Case No: 1403739/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms A Banks

Respondent: Lloyds Bank plc

Heard at: **Bristol** **On: 14, 15, 16, 17 August and 18 August in Chambers**

Before: **Employment Judge Christensen**
Dr C Hole
Ms J Kaye

Representation
Claimant: Mr Donnelly, Solicitor
Respondent: Mr Liberadzki of Counsel

RESERVED JUDGMENT

1. The out of time issues arising in the claim under S18 are determined such that the claimant may proceed with her claim.
2. S18 Equality Act: The claim for pregnancy discrimination succeeds.
3. S27 Equality Act: The claim for victimisation does not succeed and is dismissed.
4. S99 Employment Rights Act The claimant has been constructively automatically unfairly dismissed.
5. S98(4) The claimant has in any event been constructively unfairly dismissed.
6. The respondent's application for costs is dismissed.

REASONS

The claim and background

1. The claimant was employed as a Customer Service Adviser for the respondent. The claimant's line managers were two bank managers, Joanne King and Amar Chudasama. They were overseen by Fatheur Raham who was a Senior Bank Manager. The claimant was a direct report of Joanne King. The claimant was managed by Daniel Thomas after Amar Chudasama moved to another position on promotion within the bank.

2. The claimant started work for the respondent on 9 September 2019 and resigned on notice on 16 September 2021. Her employment terminated on 14 October 2021. The claimant became pregnant in or around March 2020 and gave birth to her daughter on 25 December 2020. She started her maternity leave on 23 November 2021 and never returned to her place of work. She informed Ms King of her pregnancy in early May 2020.

3. The claimant gave evidence. For the respondent evidence was given by Mr Chudasama, Ms King, Mr Thomas and Mr Rahman. It was agreed that this hearing would be limited to liability only and we were provided with a bundle running to 305 pages. Further documents were provided during the hearing. Some at the request of the respondent and some under direction of the tribunal. These were: a blank copy of the respondent's Pregnancy Risk Assessment Form (provided at the request of the tribunal), a screen shot of Mr Rahman's inbox (the respondent asked to be included) and some email correspondence passing between the claimant's union representative, Mr Waterhouse, and the respondent's Area Director, Ms Karen Edwards, in August 2021 (this was provided under direction of the tribunal).

4. This appeared relevant as it was referred to in emails dated shortly before the claimant resigned and included in the bundle [229] but had not been previously disclosed by the respondent. The claimant had not previously seen this email. Once disclosed the letter confirmed that the claimant had given her union representative permission to go above Mr Rahman and to "*reach out"* to the Area Director in an effort to see if *"anything can be done to put the situation right'* for the claimant in relation to ongoing problems, before resigning.

5. The essence of the claimant's case is that her pregnancy related issues and illnesses were not taken seriously by her managers, that she was made to feel guilty about being away from work with pregnancy related illnesses, that her requests for a pregnancy risk assessment were ignored, that her requests for a supportive chair when sitting at the counter were ignored and that when she raised a grievance about these matters the respondent did not take that seriously either and that the grievance was not handled appropriately and was not resolved. The respondent's case it that it denies some of the exchanges that the claimant says took place, that the claimant misinterpreted others and that the grievance was appropriately responded to and resolved.

Claims and issues

6. The claimant presented her application for ACAS conciliation on 2 August 2021 and her certificate was issued on 13 September 2021. She presented her claim to the tribunal on 16 September 2021 when unrepresented. After appointing a representative the claimant filed further and better particulars of her claim on 8 June 2022.

7. A Case Management Preliminary Hearing took place on 9 June 2022. At that hearing Judge O'Rourke directed the claimant to make a formal

application to amend her claim as the further particulars appeared to raise new claims of victimisation and automatic unfair dismissal on grounds of pregnancy. In accordance with that direction the claimant made an application to amend her claim on 30 June 2022. That application was not objected to by the respondent and the amendment application was granted by Judge Rayner on 26 July 2022.

8. A further Case Management Preliminary Hearing took place on 10 August 2022 before Judge Salter. That order sets out the claim and issues arising and are agreed by the parties to be those that fall for this tribunal to determine. At the start of this hearing the claimant withdraw one of the acts complained of; namely that appearing at paragraph 33 (p) – 'in or around the beginning of November 2020 by Dan Thomas, required the claimant to start her maternity leave four weeks early'.

9. As a result of the application to amend referred to below, the acts complained of were amended to include a new paragraph p. 'Upon receipt of the email from her union representative on 3 August 2021, the claimant understanding that the respondent was not going to do anything further with her grievance'. As a result of the amendment application this event becomes the last straw relied upon by the claimant in her claim for unfair dismissal.

Application to amend

10. Neither party had prepared written submissions and submissions were therefore presented orally. As the respondent started its oral submissions on day 4 and was addressing the issue of the last straw in the claim for constructive unfair dismissal, the tribunal asked Mr Liberadzki to set out its understanding of the significance of the evidence given of the exchange between Mr Waterhouse (union representative) and Ms Edwards (Area Director) and then Mr Waterhouse and the claimant on 3 & 4 August 2021. In this Mr Waterhouse relayed to her the respondent's response to her query regarding how she could resign and whether there was anything that the respondent could do to put matters right before she did so. [229 + 317]. The claimant's witness statement refers at paragraph 49 to her wishing to give the respondent a chance to resolve matters and instructing her union representative to go over Mr Rahman's head to endeavour to do so.

11. This prompted a discussion regarding the last straw with the parties and an application to amend from the claimant. Mr Liberadzki correctly pointed out that the order of Judge Salter [77] indicated that the last event relevant to the claim for constructive dismissal was Mr Rahman misinforming the claimant about a new role in or around June 2021.

12. Mr Donnelly indicated that the last straw was the communication to the claimant on 3 August 2021 by Mr Waterhouse of the respondent's response to the claimant's final attempt to resolve her grievance as an alternative to resigning. Mr Donnelly submitted that evidence had been given at the hearing on this.

13. Under direction of the tribunal on day 2, the respondent was ordered during the hearing to provide the exchange that Mr Waterhouse had with

Ms Edwards in August 2021 as it appeared relevant to understanding events in the period leading up to the claimant's decision to resign. That direction was given when the claimant was being cross examined on whether she had told anyone that she wished to progress her grievance. The claimant had responded in cross examination that she was told by Mr Thomas in October 2020 that she could progress her grievance upon return from maternity leave. The claimant also stated that she believed there were emails that passed between the respondent and her union representative regarding the progression of her grievance at the end of her maternity leave. These emails were not in the bundle but appeared to be being referred to in the document at p229.

14. The judge's note on day 2 of the claimant's evidence in cross examination at this juncture reads as follows*: "I told Dan* [Mr Thomas] *I was unhappy with how the meeting had been handled – Dan said I could progress when I returned. After maternity leave – I spoke to union rep and he went above Fats. Then I realized it would not be resolved. There are emails*".

15. The judge's note on day 2 then records a discussion about p229 and why the email exchange referred to with the Area Director, Karen Edwards, had not been disclosed. There was no reason offered by the respondent and a direction was given that they would be disclosed by the respondent if they could be found. They were found and disclosed later the same day.

16. The claimant applied to amend the claim to include this event as the last straw.

17. The respondent objected to the amendment application on the basis that (i) it had understood the further disclosure to be relevant to the question of affirmation (ii) that such a late application meant that they were unable to call Ms Bevan as a witness.

18. The tribunal adjourned to consider the application.

19. The tribunal was satisfied that from the claimant's witness statement, the email exchanges on 3/4 August appeared relevant to the claimant's decision to resign and the late disclosed documents gave greater context to that decision. The fact that Mr Waterhouse was going to go above Mr Rahman's head in a chance to resolve matters is stated in the claimant's witness statement [para49]. The fact that he did is shown by his email of 3 August [229]. The fact that the claimant decided to resign after she saw the respondent's answer is also clearly stated in paragraphs 50 & 51 of her witness statement. The final conduct of the respondent that made her resign, therefore appears relevant to her claim of constructive unfair dismissal.

20. We considered the relative prejudice to the parties.

21. The respondent has argued it would be prejudiced if the application were granted as they have not been able to call Ms Beavan. The tribunal recognizes that this may be so but the argument does not appear strong. Firstly it is relevant that the respondent has always known of this

exchange with Ms Edwards and the conversation with Ms Beavan but did not disclose the email or call Ms Beavan as a witness. Secondly because it seems inherently unlikely that either witness might say anything that would fundamentally undermine the essence of what Mr Waterhouse conveyed back to the claimant – namely that the respondent had no plans to 'put the situation right' for the claimant and instead maintaining their position that the claimant was happy. That is consistent with the view of Mr Rahman when he handled the grievance initially in October 2020.

22. The prejudice to the claimant appears stronger were we to refuse the amendment application. The claimant's evidence was that that email devastated her as it became clear that none of her issues were being taken seriously and were never going to be resolved. This is therefore an important part of the timeline of events in determining her claim of unfair dismissal. Were the claimant to be denied the opportunity of relying upon this event as her last straw we are satisfied that the balance of prejudice would weigh too heavily on the claimant.

23. The application to amend was granted. There was then some was discussion regarding the inclusion of a new clause p in paragraph 33 of the order of Judge Salter as set out above. The tribunal then broke for lunch.

24. Accepting that the application had been made very late in the day and whilst the respondent was making oral submissions, the tribunal offered Mr Liberadzki extra time to adjust his submissions. The offer was declined on the basis that Mr Liberadzki was content to do so during the lunch break.

Costs Application

25. The respondent made an application for costs on 5 July 2022 by letter that appears at p49 in the bundle. The claimant responded to the application on 2 August at p56 in the bundle.

26. It has been clarified that the application made is one only for wasted costs under Rule 80 and is not pursued as an application under Rule 76. Rule 80 provides that a tribunal may make a wasted costs order against a representative in favour of a party where that party has incurred costs as a result of any improper, unreasonable, or negligent act or omission on the part of the representative.

27. The three stage test set out in ***Ridehalgh-v-Horsefield [1994] Ch205*** is referred to both parties. The tribunal should consider
28. Did the representative act improperly, unreasonably or negligently?
29. If so, did that conduct result in the party incurring unnecessary costs?
30. If so, is it just to order the representative to compensate the party for the whole or part of those costs.

31. The relevant chronology is set out in the application. When the claimant brought her claim in September 2021 she was unpresented. Her claim form sets out what the respondent describes as only brief details of her claims. In their ET3 response the respondent requested further and better particulars from the claimant.

32. A Preliminary Hearing was listed on 9 June 2023 to give directions on the claim. The claimant instructed Mr Donnelly 4 weeks before that date. At 17.04 on 8 June, the claimant's solicitor wrote to the tribunal and copied the respondent to attach further and better particulars, a completed agenda and a draft list of issues.

33. Matters came before Judge O'Rourke on 9 June who concluded that as neither he nor the respondent's representative had had an opportunity to properly read the claimant's submissions the hearing would be adjourned. The claimant was put under a direction to amend her claim. She did so on 30 June and the respondent confirmed on 21 July that they did not object to her application to amend.

34. The respondent's application is that the claimant's representative acted in a manner which is improper or unreasonable by providing the documents after office hours the day before the Preliminary Hearing. The respondent submits that the claimant's representatives actions caused the adjournment which in turn caused the respondent to incur wasted costs in preparing for the Preliminary Hearing and making the costs application. The respondent further submits that it is relevant that the claimant did not respond to the respondent having sent a draft agenda to the claimant on 30 May.

35. The claimant's solicitor resists the application. Mr Donnelly argues that the claim was a complex one that took a full month to put in order. He also submits that it is relevant that the respondent offered no resistance to the application to amend on the basis of the further and better particulars and that he filed a list of issues linked to the further particulars to assist the Preliminary Hearing on 9 June and which was of assistance to Judge Salter as the Preliminary Hearing that took place on 10 August.

36. Mr Donnelly further submitted that his firm thought it correct to file the further particulars when they were ready rather than wait to file them the next day. Even had they done this another Preliminary Hearing would have been necessary because Judge O'Rourke directed a written application to amend. Mr Donnelly submitted that his firm was instructed late in the day and that whereas it is regrettable that they were not able to provide the further and better particulars sooner than they did, the length of time related to the complexity of the further and better particulars.

37. We have not been satisfied that there is any improper, unreasonable or negligent act of omission by the claimant's solicitor. We consider it relevant that this claim, as amended, involved some 31 allegations. The claim as presented when the claimant was unrepresented set out, as the respondent submits, only brief details of her claim. That is not a criticism of the claimant. Tribunals are most usually assisted by an unpresented claimant with an undetailed claim form seeking legal representation to assist in ensuring that the claim is properly particularized and detailed. That enables the claims and issues to be understood such that there can be an effective and fair hearing.

38. Mr Donnelly cannot be criticized by reference to the fact that his firm was instructed a month before the hearing. Given the complexity of the further and better particulars needed, once he had taken instructions from

the claimant, there does not appear to be any proper basis to conclude that there is any improper, unreasonable or negligent act or omission in his firm taking a month to take instructions to give the further particulars that were needed.

39. Ultimately the further and better particulars have assisted the tribunal to identify the issues arising in this claim. It is regrettable that the Preliminary Hearing on 9 June could not achieve more than it did, but the discussion ultimately was of assistance as judicial direction was given regarding a formal application to amend on the basis of the further particulars, which was not resisted by the respondent. This claim is complex and those further particulars ultimately were of assistance in clarifying the claims and issues and ensuring the parties were on an equal footing.

40. In our judgement there is no proper basis to conclude that the first limb of Ridehalgh is satisfied. The application under Rule 80 is dismissed.

Findings of fact

Credibility of witnesses

41. There were a number of conflicts between the claimant and the respondent's witnesses regarding things that were said between them relating to her pregnancy, risk assessments, pregnancy related illness absence, pay associated with those absences and the handling of her grievance in which she raises pregnancy discrimination.

42. We found the claimant to be straightforward, dignified and conscientious. She was a credible witness who was willing to accept points against herself and to accept that in some of the relevant conversations it might have been possible for there to be different interpretations of what was said. That is the reason given by the claimant for withdrawing her claim in allegation 'p' relation to the starting of early maternity leave.

43. There was an occasion in which her witness statement evidence focused on a particular aspect of a conversation without giving the entire context. This refers to the incident in the week commencing 20 July 2020 in which the claimant's witness statement sets out part of a conversation with Mr Chudasama and in questioning the claimant accepted that the conversation had a fuller context as she set out in her contemporaneous note of the conversation [192]; that refers both to the effect that the atmosphere at work is having on her and the importance of being able to take toilet breaks whenever there was a need, to avoid any further urine infections. Her complaint is that Mr Chudasama told her 'you are not the only one with problems…you should hear what I am going through'.

44. In his witness statement Mr Chudasama simply denied making the comment that the claimant attributes to him. In cross examination however Mr Chudasama changed his evidence to be that he could not confirm if he said them or not. He then changed his position again to be that he accepted that he might have done in the context of the fuller conversation.

45. This example did not detract in any sense for the tribunal's view that the claimant was a reliable and credible witness.

46. The respondent's witnesses obfuscated when giving their evidence, gave unclear evidence and changed their evidence when questioned. The respondent's witnesses had almost no contemporaneous notes of any of the discussions that they had with the claimant relating to her pregnancy, her pregnancy illnesses, issues regarding her pay arising from pregnancy illness. They also kept no notes of the discussions that took place at the meeting held on 8 October 2020 to address the claimant's grievance letter in which she alleges multiple acts of pregnancy discrimination. Further there is no record of the outcome of that meeting in terms of the respondent's position that a resolution was acheived. There was an almost complete lacuna of any record taking, the exception to this being Dan Thomas who did keep notes of his meetings with the claimant in October 2020 and produced these to the tribunal.

47. However his notes do not record the totality of discussions. There is a conflict between the claimant and Mr Thomas regarding a conversation on 27 October 2020. Her witness statement evidence being that she raised with Mr Thomas both the possibility of resigning and the possibility of continuing with her grievance after her maternity leave ended. Her evidence is that Mr Thomas advised her not to make a quick decision. Mr Thomas does not refer to this exchange in his witness statement, nor is it referred to in the contemporaneous note he made at the time [222] although that note does record the claimant telling him that she continued to be upset at the way in which Amar had spoken to her, that she does not think she is being taken seriously and that she has lost trust in the way in which matters are being managed. In cross examination Mr Thomas agreed that he did remember them having a discussion about resigning but then changed his evidence again so that it became that he did not remember her referring to a resignation. He also agreed in cross examination that he told her not to make a hasty decision about not coming back to work but neither his contemporaneous notes or his witness statement record this.

48. Ms King struggled to have recall of events and was in particular unclear in her recall of how she had recorded the claimant's pregnancy related absences and whether these were recorded as paid or unpaid.

49. Where conflicts exist we have referred to any contemporaneous records that do exist to assist us in resolving them and have set out in our reasons how and why we have resolved the conflicts in the way we have.

Findings of Fact

Involvement of HR & Work Day system

50. We had evidence of HR support to manager on two occasions throughout this period. HR could become involved if a manager raised a ticket through on an line portal for support.

51. On 11 September [189] Mr Chudasama raised a ticket with HR although we have been provided with no details of what question the ticket raised with HR. We have been provided with the advice from HR relating to the possibility of the claimant starting her maternity leave early. This was not something that the claimant had requested and none of the respondent's witnesses could assist us with why Mr Chudasama had raised this ticket with HR. Mr Chudasama gave evidence that Mr Rahman had asked him to raise this issue with HR. Mr Rahman however denied that he had done so.

52. On 25 September 2020 [232] Mr Rahman raised a ticket with HR after receiving the claimant's grievance letter of 25 September 2020 [203]. It is unclear whether Mr Rahman provided HR with a copy of the claimant's grievance letter or whether instead he summarized it to HR either in the ticket he raised or in the conversation that he had with Mr Gant in HR. We have not been provided with a copy of the tickets that were raised with HR. A discussion took place between Mr Rahman and Mark Gant in HR. This refers to repairing working relationships, the possibility of the claimant moving to another business unit and that HR 'would not encourage a move without attempts to address informally or giving the Group the opportunity to address via a formal grievance'. The HR response confirms that Mr Rahman was 'happy to attempt to resolve locally', although there was no discussion regarding the significance of which route the claimant might prefer and whether her views had been sought on this.

53. The Work Day system could also be used by managers to upload documents without raising an HR ticket. Two examples of this are the claimant's MATB1 certificate and the letter from the claimant's midwife dated 23 October 2020. That was uploaded to Work Day by Mr Thomas and without raising a ticket with HR.

Training on managing pregnant employees and pregnancy risk assessments

54. None of the respondent's witnesses had received any training on the management of pregnant employees or the completion of a Pregnancy Risk Assessment. The respondent's case is that, under its own policies, they had a responsibility to complete a Pregnancy Risk Assessment for a pregnant employee. The individual witnesses each had a different view regarding the necessity to carry out a Pregnancy Risk Assessment. The Risk Assessment form used by the respondent had two parts. Part A was completed by the employee and then Part B was completed by the manager [306-312].

55. Ms King was unaware of the existence of a Pregnancy Risk Assessment and unaware of the possibility of completing one.

56. Mr Chudasama's knew of the existence of Pregnancy Risk Assessments and had completed them. His evidence was that an employee needed to ask for one although he agreed in cross examination that *"it is sensible to complete one especially in a situation like this".* His view was all the items covered in the risk assessment were addressed during check ins with the claimant.

57. Mr Thomas also knew of the existence of Pregnancy Risk Assessments and had completed them. He used his judgment regarding whether or not one should be completed and would not necessarily rely upon an employee asking for one and might instead initiate one himself.

58. Mr Rahman knew of the existence of Pregnancy Risk Assessments and considered them quite important. He however did not complete them himself and would instead rely upon his managers to do so. He believed that his managers would complete a Pregnancy Risk Assessment for the claimant.

Covid

59. When the pandemic lockdown started in March 2020 the respondent remained open with reduced opening hours and took measures to limit the number of customers that could enter the bank at any time. It also introduced a system of 'stand by' days. These were days on which an employee was not required to attend work to limit the number staff members that were in the bank at any time. Managers assigned stand by days to employees. When on a stand by day an employee remained at home but had to remain on stand by to be called in if the need arose.

60. In light of the covid lockdown the respondent introduced a new way of recording absence types so that absence type could be shown as 'Emergency Leave (Paid)' or 'Emergency leave (unpaid)'. This is established by the list at p285 and the screen shots at p238. 285 is a list of the claimant's absences. We find that a manager could still record an absence type in different ways as this is how the claimant's absences in June/July 2020 are recorded. During that period the absence is recorded as 'Sickness – Full Day'.

61. The claimant's case is that the information on that list was changed shortly before the meeting in October 2020 to address her grievance. 238-242 are screen shots taken on the claimant's phone from Workday in September 2020. These include screen shots showing absences at that time being recorded as Emergency Leave unpaid. The respondent continued to record the reason for each absence in the way it always had. This could include that the reason was pregnancy related or for some other reason.

62. Ms King's evidence was and we find that she changed the way in which she had recorded some of the claimant's absences from unpaid to paid.

Chronology of events

63. The claimant worked at the City Centre Cabot Circus branch of the respondent as a Customer Service Advisor (CSA). She worked from 10.00am to 6.00pm over 5 days. She started work on 9 September 2019. Her first line manager was Ms King who was a bank manager. Her second line manager was Mr Chudasama. He was also a bank manager and more senior that Ms King. Ms King and Mr Chudasama were managed by Mr Rahman who was a Senior Bank Manager.

64. At work the claimant undertook three main functions. The first was to be on the counter dealing with enquiries from customers. When working

on the counter a CSA sat on a special high chair designed to put the CSA on a level with the customer they were serving. The counter chairs did not have any arms and required a step up to get on to them because of their height.

65. The claimant also worked in complex which required sitting in an office and at a desk with a normal height chair to deal with complex queries from customer. The third possibility was Meet and Greet which involved standing in the public foyer to assist and direct customers with queries as they entered the branch.

66. The claimant found out that she was pregnant in April 2020. The claimant informed Ms King and Mr Chudasama that she was pregnant in May 2020. Ms King accepted that she was told in early May, however Mr Chudasama denied that he was told in May and his evidence was that he was told in June. There are no notes of any conversations recording when the claimant told her managers of the fact of her pregnancy.

67. We resolve this conflict in favour of the claimant. We are assisted in resolving this conflict in favour of the claimant not only by the fact that we considered her a credible witness but also by considering the undisputed evidence that the claimant also told Mr Rahman that she was pregnant in May 2020. It seems inherently unlikely that the claimant would have told her first line manager but not her second line manager of her pregnancy in May 2020 and yet for her to have discussed it with their manager Mr Rahman in the same month.

First pregnancy related illness 13 May 2020

68. On Wednesday 13 May the claimant had an episode of bleeding when she was at work. This caused her distress and worry. The claimant approached Ms King who was supportive of the claimant. She arranged for the claimant to call her husband to collect her so that she could visit her doctor or midwife. Ms King thought the claimant may be having a miscarriage.

69. There are several disputes between the claimant and Ms King regarding what was said between them at that time. In respect of all of these we prefer the evidence of the claimant. Her recall was clear of very specific phrases. Ms King seemed less certain in terms of recall on several occasions when giving evidence.

70. Ms King's account is that on the Wednesday she told the claimant to take the rest of that day off, to attend her scan and then to take Thursday and Friday off and return on Monday. It seems in itself unlikely that that as her manager, Ms King would have told her at that stage to take 2 days off work before the claimant had even had a scan. It seems inherently more likely that Ms King would have conditioned her response in the way in which the claimant says she did.

71. The claimant's account is that Ms King was supportive on the Wednesday when the bleed started. When the claimant called her later that day to say she wouldn't be having a scan until the next day because of Covid delays she was told that she could have the Thursday off but

she'd have to see about the Friday. That account is consistent with the notes kept by the claimant at the time [195].

72. On Thursday 14 May the claimant and Ms King spoke after the claimant had had a scan. In that call the claimant told Ms King that the doctor had said that she should not return to work until the Monday. We find that Ms King conveyed a sense of irritation or annoyance to the claimant at that point by the tone in her voice regarding this but agreed that the claimant did not need to return until the Monday.

73. Ms King's response upset the claimant as she felt that the annoyance that she conveyed to her was inappropriate.

Meeting with Mr Rahman 18 May 2020

74. The claimant had a meeting with Mr Rahman in the week commencing 18 May. They discussed the fact of her pregnancy and some of the issues she was having at work. Mr Rahman agreed that in light of her pregnancy she could split her lunch hour into 2 half hour breaks and that she could have more frequent toilet breaks.

75. There is a dispute between them regarding whether, in this meeting, the claimant asked for a Pregnancy Risk Assessment to be carried out. In his witness statement Mr Rahman gives evidence that the claimant did not specifically request a Pregnancy Risk Assessment until the meeting of 8 October 2020.

76. In his oral evidence Mr Rahman confirmed that he would have expected one to be done by her managers but also that he had no conversations with them to make sure one had been done.

77. Mr Rahman's evidence is that after this meeting he instructed her line managers to follow process and provide as much support as possible. On his own evidence following due process would have included the completion of a Pregnancy Risk Assessment. There is no written evidence of any communication from Mr Rahman to his managers to this effect although it is clear that a number of work place measures were taken thereafter in the light of the claimant's pregnancy.

78. The claimant's evidence is and we find that she asked Mr Rahman for a Risk Assessment relating to her pregnancy because her role was stressful when things got busy, that on occasions she could not leave her desk for a couple of hours and further that she was concerned about her chair because she anticipated it would cause problems later in the pregnancy as it was not supportive enough. Her evidence was and we find that her midwife had told her it was important that she did not sit in one position for too long. Her evidence was and we find that her concern with the chair was that it did not have arm rests, that it was not supportive enough and that she might fall off it. We find that she raised her concerns about the unsuitability of the till chairs with Mr Rahman in this meeting.

79. The claimant's evidence is and we find that Mr Rahman told her that a Pregnancy Risk Assessment was not needed until she was 12 weeks pregnant. In his oral evidence, Mr Rahman accepted that 12 weeks had

been discussed in that meeting but that was in the context of when her next scan would be. We do not accept his evidence in that regard as there was no discussion between them regarding when her next scan might take place. The discussion related to the claimant's concerns about her health and safety at work in light of her pregnancy.

80. We do not consider that this allegation is one that the claimant has made up nor indeed that she misunderstood the discussion around the significance of 12 weeks. That meeting with a Senior Bank Manager was to enable her to raise a number of work related pregnancy concerns and her health and safety at work. That reality is consistent with her having sought a meeting with a Senior Manager.

81. Mr Rahman also gave evidence in the context of pregnancy risk assessments that "regardless I consider that wellbeing chats and adjustments are sufficient to support a pregnant colleague"

82. His position on risk assessments shifts. It moves from being that he considered pregnancy risk assessment quite important and expected his managers to do one, to being that one was not needed until 12 weeks and then to stating that he regarded wellbeing chats and adjustments as being sufficient for a pregnant colleague.

83. Mr Rahman's response in our view indicates a casual and dismissive attitude to the claimant's concerns around her pregnancy and his responsibilities to maintain her trust and manage her pregnancy related concerns about her health and safety at work. That is consistent with the claimant's position that her pregnancy concerns were not being taken seriously. There was no proper basis for Mr Rahman to conclude that a Pregnancy Risk Assessment would not need to be completed until she was 12 weeks pregnant and his response tends instead to indicate that he was not taking the claimant's concerns nor indeed the respondent's responsibilities in that regard seriously, instead he was seeking to underplay them. Even after telling her that a Pregnancy Risk Assessment would be completed by a manager, presumably after 12 weeks of pregnancy, he did nothing to follow this up with his managers. In fact one was never completed.

84. Mr Rahman witness statement sets out "I consider that wellbeing chats and adjustments are sufficient to support a pregnant colleague'. That view is consistent with Mr Rahman in fact believing that a Pregnancy Risk Assessment was not needed, notwithstanding that the claimant had asked him for one.

85. What Mr Rahman told the claimant concerned her as it was contrary to her understanding of what the respondent was required to do in terms of the completion of a Pregnancy Risk Assessment.

Measures put in place in response to pregnancy

86. Notwithstanding that no steps were taken after the claimant's request for a Pregnancy Risk Assessment to complete one, we are satisfied that a number of measures were thereafter put in place to reflect the fact of the claimant's pregnancy.

87. It was agreed that the claimant could split her lunch break into 2 half hour segments, that she could take toilet breaks when needed, that she would only be asked to be on Meet & Greet in an emergency to avoid her having to stand and that she would not have to carry bags of coins to or from the counter. This was to avoid her having to lift the bags of coins which could be heavy.

88. The claimant was provided with check ins with her managers to ensure her wellbeing. Other than those disclosed by Mr Thomas, no manager kept any records that were disclosed of these check ins. Mr Chudasama told us he had taken notes of his check ins with the claimant but had not been able to locate them after moving branch and believed they had been destroyed.

89. It is part of the respondent's case that the claimant was also provided with additional stand by days in light of her pregnancy. The claimant gave evidence that she had no knowledge of this adjustment for her because of her pregnancy. We find that she was not provided with any additional stand by days because or her pregnancy. It is the respondent's own evidence [207] that the claimant was provided with additional stand by days, not in light of her pregnancy however but to reduce her exposure to covid because of a health condition that her husband had. We find that the claimant was not provided with additional stand by days because of her pregnancy.

90. It is part of the respondent's case that an adjustment was made for the claimant in light of her pregnancy to provide a daily rotation between Counter, Complex and Meet and Greet [207]. In fact all CSAs rotated to a degree between these roles in any event under direction of their managers. Mr Chudasama's witness statement sets *out 'Ms Banks was able to rotate her roles (she could choose between working on the Counter, Enquiries and Meet and Greet) so that she could work in positions where she felt most comfortable and so that she was not fatigued.'* We find that this does not reflect the reality of the way in which the claimant was managed. Mr Chudasama gave oral evidence *that 'the claimant would come to a manager and say I have been on the counter today and she asked for a rotation to be put on complex'*. However Mr Chudasama has given no evidence that this in fact ever happened, nor indeed that the claimant was told that she could 'choose' what her rotations were. He had no direct recall of ever managing the claimant in a way in which she got to choose where she worked as he sets out in his witness statement. There is no reliable evidence that any manager was given an instruction to alter the claimant's rotations in light of her pregnancy. Ms King gives no evidence regarding an adjustment on her rotations to reflect her pregnancy. Mr Rahman has given no evidence regarding instructions to his managers in this regard.

91. Mr Chudasama had meetings with the claimant on 22 & 23 June to discuss her pregnancy and to provide the claimant with a number of the respondent's maternity guidelines and policies.

Second pregnancy related illness June 2020

92. On 30 June the claimant commenced her second period of pregnancy related absence from work. She had developed a urine infection which required hospital treatment. She was absent from work from 30 June 2020 to 17 July 2020.

93. The claimant's case is that during this period her absence was recorded as non-pregnancy related and unpaid, that she could see this on her mobile phone at the time and that this has been changed on the records produced by the respondent. The claimant's evidence was that she saw screen shots at that time which concerned her as she was still in a probationary period during which absence from work may not be paid. The claimant's evidence was that she has kept screen shots from September 2020 but did not keep records of screenshots in July 2020.

94. From the evidence of Ms King we are satisfied that the records on Workday can be and in fact were amended by her. From p 285 we note that the absence in this period is not recorded as 'paid' which is anomalous and unlike all the other entries. We find that Ms King's evidence was confused about what she had done at the time and whether and if so when she had changed the records. She accepted that she may have done.

95. It is on this basis that we accept the evidence of the claimant and find that in this period of absence, entries were made in Workday, which were visible to the claimant on her mobile phone, showing the absence as non-pregnancy related and unpaid. Those records were later changed.

96. This caused the claimant worry and distress.

97. During this period of absence and on or around 13 July 2020, the clamant attended her place of work to hand in a fit note for this absence. She met with Ms King and Mr Chudasama and discussed with them her need for more frequent toilet breaks, reduced sitting time at the till and a more supportive chair to help with her pregnancy symptoms. We find that the claimant was reassured that these measures would be put in place for her on her return.

98. We find that the claimant was not in fact provided with a rotation that gave her less time on the tills. We accept the claimant's evidence in this regard and the respondent has produced no clear evidence of her rotations that would tend to indicate she was given less time on the tills.

99. We find that the claimant was never provided with a more supportive chair when working on the till or otherwise.

100. All of this tends to support the claimant's case that her pregnancy related concerns were not being taken seriously by the respondent and instead were being dismissed. This conduct by the respondent damaged the claimant's trust in her employer as it indicated to her that the respondent did not take its responsibilities to her regarding health and safety during pregnancy seriously.

Toilet Breaks

101. In relation to toilet breaks there is are conflicts between the claimant and Mr Chudasama. The claimant's case is that she spoke with Mr Chudasama twice in the week in which she returned to work about toilet breaks.

102. The **first** incident is one in which the claimant's account is that she explained to Mr Chudasama how important it was for her health and safety for her to take toilet breaks whenever she had a need to.

103. The claimant accepted in cross examination that the conversation she had with Mr Chudasama was as she set out in the notes she kept of that conversation at the time [193] which are fuller than the account she gives in her witness statement. The claimant's position being that the significance of her not referring in her witness statement to the atmosphere at work and the effect it was having on her was not done to cast Mr Chudasama's comments in a more negative light. Her position is that both events related to the pregnancy related issues she was having at work.

104. Mr Chudasama's position on this conversation has already been set out above and is an example of obfuscation. He either denies that the conversation took place at all or accepts that it may have taken place within the fuller context of a conversation in which the claimant brought to his attention both her need to go to the toilet when she needed to and the effect the poor atmosphere was having on her.

105. We find that the conversation with Mr Chudasama took place as set out at p193. This is a note of various events created by the claimant in 2020 and emailed to her union representative in September 2020. We place reliance upon this as it is a contemporaneous account by the claimant.

106. We find that having set out to Mr Chudasama both her concerns about toilet breaks and the affect the bad atmosphere was having on her, his response to her was to seemingly diminish the significance of her pregnancy related concerns by highlighting his *own "you are not the only one with problems…you should hear what I am going through"*.

107. We find that this response caused the claimant to feel upset and undermined as she felt that her legitimate pregnancy related concerns were not being taken seriously by Mr Chudasama.

108. The **second** incident concerns a conversation a few days later. There is a further conflict between the parties. The claimant's account in her witness statement refers to being told that if she needed to take toilet breaks she had to first make sure there were two people on the till.

109. The claimant's account in her witness statement is that she was approached by Mr Chudasama and told "you can use the bathroom when you need it but can you first make sure that there are two colleagues on the till"

110. Mr Chudasama's account is that he recalls a conversation with the claimant about toilet breaks but that it was limited to telling her that she

needed to let someone on the floor know where she was going to ensure sufficient cover on the tills but also that it was not his position that there was a need for two people on the tills.

111. We turn again to the note at p193 to provide assistance in resolving this dispute and find that Mr Chudasama told the claimant that she had to make sure there were two people on the till or instead to tell a manager know she was going to the toilet to ensure cover on the tills.

112. The claimant's complaint in this regard is that she felt singled out by Mr Chudasama as no other members of staff were required to do this before using the toilet. The claimant felt embarrassed and humiliated at being required to take steps to go to the toilet that were not required by other members of staff.

August 2020

113. In or around August the claimant discussed the possibility of working from home once she got to 26 weeks, with Mr Chudasama and Mr Rahman.

Third pregnancy related illness September 2020

114. On 7 September 2020 the claimant had two days absence from work as she was experiencing pain that felt like contractions. She spoke with Ms King on the telephone to report the absence.

115. Ms King and the claimant largely agree with the contents of the discussion between them. It was that Ms King questioned the claimant regarding the reason for the absence and when she would return. The significance of the exchange however differs on their different accounts.

116. On Ms King's account she asked the claimant what was wrong with her and when she would be back. She denies making a comment about having a stressful morning. In questions from the tribunal Ms King accepted that she told the claimant that pregnancy can be uncomfortable and also accepted that she may have told Mr Chudasama that the claimant was in discomfort.

117. On the claimant's account both the content the tone of the conversation between them left her feeling guilty for being absent and disbelieved and that the significance of her pains were being downplayed. Her evidence is that Ms King said 'what *exactly* seems to be wrong?', and, "*I* have had a stressful morning", and "Let me know if you will be in, because I will have to find cover". [the italics are to provide emphasis and are reproduced from the claimant's witness statement] It is relevant that by this stage the claimant was starting to loose trust in her employer because the exchanges she had with her managers regarding pregnancy issues left her feeling that those issues were not being taken seriously.

118. We find that the exchange took place in the way that the claimant describes in her witness statement and had the impact on her that she describes It is consistent with the notes the claimant made at p194 and is consistent with a number of exchanges with her managers by that stage,

in which they ignore requests for risk assessment and for a more supportive chair and appear not to take the pregnancy issues that she brings to her attention seriously.

119. Because she felt guilty after her conversation with Ms King for being absent, the claimant decided to work on 9 September despite still feeling ill and in pain. Later that day the claimant's midwife referred the claimant to hospital because of the pain.

120. The claimant messaged Mr Chudasama from hospital on 9 September [183] at 22.46. *"Hey Amar! Sorry for texting so late, but the pain got worse and midwife sent me to hospital. I'm still waiting to be seen and they are not sure what's wrong. I won't be in until the end of the week, sorry. I will call you tomorrow but thought I will text you now in case I'm asleep in the morning"*

Thursday 10 September 2020

121. The next day she spoke with Mr Chudasama. Mr Chudasama denies making the comments that the claimant ascribes to him, his evidence being that he asked if he could be of any support in that conversation but otherwise could not remember the details of conversation.

Pregnancy discomfort

122. The claimant's account in her evidence was that *'when I spoke to him he was cold and said "if its not an infection and there is nothing wrong with your baby, you should be at work"* and *"As Joanne said, you should get used to feeling discomfort, because you are pregnant"*.

123. Mr Chudasama denies making these comments. His evidence was that he does not remember the specific conversation but accepts that he would have had a conversation regarding when the claimant would return to work and to see what further support he could offer to her. Mr Chudasama accepted when asked by the tribunal that he had asked her in this conversation why she was having further scans and tests.

124. The claimant's evidence is that Mr Chudasama made her feel that her job was at risk because of her absences by telling her that he was concerned about her time off and needed to have a discussion with the claimant about this. When the claimant pointed out to Mr Chudasama that the absence was pregnancy related he replied *"it's customers demands I have in mind".*

125. Mr Chudasama's account of this conversation is that he does not recall it specifically but that he would have asked when she was expected to come back to work, as he would have done with any employee who was absent sick. His position is that the claimant may have taken the conversation out of context.

126. We find that the conversation took place in the way described by the claimant. She had very specific recall of the conversation and it is supported by the notes made and sent to her union representative on 14 September. In those notes she has written *"'Amar did not seem interested*

in my wellbeing, after me explaining what happened in hospital, saying that the baby is doing well and that they seem to think its just severe cramps and growing pains, but also that I'm still waiting for test results. He said 'if its not an infection and if nothing is wrong with a baby you should be at work'. And that*: "as Jo said, you should get used to feeling discomfort because you are pregnant".*

127. The comments regarding Jo (Ms King) are consistent with her witness evidence that she told the claimant she may feel discomfort during pregnancy. It is also consistent with oral evidence to the tribunal that her view was that pregnancy can be uncomfortable and that she had a discussion with Mr Chudasama regarding the claimant's discomfort.

128. The notes also record *"he also said that he is concerned about my absence since I've been calling in sick a lot and that we need to have a discussion about it. When I said that I thought pregnancy related absence is not being taken into consideration, he replied by saying that it's customers demands he has in mind"*

Pregnancy Risk Assessment

129. The claimant's evidence is that she raised with Mr Chudasama in that conversation that she had not had a proper Pregnancy Risk Assessment and that having been put on the till the day before she went into hospital she was concerned it was unsafe and was causing her discomfort.

130. On the claimant's evidence, Mr Chudasama responded "yesterday there was a demand for you to be on the till and that today you will be in complex". He then questioned why I wouldn't in in work the following day and said that thee would be a discussion about the claimant's absence on Monday"

131. Mr Chudasama's account is to deny that any of this was said.

132. This exchange is set out in the notes of 14 September and provide a contemporaneous note of the conversation. We do not judge the claimant to be a person who would make up such allegations and find that they happened as she described.

Absence affecting chance to work from home

133. The claimant's account is that in this same conversation Mr Chudasama told her that her absences may affect her opportunity to work from home going forward. The claimant's evidence is that she understood this to be a hidden threat.

134. Mr Chudasama gave evidence that he denied saying anything like that to the claimant.

135. We find that the comments were made to the claimant as she describes in her evidence. They are consistent with the notes she made at the time and that she sent to her union representative on 14 September.

Impact on the claimant

136. The conversation with Mr Chudasama left the claimant feeling hurt, upset, harassed and bullied. She felt unsupported by Mr Chudasama, that he was not taking her pregnancy illness seriously and this caused her to loose trust and confidence in Mr Chudasama.

Friday 11 September

137. The claimant and Ms King spoke on the phone on 11 September. Ms King requested an update from the claimant regarding her absence from work.

138. On the claimant's account Ms King asked the claimant "What *actually* is wrong with you", (the quote keeps the emphasis from the claimant's witness statement) and "well what is it then". The claimant's evidence is that Ms King told the claimant that she would not be paid for her absence and that she spoke to her in a patronising way that upset the claimant greatly as Ms King was behaving towards her in the same way that Mr Chudasama had.

139. On the claimant's account she told Ms King that Mr Chudasama had really upset her the day before in the way he spoke to her and that in light of this she wished to set up a Wellbeing Meeting. Ms King responded "what have *I* done wrong?" (emphasis kept from witness statement).

140. On Ms King's account she called the claimant to find out why she was unable to come into work so that her absence could be correctly recorded. She denies making any of the comments that the claimant refers to.

141. On Ms King's account she told the claimant that she may not be paid for some of her absence and that she needed to check this with HR. There is no evidence from the respondent of a query or ticket being raised with HR on this point.

142. We have again considered the contents of the notes at p194. These confirm the contents of the witness statement and also that the claimant told Ms King that the doctor would sign her off for the next week if things did not improve.

143. For the same reasons that we set out above, we find that the conversation with Ms King took place in the way described by the claimant in her evidence.

144. The claimant produced images from her mobile phone showing screen shots -238-242]. These show that for 7 & 9 September her absence is shown as 'Approved emergency leave (unpaid) and then later screen shots in which for the same dates her absence is shown as 'Approved Emergency Leave (Paid). They also show two screen shots for the 11 September. One shows 'Emergency Leave (unpaid) with the reason being 'other' and the other shows 'Emergency Leave (Paid) with the reason being 'pregnancy-related'.

Request for Wellbeing Meeting

145. After her conversation with Ms King, the claimant sent an email to Ms King and Mr Rahman on 11 September [190] to confirm her request for

a Wellbeing Meeting on 22 September. Her email was not responded to and this left the claimant feeling upset, hurt, anxious and unsupported.

146. Mr Rahman gave evidence that he never received that email and produced a screen shot of his inbox at that time to establish that the email did not appear in his inbox. This was added to the bundle during the hearing at p313 & 314. We are satisfied that Mr Rahman knew of the request for a Wellbeing meeting from the contents of the email at p187 dated 11 September. That is an email from the claimant to her union representative referring to the conversation that the claimant had had with Ms King earlier that day *"I spoke to Joe [sic] – my line manager and she said that, after discussion with Fats [*Mr Rahman], *they won't be happy to come to my house for a wellbeing appointment due to covid 19, however they are happy for us to attend to the branch even if I am signed off sick by the doctor since its just a wellbeing meeting"*.

147. There is no explanation provided by Ms King, as the claimant's first line manager, for her failure to respond to the claimant's email to confirm that the meeting would take place.

148. Having received no response from the respondent to her request for confirmation of the meeting, the claimant decided to cancel the Wellbeing Meeting. She wrote to Mr Rahman and Ms King on 18 *September "I no longer think the meeting would be beneficial, due to the lack of communication in confirming the wellbeing meeting as well as my personal circumstances".*

149. The claimant had concluded by this stage that her employer was not paying due regard to her wellbeing as a pregnant employee.

Grievance Letter 25 September 2020

150. The claimant concluded that it would be necessary for her to raise a formal grievance in order for her pregnancy related concerns to be taken seriously [203].

151. It is addressed to Mr Rahman and states:

152. "*I would like to discuss the way I have been discriminated against by my line managers since the beginning of my pregnancy…….my pregnancy has not been easy, what caused a fair amount of absence, right from the beginning….while my pregnancy progressed I had few unpleasant experiences at work, when I did not feel supported, which I openly discussed with my line managers. I openly admitted that I do not agree with the way I was treated on a number of occasions and discussion with line manager….I repeatedly requested to be moved from the till or to have a more supportive chair ordered and it always seemed to be ignored in a way.*

153. *After my 2 week absence, when I had an infection, absence was put down as non-pregnancy related and no return to work meeting took place and line managers never asked me what adjustments I may need"*

154. She refers to examples of feeling penalized or mistreated and sets out the problems she encountered in September in her conversations with Ms King and Mr Chudasama referred to in our findings above. She

recounts the conversation with Mr Chudasama in September referred to above in which she raised her concern that she had not had a proper risk assessment and that this was not addressed by Mr Chudasama. She tells Mr Rahman how upset she was.

155. She sets out her concerns about her absences being recorded as unpaid and then being changed to paid and continues *"this week's absence has not been added at all. All of that made me even more anxious and caused panic attacks. I became concerned that I may lose my job and that my maternity leave will be affected. I am also anxious about coming back to work and working with my managers.*

156. She continues *"I have thought about what would resolve this and I think it would be best for me not to work with both of the managers involved since I do not believe that a healthy relationship can be restored. I would like to receive an apology for being treated unfairly and would like to have clearance over my absences since it causes me great distress when my sickness is repeatedly being changed and I can not tell how much I will earn. I would like to receive any sort of clarification over my maternity leave since I did not receive any help with submitting it. I would also like to be assured that I will not be penalized for my pregnancy related absences."*

157. The letter ends with the claimant indicating that she would like to talk to Mr Rahman about this and wished to be accompanied by her Trade Union Representative, Mr Russell Waterhouse.

158. It is clear from the content of the letter that the claimant is raising a grievance about serious matters relating to a number of incidents of pregnancy discrimination from her managers. In this judgment we refer to the letter as a grievance letter.

Grievance Resolution process

159. We make some findings on the one page document that the respondent produced [293] that is headed Harassment & Grievance Resolution. We have not been provided with any other policy documents relating to the handling of grievances. The respondent's case is that Mr Rahman responded to the claimant's in accordance with their policies.

160. That document sets out that when an employee raises a grievance they can expect to be given help in understanding what options are available. Mr Rahman's witness evidence is that he spoke to the claimant and told the claimant that if she wished to, she could pursue matters through the formal grievance process. The claimant's evidence is that he did no such thing and instead when they spoke on 30 September, he tried to persuade her to attend the meeting without her union representative and that he suggested the meeting should be dealt with informally. The claimant was uncertain what processes were available to her. She was not able to access the respondent's intranet at that time as she was absent from work. We are satisfied that it was the respondent's responsibility in accordance with their process to ensure that the claimant understood what her options were – particularly given that the nature of

the complaint – and they failed to do so. No explanation is provided for this failure.

161. We find that Mr Rahman had no discussion with the claimant regarding what options were available to her and whether she wished to pursue her grievance formally. This is consistent with the HR note that appears at p232. This is a record of a conversation that Mr Rahman had with HR on 29 September 2020 to discuss the grievance letter. It starts out *"spoke to SBM [senior business manager – Mr Rahman] to discuss letter sent to him. SBM looking to speak to the colleague to address their concerns locally"* and ends *"SBM happy to attempt to resolve locally and case to be closed".* It confirms that further advice can be sought if the complainant wished to pursue matters formally. There is no discussion with HR about options – instead this tends to indicate a settled view that local and informal resolution would be carried out.

162. That document also sets out that to ensure concerns are addressed quickly, employees will be encouraged to resolve issues through a conversation or through mediation. It sets out that the formal process could only be used if informal resolution is not appropriate due to the nature of the complaint. It sets out that any mediation would be facilitated by an independent accredited mediator.

163. Mr Rahman was not able to assist the tribunal with understanding his thought process in determining that informal resolution was appropriate, notwithstanding the nature of the grievance being one of discrimination. He simply asserted that he believed mediation was appropriate.

ACAS Code of Practice and Guide to Grievances at Work

164. The claimant's complaint is that the respondent failed to follow not only its own grievance procedure in handling her grievance but also failed to follow the ACAS Code of Conduct. We therefore make some findings on what the ACAS Code and Guide say about handling grievances. Employment Tribunals are required to take the ACAS Code of Practice into account when considering relevant cases.

165. The Code of Practice sets out at paragraph 40 that following a grievance meeting 'decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance'.

166. The Guide indicates that mediation may be used with the assistance of an independent third party or mediator. It sets out that mediators may be employees trained and accredited by an external mediation service who act as internal mediators in addition to their day jobs.

167. It sets out that 'employees should aim to settle most grievances informally with their line manager. Many problems can be raised and settled during the course of everyday working relationships. '

168. It indicates that mediation may not be suitable if used as a first resort or if the individual is bringing a discrimination or harassment complaint that they want investigated.

169. The Guide confirms that the Code advises employers to keep a written record of any grievance cases they deal with and sets out the detail of what should be in the written record. This includes the nature of the grievance, what was decided and actions taken and the reasons for the actions.

The meeting 8 October

170. It is clear that the meeting to consider the claimant's letter was not a formal grievance meeting. Mr Rahman referred in his oral evidence to the meeting being a mediation meeting but also accepted that he was not an independent trained mediator, in accordance with the respondent's policy.

171. The claimant was accompanied by her union representative.

172. There are no notes of any discussion at the meeting, nor anything in writing recording how if at all it was resolved by the respondent and how things would move forward given the claimant's clear position that she did not believe she could return to work with the same managers.

173. At the outset of the meeting Mr Rahman said to the claimant that he was unaware of the claimant's situation. This upset the claimant and she challenged Mr Rahman in the meeting on this by referring him back to the meeting that they had had in May 2020.

174. The respondent's position is there was an airing of views at the meeting as between the claimant, Ms King and Mr Chudasama and the claimant left the meeting content with that discussion and accepting that that she may have taken the comments she complained of out of context. Mr Rahman's evidence was that he made findings that all parties needed to communicate better, that the claimant had misunderstood comments made to her.

175. The claimant's evidence was that the meeting became a continuation of the respondent not taking her or her pregnancy related concerns seriously and were another example of the respondent not taking her complaints seriously and instead it all being blamed on lack of communication. Her evidence is that Mr Chudasama accepted that he had said the things she complained of but tried to justify then by saying 'I'm sorry if you didn't feel like we supported you' The claimant's position is that this made things worse as there were no findings and no acknowledgment of any wrongdoing by the respondent. The claimant's position is that Mr Rahman was dismissive of her complaint, did not accept she had been discriminated against or that anyone had done anything wrong. The claimant accepted in that meeting that she may have misinterpreted some of the conversations that she had with Ms King.

176. We find that the claimant left that meeting accepting that the issues she had with Ms King had been resolved to a degree but not otherwise. We find that she continued to perceive that her pregnancy issues were not

being taken seriously and were instead being dismissed by the respondent. That she continued to feel aggrieved is corroborated by our findings on the discussions she had with Mr Thomas on 27 October.

177. There was a discussion at the meeting regarding the claimant's request for a more supportive chair. Mr Chudasama ordered a new chair for the claimant the next day, for it to be delivered to her at home. In fact no new chair was ever delivered to the claimant.

Return to work 12 October

178. It has been anticipated that the claimant would start working from home on or after Monday 12 October – to do so she had to attend some in branch training. She was not able to attend some of the in branch training. The working from home measure was taken to ensure that the claimant did not have to travel into the branch when pregnant and to allow her more flexibility. Mr Rahman messaged the claimant on Friday 9 October to say that Mr Chudasama would be supporting the claimant on the Monday.

179. The concerned the claimant and she emailed her union representative on Saturday 10 October [214] to seek assistance as she was worried about being managed by Mr Chudasama as she did not feel satisfied that her grievance had been resolved in that regard. She said *"I'm sorry for contacting you at the weekend but we couldn't get me logged on to the system yesterday so Fats messaged me that he will have Amar supporting me on Monday morning with it. Trouble is that it will be 9am an hour before branch opens and I really don't want to be with him by myself. I feel this is appropriate as we didn't agree on anything yet and grievance is still in process. I really wouldn't feel comfortable with it"*

180. This satisfies us that there had been no effective resolution to the claimant's grievance as the claimant remained concerned about being managed by Mr Chudasama. Mr Waterhouse responded to the claimant and said *"I suspect that Fats will not progress the grievance formally unless you specifically tell him that is what you want to do"*

New manager Dan Thomas

181. Mr Thomas started to manage the claimant at this time. Mr Thomas kept notes of his wellbeing meetings with the claimant [221-223]. These provide a contemporaneous account of those meetings but as we have already found at paragraph 47 above we are not satisfied that they provide a full account of all conversations that Mr Thomas had with the claimant.

182. The claimant met with Mr Thomas on 12 & 13 October to support her to receive the training that she needed. She expressed her concern to him on the 13th that she had not been able to do the training on the 12th. He endeavoured to reassure her on this. The claimant completed some of the training and left the branch. The claimant was feeling stressed and vicitmised by her managers.

Work place stress & continuation of grievance

183. She visited her doctor who signed her off with work place stress for 2 weeks and until 27 October. Thereafter she remained absent from work

for pregnancy related reasons until her maternity leave started. The claimant never returned to work. She started her maternity leave on 23 November 2020.

184. The claimant saw her midwife on or around 23 October [218]. Her midwife advised the claimant not to take any further action to pursue her grievance at that point to ensure the wellbeing and health of the claimant and her baby. The claimant wrote to Mr Waterhouse on 26 October [219] to explain the advise from the midwife and that the midwife *" wants me to avoid as much stress as possible. I will be proceeding with this as I was not satisfied with the outcome of the meeting we had with Fats, however it would be great if you could support me in postponing it"*

Midwife letter

185. The claimant's midwife wrote a letter dated 23 October [218] for the claimant to give to her employer. The claimant provided Mr Thomas with a copy of this letter. He uploaded it to Work Day on 26 October but did nothing more. He did not raise any ticket with HR to bring it to their attention nor did he bring it to the attention of Mr Rahman or any other manager. The letter raises concerns about how the claimant has been managed in her pregnancy, the stress that she has been under and the claimant's worries about the impact that this might be having on her unborn child. The letter sets out the importance of a workplace being free of stress and flexible around the needs of a pregnant employee to *"reduce the risks of pre-term labour, fetal growth restriction, hypertension, postnatal depression"*

186. It asks the respondent to review its maternity policies and risk assessments for pregnant women *"as employers need to take into account any health and safety risks to avoid to put any pregnant women in the same situation as Alicija today"*

187. The claimant never received any acknowledgment of receipt or response to the issues raised from either HR, from Mr Thomas or from any of the respondent's managers. This is notwithstanding the serious concerns about the health, safety and wellbeing of the respondent's pregnant employees and their unborn children in general terms and for the claimant specifically. The respondent has provided no explanation for this.

188. We are satisfied that the actions that the respondent took in relation to the letter demonstrates a casual attitude from the respondent to the serious issues raised by the midwife in relation to the health and safety of the respondent's pregnant employees and the claimant specifically.

27 October wellbeing meeting

189. The claimant and Mr Thomas had a wellbeing telephone meeting on 27 October. In that meeting the claimant confirmed that she had lost trust in how things will be managed moving forward. She confirmed that she remained dissatisfied with the way in which Mr Rahman had handled the meeting on 8 October and accepted that as between her and Ms King there may have been a misunderstanding but that she remained upset regarding the way Mr Chudasama had spoken to her and that she remained concerned she had not been taken seriously and that what had

happened would leave a mark against her and stop promotions in the future.

190. Although not recorded in Mr Thomas's note we find that there was also a discussion between the claimant and Mr Thomas regarding the possibility of resigning because of her dissatisfaction with the way in which her grievance had been handled and the possibility of continuing with the grievance once her maternity leave had finished. Mr Thomas told the claimant to take time to think about things and that she could progress matters when she returned from maternity leave. From that discussion the respondent understood, through Mr Thomas that the claimant did not consider the grievance as resolved, and that she was advised that she could wait until end of her maternity leave before determining whether to pursue it further. From that discussion the claimant understood that her employer had assured her that she could revisit the grievance when she returned from maternity leave.

191. By this stage the claimant had lost trust and confidence in Mr Rahman and Mr Chudasama and had little trust in how the company would manage her maternity going forward. She was to an extent reassured by her conversation with Mr Thomas.

December 2020

192. The claimant and Mr Rahman spoke during December about moving to a Connect home-based telebanking upon her return from maternity leave.

193. The claimant gave birth on 25 December 2020. She experienced post natal depression/baby blues after giving birth.

194. The claimant followed the advice of her midwife not to pursue her grievance in the autumn of 2020. After giving birth the claimant suffered from post baby blues, and was focused on breast feeding and bonding with her baby. She considered it important to focus on connecting with her baby and to ensure she did not transfer any stress to her baby through hormones in her breast milk. The claimant breastfed exclusively for 5 months and then weaned her baby to a bottle at 6 months.

195. During this period, the claimant remained hopeful that she would get a response from the respondent to the letter from her midwife. She thought that this might happen when she was due to return to work and did not consider that she had to take any further action whilst on maternity leave. She considered it important that her grievance was resolved to restore her trust and enable her to return to any form of employment by the respondent after her maternity leave ended.

June 2021

196. The claimant and Mr Rahman spoke to discuss the possibility of the Connect role on return from maternity leave.

197. On the claimant's account Mr Rahman promised that the role would be suitable because it would be more flexible for the claimant's childcare and personal needs. He encouraged her to consider it as a suitable job to

return to after her maternity leave. The claimant felt hopeful after this conversation.

198. On Mr Rahman's account he told the claimant that he did not know what the working patterns for the role were and he arranged for the claimant to speak to the relevant manager, Karen Eley who would be able to explain these.

199. We consider it to be inherently unlikely that Mr Rahman would have made a promise as such to the claimant to the claimant about the suitability of the role and is inherently more likely to have said what he has put in his witness statement. We are satisfied that he encouraged her to consider this opportunity upon return from maternity leave but told her she needed to speak to Ms Eley to find out the specifics.

200. The claimant's position is that after speaking to Ms Eley she realized that the role was not suitable for her as the role involved shift work meaning that her hours could not be guaranteed. This was unsuitable for the claimant given her caring responsibilities to her daughter and to her husband. The claimant felt that Mr Rahman had misled her about the role.

201. We are not satisfied that Mr Rahman misled the claimant about this job.

Return to Work: final attempt to resolve grievance 3/4 August 2021

202. On 26 July 2021 the claimant confirmed to Mr Rahman that she was planning to return to work on 20 September [172] but could return earlier. Now facing the prospect of having to return to work in branch she determined that she would give the respondent a final chance to resolve her grievance to enable her to return to work as an alternative to resigning.

203. She spoke with Mr Waterhouse and agreed with him that her wish to resolve the grievance would be escalated by him to the level of management above Mr Rahman and to the Area Director Karen Edwards. The claimant had contacted ACAS on 2 September to commence the process of early conciliation. Mr Waterhouse contacted the Area Director on 3 August [317].

204. Mr Waterhouse emailed Ms Edwards on 3 August 2021 [317/318] and said *"I have had a conversation with Alicija this morning she has given me permission to reach out to you. She has asked about how she can resign from the company due to the ongoing problems and stress she feels she has had with the team in Bristol. I would welcome a call with you before she resigns just to see if there is anything that can be done to put the situation right"*

205. Ms Edwards was on leave and responded by email to Mr Waterhouse asking him to speak with her assistant Andrea Bevan. Mr Waterhouse spoke with Ms Bevan and then emailed the claimant on 3 August to let her know what the respondent's response was. [229]

206. The final straw for the claimant was the realization that her grievance was never going to be taken seriously and addressed.

Notwithstanding the claimant knowing that Mr Waterhouse was going to ask whether there was a chance that matters could be resolved to avoid her resignation, the respondent's response gave no indication of any inkling on the part of the respondent to wish to do so. Instead the respondent restated the position of Mr Rahman - that the respondent believed her to be happy with the outcome of her grievance. Mr Waterhouse told the claimant what he had said to Ms Edwards namely *"it goes without saying that I responded well it does not appear that way or I would not be contacting Karen [Edwards]"*

207. In her oral evidence in cross examination the claimant said this and become upset whilst giving this evidence *"It wasn't straightforward, that email devastated me as none of my issues were ever going to be resolved nor my midwife letter addressed. Everyone kept telling me I was happy. My emotions were complicated, I did not know what actions to take"* The claimant's evidence in cross examination was that she understood that she was not being taken seriously, that the issues she had raised were not going to be addressed, it did not assist to be told that Mr Chudasama had left the branch as the issues remained unresolved and Mr Rahman was still in charge of the branch. We find that correctly describes the impact on the claimant on learning of the respondent's response to her wish to explore whether there was anything that could be done to put the situation right.

208. The claimant perceived that the response from the respondent relayed to her by Mr Waterhouse was extremely ignorant and that she felt like an inconvenience and a liability rather than a person. We find that that this is how the claimant felt at the time. The claimant's evidence is and we find that she had suffered from post natal depression/baby blues in the period after giving birth. The claimant's evidence was and we find that in after receipt of the respondent's response in August she started having panic attacks and was loosing sleep and was struggling with how to respond to the position she was in.

209. The claimant messaged Mr Rahman [173] on 4 August to let him know that she wished to extend her maternity leave for a full year. In her message to Mr Rahman she stated that the reason was because her husband was changing treatment for his medical condition. In oral evidence the claimant explained that was not the real reason and she was concerned that Mr Rahman might question her if she gave another reason. Her evidence was that by extending her maternity leave she didn't need to do anything at that stage.

210. This is consistent with her medical notes that appear in the bundle and which show she consulted her GP about her low mood on 13 August and again on 17 August. [261]. The 13 August entry indicates that she had had baby blues since giving birth which had seemed to be improving but for the past two weeks the claimant's mood had worsened and that she was getting upset easily for no reason and getting more angry. The claimant was given details of sources of support for mental health issues. The 17 August entry indicates some improvement to mood since seeking support.

211. The claimant's medical notes appear in the bundle and are referred to in that part of her witness statement that addresses injury to feelings. The claimant referred to them in closing submissions. Notwithstanding that we are addressing liability, the notes assist as they seem relevant to some issues that are before us on liability. Namely factors that might be relevant to affirmation and further in relation to out of time points.

212. Mr Rahman messaged the claimant on 26 August to ask the claimant if she would be attending her Keeping in Touch (KIT) days. She responded the same day [175] that she would not be attending any Keeping in Touch Days. She confirmed again to Mr Rahman on 7 September [176] that she would not be taking any KIT days.

213. ACAS completed Early Conciliation on 13 September 2021.

Resignation Letter 16 September 2021

214. Her letter [234] is addressed to Mr Rahman.

215. It states " *I am writing to inform you that I am resigning from my position of Customer service advisor….I feel I am left with no choice but to resign in light of my experiences regarding manager's misconduct, lack of communication and understanding between not only myself and managers but also between the management team and myself.*

216. Over the last year of my employment I have been mistreated and discriminated against while pregnant and on maternity leave. Regardless of my numerous complaints and grievance letter I have not been taken seriously and was even requested to be alone with the manager in question. I was also asked inappropriate and personal questions about my pregnancy and my wellbeing"

217. The letter refers to the claimant having to start her maternity leave early which is no longer being pursued as part of her claim.

218. The letter states *"I appreciate the opportunity that you have given me and I believe the skills I have gained will serve me well in the future, however I can no longer continue working in an environment that puts me through unnecessary stress and also makes me feel undervalued and disrespected"*

219. The letter offers a month notice and to undertake an exist interview if the respondent wishes her to do one.

The law

220. The relevant law is helpfully set out in the Case Management Order of Judge Salter of 10 August 2022 [66-82]. We do not repeat it here.

Submissions

221. The tribunal received oral submissions from the parties.

Respondent's submissions

222. We were taken to 5 authorities by the respondent.

223. ***Mari-v-Reuters UKEAT/0539/13*** at paragraphs 48 to 50. This case concerns the significance of the acceptance of sick pay and to the extent to which that indicated that the employee had accepted a demotion. In the Mari case the EAT set out that *"there is no absolute rule that acceptance of sick pay is always neutral….the significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position…..affirmation is a mixed question of fact and law"*

224. The respondent submits that receiving sick pay is analogous to maternity pay and that continuing receipt by the claimant indicates affirmation. The respondent submits that there is no explanation for the delay in resigning and no medical evidence and further that she was in correspondence with her employer in the period after 3 August 2021.

225. ***Fereday-v-South Staffordshire NHS Primary Care Trust UKEAT/0513/10/ZT*** at paragraphs 42-46. This case concerned an employee who was away sick and confirms that long delay in resigning can be evidence of affirmation. The decision of the Employment Tribunal that the claimant had affirmed the contract was upheld by the EAT. In Fereday the tribunal had found that there had been a 6 week delay from the outcome of a grievance decision to her resignation. During this period the claimant actively arguing with the respondent that some particular contractual provisions should be applied in her favour and she also complained about a change in her job title.

226. In Fereday the EAT confirmed that affirmation can arise in many ways as set out in WE Cox Toner (International) Ltd-v-Crook [1981] IRLR which confirmed that affirmation can be implied by long delay. The EAT cite this passage from Crook: an innocent party *"can choose one of two courses; he can affirm the contract and insist on its further performance or he can accept the repudiation; in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses….but he is not bound to elect within a reasonable time or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence affirmation…if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract".*

227. ***Madarassy-v-Nomura [2007] EWCA Civ 33*** at paragraphs 127-139 which deal with pregnancy risk assessments. It sets out the relevant provisions of the Management of Health and Safety at Work Regulations 1999.

228. In Madarassy the Court of Appeal agreed with the EAT that the Employment Tribunal had erred in law. Ms Madarassy had argued that it was not for a pregnant worker to identify a risk, that was the function of the risk assessment - Reg 16(1). She argued that a failure to complete a risk assessment was itself a detriment.

229. Nomura argued that its obligation under the Regulation did not arise unless 3 conditions are satisfied by the the evidential material before the Employment Tribunal. Work is of a kind (a) which could involve risk (b) by reason of her condition (c) to the health and safety of a new or expectant mother or her child.

230. In Madarassy the Court of Appeal concluded that the Employment Tribunal had erred in law because it did not make any express finding of a risk to health and safety arising from exposure to radiation from the computer; nor was there evidence from which it could infer such findings. Ms Madarassy's claim had arisen in relation to her comfort sitting before a computer and radiation from that computer.

231. Ms Madarassy's appeal was dismissed and the findings of the EAT were upheld. Matters were remitted.

232. ***Indigo Design-v-Martinez UKEAT/0020/14/DM*** at paragraphs 29-34. This relates to the importance of identifying the grounds for the treatment complained of in a claim of pregnancy discrimination. On the facts in that case the EAT confirmed that the Employment Tribunal had applied the wrong test in the pregnancy discrimination claim. It failed to adopt the two stage approach in both the sex discrimination parts of the claim and the pregnancy discrimination parts of the claim. The tribunal had fallen into error in this regard. *"failure to provide a notification of a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, 'because of' pregnancy or maternity leave. It may, for example be a simple administrative error".*

233. The respondent submits that the tribunal should consider this approach in this case and apply the provisions of the burden of proof to establish whether the pregnancy was the reason for the treatment complained of.

234. ***Sefton Borough Council-v-Wainwright UKEAT/168/14*** at paragraphs 50-53.

235. Sefton confirms the importance of identifying the reason why the claimant was treated in the ways complained of. The tribunal *"fell into error in assuming that the S18 question was answered by its finding that there had been a breach of regulation 10"* of Management of Health and Safety at Work Regulations 1999.

236. The EAT confirmed that the context in which an event happens is insufficient and instead the correct approach is for the tribunal to identify the reason it happened.

237. The respondent submits that the burden of proof is relevant and that it is for the claimant to show facts from which the tribunal could conclude that pregnancy was the reason for the treatment. If the burden of proof shifts to the respondent it submits that there is no general obligation to complete a pregnancy risk assessment. Unreasonable behaviour is not enough and the tribunal needs to ask itself was their unfavourable treatment and if so was it because the claimant was pregnant.

Discrimination

238. In overview the submissions of the respondent are that for the events complained of the claimant has made repeated misrepresentation of benign conversations and mispresented discussions to cast them in a negative light. The respondent reviewed each of the allegations and reminded the tribunal that we must identify the reason for the conduct complained of in so far as they are presented as claims of discrimination. The respondent has submitted that it is relevant that if there is a general risk to all CSAs from the chair it is not a risk arising from pregnancy.

Constructive Unfair Dismissal

239. There is a high threshold to establish a sufficient breach of the implied term of trust and confidence. Where there is a course of conduct it is important to identify the last straw which need not be a breach in itself but needs to add something relevant.

240. The respondent submits that if neither of the 2 events in 2021 (new p and q) constitute a last straw and contribute to a breach of the implied term of trust and confidence there is too long a delay from October 2020 and an affirmation of the contract.

241. In the alternative if the events in 2021 are a last straw then in any event there is too long a delay from the email in August 2021 in that there is a period of 6 weeks before the claimant resigns. It is relevant that the claimant was corresponding with her employer in this period. The fact of starting Early Conciliation on 2 August is a neutral event.

242. The respondent does not advance any potentially fair reason for the dismissal in the event that the tribunal concludes that it is not automatically unfair and examines it instead as a claim for 'ordinary' constructive unfair dismissal.

Victimisation

243. The submission is that the respondent did not subject the claimant to a detriment because she did a protected act.

Out of Time

244. It is agreed that any events that take place before 3 May 2021 are potentially out of time.

245. In relation to that possibility the respondent submits that there is a year of delay. The claimant was signed off sick on 14 October 2020 and started her maternity leave on 23 November 2020. The respondent submits that there is no medical evidence to support the evidence of the claimant to support her evidence that she wishes to avoid stress whilst breast feeding or that this would create a real risk. The respondent submits that she was able to pursue her complaint if she wished to.

246. In terms of prejudice the respondent argues that the delay has caused problems for the respondent as much of the evidence relies upon un-noted conversations and meetings. The respondent submits that if the respondent's witnesses are less credible because of this, this should be

factored into any exercise by the tribunal of any just and equitable discretion to extend time.

Claimant's submissions

Discrimination

247. In relation to the issue of the legal obligation to undertake a pregnancy risk assessment, the claimant submitted that the facts in this case were distinguishable from the Indigo case. The facts in the instant case do not establish an administrative error but instead a decision by the respondent not to undertake one notwithstanding several requests from the claimant to do so, this failure being raised in her grievance letter and the claimant's midwife raising with the respondent the need for pregnancy risk assessments. The claimant submits that check in meetings are not a substitute for a pregnancy risk assessment.

248. The clamant reviewed each of the allegations and submitted that the evidence indicated that she had been treated unfavourably and that the reason for this was her pregnancy.

Constructive Unfair Dismissal

249. The claimant has submitted that there was a continuing course of conduct by the respondent from May 2020 to August 2021 that amounted cumulatively to a breach of the fundamental term of trust and confident. The last straw was the realisation in August 2021 that the respondent was not going to address the claimant's grievance.

250. In relation to delay and affirmation the claimant submits that delay in itself does not necessarily indicate affirmation. The claimant submits that it is relevant that she declined the KIT days suggested to her by Mr Rahman in August and September 2021 and that the claimant needs to be given a reasonable amount of time to resign. The claimant submits that it is also relevant that there were numerous lines of communication running at that time with the claimant communicating directly with Mr Rahman but her union representative going above him to the Area Director. The claimant has also submitted that her medical records are relevant.

251. The claimant submits that the dismissal is automatically unfair as it is connected with the pregnancy.

Victimisation

252. The claimant submits that the claimant suffered the detriments set out because she had done a protected act.

Out of time

253. The claimant submits that the last discriminatory act took place in July 2021 when Mr Rahman misinformed the claimant regarding the possible new role in Connect.

254. Addressing the possibility of an extension of time the claimant submitted that any prejudice to the claimant caused by the passage of time was caused by the failure by the respondent's managers to have kept contemporaneous records. The claimant argues that it is relevant that she was absent from work with work related stress from 13 October and then

on maternity leave from 23 November. She was then not in work up to the point of her resignation. She was advised by Mr Thomas in October not to make a quick decision on the progression of her grievance.

Determination of claims

255. We have been satisfied in general terms by our findings of fact that the claimant had cause to perceive that her concerns and complaints regarding her pregnancy and pregnancy illness were not being taken seriously by the respondent.

256. Our findings indicate that the respondent is an employer who provided no training to its managers on the management of pregnant employees and that each of the managers before us had a different view of their responsibilities in relation to the completion of pregnancy health and safety assessments. One of the claimant's managers had never even heard of a pregnancy risk assessment and had little understanding of how to record pregnancy related illness absence. Mr Rahman variously argued that he considered them important, that he expected his managers to undertake one, that one was not needed until 12 weeks gestation but also that wellbeing chats were sufficient to support a pregnant employee. We have found that the claimant raised a Pregnancy Risk Assessment with him in May 2020 but that thereafter he took no steps to ensure that one was undertaken.

257. We consider the management by the respondent to the pregnancy issues raised by the claimant to be unusually casual and have considered what explanations exist for this approach. Examples of this include:

Response to the requests for a pregnancy risk assessment. The claimant asked two different managers for a pregnancy risk assessment and neither of them provided any proper response to the request and in any event did nothing ensure that an assessment was carried out. Mr Rahman was asked in May and Mr Chudasama in September.

258. Mr Rahman denied that he was asked. We have found that he was asked. Mr Chudasama also denied that he was asked in September, we have found that he was.

259. The claimant also raised her concern in this regard in her grievance letter but no response was provided to this concern.

Response to requests for a more supportive chair

260. The claimant asked two different managers for a more supportive chair for use when she was on the counter. She asked Mr Rahman in May 2020 and Ms King and Mr Chudasama in July 2020.

261. The respondent's witnesses deny that these requests were made. We have found that they were.

262. Given that the counter chair was raised and had no arms, and given that the claimant was pregnant, the lack of any action to ensure that the claimant was provided with the chair she had asked for seems unusual and requires some sort of explanation. There is no explanation provided

for the claimant not being provided with such a chair. The respondent has submitted that it would be relevant if the chair provided a general risk to all CSAs but has not provided any evidence to indicate that they had reached such a conclusion.

The disparity of view between the managers on the need for a pregnancy risk assessment. There was a notable disparity of view between the managers regarding their responsibilities in undertaking a risk assessment. We have made findings on this disparity. None of Mr Rahman, Mr Chudasama and Mr Thomas agreed on what might trigger the responsibility to undertake a pregnancy risk assessment. No explanation is provided for this disparity.

263. It is also a notable fact that the claimant's first line manager did not even know what a Pregnancy Risk Assessment was.

264. There is no consistent explanation for the failure to have undertaken a pregnancy risk assessment.

No training for managers on managing pregnancy. We consider it relevant as a finding of fact that the respondent's managers are provided with no training on managing issues that might arise in pregnancy. This might for example include how to manage pregnancy related illness absences in terms of pay and how those absences are recorded and the completion of a Pregnancy Risk Assessment.

265. There is no explanation for this lack of training.

Response to the grievance. Notwithstanding that the claimant raised a serious complaint of discrimination with her manager, Mr Rahman has provided no satisfactory explanation for (a) not ensuring the claimant understood what options were available to her to resolve the complaint, to include that she could progress it formally. That would have been consistent with their own policy and with the ACAS Code; (b) determining in his own mind that informal mediation was appropriate notwithstanding any consideration being given to the nature of the complaint being one of discrimination. The 'nature of the complaint' is a relevant consideration in the respondent's policy in determining whether a formal or informal process should be used. The ACAS Code and Guidance also sets out that mediation may not be suitable as a first resort or if the complaint relates to discrimination; (c) determining that he would enter what he considered to be a process of mediation notwithstanding that he was not an independent or trained mediator. Both the respondent's own policy and the ACAS Code and Guide sets out that mediation should only be carried out with an independent trained mediator; (d) keeping no written record of the discussions at the meeting on 8 October, of the outcome of those discussions and what actions were to be taken thereafter and the reasons for them. This would have been consistent with the ACAS Code and Guide.

266. No explanation is provided for any of this beyond Mr Rahman asserting in evidence that he believed what he did to be appropriate. We consider these failures by the respondent to have handled the grievance in way that was consistent not only with their own policy but also with the

ACAS Code to be entirely consistent with the tenor of the claimant's case. Namely that this respondent did not take pregnancy issues seriously and did not take her pregnancy issues, pregnancy related illnesses and pregnancy discrimination grievance seriously. Instead the respondent was seeking to minimise their significance. Such an approach would be compatible with the possibility that discrimination complaints in the context of pregnancy are not taken seriously.

Acts complained of

267. We are satisfied that Ms King put a degree of pressure on the claimant on 13 May 2020 regarding her pregnancy related absence by telling her that she could have the next day off but that she would have to see about the next day.
268. We are satisfied that Ms King indicated irritation, by the tone in her voice, with the claimant on 14 May when the claimant indicated that on the doctor's advice, she would not be back at work until the Monday.
269. We are satisfied that the claimant asked Mr Rahman for a Pregnancy Risk Assessment in the week of 18 May 2020 and that he told her that one was not needed at that stage. He did not complete a Pregnancy Risk Assessment.
270. We are satisfied that around July 2020 Ms King recorded the claimant's pregnancy related illness as non-pregnancy related.
271. We are satisfied that (i) on or around 13 July 2020 the respondent failed to take steps to ensure that the claimant had less sitting time at the till (ii) failed to provide the claimant with a supportive chair while sitting at the till.
272. We are satisfied that on or around 20 July 2020 Mr Chudasama said to the claimant 'you are not the only one with problems' and 'you should hear what I am going through'.
273. We are satisfied that on or around 20 July Mr Chudasama asked the claimant to ensure that there were two other colleagues on the till before she could use the toilet. He also told her that in the alternative she could tell a manager that she was going to the toilet.
274. We are satisfied that on or around 7 September 2020 Ms King downplayed the claimant's illness and made her feel guilty for her pregnancy related absence by the comments set out.
275. We are satisfied that on or around 10 September 2020 Mr Chudasama said to the claimant all the comments that are ascribed to him in paragraphs (i-vi).
276. We are satisfied that on or around 11 September 2020 Ms King said to the claimant the comments that are ascribed to her in paragraphs (i-iv) with the exception that we have found that Ms King said to the claimant that she may not be paid rather than that she would not be paid.
277. We are satisfied that the respondent failed to respond to the claimant's request on 11 September 2020 for a wellbeing meeting.
278. We have not been satisfied that on or after 18 September 2020 Ms King told the claimant that her pregnancy related absence would not be paid. Our findings show only one earlier conversation about the possibility of not being paid for pregnancy absence.
279. We are satisfied that on or around 30 September 2020, Mr Rahman did and said the things ascribed to him in paragraphs (i-iii)

280. We are satisfied that on 8 October 2020 and at the claimant's grievance meeting Mr Rahman said and did the things ascribed to him in paragraphs (i-iv).

281. We are satisfied that on or around 23 October 2020 Mr Thomas uploaded the letter form the claimant's midwife to New Day but otherwise took no action to acknowledge it or respond to it and Mr Thomas did not forward the letter to HR by the raising of a ticket.

282. New paragraph p is agreed to be: upon receipt of the email from her union representative on 3 August 2021, the claimant understanding that the respondent was not going to do anything further with her grievance' We are satisfied that the claimant did understand upon receipt of that email that the respondent was going to do nothing further with her grievance.

283. We have not been satisfied that in or around June 2021, Mr Rahman misinformed the claimant about the flexibility of a new role elsewhere in the business.

S18 Equality Act: Pregnancy Discrimination

284. The statute provides that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of her pregnancy or because of illness suffered by her as a result of it.

285. The claimant relies upon all of the above acts as acts of pregnancy discrimination, her case being that they amounted to unfavourable treatment because of pregnancy/pregnancy illness. They all took place during the protected period.

286. We have found that they all took place as described by the claimant other than in relation to allegation (j) where we have found that Ms King said that they claimant may not be paid rather than that she would not be paid, (l) and (q).

287. Was the unfavourable treatment complained of because of pregnancy or because of pregnancy illness?

288. In answering this question we remind ourselves of the guidance from ***Sefton*** that the context in which something happens is not enough. We would fall into error if we did not adopt the correct approach identify the reason it happened.

289. We do not consider that we are in a position to make positive findings regarding why the acts complained of took place. Many of them are denied by the respondent and few have any contemporaneous notes assisting in understanding why the various events happened as they did.

290. We are therefore assisted in answering the reason why question by adopting the provision of S136 relating to the burden of proof. The respondent has submitted that it is for the claimant to show facts from which we could conclude that pregnancy was the reason for the treatment.

291. Our findings indicate more than a difference in treatment or unfavourable treatment and the fact of the claimant being pregnant. The totality of our findings indicate a number of incidents which include that the respondent ignores specific pregnancy requests relating to health and safety, misinformed the claimant regarding how her pregnancy absences should be treated, caused her to fear that there will be negative consequences because of her pregnancy absences and then processed her pregnancy discrimination grievance in a way that was not compatible with either their own policy or the ACAS Code.

292. We are satisfied from the facts as found, that we could conclude that pregnancy and pregnancy illness indeed form the reason for the treatment. The claim is brought on the basis that this respondent did not take her pregnancy and her pregnancy issues seriously. If that were right it would mean that the reason for the treatment complained of is indeed pregnancy. We do not understand the respondent to be arguing that in general terms they do not take discrimination matters seriously and that therefore explains their actions.

293. We have set out at paragraphs 255-266 some of the features in our fact finding that tend to indicate that there is what we describe as a systemically casual approach to the handling of pregnancy issues. This includes ignoring 2 requests for a pregnancy risk assessment and two requests for a supportive chair while working on the counter, a manager not knowing how to handle pregnancy illness absences and not knowing if an employee would be paid, a manager not knowing of the existence of a pregnancy risk assessment and others disagreeing on when and whether one should be completed, managers putting pressure on the claimant to return to work notwithstanding her being absent with pregnancy illness, a manager bypassing the respondent's own policy for handling grievances and not following the ACAS Code . In light of there being no satisfactory explanations from the respondent that would tend to indicate an alternative explanation for the treatment we conclude from our fact finding that the events complained of which succeed, amount to unfavourable treatment because of pregnancy or pregnancy illness.

294. The other possibility put forward by the respondent is that the claimant has exaggerated or misinterpreted events. We reject that alternative on the basis of our findings. Although our findings do include rejecting some of the events as characterised by the claimant as being discrimination, in the round our findings do not support such a possibility.

Pregnancy Risk Assessment

295. We deal specifically with the question of whether the obligation under Regulations 3 & 16 of the Management of Health and Safety at Work Regulations 1999 had been triggered. Further and if so, whether a failure to complete such an assessment is because of pregnancy or some other reason such as an administrative error.

296. From ***Madarassy*** we understand that that the obligation will not arise unless 3 conditions are satisfied by the evidential material before us. In that case the issue arose in relation to the claimant's comfort in working at and radiation from a computer. The case report refers to there being no evidence on the facts other than some general statements made by Ms

Madarassy herself about pain and discomfort. The conditions are that (a) work is of a kind that could involve risk (b) by reason of pregnancy (c) to the health and safety of a new or expectant mother or her child.

297. On the facts of the instant case we have evidence of (i) the respondent itself concluding that the health and safety of pregnant CSAs required adjustments to working practices – namely ensuring they did not have to carry heavy bags of coins and not to have to be on Meet and Greet other than in an emergency to avoid having to stand (ii) two requests from the claimant to managers for a risk assessment to be carried out in light of her chair at the counter not being supportive enough and a reminder in her grievance letter that this request had not been actioned and (iii) two requests from the claimant to managers for a more supportive chair and (iv) Mr Rahman considering that pregnancy risk assessments were important and expected one of his managers to carry one out.

298. We consider that that meets the conditions set out in Madarassy and that the obligation therefore arose. These are not generalised statements from the claimant. They are set in the specific circumstances of her heightened chair having no arms and requests for a more supportive chair. She also made specific requests for a pregnancy risk assessment in light of the lack of support on her chair. Further on the respondent's own evidence they have themselves identified matters that could involve risk to the health and safety of pregnant CSAs.

299. We accept the respondent's submission that if an obligation arises we must go on to determine the reason one was not completed and that unreasonable behaviour is not enough.

300. We reject any possibility that an administrative error explains the failure. The respondent instead ignored two requests from the clamant while she was still at work and then failed to address her concerns in this regard when she raised this in her grievance letter. We regard this response to be consistent with the respondent failing to take pregnancy matters seriously.

301. Subject to the time limitation issues that we address below we find that the claimant has been treated unfavourably because of pregnancy/pregnancy illness.

S27 Equality Act: Victimisation

302. It is accepted by the respondent that the claimant's grievance of 25 September 2020 is a protected act.

303. We must determine whether any the events from (m) to (r) amount to detriment because the claimant had done the protected act.

304. We approach this question in a way consistent with our approach to the claim under S18. What is the reason for the treatment?

305. Consistent with our approach to the claim under S18, we determine that the reason is the consistent casual approach to the handling of

pregnancy related matters and her concerns not being taken seriously. That approach does not alter after the claimant raises her grievance. Mr Rahman's approach to the handling of her complaint is consistent with it. Our findings do not support a determination that it is the raising of the pregnancy discrimination complaint that is the reason for the treatment complained of.

306. The claim for victimisation is therefore dismissed.

Constructive Unfair Dismissal

307. No timing issues arise in the claim for unfair dismissal, it is presented within the time limits set out.

308. S 95 (1)(c) of the Employment Rights Act states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. The burden is on the claimant to show that there is a dismissal.

309. The claimant relies upon the conduct of the respondent in events (a) to (q). We refer to paragraph 36 (a) to (c) in the order of Judge Salter to guide us in determining this part of the claim.

310. Because the claimant has qualifying service to bring a claim for ordinary unfair dismissal the burden falls on the respondent to establish the reason for the dismissal in the event that we determine that there has been a dismissal.

311. The respondent does not advance any potentially fair reason for the dismissal.

Has there been a dismissal?

312. In accordance with the guidance in ***Western Excavating -v-Sharp [1978] ICR 221*** we consider whether the employer is guilty of conduct which is a significant breach gong to the root of the contract. If so then the employee is entitled to treat herself as discharged from performance and terminate the contract by reason of the employer's conduct. The employee would be constructively dismissed.

313. We consider that the conduct of the employer, in terms of how it managed the claimant's pregnancy issues, strikes at the root of the contract in terms of the need for a pregnant employee to trust her employer to manage her such that her pregnancy illness absences are properly managed in terms of pay and recording of absences, that her health and safety and that of her unborn child are properly taken account and that any complaints arising from the claimant's concerns about failures in that regard are taken seriously and properly investigated and responded to.

314. We have found that (other than in relation to (j), (l) & (q) as set out above) the events relied upon by the claimant to found her claim of pregnancy discrimination took place and amounted to unfavourable treatment because of pregnancy.

315. The events relied upon in the claim for unfair dismissal took place in a period from May 2020 and until August 2021, with the claimant being on maternity leave from November 2020. We are satisfied that, up to the point of her starting maternity leave, the events relied upon caused very significant damage to her ability to trust her employer.

316. We are satisfied from our findings that these events started to upset the claimant in May 2020 and to erode trust and confidence in her employer such that by the time her maternity leave started the claimant had almost no trust in the respondent. This is clear from her conversations with Mr Thomas in October 2020 when she told him that she had lost trust in how things would be managed moving forward and discussed both the possibility of resigning and the possibility of continuing with her grievance once her maternity leave had ended. From those conversations Mr Thomas understood that the claimant did not regard her grievance as resolved, that she was concerned that she was not being taken seriously but also that she was not in a position to pursue it further at that stage on the advice of her midwife because of the stress it was causing her. The claimant was signed off work with work related stress from 13 to 27 October. Her maternity leave started on 23 November. She gave birth on 25 December. Her focus naturally needed to be on maintaining her wellbeing and that of her unborn child and avoiding stress. Mr Thomas told the claimant that she should take her time and reassured the claimant that she could progress her grievance when she returned from maternity leave.

317. We consider this conversation to be important in the sense that by the time it took place trust and confidence hung by a thread. The claimant was persuaded by Mr Thomas not to do anything hasty and instead to wait until her maternity leave was over to resolve her grievance at that stage if she wished to. That is what she decided to do.

318. After the birth of her child the claimant's focus was naturally on adjustment to motherhood, bonding with her child and breastfeeding.

Event (q) conversation in June 2021

319. The claimant relies upon event (q) as constituting a further breach of the implied term of trust and confidence. We are not satisfied that that is a proper characterisation of that event and are not satisfied that the conversation with Mr Rahman objectively added anything further to the damage to trust and confidence. We have already rejected the possibility that this conversation constituted pregnancy discrimination.

320. By June 2021 it is clear that the claimant had no trust in Mr Rahman. It is for that reason that she did not want to engage with him further in any attempts to resolve her grievance. She did however have to engage with him regarding return to work. The conversation was an attempt by Mr Rahman to find the claimant a home based role in Connect upon her return which did not involve the claimant returning to work in branch.

321. He was optimistic that it may be suitable for her and put her in touch with the manager of Connect. It was the claimant's conversation

with the manager of Connect which led her to realise that the role was not suitable for her.

Event new (p) Last Straw 4 August 2021

322. The last straw event relied upon by the claimant took place on 4 August 2021. We remind ourselves that at this stage the implied term of trust and confidence had been severely damaged and was, as we describe it, hanging by a thread after her conversation with Mr Thomas and when the claimant started her maternity leave. Whether that thread was strengthened or whether it finally snapped was dependent on how the respondent managed any indication from the claimant upon her return from maternity leave regarding the resolution of her grievance.

323. Although not stated in bold terms the communication to the respondent by the claimant, through her union representative on 3 August 2021 was clear. This employee is about to resign, there are ongoing problems – is there anything the respondent can do to put the situation right before she resigns.

324. The answer came back to the claimant that the respondent gave no inclination to put matters right and instead believed that the claimant was happy. This response was consistent with the response that Mr Rahman had offered in October 2020.

325. We remind ourselves that the claimant knew from her conversation with Mr Thomas in October 2020, that the respondent understood that the claimant was not happy and that the grievance was not resolved, that the claimant had considered resigning in October 2020 but had been reassured by Mr Thomas that she could revisit the resolution of her grievance upon return from maternity leave.

326. In terms of whether this conduct by the respondent now added something further to the breach as a last straw we are satisfied that it did. This was the straw that finally caused that very fine thread of trust and confidence to break. It added something to the previous breaches and was consistent with them in that it confirmed that the respondent was never going to resolve her concerns about the management of her pregnancy and pregnancy discrimination.

327. The respondent behaved in a way that was likely to destroy or seriously damage the trust and confidence as between the claimant and the respondent and it had no proper cause for doing so. Through a number of its managers, it persisted in a course of conduct which undermined the claimant's ability to trust her employer, which indicated that her pregnancy concerns were not being taken seriously, that her health and safety as a pregnant employee was not being properly managed, that her pregnancy illness absences were not properly managed and that her complaints about all of this were also not taken seriously.

Did the claimant resign in response

328. The claimant did resign in response to the breaches. Her resignation letter is fulsome and makes that abundantly clear.

329. We have considered the significance of the fact that the resignation letter refers to that part of the claim that has been withdrawn by the claimant. Namely that she was required to start her maternity leave early. We do not consider that this impacts on our determination that she resigned in relation to the breaches that she does rely upon.

Affirmation – did the claimant tarry before resigning and affirm the contract?

330. We have reminded ourselves of the guidance given in the cases submitted by the respondent.

331. From ***Mari*** we understand that the receipt of sick pay in the face of repudiatory breach, may not always be a neutral event and that the circumstances in may vary infinitely. The respondent submits that receipt of sick pay is analogous to maternity pay and that continuing receipt indicates affirmation.

332. ***Fereday*** found that a 6 week delay from the outcome of a grievance to a decision to resign for an employee who was away sick indicated affirmation. In that case in that 6 week period the claimant continued to actively argue with the respondent about her contractual provisions.

333. Fereday assists in taking us to the words of the EAT in ***Crook*** that confirms affirmation can be implied by a long delay. At some point the innocent party has to choose between affirmation or the acceptance of the repudiation. It sets out that the innocent party is not bound to elect with a reasonable time or any other time. Mere delay unaccompanied by an express or implied affirmation of the contract.

334. We are examining a 6 week period from the last straw on 4 August 2021 to resignation on 16 September.

335. The claimant submits that delay itself does not necessarily indicate affirmation. That it is relevant that the claimant declined the KIT days suggested by Mr Rahman in August and September 2021, that the claimant needs to be given a reasonable amount of time to resign in all the circumstances. These include that her medical records are relevant. We have made findings on her medical records at that time.

336. We consider it helpful to consider what is stated in Mari and that circumstances may vary infinitely. We therefore focus on the circumstances in this case.

337. If it is right to compare the receipt of maternity pay to sick pay in terms of affirmation, as submitted by the respondent, then we must consider whether the receipt of maternity pay from 4 August to 16 September indicates affirmation.

338. We are not satisfied that, in itself, it does because there are a number of other things happening in the period from 4 August to 16 September that are potentially relevant to the question of affirmation.

339. The claimant gave evidence that upon receipt of the email of 4 August *"it wasn't straightforward, that email devastated me as none of my issues were ever going to be resolved nor my midwife letter addressed. Everyone kept telling me I was happy. My emotions were complicated, I did not know what action to take"* We have found that the letter had the impact that she described. She had, until receipt of that email, continued to hope that the grievance might be resolved and the issues raised in her midwife letter be addressed.

340. We are satisfied from this that the claimant's thought process was thrown in to a degree of turmoil and this is corroborated by her medical records which show a visit to her GP on 13 August with the problem described as 'Tearful' and in which the claimant reports to her GP that things had worsened for her in the past 2 weeks and that she was crying and getting upset easily for no reason and getting more angry. She returned on 17 August with the problem described as 'Depressed Mood'. This corresponds with the period after receipt of the email of 3 August.

341. The claimant messaged Mr Rahman on 4 August to let him know she wished to extend her maternity leave for a year. We have considered whether this could indicate an affirmation of the contract as we can see that it arguably could. Her evidence was that she did so as it would mean that she wouldn't need to do anything at that stage and did not wish to be questioned by Mr Rahman, she was panicking. We therefore understand this to be a response to the turmoil caused by the email received on 3 August and is consistent with it. We are therefore satisfied that this is not consistent with an affirmation of the contract.

342. The claimant responded to Mr Rahman's enquiry regarding KIT days on 26 August and 7 September to confirm that she would not be attending them. This is not correspondence that is consistent with affirmation of the contract. Had the claimant attended KIT days that could have been an indicator of affirmation.

343. There is nothing comparable to facts in Fereday and a 6 week period in which the claimant continues to correspond with the respondent to argue about contractual provisions.

344. The circumstances in the instant case include that the claimant's mental health started to deteriorate after receipt of the email on 3 August. Accepting that the answer to the question is a mixture of fact and law and taking all the above factors into account we are satisfied that the claimant resigned within a reasonable period of time and that the 6 week period between receipt of the email and communicating her decision to resign does not indicate an affirmation of the contract. The claimant resigned in relation to the breaches of contract with the last straw taking place on 3 August 2021.

345. We are therefore satisfised that there was a constructive dismissal. No potentially fair reason is advanced by the respondent.

Automatic unfair dismissal S99 Employment Rights Act & Regulation 20 Maternity & Parental Leave Regulations 1999

346. Was the constructive dismissal in response to the alleged acts of discrimination, if so the dismissal is automatically unfair.

347. Pregnancy discrimination lies at the heart of all of conduct by the respondent that the claimant relies upon to support her claims. Her resignation was in response to them with the final straw being realisation that her pregnancy discrimination grievance was not going to resolved. That last straw added something of significance to the pre-existing damage caused by earlier events. We are therefore satisfied that the dismissal is automatically unfair.

Ordinary unfair dismissal S98(4)

348. If this approach is wrong we would in any event determine that the dismissal was unfair on the basis of S98(4). There is no potentially fair reason advanced by the respondent.

349. The claimant resigned in response to conduct of the respondent that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The respondent had no reasonable or proper cause for this.

350. <u>Out of time – S18 Claim</u>

351. In relation to the claims under S18 Equality Act out of time issues arise as set out in the Order of Judge Salter.

352. Events that took place before 3 May 2021 are out of time.

Did the claimant submit the ET1 within 3 months of each act of discrimination complained of?

353. The claimant did not do so. On the basis of the claim as unamended the last act relied upon took place in June 2021. We have found that that act did not constitute pregnancy discrimination.

354. On the basis of the claim as amended during the hearing it appears that the new paragraph (p) last straw that took place on 3 August 2021 is in time, although we received no submissions on this point and it is unclear whether the claimant is relying upon this last act as being also one of pregnancy discrimination. We have therefore approached the out of time issue for the Equality Act on a number of basis to cover what appear to be all possibilities.

Last act of discrimination

355. If the last act relied upon is event (q) that took place in June 2021, we have not been satisfied that act is one of discrimination.

356. If the last act relied upon is event new (p) that took place in August 2021 we have been satisfied that that act amounted to discrimination. It was confirmation that the claimant's complaint of pregnancy discrimination was not going to be progressed by the respondent. If relied upon and on its face this event appears to be in time.

357. All earlier events took place between May 2020 and October 2020 and on their face are therefore all out of time.

Continuing act?

358. In accordance with S123(3) we must determine the issue of whether there was conduct extending over a period such that the conduct is to be treated as done at the end of the period.

359. We have reminded ourselves of the legal guidance that exists in addressing this question. We should not focus to too great an extent on whether a policy as such exists such that it would be proper to determine that there was a continuing act. Our focus should be on whether there is an ongoing situation or continuing state of affairs rather than a succession of unconnected or isolate specific acts. We should examine the substance of the complaints in question and consider whether they can be said to be part of one continuing act by the employer.

360. We have found that none of the claimant's managers had been trained in managing employees who are pregnant and adopted what we have described as a systemically casual approach to all the pregnancy issues that she brought to their attention. This in turn caused the claimant to feel undermined, unsupported and in general terms not taken seriously in terms of her needs for support when pregnant and when suffering pregnancy illness. To the extent that it is relevant the Area Director's response to the claimant in August 2021 through her assistant continued this approach.

361. We consider that these facts do not indicate a policy as such but do indicate an ongoing situation or continuing state of affairs. We are satisfied that there was conduct extending over a period and that the last act took place at the end of that period.

362. As it is unclear whether the last act relied upon as an act of discrimination took place in October 2020 ((n) and (o)) or in August 2021 (new (p)) we address both possibilities.

363. In the event that the last act relied upon took place in October 2020 the claim is out of time. In the event that the last act took place in August 2021 the claim is in time.

Extension of time?

364. In accordance with S123(1)(b) we should consider whether if out of time, the claim was made within a further period that the tribunal considers just and equitable.

365. We remind ourselves that there is no presumption that we should exercise the discretion to do so unless we have been satisfied that it is just and equitable to extend time limits The exercise of discretion is the exception rather than the rule.

366. We approach this on the basis that the correct analysis of the case is that the last act complained of took place in October 2020 and that any delay should be examined from that date.

367. We consider the following relevant: (a) in that month Mr Thomas told the claimant that she could delay the progression of any further complaint about her pregnancy grievance until her return from maternity

leave. Consistent with this, when the claimant was due to return from maternity leave in September 2021, she raised her ongoing problems with the respondent in August 2021 and asked if there was anything that could be done to put the situation right as an alternative to resigning. (b) the claimant gave birth in December and was thereafter very naturally focused on the process of adapting to being a mother, caring for an infant and breastfeeding for 6 months (c) the claimant suffered from what she has described in her evidence as post natal depression after giving birth and is described as baby blues in her GP records, this lasted for some months after giving birth (d) in August 2021 and after receipt of the email on 3 August 2021, the claimant suffered some mental health problems.

368. The length of the delay is 11 months which we regard to be not an inconsiderable period of delay. When we look at the reasons for it they appear to support the possibility that we should exercise our discretion in favour of an extension. We consider that the fact of the assurance by Mr Thomas would tend to indicate that it would be just to exercise our discretion. Further the fact of having given birth and entering a period of maternity leave supports the possibility that this is a good reason for the delay, that is further supported by the baby blues she had after giving birth and the mental health problems that she had in August. The reason for delay after receipt of the letter of 3 August has already been addressed in our judgment when we examined the affirmation point above.

369. We also consider relative prejudice. The respondent has argued that it is prejudiced by the delay because so much of the relevant evidence relates to conversations of which there is no written record made by the respondent and thus this affects memories. Accepting that that they may be so we regard that as a feature that does not weigh very heavily in favour of the respondent in terms of the balance of prejudice. It is clear that some managers did take notes, it seems that practice may have varied. Mr Thomas did and Mr Chudasama did. Mr Chudasama had destroyed his notes. Ms King and Mr Rahman chose not to take notes of their discussion with the claimant about her pregnancy issues. There has been no satisfactory explanation provided by Mr Rahman for his failure to have documented any part of the handling of the claimant's grievance and we have addressed this in our findings.

370. We consider the balance of prejudice would weigh more heavily against the claimant in the event that we did not exercise our discretion. We have been satisfied in terms of reason for the delay. Even accepting that the claimant may advance her claim for constructive unfair dismissal we do not regard that as a complete answer in all the circumstances given the importance of workers being able to bring their claims for discrimination to an Employment Tribunal.

371. We therefore do exercise our discretion to extend time such that if the last act of discrimination complained of took place in October 2020 the claimant may proceed with the claim.

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Employment Judge Christensen
Date 12 September 2023

Reserved Judgment & Reasons sent to the Parties on 28 September 2023

For the Tribunal Office