing to engage with and respond to the Claimant's grievance appeal reasonably, impartially, and fairly [detail to be provided]*

9.85. No further detail has been provided of the failure to engage with the grievance.

9.86. We have found that the content of the letter giving the grievance outcome was undermined by a series of inaccuracies. It did not reflect genuine engagement with the points raised in the grievance. It was therefore not reasonable or fair.

9.87. The grievance appeal outcome echoes what is in the grievance outcome, with some additional misrepresentations. It represents a further attempt to avoid any suggestion that the decision made on 21 September and then that of 23 September was influenced by knowledge of Ms Botha's pregnancy.

9.88. That is a failure to engage with and respond to the appeal, reasonably, impartially and fairly.

9.89. The question is whether that was because Miss Botha had done a protected act.

9.90. There is no legitimate reason for the approach taken. It was not an honest rebuttal of the grievances or appeal. Miss Botha had managed to present her appeal more fully than she had been able to present the grievance, and her grounds were not addressed. The same individuals were involved at each stage and the Respondent seemed locked in denial of any error or unfairness in their conduct.

9.91. In that context, we cannot identify a different reason for the conduct towards Miss Botha over the grievance appeal, other than that it was because she had done a protected act.

9.92. We find victimisation in the reduction of pay and change of role and in the failure to engage with and respond to the Claimant's grievance appeal as pleaded.

*Schedule 5 Employment Act 2002*

9.93. The Claimant was not given a written statement of employment particulars for the first year of her employment. She was entitled to it, and in practice, Mr Longman needed it as much as she did.

9.94. A written statement was provided on 31 October 2021. It does not reflect the terms as she understood them to be, or the terms in place at the time but this provision relates to the existence of a written statement of terms, not their content. There is provision made for disputes over the terms provided to be referred to a Tribunal.

9.95. While the Respondent was in breach of section 1 of the Employment Rights Act 1996, this remedy is not available to the Claimant because of the written statement issued on 31 October.

## Judgment

9.96. In our judgment, the Claimant succeeds in her claims of pregnancy discrimination, contrary to the Equality Act 2010, section 18, that is unfavourable treatment during the protected period including dismissal on the grounds of pregnancy or pregnancy-related illness, of detriment on the prohibited ground of pregnancy contrary to section 47C of the Employment Rights Act 1996, and victimisation contrary to section 27 of the Equality Act 2010.

9.97. In the alternative, if we are wrong in seeing the events after 2 December as implementing decisions made in the protected period, the Claimant succeeds in her claim of sex discrimination in the detriment caused by the persistent correspondence and then the dismissal following a meeting which she was unable to attend while suffering a pregnancy-related illness.

9.98. She succeeds in her claim of automatically unfair dismissal on the grounds of pregnancy.

9.99. The claims in respect of protected disclosure, including both detriment and dismissal (sections 47B and 103A of the Employment Rights Act 1996), of automatically unfair dismissal on the grounds of health and safety concerns (section 100 of the Employment Rights Act 1996) and failure to provide a written statement of terms and conditions are dismissed.

**Employment Judge Street**

Date 23 August 2023
Judgment & reasons sent to the Parties on 20 September 2023

For the Tribunal Office