EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: 4105899/2022 and 4101052/2023

Final Hearing Held in person in Edinburgh on 4 to 7 July and 9 to 11 August 2023; and members' meeting on 7 September 2023

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Employment Judge: Russell Bradley
Tribunal Member: Ms L Grime
Tribunal Member: A Matheson

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Miss Raegan Drew — **Claimant**
D Milne
Advocate

The Co-operative Group Limited — **Respondent**
A MacPhail
Barrister
Instructed by Hill Dickinson LLP

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous Judgment of the Tribunal is that: -

1. The claim of detriment pursuant to section 47C of the Employment Rights Act 1996 is dismissed under Rule 52 of the Employment Tribunals Rules of Procedure 2013 it having been withdrawn in the course of this hearing;

2. The claim under section 18 of the Equality Act 2010 was presented within such time as was just and equitable; and the tribunal has jurisdiction to hear it;

3. The claim under section 18 of the Equality Act 2010 succeeds; no declaration or order for compensation is made;

4. The claim under section 80H of the Employment Rights Act 1996 does not succeed and is dismissed;

5. The claim under section 19 of the Equality Act 2010 does not succeed and is dismissed;

6. The claim of unfair (constructive) dismissal does not succeed and is dismissed.

REASONS

Introduction

1. On 7 November 2022 the claimant presented an ET1. In it (4105899/2022) she made claims of (i) discrimination on grounds of pregnancy or maternity and sex; (ii) detriment as a result of pregnancy; and (iii) a failure to deal with a flexible working request in a reasonable manner. Her employment with the respondent had ended on 24 October 2022. Those claims were resisted. On 18 January 2023 the tribunal held a case management preliminary hearing. It made various orders. It noted; an agreed list of issues; the respondent's request for further information; and the claimant's intention to issue a further claim of unfair (constructive) dismissal. On 23 January she presented an ET1 bringing that claim (4101052/2023). On 24 January the claimant provided further particulars of her first claims. The claim of unfair dismissal

was resisted. On 7 March the cases were conjoined. On 22 March the tribunal held another case management preliminary hearing. It; considered and refused an application by the claimant to amend in another claim; clarified the unfair dismissal claim; and recorded issues relative to it.

5 2. All of the claims are connected to the claimant's pregnancy and her attempts to return to work at the end of her maternity leave.

3. This hearing began with a bundle of 260 pages. Various additions were made to it before and during the hearing of evidence. It was surprising that the claimant's written flexible working request (which became **pages 261 and**
10 **262**) was one of those late additions given the importance of that document to one claim. An updated schedule of loss (**page 71A**) was added prior to the start of evidence. For reasons to do with various aspects of the bundle, the start of oral evidence was delayed until about 2.40pm on 4 July.

4. On 5 July, the claimant withdrew her claim of detriment which had been
15 brought under section 47C of the Employment Rights Act 1996. The consequent dismissal of that claim is reflected in the judgment above.

<u>The issues and PCPs</u>

5. By 22 March the tribunal had noted an agreed list of issues. Regrettably, there were departures from them as the hearing progressed. We say more
20 about this below.

<u>Witnesses</u>

6. We heard evidence from; the claimant; Andrew Brown, respondent's Operational Transformation Lead; and Matthew Whitelaw, respondent's Funeral Service Manager. For reasons to do with management of hearing
25 time the respondent's witnesses were taken in reverse order. That made no to the consideration of the claims.

Findings in Fact

7. From the evidence which we heard and the documents spoken to from within the bundle we found the following facts admitted or proved.

8. The claimant is Raegan Drew. Her date of birth is 5 October 1989.

9. The respondent is The Co-operative Group Limited. Amongst other things it provides funeral services. It provides those services across Great Britain. It is also a food retailer. It employs about 65,000 staff.

10. On or about 11 January 2010 the claimant began employment with the respondent. She began in the role of mobile funeral arranger. It was a full time role. She was based at the respondent's premises at South Clerk Street, Edinburgh. It is also known as Newington. The role required her to work at other offices covering absences for maternity leave, sickness and other business reasons. Those other offices were for the most part in the Edinburgh area. The role involved; being a first point of contact for families of a deceased person; liaising with celebrants, crematoria, and florists; and handing matters over to a funeral director for funeral ceremonies.

11. Sometime in about 2014 the claimant became a funeral director with the respondent. This involved the completion of a qualification, Principles of Funeral Operations and Services (L3). The claimant completed it via the respondent.

12. On 27 December 2018 the respondent wrote to the claimant (**page 111**). The letter confirmed her; normal working hours of 45.5 per week; rate of pay of £12.01 per hour; and base location of South Clerk Street, Edinburgh. The letter enclosed a copy of her principal statement of terms and conditions of employment (**pages 112 to 119**). The statement set out the claimant's terms relating to (amongst other things); location, remuneration, hours of work and holidays. It referred to a role profile. It was not produced.

13. On 24 October 2022 the claimant resigned with immediate effect (**pages 259 and 260**).

14. In the role of funeral director, the claimant performed all of the duties of a funeral arranger. In addition, she; had the responsibility of conducting funerals; and was required to participate on an "*On Call Rota*". The rota covered the claimant's location and a wider area across Edinburgh. Those participating in it were funeral directors and drivers. Funeral arrangers did not participate in it. It was not part of their terms and conditions of employment to do on call work. Part of the On Call work required the claimant to answer telephone calls outwith her normal opening hours. Another part of that work required her to attend premises to remove the body of a deceased. The claimant's payslips describe pay of On Call work as "*Funerals Standby NR*". There was no reference to On Call work or pay for it in either the letter of 27 December 2018 or in her terms of employment.

15. In the respondent's business, Mondays tend to be busy by virtue of work generated from deaths occurring over weekends. In its business, Fridays tend to be popular for funerals.

16. The branch opening hours were Monday to Thursday 8.45am to 5pm and 9am to 4pm on a Friday. This was the claimant's working pattern. It equated with 37.5 working hours per week. In addition she was expected to work the "*extra*" hours to 45.5 per week doing things like; attending funerals out of hours and attending to viewings with families.

17. Sometime in about 2018, the claimant's image was used in several national media outlets. She participated in podcasts on the respondent's behalf. One of those was for the BBC which was about her career. The claimant was not paid for those activities. She did not ask or expect to be paid for them.

18. In about May 2020 Matthew Whitelaw was appointed as Funeral Services Manager, Edinburgh. As a result he became the claimant's line manager. In that capacity he oversaw about 15 locations (or branches) operated by the respondent. Those branches were across Edinburgh and East Lothian. They included Galashiels. In that role he reported to Ashlene Robertson, Regional Operations Manager.

19. The claimant's payslip dated 14 November 2020 shows a payment of £238.08 for Funeral Standby NR, or On Call work (**page 209**). That payslip discloses that it is for the 4 week period between 25 October and 21 November 2020. That payment represents On Call work carried out in the previous 4 week period. Around this time, one of the claimant's colleagues was Terry Dickson, Care Logistics Manager for Central & South East Scotland.

20. On 13 January 2021 Mr Dickson emailed about 17 colleagues including the claimant (**page 123**). In it he said, "*Please see attached. The oncalls need covered and we would appreciate your help to cover them. Please let me know by the close of business on Friday 15 January 2021 of any oncalls that you can help cover.*" The attachment, which appears to be a spreadsheet called "*Oncall cover*", was not produced. The claimant replied later that day (**page 123**). She said "*Just checking these dates I've got the 9 Feb down for Emma too. x*"

21. **Pages 210 to 213** are the claimant's payslips respectively dated 11 December 2020, 8 January, 8 February and 8 March 2021. Each discloses a payment for On Call work. Each of them is a payment in arrears for that work. All of those payments differ.

22. In February 2021 the claimant became pregnant.

23. On 22 March 2021 Mr Dickson emailed a larger number of colleagues including the claimant (**page 122 into 121**). In it he said, "*Please see attached. The on calls need covered and we would appreciate your help to cover them. Please let me know by the close of business on Friday 25 March 2021 of any on calls that you can help cover.*" The attachment was not produced. The claimant replied within about 4 minutes (**page 122**). In it she said, *"I'm trying not to do extra just now but obviously if ur stuck I would help.*"

24. On 25 March 2021 the claimant informed Mr Whitelaw of her pregnancy.

25. Also on 25 March the claimant emailed Mr Whitelaw and Mr Dickson (**page 120**). The subject heading was "*Raegan Drew On call cover*". In it she said (referring to a list of dates between 9 April and 11 September 2021) "*From April till October these are my on call being covered by drivers as I'm on as the driver with Tam*". The dates listed were to be covered by either "*Joyce*" or "*John F*". Her rationale for arranging this cover was that she was pregnant, and she could no longer carry out the manual handing of deceased bodies element of her On Call Rota duties. At the time of this email, Mr Whitelaw was aware of the claimant's pregnancy. His understanding was that the claimant's On Call dates listed in her email were being covered to support her pregnancy.

26. At about that time, the claimant's normal working pattern remained Monday to Thursday 8.45am to 5pm and 9am until 4pm on a Friday.

Period between notification of pregnancy and "*leave*"

27. At about the time of notifying the respondent of her pregnancy, the claimant reviewed its Maternity and Pregnant Parent Leave Process (**pages 164 to 168**). It requires "*the manager*" to carry out a risk assessment using the relevant Form within two weeks of being told of the pregnancy. No risk assessment for the claimant took place. She did not raise it as an issue at the time. The claimant did not request a risk assessment. The Process (**pages 167 to 168**) provides that before the start of maternity leave managers should agree with the colleague how they would like them to keep in touch while the colleague is away from work. Neither party sought to agree with the other as to how they might keep in touch during the claimant's maternity leave. The claimant did not raise the fact that Mr Whitelaw had not done so at the time.

28. Around this time, the claimant delivered virtual national careers' advice to schools. She also participated in a "*train the trainer*" course in York. She then delivered "*Mindset*" training in various regions for the respondent. The claimant was not paid for those activities. She did not ask or expect to be paid for them. At about this time, she discussed her pregnancy with Nick

McLennan one of the respondent's regional managers. He said that; he could see no reason why she couldn't return to work on a part-time basis; and had some members of his team who had done so.

29. On 6 April 2021 the respondent issued to the claimant a payslip for the 4 week period between 14 March and 10 April (**page 214**). It discloses a payment of £152.62 for on call work. That work was done in the 4 weeks prior to 14 March. On 3 May 2021 the respondent issued to the claimant a payslip for the 4 week period between 11 April and 8 May **(page 215**). It discloses a payment of £48.84 for on call work. That work was done in the 4 weeks prior to 11 April. The claimant was aware that by that time (about 3 May 2021) she would not receive any further On Call payments until a return from maternity leave.

30. On 1 June the respondent issued to the claimant a payslip for the 4 week period between 9 May and 5 June (**page 216**). It does not disclose any payment for on call work. The four weekly wage slips for the period 28 June to 20 September 2021 do not disclose any payment for on call work (**pages 217 to 220**).

31. In mid-2021 the respondent operated some restrictions because of COVID-19. They required the claimant (as she was about 16 weeks pregnant) to "*shield*". Accordingly, on or about 24 July 2021 the claimant stopped working from the South Clerk Street premises. As per the respondent's relevant policy she was then "*shielding*". She worked from home. A short time prior to shielding, the claimant had an informal discussion with Mr Whitelaw about working hours on her return. It included reference to the possibility of her returning full time or part time.

32. Thereafter and prior to taking maternity leave she used some annual leave entitlement. On 11 October 2021 she began a period of maternity leave. By that time, Mr Whitelaw regarded the claimant as competent, conscientious and providing a high standard of care. He saw her as "*a good employee*." His

view was that they had a good working relationship. The claimant regarded their relationship as sound and professional.

Maternity leave period until 15 July 2022

33. In about January 2022 the claimant booked a nursery place for her child. She required 3 full days at the nursery. She was of the view that if she had decided to come back to work full time the cost of 5 days at nursery would be more than she earned. The booking involved the payment of a deposit. The nursery is on the route between her home and her place of work.

34. Clair Ward is employed by the respondent. Prior to the claimant's maternity leave Ms Ward worked as a funeral arranger. For the period of the claimant's maternity leave, Ms Ward "*stepped up*" into the claimant's role as funeral director at South Clerk Street. Ms Ward was therefore carrying out both functions in the time of the claimant's maternity leave. The claimant regarded her as a friend. They spoke frequently including during the claimant's maternity leave period. On some occasions in that time, the South Clerk Street branch was closed at hours when it would ordinarily have been open. On other occasions, it remained open but was covered by staff from other nearby branches. On other occasions still, families were seen at the branch nearest to South Clerk Street which was Niddrie.

35. On or about 15 March 2022 Mr Whitelaw telephoned the claimant. He asked how she was. He mentioned a staff night out which was due to take place in April. He agreed to provide further information about it. He did not do so.

36. On or about 11 April 2022 the claimant contacted Mr Whitelaw by What'sApp. A copy was not produced. She then telephoned him. She asked him how she should go about securing a letter of employment for a mortgage renewal application. She said that she would be in touch in due course about returning to work. Mr Whitelaw said words to the effect that; he would have her back in any capacity, whatever way fitted; and it would be great to have her back. The claimant understood him to mean that "*fitting*" meant accommodating both her needs and the needs of the business.

37. On 1 May 2022 the respondent issued to the claimant a payslip for the 4 week period between 10 April and 7 May (**page 221**). It does not disclose any payment for on call work. The single payment shown is of statutory maternity pay of £626.64.

5 38. On 30 May 2022 the respondent issued to the claimant a payslip for the 4 week period between 8 May and 4 June (**page 222**). It does not disclose any payment for on call work. It shows a payment of statutory maternity pay of £626.64.

39. On or about 21 June 2022 the claimant emailed Mr Whitelaw. She asked
10 about the process "*for lieu days whilst on maternity*." The email was not produced.

40. On 27 June 2022 the respondent issued to the claimant a payslip for the 4 week period between 5 June to and 2 July (**page 223**). It does not disclose any payment for on call work. It shows a payment of statutory maternity pay
15 of £626.64.

41. Sometime shortly thereafter, the claimant's statutory maternity pay stopped. It is likely that this was around 11 July, 39 weeks after the start of her maternity leave. The claimant then contacted the respondent's HR function to enquire about the possibility of taking and being paid for annual leave at that time.
20 She was advised that; in order to do so she would require to return to work; and she could "*take a few KIT days to generate a wage*" (**page 138**).

15 July to 16 September 2022

42. On Friday 15 July the claimant emailed Mr Whitelaw (**page 232**). She said; she wanted to give him an update on her thoughts; she was due back in
25 October; her child had a nursery place 3 days per week; and she had spoken to Ms Ward who had expressed an interest to her in continuing full time (in the funeral director's role). She; referred to a previous discussion between herself and Mr Whitelaw from which she noted his view that he could not see how a part time funeral director position could work; and said that she

completely understood that view "*since a* [sic] *on call rota is not something my life can work around now*"; said that she would like to propose in her "*work life balance request*" a job swop with Ms Ward but working (in a funeral arranger role) part time and with slightly reduced hours. Her email continued, "*I intend to apply for Tuesday-Thursday 8.45-4pm this is so I can collect [her child] from nursery in Penicuik on route home and it fit in with the nursery last pick up. Full time return is not possible for me. I understand this might not work for the needs of the business and it will be up to HR/management to come back to me. Should it be accepted, I would propose starting back Tuesday 18 October*."

43. The claimant's partner could ordinarily have taken their child to and from nursery. The factors weighing against that arrangement were that; his work required an amount of travel to different locations; his earnings were higher than those of the claimant; and the claimant's wish for continuity of care for their child, which was better provided by her assuming responsibility for nursery transport. In the claimant's opinion, the arrangement involving her partner in nursery transport would have meant that as a family they would have been worse off.

44. On Tuesday 19 July Mr Whitelaw replied (**page 233**). He said, "*I hope you are well and thanks for the Email, I will have a look over and see what we can do for your request however the part for the Funeral Director Vacancy would require the role to be advertised internal and external for fairness to everyone. I am on annual leave from the 25 July for 2 weeks and hopefully we can catch up August to discuss the options available*." The requirement to advertise in this way was as per the respondent's policy in such circumstances.

45. The claimant replied within about 3 minutes (**page 233**). She said "*No probs Matt, I was reading the policy this morning. I have the formal request form to fill out and return to you. I will get that done in due course. Enjoy a well-earned rest and I will catch up with you on your return*." The policy to which the claimant was referring was the respondent's flexible working policy.

46. Had the respondent agreed to the claimant's flexible work request and had she taken up the arranger role it would have been open to Ms Ward to apply for the vacancy of full time funeral director. There was no guarantee that she would have been appointed. Mr Whitelaw's view was that if she had not been appointed she would probably have returned to her arranger role. In his view this would have created a difficulty if that role (or part of it) was being performed by the claimant.

47. Mr Whitelaw replied on Friday 22 July (**page 234**). It begins "*Flexible working process – Co-op Colleagues (coop.co.uk)*". It says "*Just a short email to make sure you have the most up to date details, the 2nd section on the page has a form if you could fill this in please and return that would be great. Hope the Family is well and speak soon*."

48. On Monday 25 July the claimant emailed Mr Whitelaw (**page 235**). It attached a flexible working request (**pages 261 and 262**). The email says she wanted to go into a little bit more detail "*as the form isn't that big*." Her email continues, " *As you are aware I am looking to return from maternity leave in October. Currently I am on a 45.5 hour contract as a funeral director based at South Clerk Street. Due to maternity leave and way of return I would propose to reduce my days and hours due to family needs. As previously discussed, you stated that a part time funeral director role would not be feasible, I would like to therefore propose the following. I have secured ….a place at nursery 3 full days and would need to be available to collect him for 5pm so the working times I have provided take into account the travel time from my current base at SCS. Whilst being off, Clair Ward the arranger at SCS has stepped up to cover my role unofficially as well as covering her own role as funeral arranger at SCS. Resulting in the parlour being closed frequently. As both are client facing roles, I believe it would be more structured to have the branch open 3 full days during the week and workload out with this time can be planned to meet the business needs. I believe that this proposal will have no financial implication to the business and would currently increase client service. I believe the aforementioned would not*

require to be advertised externally as this is not a vacancy but a feasible proposal of a return to work from maternity. Which would suit both current employees and business alike. I am happy to discuss in finer detail should you wish however this is a brief outline of how I would propose returning from maternity in a way that suits the business and myself."

49. **Pages 261 and 262** are a *pro forma* flexible request form. It refers to "*The Flexible Work Process on the Intranet*". It says it has details of the process that the respondent would follow. That process was not produced. On the form, the claimant set out her then current working pattern of Monday to Thursday 8.45am until 5pm and 9am until 4pm on a Friday. On the form the claimant indicated; that she wished the new arrangement to be permanent (as opposed to temporary); for it to start on her return, 18 October; on the impact of her role, her team and customers she said that it would ensure that the branch was open more often that it had been ("*closed a lot*") during her maternity leave; and workload and cover could be planned between herself and Ms Ward to increase client service; and in answer to the question, "*How do you think this impact can be dealt with?*" She said "*If the job swop is agreed workload can be planned for my 3 days and appointments outwith planned around Clair's funerals. The job swop has proved successful locally in the past*."

50. On Thursday 11 August Mr Whitelaw replied (**page 236**). He; thanked her for the details and the completed flexible working request form; and invited her in "*for a chat*" in the following week or two in order to "*discuss the options available to you*."

51. The claimant replied within about 20 minutes (**page 236**). She sought a date best for him for which she could make herself available.

52. The tone of their exchanges up to this time was friendly and informal. It suggested that they both viewed their working relationship as good.

53. The claimant and Mr Whitelaw met on Thursday 25 August. A typewritten minute of it was prepared (**pages 126 to 129**). It used a template. It shows

that Mr Dickson was also present. He prepared the minute. It records that the meeting lasted 11 minutes. In summary that note recorded; Mr Whitelaw's view that having considered the proposal he could not facilitate it due to the needs of the business and the branch opening times; a vacancy as a full time mobile arranger; roles in other regions or food and the claimant's views on the latter; Mr Whitelaw's view on a previous job swop which was "*like for like*" as it was full time for full time and it not being possible to create a role; his reference to a list of other roles, which list the claimant declined; an agreement that he would email her the minute of the meeting and she would call him; and an offer to read the notes at the time. The note concludes with an agreement that Mr Whitelaw would send to the claimant a copy of the handwritten notes. It appears that this was not done.

54. The claimant felt blindsided by what she saw as the formality of the meeting. She had been invited in for a chat. She was not prepared for the formality of the presence of a notetaker and the taking of notes. She was upset by that. She was also upset by the meeting opening with Mr Whitelaw's refusal of her request. During the meeting she was upset by the suggestion of alternative work in food retail.

55. On Friday 26 August (12.58pm), Mr Whitelaw emailed the typed minute to the claimant (**page 237**) for her to look over. He undertook to get a letter with the details of his decision to her "*as soon as I get the letter back from HR*". Within about 15 minutes (at 1.21pm on 26 August) the claimant replied (**page 239**) to say that she had a couple of discrepancies with the notes and asked him if she should email them to him. At 2.53pm, Mr Whitelaw emailed to her a letter with "*the Justification for the decision*" (**pages 238 to 239**). The letter was at **pages 246 and 247**. It appears that he sought and received some comments to it from the respondent's HR function (at about 2.49pm) prior to issuing it (see **page 132**).

56. The minute of the meeting reflects Mr Whitelaw's statement that the respondent did not have any vacancy that matched what the claimant was looking for and continued, "*The only vacancy I have currently is a full time*

mobile arranger." A mobile arranger role ordinarily covers sickness, holiday and other absences over a number of branches.

57. The letter of 26 August (**pages 246 and 247**) sets out three reasons why Mr Whitelaw was unable to agree the claimant's original request. In summary they were; (first) because of the negative impact on service to customers; the imperative of the premises being open and available to clients for its opening hours of Monday to Thursday, 9am to 5 pm and on Fridays 9am to 4pm; (second) it would not be possible to reorganise the work amongst the rest of "*her team*"; he noted that other branches had supported opening and closing (referring to her maternity leave period), with additional work for others; there was no current vacancy in the "*Edinburgh Care Centre*" for the hours that she had requested being a part-time funeral arranger; and the proposed job swop wasn't an option because (i) it was not "*like for like*" (meaning it was a change from 2 full time employees to 1 full time and 1 part time) and (ii) of the need to follow a "*fair process*" for equal opportunities for "*every colleague*", meaning that the role of full time funeral director at South Clerk Street would require to be advertised; and (third) her requested hours would require recruitment of an additional member of staff to cover Mondays, Fridays and the additional hour (4pm until 5pm on a Tuesday, Wednesday and Thursday) for the commitment to branch opening hours, and in his view recruiting for those hours would be difficult. His letter then noted the claimant's wish for more time to think about things, and his anticipation of a call the following week. The letter advised that if she "*really*" disagreed with his decision she should appeal in writing to him. It concluded that if she would like to speak further about his decision she should let him know.

58. The claimant replied to the emailed letter also on Friday 26 August (at 3.10pm) (**page 238**). In it she; requested a meeting prior to appeal "*with representation*"; set out her reasons for such a meeting; said that she did not feel that there had been consideration to "*other flexible working opportunities within the team*"; questioned that she should have been invited in for KIT days "*as per the policy*" as she may have had a better understanding of his

views about her return to work; referred to "*the few phone calls …had in the past 12 months*" in which she had been told that Mr Whitelaw couldn't see how a part time funeral director could work "*hence the proposal I put forward*"; referred to a previous comment from him that he "*would take me back in whatever capacity you would just be happy to have me back*"; expressed her sadness that her situation "*couldn't feel further from this*"; noted her belief that an appeal was to go to the regional manager as confirmed to her by HR that day; and concluded that she would be in touch with minute amendments "*once I have spoken to my union*".

59. On Monday 29 August the claimant first contacted her trade union. She did so because of the way she felt after the meeting on 25.

60. On Tuesday 30 August (at 9.53am) the claimant emailed Mr Whitelaw (**page 241**). She asked for a convenient time for another meeting. He replied at 10.45am (**page 240**). He suggested 2, 5 or 6 September. He advised that she could bring a trade union representative or work colleague.

61. Later on 30 August (10.20pm) she set out her 5 numbered discrepancies to the minute (**pages 242 and 243**). The first was to say that the mobile role was not mentioned in the meeting until later than was reflected in the minute. The second was that; only food roles were mentioned (not in other regions); and that omitted was Mr Whitelaw's reference to looking at "*maybe a CC role could be more flexible but they don't have any*." The third was the omission of references to branch closures; and Mr Whitelaw's comment that a split mobile role would not suit her needs. The fourth reiterated point 2 and that she had been only offered how to apply for one 16 hour food role. The fifth was that she was not offered to read the notes.

62. On 31 August Mr Whitelaw replied (**page 242**). He said that he would attach her email with the notes taken. He said they could discuss any points at their next meeting. He said that the date for the meeting was still to be confirmed with the union representative. He set out further detail on the mobile arranger role. He said that the role was "*available within Edinburgh and also in*

Tranent." He suggested that the parties might look at a "*job share option*" but taking account of how it would work, how flexible she could be, and how annual leave "*etc*" would be covered. He referred to other vacancies outwith their region which could be looked at. He suggested that the claimant look at 5 the respondent's website and its current vacancies to keep up to date with anything that would be suitable.

63. In the claimant's opinion the typewritten version of the minute had been in part purposefully fabricated by its author. She held that opinion at the time she read it. That opinion was based on her view that Mr Dickson "*constantly* 10 *made things up*." The claimant's decision to seek trade union representation was in part based on her wish to protect herself thereafter.

64. On Thursday 1 September the claimant emailed Mr Whitelaw (**page 245**). In it she said that her union's next available date was Tuesday 13. She enquired if it was suitable. On 2 September, Mr Whitelaw replied (**page 244**). On the 15 question of the date for meeting, he sought her representative's details for an invitation and suggested 12.30pm. On the question of her return to work he noted; his awareness of her expected date of 18 October; his expectation (having spoken with HR) that as matters stood she would be returning to the full time funeral director role; his anticipation that if the flexible working 20 request had not been resolved the respondent "*may have to look at using annual leave or …unpaid leave*."

65. On Tuesday 6 September Mr Whitelaw wrote to the claimant (**page 248**). In it he; referred to their recent meeting; thanked her for sharing her thoughts about how her proposal might work; confirmed date, time and location of the 25 2nd meeting; and noted that she would be represented by Daniel Reid, her trade union representative.

66. Some time after 6 September and prior to the second meeting on 13 September, the claimant prepared a document headed, "*Correspondence with my manager whilst on maternity leave*" (**page 138**). It set out 8 bullet 30 points. Bullet 3 referred to the call from Mr Whitelaw on 15 March. It said that

this "*was the only time he called to check in*". Bullet 5 referred to an email to him on 21 June 2022 asking about lieu days whilst on maternity leave, and her intention to speak to him in July about a date in August to discuss her return. Bullet 8 records her concerns about maternity pay stopping and her attempts via Mr Whitelaw and HR to secure some pay prior to returning to work. She noted that the HR colleague suggesting taking "*a few KIT days to generate a wage. He was surprised to hear I had not been in for any*."

67. On Tuesday 13 September the claimant and Mr Whitelaw met. A handwritten minute of it was prepared (**pages 140 to 146**). It was signed on each page by the claimant and Mr Whitelaw. The stated purpose of doing so was to say that it was a true and accurate reflection of the meeting. A typewritten minute of it was prepared (**pages 147 to 148**). The typed note is a fair representation of the discussion. It records that Daniel Reid of USDAW was present as the claimant's representative.

68. The typed note records, in the context of Mr Whitelaw's first reason for his response to the flexible working request, the claimant's question; "*with current branch closures are we delivering the service?*" And Mr Whitelaw's answer in the affirmative as much as the respondent could as per staffing levels. It then records the claimant's question, "*Could the work be shared between the team to allow for part-time work?*" and Mr Whitelaw's answer, "*The part-time funeral director role does not exist.*" The claimant felt that this was quite dismissive and that Mr Whitelaw was shutting that conversation down. The note then records the claimant's question, "*Could you create this role?*" And Mr Whitelaw's answer, "*No. That's up to HR*." The claimant then asked, "*Would you be able to arrange a job share?*" Mr Whitelaw replied, "*The perfect example is Jeanette and Isy in Musselburgh. You'd need to know how this would work*." The reference to staff in Musselburgh was to job sharing of both arrangers working; 18.75 hours per week; 5 days each per week; one working in the morning, the other in the afternoon in alternate weeks. There was a daily handover and they covered each other's annual leave. Mr Reid then asked how the respondent would manage for protected

characteristics in relation to a part-time funeral director role and used an example asking how the respondent would manage a disabled person who required part-time? Mr Whitelaw agreed that such a situation would need to be managed and the respondent "*does need to look at this*". The note then records the claimant asking "*Could we look at an alternative hour? I know I'd potentially need to make alternative arrangements and I can be flexible*." To which Mr Whitelaw asked, "*Is that an alternative flexible working request?*" The claimant replied, "*No. It's very similar*." Mr Whitelaw said he was willing to continue to look into that, but "*it must work for the business*." In answer to Mr Whitelaw's question as to whether the claimant was looking to appeal, she said, "*I'm just looking to find a way to return to Funeralcare. I gave a suitable plan with Clair swapping roles*." The note then records an exchange between the claimant and Mr Whitelaw in which; he confirmed that; he could not do a job swop; it (the funeral director role) would have to be openly advertised for "*equal opportunities*"; and advised that in the future as per business needs "*the Funeral Directors may be relocated so the South Clerk Street branch may not have an FD." Mr Reid then advised (in answer to a question) that he would then like to explore the role of part-time funeral director. It was then agreed that Mr Whitelaw would call HR "to try to get some answers*". He did so in an adjournment of about 15 minutes. Mr Whitelaw then noted that he was not aware of any part-time funeral directors in Scotland; he would need to look at the business rationale on "*back of*" his letter of 26 August; how they impact on clients and the business and how that part-time role would work if a funeral was early or late, and in relation to job share; and his need to get advice and feedback.

69. The meeting concluded with; Mr Whitelaw agreeing to speak to Stuart Fowler, the acting Regional Operations Manager who was covering for Ms Robertson; him agreeing to revert to Mr Reid by the end of that week; and speak to managers in the south to find out if they have part-time funeral directors. The claimant's expectation at that time was that Mr Whitelaw would "*look at options*" and perhaps come up with a plan.

70. Within about 30 minutes (13 September at 1.47pm) Mr Whitelaw emailed Gemma Jones in HR for examples of part-time working funeral directors within the business (**page139**). At 2.18pm that day she replied to say; there were exactly 13 part-time FDs across the business, 3 in the North, 2 of whom job share (**page139**). In the respondent's business "*North*" includes Scotland, north west England and north Wales. She advised that; every case is taken on its own merits; decisions are made on what is operationally possible given "*their unique circumstances*"; and the respondent did not have any 4-day part time FDs and that would be a common operational problem in most/all areas.

71. The typed meeting note does not record any discussion about the claimant's discrepancy points or about the mobile funeral arranger role, full or part-time.

72. On Friday 16 September Mr Whitelaw wrote to the claimant (**pages 149 to 151**). In it he; referred to the discussion about a part-time funeral director role, "*the Mobile Funeral Arranger Role within Edinburgh and Job Sharing*"; advised that he was unable to agree her request for the role of funeral director to be made part time; set out two reasons for that decision being, (first) the difficulty of recruiting an additional team member with an allied concern of a part-time funeral director's availability for viewings, weekend viewings and the On Call Rota, and (second) a planned "*Organisational change*" which would impact her role or team; proposed the possibility of her returning into the Mobile Arranger Position including options for it to be part-time, with an example and things to consider, posed as questions; and concluded with a reiteration of a right of appeal. The letter makes no reference to a discussion between Mr Whitelaw and Mr Fowler or of Mr Whitelaw's attempts to speak with him.

<u>17 September to 25 October 2022</u>

73. The claimant submitted a written appeal (**pages 152, 152a and 152b**). In summary, it discussed four issues. First, it commented negatively on the meeting on 25 August. It said that; it was quickly apparent that she was not welcome back; the meeting lasted no more than 8 minutes; the outcome was

delivered prior to any discussion; and she was surprised that despite being portrayed as a friendly chat, Mr Dickson was present and took notes "*to keep things above board*". Second, it commented on her flexible working request itself. It said that it had not been for a part-time funeral director role because Mr Whitelaw had said previously that he could not see it working. Third, it commented on the decision and reasons for "*denying my request to return to my role as funeral director on a part time basis*." It commented on each of the two reasons in turn. On the first reason (of it being difficult to recruit an additional team member) the claimant noted that no real supporting evidence had been provided. She said that she was open and willing to be flexible to meet demands of the role. She referred to a previous successful part time director within Edinburgh (Martin McBurnie) albeit she was not sure how it had worked. On the second of "*Organisational change*" she criticised it and its rationale as being very vague and making little or no sense. She suggested that it appears "*to be just another attempt to obstruct and be un-cooperative in my return to work*." Fourth, it commented on the mobile arranger role. While noting that it could be part-time over five days, the claimant said that as she had availability over only 3 days "*I can't help but feel this is another attempt to stop my return to work and again, another example of not taking her flexible working request serious*[ly]." The appeal document concluded by referring to the previous comment by Mr Whitelaw that he would "*take you back in any capacity, it will just be great to have you back*" and questioned what had changed and noted her sadness.

74. On 22 September the claimant began early conciliation (**page 1**).

75. By letter dated 29 September 2022 Andrew Brown, Operational Transformation Lead invited the claimant to a meeting with him on 6 October to discuss her appeal (**page 153**).

76. The claimant and Mr Brown met on 6 October. A handwritten minute of it was prepared (**pages 154 to 161A**). It was signed on each page by the claimant and Mr Brown. The stated purpose of doing so was to say that it was

a true and accurate reflection of the meeting. It record that the claimant was accompanied by Mr Reid.

77. Prior to the meeting Mr Brown had read; copies of the notes from the two meetings with Mr Whitelaw; the flexible working application form; the email trails between the claimant and Mr Whitelaw; Mr Whitelaw's two letters to her; and her appeal document. The claimant was optimistic about the outcome to her appeal.

78. The note recorded; a summary of the flexible working request being the job swop with Ms Ward and the need for an opportunity for others to apply for the FD role; reference to the previous part time funeral director role (held by Morton McBurnie) and to a few in other areas; discussion on the part time arranger role; discussion on the possibility of part time working in the FD role including the claimant's flexibility around days (which needed to be fixed at 3) and finish time and the implications for planned and unplanned overtime and the on call rota; reference to two mobile arranger roles in Edinburgh contrasting her assertion that her options were "*very much dismissed*;" and a discussion on the "*Organisational change*" referred to. The meeting ended with Mr Brown's hope to revert to the claimant by the end of the following week.

79. Mr Brown understood that the respondent had 3 situations in the UK in which it employed part time funeral directors. In one, in Wales it was by virtue of an arrangement in existence at the time that business had been acquired by the respondent. In a second in Wales, the director's part time role came about by virtue of its geography and levels of business. In the third, in Devon and Cornwall, it was again by virtue of low work volumes and flexibility to meet client needs.

80. On 7 October the early conciliation certificate was issued (**page 1**).

81. On 11 October Mr Brown met Mr Whitelaw. A handwritten note of it was prepared (**R2, pages 1 to 6**). It is unsigned. It recorded; their exchange as to why there had been two meetings prior to the appeal; Mr Whitelaw's

summary of the discussions at them; Mr Whitelaw's enquiry (of Mr Dickson) about his recollection of a previous part time director in Edinburgh (none) and his opinion (if there had been one) of it being "*a logistical nightmare*"; their discussion on how "*out of hours*" would work if the branch operated with two part time directors; their discussion on Mr Whitelaw's two reasons for refusing her request to work part time in the director role, noting that what was being considered was a "*shuffle of FDs rather than a major re-organisation with jobs at risk*"; and concluded with their agreed summary that (i) the job swop would not work, (ii) Mr Whitelaw's view was that the part time director role was not really viable and (iii) Mr Whitelaw was open to a mobile arranger role with hours to be agreed.

82. At about that time, Mr Brown also spoke with Mr Dickson. No note of that conversation was produced. No explanation for that was given. He sought from Mr Dickson information about how Mr McBurnie's contract had worked. He understood that by that time Mr McBurnie had retired.

83. On 13 October Mr Brown wrote to the claimant (**pages 162 and 163**). It noted that the appeal was against the decision to reject her flexible working request. It set out that he was responding to each of four points. He referenced them using four bullet points. In summary they were; on the first issue around the meeting in August he agreed that its purpose could have been clearer but that was mitigated by what had occurred at the second meeting; on the second issue of Mr Whitelaw's first reason for rejecting her request, he focussed on the difficulties created in recruiting an additional employee to cover her "*job swop*" hours. He shared Mr Whitelaw's views based on what Mr Whitelaw had told him and also on his own views of the business. He then said "*I know we discussed that you would consider alternatives, but even if able to work full days to cover the opening hours of our funeral homes, you'd still leave a gap and complicated requirements to ensure fair allocation of work out of hours and on the on call rota*"; on the third issue of a prior part time director in Edinburgh, he advised that that colleague had left several years previously and the respondent's way of working had changed

significantly since; and (fourth) he noted that her reference to a statement within the respondent's Flexible Working Manager FAQ's was different from the position which prevailed in Edinburgh at the time.

84. On 24 October the claimant intimated her resignation with immediate effect (**pages 259 and 260**). It referred to her flexible working request and the appeal outcome letter. It referred to the fact that no agreement could be met to allow her to return to her role and continue with her career following her maternity. She thanked the respondent for the experience and knowledge which her work had provided to her. The claimant felt that she had been obstructed in her attempts to return to work. She felt that there had been no effort to accommodate her. She did not record those views in her resignation. The non-payment of On Call payments after May 2021 was not a reason for her resignation.

<u>After 24 October 2022</u>

85. In the period following her resignation the claimant struggled with her emotions. She suffered from anxiety. She had difficulty sleeping.

86. In the period between 24 October and 7 November the claimant met with her trade union representative. For the meeting, she compiled her payslips. They included those at **pages 209 to 217**. They discussed the fact that her last pay for on call work was made on 3 May 2021. They discussed how the cessation of that work and that pay had come about. In those discussions it occurred to the claimant that she may have a claim arising from that cessation based on the fact of her pregnancy.

87. She did not seek alternative work until about 27 December. At about that time, she applied for Job Seeker's Allowance. She received JSA in the period between 9 January and 17 April 2023. It was paid fortnightly. In the period to 1 April 2023 it was paid at the rate of £154.00 per fortnight. Thereafter it was £169.60 per fortnight.

88. The claimant made a number of applications for jobs up to about 16 March 2023.

89. In about mid-February 2023 she began work with a business operated by her brother. At about that time he suffered a stroke. She spent some time assisting other family members with the impact of the stroke on the business.

90. On 15 May 2023 the claimant started work as a school secretary (**C1 pages 1 to 7**).

91. By 24 October 2022 the gross pay per year for a full time funeral director employed by the respondent was £31,373.00. Gross monthly pay was £2614.42. Net pay per month was £2110.00. Gross weekly pay was therefore £603.33. Net weekly pay was thus £486.92. It was agreed that those were the claimant's pay rates as at 24 October 2022.

Comment on the evidence

92. On several occasions in the course of her evidence the claimant was visibly upset. She was tearful. In the main we viewed her as honest and reliable. We thought that she was doing her best to recall the detail of what turned out to be a less than straightforward attempt to return to work. On one issue we did not find her position to be completely credible, albeit it was not material to our decisions on the issues. Up until the start of their meeting on 25 August 2022 relations between the claimant and Mr Whitelaw were good. They both described it in positive terms. The tone of their email exchanges between 15 July and 25 August was informal and friendly. The claimant's opinion was that the typewritten version of the minute of the meeting had been in part purposefully fabricated. She believed that it contained untruths. She described being blindsided by the formality of the meeting. Logically extended it is difficult to see how the claimant believed that the respondent was treating her fairly throughout the rest of the process if her faith in it had been so badly affected by the time of receipt of the minute of the first meeting. But her evidence was that she still believed that her appeal could succeed. We

concluded that her evidence to do with the impact of the meeting on 25 August was a little exaggerated.

93. Mr Whitelaw was not a particularly convincing witness. He appeared to have been quite (over)reliant on advice from the respondent's HR team. For example, the advice from HR on the possibility of part time working as a funeral director was that based on the particular circumstances every case is decided on its own merits and whether it was "*operationally possible*". The factor "*operationally possible*", together with the evidence about branches (in Wales and the south west of England) where part time working had occurred, strongly suggested that local "*operational*" factors for which local management would have a large say would be critical to whether or not a request for part time working would be agreed. In Edinburgh that local management was Mr Whitelaw. Yet in the meeting of 13 September he was unaware of this and deferred to HR. The bundle contained the respondent's Flexible Working Manager FAQ document (**pages 185 to 190**). Mr Whitelaw's evidence was that he had not seen it before its inclusion in the bundle. He explained, in answer to questions about it, that he sought advice from HR, which answers he assumed were based on that document and had influenced some of the wording of his outcome letters. Separately we found it difficult to accept that he anticipated three or four meetings with an employee seeking flexible working when at the start of his first meeting with the claimant on 25 August he said that he was unable to facilitate the request. If an employee cannot make another request within a year, subsequent meetings with the decision maker are pointless. A related point was his evidence around how the meeting in September came about, and who arranged it. In his meeting with Mr Brown, he said that he had offered it "*as I wanted to exhaust all opportunities for*" her. That is not borne out by the exchanges at the time. While his letter of 26 August offers further discussion with him (on an open ended basis) the second meeting is fixed after a request from the claimant. In his evidence to us, he said it had always been his assumption that there would be another meeting. That in the circumstances is not a credible suggestion. If that had been the case, the letter of 26 August would

have clearly said so. Separately, his letter of 16 September (after the second meeting) records that there was a discussion in the meeting on 13 September about "*the Mobile Funeral Arranger Role within Edinburgh and Job Sharing*." The note of that meeting makes no reference to that role. That discrepancy was not explained.

94. Mr Brown was an impressive witness. He was independent of the claimant's employment and the area within which she worked. He gave answers in a straightforward and direct manner. We considered him credible and reliable. Where our findings departed from his evidence that was not because he was in any way attempting to mislead us, quite the contrary.

95. Where there was differing oral evidence before us we placed weight on contemporaneous material. For example, we preferred the claimant's evidence as to the fact and content of a previous discussion with Mr Whitelaw about part time working in the funeral director role by reference to her email of 15 July 2022 (**page 232**).

96. There was a dispute between the parties about the initial handling of the claimant's flexible working request. In particular, there was a dispute about the circumstances that brought about the second meeting between the claimant and Mr Whitelaw. In his evidence in chief, Mr Whitelaw said his perception was that there should be as many meetings as possible, as required, in order to consider a flexible working request. That might mean, he said, 3 or 4 meetings. In the claimant's case that included the initial informal chat pm 25 August. The undisputed note at the end of the meeting (**page 128**) was that; in light of the respondent's position the claimant would need to go back to the drawing board; she needed to think about things once she had seen (by email) the note of the meeting; and Mr Whitelaw was not to call her, she would call him.

97. There was competing evidence about the fact that the minute of the meeting of 25 August was incorrect. There was also competing evidence about the

ways in which it was incorrect. In our view it was not necessary to try to reconcile those ways.

98. In the cross examination of Mr Whitelaw it was suggested to him that he failed to consider a number of options which may have resolved things with the claimant and resulted in her being retained in a mutually acceptable role, with acceptable hours and days. Those options included trial periods and compressed hours under reference to the respondent's FAQ's for managers for flexible working (**pages 185 to 190**). It is obvious that no-one referred to this document at the time. Mr Whitelaw candidly accepted that he had not seen the document before giving evidence. The suggestion of a failure on Mr Whitelaw's part was limited by the fact that the claimant had not suggested any of those options at the time. The criticism of Mr Whitelaw in that regard is therefore quite limited. We did not hear from the claimant as to why she had not referred to the FAQ document at the time.

Submissions

99. The parties lodged written submissions. We are grateful for the work that went into each and for their content. We mean no disservice in having not repeated or summarised them here. To the extent relevant and necessary we refer to what was said in them below.

The statutory provisions relevant to the claims

100. Section 18(2) of the Equality Act 2010 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—(a) because of the pregnancy, or (b) because of illness suffered by her as a result of it*."

101. Section 80F(1) of the Employment Rights Act 1996 provides that a qualifying employee (which includes the claimant) may apply to his employer for certain changes in their terms and conditions of employment. Section 80G(1) provides that the employer shall deal with the application in a reasonable

manner and shall only refuse the application because it considers one of 9 grounds applies.

102. Section 19(1) and (2) of the 2010 Act provide " *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—(a) A applies, or would apply, it to persons with whom B does not share the characteristic,(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,(c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."* The relevant protected characteristics include sex.

103. For a claim of unfair dismissal section 95(1)(c) of the 1996 Act provides that an employee is dismissed if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*".

104. We have noted below a number of authorities. Some of them were referred to by the parties.

Discussion and decision

105. One of the difficulties in this case is the ambiguity which existed between what was being sought by the claimant within a process which began with a *pro forma* flexible working request on 25 July 2022 and ended with Mr Brown's letter of 13 October. The flexible working request was a "*job swop*". It involved the claimant reducing her days, and her hours on those days. By the time of the meeting with Mr Whitelaw on 13 September, he was reconsidering the question of a part-time funeral director role. That was something which the claimant believed was not feasible based on what he had told her and what she knew about the On Call rota. The idea of the claimant working as a part-time funeral director was very different from the job swop. By the time of

the letter of 13 October, the two different proposals appear to have merged. Indeed on one view Mr Brown in his letter appears to have confused them. His reference (on **page 162**) to "*fair allocation of work out of hours and on the on call rota*" could only be to the funeral director role because arrangers do not work on that rota.

106. We decided the claims by answering the issues on each to the extent necessary. Where the parties' position on particular issues was not agreed we have commented on their respective positions.

Pregnancy and maternity discrimination; section 18 of the Equality Act 2010

107. Did the respondent engage in the following conduct: ceasing to make payments of on-call allowances to the claimant?

    a. The respondent answers this question by accepting that "*standby payments were ceased*." While not a straightforward answer *"yes*", our view was that its answer was in substance just that. Even if not, the evidence supports the conclusion that; on-call payments to the claimant ceased on or about 8 May 2021; up until that point those payments had been made for on-call work; and the respondent ceased those payments.

108. Did that constitute unfavourable treatment?

    a. The parties were not agreed on the answer to this question. The claimant's (obvious) position was that it did. The respondent argued that it did not. At the time of the cessation of the payments the claimant did not see it as such. The claimant openly arranged for her on-call cover duties for a period of 5 months to be carried out by others. Her rationale was that she was pregnant and she could no longer carry out the manual handing of deceased bodies element of her duties. She knew then that the payments would therefore cease. She did not complain about that at the time. It only became an issue in the claimant's mind when in early November 2022 she showed her

wage slips to her trade union representative. But the claimant's view is not a complete answer to the question. The respondent argued that; others took on her work and "*naturally*" they would have been paid instead; and the claimant continued to be paid as if working 44.5 hours albeit the actual hours worked reduced to 37.5. That may be so, but the claimant was no longer receiving a payment for work which she had previously done. "*in most cases …. little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach*" (***Trustees of Swansea University Pension and Assurance Scheme and another v Williams*** [2019] I.C.R. 230 at paragraph 27). ***Williams*** was clearly dealing with section 15 of the Act. The claimant in her written submission referred to paragraph 5.7 of the EHRC Code which says, a claimant (also under section 15) "*must have been put at a disadvantage*." We agree with that approach. In this case the claimant was put at the disadvantage of the loss of payment of the on-call allowance.

109. Was it done because of the claimant's pregnancy?

a. In our view, on call payments ceased because the claimant stopped doing on call work. She ceased on call work (or at least the manual handing of deceased bodies element of her On Call Rota duties) because she was pregnant. Paragraph 3.11 of the EHRC Code says, "*Because of' a protected characteristic has the same meaning as the phrase 'on grounds of' (a protected characteristic) in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause*." The respondent accepted that the cessation occurred because the claimant was no

longer doing the work. But it argued that; it is not enough for pregnancy to be "*part of the background context*" which it was here, and there was no indication that pregnancy formed part of the mental processes of whoever implemented the change. Two points occur to us. First, it is in our view not necessary to ascertain the mental processes involved. Second, the "*cause of the cause*" or the "*root cause*" in this case was pregnancy. It was more than background. The cessation was therefore in our view "*because of*" the claimant's pregnancy. In answer to this question Mr Macphail advanced a new and separate argument. It was that; the claim is in essence a pay discrimination claim and as such (under reference to ***Gillespie and ors v Northern Health and Social Services Board and Ors*** 1996 ICR 498, ECJ; ***British Airways (European Operation) Gatwick Ltd v Moore and anor*** 2000 ICR 678, EAT ***Parviainen v Finnair Oyj*** 2011 ICR 99, ECJ; and ***Gassmayr v Bundesminster fur Wissenschaft und Forschung*** 2011 1 CMLR 7, ECJ) it is not actionable at all. We did not accept that argument. First, none of those cases decided a claim under section 18 of the Act or analogous legislation. Second, They were all distinguishable from the facts of this case. In ***Gillespie*** the (equal pay) questions for the European Court of Justice were whether women on maternity leave must continue to receive (i) full pay in that period and (ii) a backdated pay rise awarded before or during the start of the period of leave. In ***Moore*** the two claimants were employed as cabin crew who received flying allowances in addition to basic pay. They both became pregnant and, as per their contracts of employment, ceased flying duties and transferred to ground duties, which entitled them to basic pay only. They complained that the loss of the flying allowances meant that the terms and conditions relating to their ground duties were less favourable than corresponding terms and that they had not been offered suitable alternative work within the meaning of section 67(2) of the Employment Rights Act 1996. They also claimed equality of pay with male comparators seconded to ground duties at their own

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request who received an annual allowance to replace the flying allowances. The tribunal found that the ground duties were both suitable and appropriate in the circumstances within the meaning of section 67(2)(a) but that since part of the flying allowances represented profit and formed part of their pay, the terms of the ground duties were less favourable within the meaning of section 67(2)(b) and that the applicants had not been offered suitable alternative work. The tribunal further found that one of the applicants was entitled to equality of pay with the male comparators. The airline appealed. The appeal on suitable employment was not successful. The employees were entitled to an assessment of remuneration due to them. The appeal on the question of equal pay succeeded. Where an employee was suspended from work on maternity grounds, the position was governed by the code embodied by sections 66 to 70 of the Employment Rights Act 1996. No separate equal pay claim arose under Article 119 of the E.C. Treaty in relation to alternative work performed by the employee in those circumstances. In ***Parviainen*** The claimant employee of the airline was transferred from flying duties to office work for health reasons when she became pregnant. She suffered a 33% drop in her earnings as a result, as 40% of her previous earnings came from supplementary allowances dependent on the performance of specific functions no longer open to her. She brought a claim in a district court in Finland for the loss of salary, contending that the reduction in her pay was discriminatory and contrary to article 11(1) of Council Directive 92/85/EEC 1. The court referred to the Court of Justice for a preliminary ruling the question whether article 11(1) required that a worker who was transferred to lower-paid work because of pregnancy, in accordance with article 5(2) of the Directive, had to be paid the same as she had received on average before her transfer. The court decided that she was not entitled under article 11 to the average pay prior to transfer. In ***Gassmayr*** the claimant worked as a junior hospital doctor. She received an on-call duty allowance for extra hours that she worked in

addition to the normal hours set out in the duty roster. Under national protective legislation she was required to stop working for part of her pregnancy and then for maternity leave. She claimed that for the duration of the prohibition on work, which because of her pregnancy and then her maternity leave had prevented her from performing on-call duties, she was still entitled to payment of an allowance corresponding to the average on-call duties performed. Her employer's position was that as she had no longer been allowed to perform on-call duties, no remuneration for them was payable. She brought a local claim relying on the principle of EU law of equal pay for men and women. The referring court sought a preliminary ruling from the Court of Justice. Amongst other things the ECJ decided that she had not entitlement to on-call duty allowance during a pregnancy-related temporary absence. There did not appear to us to be a principle of law which could be gleaned from these cases which was relevant to this claim such that the claim under section 18 of the 2010 Act was "*not actionable at all*." ***Parviainen*** and ***Gassmayr*** were claims for equal pay and did not appear to us to be analogous to the claim of detriment maintained by the claimant in this case.

110. Was the claim presented in time?

a. The claimant accepted that the claim had not been presented within the "*3 month rule*". She sought to rely on section 123(1)(b) of the 2010 Act which provides the alternative, "*such other period as the employment tribunal thinks just and equitable*." The relevant dates are as follows; On 1 June 2021 the respondent issued to the claimant a payslip which did not disclose any payment for on call work; on 29 August 2022 the claimant first contacted her trade union; on 22 September 2022 the claimant began early conciliation; on 7 October 2022 the early conciliation certificate was issued; on 7 November the ET1 was presented, which included a claim of detriment by virtue of an alleged failure to pay her on call allowance. The claimant's

evidence was that within weeks leading up to 7 November she compiled her payslips for discussion with her trade union representative and it was within those discussions that she became aware of the claim. There was no mention of the issue in the letter of resignation. Given the approach taken by the claimant on other issues about which she was unhappy our view was that it was more likely than not that if she had been aware of the claim earlier she would have raised it at that time. It follows that it is more likely than not that she was first aware of the claim in early November, prior to 7. We agree with the respondent that after 1 June 2021 the claimant was aware of the underlying facts underpinning the claim. We did not accept (as Mr Macphail argued) that she chose not to obtain legal advice at that point. The fact that she did not was not a conscious choice. There would have been no other reason for her to seek advice at that time. She had not started her maternity leave. Of the various factors referred to by the claimant in deciding this question (from ***British Coal Corporation v Keeble*** [1997] IRLR 336) we noted that three of them which are almost always relevant are (i) the length of, and (ii) reasons for, the delay; and (iii) whether the delay has prejudiced the respondent (***Southwark London Borough Council v Afolabi*** 2003 ICR 800). There appeared to us to be little or no prejudice to the respondent in that it had been able to fully answer the substantive claim. On one view the delay was substantial, 1 June 2021 to 7 November 2022. But in our view the relevant period was much shorter because of the reason for it; that the claimant was unaware of it until a discussion with her union representative. On that analysis the claim had been presented within that short period which we considered to be just and equitable.

111. Has the claimant proven any loss?

a. No. It is in our view clear and consistently so since 7 November 2022 that the primary claim is of a calculable pecuniary loss. The ET1's

Grounds of Claim (**page 19** at paragraph 10) assert that she suffered a financial detriment. In her closing written submission she "*does not seek to recover the loss in relation to her direct discrimination with exception of injury to feelings.*" The primary issue on this claim is about the loss of on call allowances. We agree with the respondent's submission that compensation is not due for injury to feelings because the claimant was not troubled by the cessation of the allowance at the time, and indeed she expected it to cease. There was no evidence that she was in any way upset or that there was any injury to her feelings in early November or thereafter resulting from her realising that she had this claim.

Claim under section 80F of ERA 1996; statutory right to request contract variation

112. On 25 July 2022 did the claimant make a flexible working request which complied with the requirements of section 80F of ERA 1996?

    a. We have taken the respondent's answer "*R has not identified any non-compliance in this regard*" as indicating "yes" to this question. The claimant completed the respondent's *pro forma* form making the request. There was no question at the time or within this litigation that it did not comply. We agree that it did.

113. Did the respondent deal with the claimant's flexible working request in a "*reasonable manner*" (for the purposes of s80G ERA)?

    a. It was odd that the respondent's Flexible Work Process was not produced. Nonetheless, in our view the answer to this question is "*yes*." We had regard to the ACAS Code of Practice on handling in a reasonable manner requests to work flexibly. The claim was limited to an assertion that the respondent had not dealt with the application in a reasonable manner. The claimant referred to the employment tribunal decision in the case of ***Whiteman v CPS Interiors Ltd and ors*** ET Case No.2601103/15 and it having been cited with approval

in the IDS Handbook Volume 1 at 4.29. That paragraph notes that reasonableness in this context refers more to the decision-making process than the substance of the decision. In her written submission the claimant criticised the respondent's conduct at the August 2022 meeting, Mr Whitelaw's letter of 16 September and Mr Brown's approach to the appeal. She summarised her position thus, "*the respondent had a closed mind to the flexible working request. Its requirements both in respect of employee hours and customer service were completely rigid. The respondent failed to consider in what ways they had been previously flexible in relation to the matter of working hours and customer service. It can be concluded that the wholly incompetent handling of the matter by Matthew Whitelaw and the generally closed mind of the respondent has resulted in a failure by them to handle the request reasonably*." In our view these criticisms stray into the substance of the decision itself. An analysis of the question is not helped by the fact that the whole process was clearly considering more than just the "*job swop*" request which was the statutory request in issue. By the time of the appeal the emphasis had shifted very much to a consideration of the claimant's return to the role of funeral director on a part-time basis. Indeed all of the claimant's criticisms of Mr Brown were to do with that role. In the context of the Code in our view the respondent; considered it prior to all three meetings; discussed it with the claimant; informed her of its decision and the rationale; and allowed a right of appeal. In our view the Code was followed, the respondent acted in good faith and gave real thought to the request. That being so, the respondent dealt with the claimant's flexible working request in a reasonable manner. The claim that it did not do so does not succeed.

<u>The claim of indirect discrimination</u>

114. "*In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a*

provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification." ***Dziedziak v Future Electronics Ltd*** EAT 0271/11 at paragraph 42. Those comments relate to a claim of indirect discrimination.

115. At the preliminary hearing on 18 January 2023 at which the respondent was represented by counsel (not Mr Macphail) an agreed issue was that the respondent operated a PCP of "*requiring Funeral Directors to work full time*". At the outset of this hearing, the respondent departed from that position. In its written submission (and in a proposed list of issues which was tendered during the hearing) it proposed, instead, "*The PCP of requiring FDs (in the Edinburgh area) to work full time.*" The respondent's submission asserted that it was apparent that it would be factually incorrect to work with the PCP of "*the PCP of requiring FDs [throughout the UK] to work full time*" because it was clear from the evidence that there were some part time funeral directors elsewhere in the UK. That is indeed the case. That was obvious (and should have been to the respondent) as early as 13 September 2022 when Mr Whitelaw was advised by HR of that fact. It was regrettable that the question had not been discussed and agreed between the parties prior to the start of the evidence. In her written submission and for the first time the claimant proposed, instead, the following as the PCP "*requiring funeral directors, nationwide, to work full time hours except on a case-by-case basis where business needs can be met*." In discussion with Mr Milne this developed to being a PCP of "*requiring funeral directors, nationwide, to work full time hours except in the case of those who request to work part time with any such requests made being dealt with on a case by case basis taking into account the request made, the circumstances of the request and the needs of the business.*" At latest by the time of the finalising of the bundle it should have been apparent to the claimant that the issue agreed on 18 January did not

reflect the factual background. She could have clarified her position earlier than she did.

116. It is convenient to consider the claimant's versions first. The first difficulty with both of them is that there is no evidence to support a finding that either is a 'practice' which was operated by the respondent. While we heard evidence about examples elsewhere in the UK, that evidence suggested that there was no requirement to work in the way described. Those examples were legacy situations from businesses which the respondent acquired or which occurred by virtue of the peculiarities of the locale. We did not accept that the email on **page 139** was sufficient to show the existence of either PCP contended for. Even if we are wrong about that, there was no evidence to support a finding that either of the claimant's versions of the PCP put women generally at a disadvantage. Indeed, her submission referred to the requirement to work full time. The three reasons set out there referred to the original (January 2022) version of the PCP. Nowhere does she suggest that any of them are referable to her final versions of it. On that basis she has not discharged the burden on her. Separately, she has not shown that she was put to the same disadvantage. It is relevant to repeat the relevant paragraph (25) of her submission. "*I also say that the claimant was put to that disadvantage. In the event she returned to work, she would require to work five days per week. That would mean she could not care for her child. She would incur increased childcare costs. She did not want to spend all her time at work. The claimant did not consider it in her child's best interests*." This takes no account of the claimant's revised versions of the PCP. Accordingly, our view is that the claimant has not shown that either PCP was operated by the respondent. Even if we accepted that either PCP was operated, the claimant has not shown that the PCPs now relied on disadvantaged either women generally or herself.

117. We should say something about the respondent's suggested PCP; "*of requiring FDs (in the Edinburgh area) to work full time*." We were not persuaded that this was a helpful analysis of the facts. Two points occurred to

us. First, there was evidence that a previous part time funeral director role (held by Morton McBurnie) had existed in the Edinburgh area. That tended to suggest that it was not an invariable practice. Second, and more importantly, the respondent did not refuse the claimant's suggestion to work part time because of its requirement that funeral directors had to work full time. On the facts, the respondent considered the claimant's suggestion and rejected it for the reasons set out in Mr Whitelaw's letter of 16 September. It is in our view clear by at least that time that the respondent was not operating the PCP which it now references.

118. It was unnecessary for us to consider the other issues on the claim of indirect discrimination.

Unfair constructive dismissal

119. In 1977 in the Court of Appeal in ***Western Excavating (E.C.C.) Ltd. v Sharp*** [1978] I.C.R. 221 Lord Denning MR describing "*the contract test*" (which he regarded as the correct test in a claim of constructive dismissal) said, "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*"

120. In 2016 in ***Ishaq v Royal Mail Group Limited*** [2017] IRLR 208 in the EAT, his Honour Judge Shanks said, "*The law on constructive dismissal is well*

established, …. The basic principles come from ... Western Excavation (ECC) Ltd v Sharp …".

121. The parties agreed that the term relied on is the implied term of trust and confidence.

5 122. We first focussed on identifying the conduct of the respondent ultimately relied on by the claimant as allegations of a breach of that term. We then considered whether that conduct occurred and whether it was a breach of it. At the preliminary hearing on 22 March the tribunal recorded that the claimant relied on three "*acts*" as breach. The first (cessation of on-call payments) 10 cannot have been a reason for the claimant's resignation because on her evidence she learned about it after the date of her resignation. It could therefore not be an act which formed a basis for her resignation. We understood from discussions with the claimant's counsel that he accepted this. Second, an alleged failure to complete various assessment and Keeping 15 in Touch forms. This was withdrawn as a basis for the claim. Third (as recorded at the March PH) "*the decision taken and manner in which the respondent dealt with her flexible working request*". This can be contrasted with the claimant's pleading (Grounds of Claim paragraph 27, **page 90**) in which she relies on "*the repeated rejection of each flexible working* 20 *suggestion made by the claimant and the unreasonable refusal of her flexible working request*." We focussed on the latter albeit on one view the former is a slightly different way of saying the same thing. The latter reflects the *de facto* position in that the suggestion of part time working in the funeral director role was beyond (and different from) the flexible working request itself.

25 123. In our view this respondent (and any employer for that matter) is entitled to reject a flexible working request or suggestion so long as that refusal complies with the relevant statutory framework. There is no suggestion in this case that the respondent refused the claimant's application for a reason not contained in section 80G(1)(b) of ERA 1996. Rejection *per se* could not be a 30 breach of contract. The claimant's submission was that; the respondent's response to the claimant's appeal was the most recent act which caused or

triggered her resignation; she believed that she had been dealt with obstructively and felt like she was not wanted back; the response to the appeal was part of a course of conduct; and that this "*final straw*" was not innocuous. That course of conduct, looked at in the context of the claimant's pleading, was the episode of considering the flexible working request to the appeal outcome.

124. We reminded ourselves of the test; was the respondent's conduct calculated to or likely to destroy or seriously damage the mutual trust and confidence between the parties? ***Malik v Bank of Credit and Commerce International SA*** [1997] ICR 606. The claimant accepted (correctly) that the test is an objective one.

125. In our view the respondent's rejection of the flexible working (job swop) request was not unreasonable. We have set out the basis of that view above.

126. The claimant's other suggestion about how she might return to work was returning part time as funeral director. We reminded ourselves that on 15 July 2022 and prior to submitting the flexible working request the claimant wrote to Mr Whitelaw to say that she completely understood his view that he could not see how a part time funeral director position could work "*since a* [sic] *on call rota is not something my life can work around now*" (**page 232**). Logically, at that point in time the claimant could not complain about the respondent's attitude to such a suggestion because she understood and did not dispute it. The question then becomes; did the respondent's conduct thereafter in considering the suggestion of a part time funeral director role conduct itself in a way that was calculated to or likely to destroy or seriously damage the mutual trust and confidence between the parties? In our view it did not. Without rehearsing the evidence there is no doubt that Mr Whitelaw revisited the question in the meeting on 13 September, took advice from HR, and provided reasons why he was unable to agree to the suggestion. In our view they were credible reasons. The claimant included in her appeal to Mr Brown her criticisms of those reasons. He responded to them.

127. The respondent rejected the two suggestions made by the claimant. There was nothing in the conduct of the respondent in doing so that was either calculated or likely to destroy or seriously damage the trust and confidence between them. The claim of unfair constructive dismissal does not succeed.

5 **Remedy**

128. The claim of unfavourable treatment under section 18 of the 2010 Act succeeds. Our judgment reflects that. Section 124 of that Act thus applies. It provides that an employment tribunal may (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to 10 which the proceedings; (b) order payment of compensation; and/or (c) make an appropriate recommendation. The claimant sought neither of (a) nor (c). On that basis we did not order either. We made no order for payment of compensation for injury to feelings for the reasons set out above.

Employment Judge: **R Bradley**
Date of Judgment: **04 October 2023**
Entered in register: **05 October 2023**
and copied to parties