EMPLOYMENT TRIBUNALS

Claimant: Miss AMY HALLETT

Respondent: SP PLANNING LIMITED

Heard at: Bristol **On:** 16th – 19th October 2023

Before: Employment Judge David Hughes
Mrs V Blake
Ms J Cusack

Representation
Claimant: In person (assisted by her father)
Respondent: Allan Roberts, counsel

RESERVED JUDGMENT

1. The Claimant's complaint of a detriment contrary to Reg 19 of the Maternity and Parental Leave Regulations 1999, reg 19, insofar as it concerns an allegation of not offering the Claimant appropriate support to become a member of the RTPI was not presented within the applicable time limit. It was reasonably practicable to do so. The Tribunal therefore lacks jurisdiction to consider that element of the Claimant's claim.

2. The Claimant's complaint that she was not offered appropriate support to become a member of the RTPI, insofar as it is made under the Equality Act 2010, ss18, was not presented within the applicable time limit, but it is just and equitable to extend the time limit.

3. The Claimant's claim for automatic unfair dismissal, contrary to the Maternity and Parental Leave Regulations, reg19, is not well-founded and is dismissed.

4. The Claimant's claim that she was subjected to a detriment contrary to the Maternity and Parental Leave Regulations 1999, reg 19, to the extent that the Tribunal has jurisdiction to consider it, is not well-founded and is dismissed.

5. The Claimant's claim that she suffered Pregnancy and Maternity Discrimination contrary to the Equality Act 2010, s18, is not well-founded and is dismissed.

6. The Claimant's claim that the Respondent failed to make reasonable adjustments, contrary to the Equality Act 2010, ss21 & 21, is not well-founded and is dismissed.

7. The Claimant's claim for victimisation, contrary to the Equality Act 2010, s27, is not well-founded and is dismissed.

8. The Claimant's claim for wrongful dismissal is not well-founded and is dismissed.

REASONS

Who everyone is

1. The Claimant was employed by the Respondent as a graduate planner from 03.05.2021 to 30.05.2022. The Respondent is a small planning consultancy business. Although it has a business address in London, it operates primarily from premises in Cheltenham and Gloucester.

2. In the ET1, the Claimant said that the Respondent employed 12 people. In the evidence before us, it was said that it employed 14 people when the Claimant worked for it. Although exact numbers fluctuated over time, they were in this range. Apart from an office manager and a marketing person, all other staff were planning professionals of some sort, although not all were members of the Royal Town Planning Institute. The Respondent can fairly be described as a small business.

3. The managing director of the Respondent was and remains Simon Firkins. Although others held the title "director" within the business, they were not statutory company directors. In the course of the hearing, we heard evidence from Mr Firkins, from Becky Brown, who was the Claimant's line manager and is a chartered planning consultant, Paul Jenkins, another chartered planning consultant, and Elizabeth Shield. Ms Shield said in her statement that she was formerly a planning consultant with the Respondent, but at the time of her statement was working for a firm of solicitors. However, she also said that she would be rejoining the Respondent in October 2023. Whether she had done so by the time of the hearing was not addressed, and we think nothing turns on this.

4. The Claimant had, in the past, been employed by the Nationwide Building Society, in a managerial role. We were not told the exact dates of this, and it does not matter for this dispute. She is also a shareholder (1%) and a director of Poulsom Design Services Ltd. This company trades under the name "Poulsom Architectural Design and Planning Services", or so describes itself on documents we have seen, and will be referred to as "Poulsom".

5. Poulsom is run by a Mr Russell Poulsom, who is the Claimant's partner. Both he and the Claimant have been statutory directors of Poulsom since it was incorporated.

<u>What the claim is about</u>

6. The Case Management Order ("CMO") dealt with in greater detail below states, that, by a Claim Form dated 10.05.2022, subsequently amended, she brought the following claims:

    a) Automatic unfair dismissal contrary to the Maternity and Parental Leave Regulations 1999;

    b) Being subject to detriment contrary to the Maternity and Parental Leave Regulations 1999;

    c) Discrimination on the grounds of pregnancy and /or maternity etc. contrary to section 18 of the Equality Act 2010;

d) Disability Discrimination by a failure to make reasonable adjustments to the disciplinary process contrary to section 20 Equality Act 2010

e) Breach of contract relating to notice.

7. The CMO did not include in its list of causes of action claimed, a claim for victimisation contrary to s27 of the Equality Act 2010. However, that claim is recognised in the list of issues also contained in the CMO and, subject to arguments about jurisdiction, the Respondent was content that we consider it.

8. On 20.06.2022, the Claimant emailed the Tribunal, to apply to amend her claim to add a claim for her dismissal, saying that it was "*unfair and discriminatory*". She said that she felt the sole reason for her dismissal was that she had raised concerns about pregnancy related discrimination in the workplace. The Respondent recognised that this was, in substance, an application to amend, did not object to the application, and filed amended Grounds of Response on 10.08.2022.

9. The claim came before Employment Judge Rayner on 09.02.2023, for a Case Management Hearing. Employment Judge Rayner prepared the following list of issues:

1. Time limits
1.1 The claim form was presented on 10 May 2022. The Claimant commenced the Early Conciliation process with ACAS on 18 March 2022 (Day A). The Early Conciliation Certificate was issued on 28 April 2022 (Day B). Accordingly, any act or omission which took place before 19 December 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide
1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:
1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination and/ or the act complained of?
1.3.2 [DETRIMENT] If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period.

2. Wrongful dismissal; notice pay
2.1 What was the Claimant's notice period?
2.2 Was the Claimant paid for that notice period?
2.3 If not, was the Claimant guilty of gross misconduct or did she do something so serious that the Respondent was entitled to dismiss without notice?

3. Automatic unfair Dismissal (Maternity and Parental Leave etc regs 1999 reg 20)
3.1 Was the reason or the principal reason for the Claimant's dismissal
3.1.1 The pregnancy of the employee?

4. Detriment Maternity and Parental Leave etc regs 1999 reg 19) (Employment Rights Act 1996 section 47B)
4.1 Did the Respondent do the following things once it knew the Claimant was pregnant:
4.1.1 The employer stopped providing feedback
4.1.2 The claimants responsibilities were reduced ;
4.1.3 Ask the Claimant to do administrative tasks such as taking notes, amending spreadsheets or down load planning applications;
4.1.4 Hushing up conversations about the Claimant becoming chartered;
4.1.5 Making excuses not to meet the Claimant to discuss her complaints;
4.1.6 Locking the Claimant out of her computer on 25 February 2022;
4.1.7 Failing to invite the Claimant to a works social on 4 March 2022;
4.1.8 Start an internal investigation into the Claimant for gross misconduct;
4.1.9 on 18 March 2022Accuse the Claimant of gross misconduct;
4.1.10 during the disciplinary meeting, which the Claimant did not attend, the employer introduced a fourth reason (plagiarism) for disciplinary action, without prior notice. The Claimant was not able to comment on or explain why this was inaccurate.
4.1.11 The Respondent conducted a second meeting about the Claimant but did not invite the Claimant to the meeting.

1.1[1] By doing so, did it subject the Claimant to detriment?

[1] The numbering, and spelling, is from the Case Management Order. The parties were aware that the numbering had gone awry in the hearing, and we are satisfied that this did not impact on anyone's understanding of the issues.

1.2 If so, was it done for the reason that
1.2.1 The Claimant was pregnant?
1.3 The Claimant was pregnant from the

2. Pregnancy and Maternity Discrimination (Equality Act 2010 s. 18)
2.1 Did the Respondent treat the Claimant unfavourably by doing the following things:
2.1.1 The employer stopped providing feedback
2.1.2 The Claimant's responsibilities were reduced ;
2.1.3 the Claimant was asked to do administrative tasks such as taking notes, amending spreadsheets or down load planning applications;
2.1.4 conversations about the Claimant becoming chartered were hushing up;
2.1.5 Making excuses not to meet the Claimant to discuss her complaints
2.1.6 On 16 February, Simon Firkins said to the Claimant , when she said she may be suffering from ante natal depression, why are you telling me this?" "what are you hoping to gain from this?" "well you don't need to be that honest"
2.1.7 Locking the Claimant out of her computer on 25 February 2022;
2.1.8 Failing to invite the Claimant to a works social on 4 March 2022;
2.1.9 Failing to provide the Claimant with a payslip for February or March 2022;
2.1.10 Start an internal investigation into the Claimant for gross misconduct;
2.1.11 Accusing the Claimant of gross misconduct on 18 March 2022;
2.1.12 during the disciplinary meeting, which the Claimant did not attend the employer introduced a fourth reason (plagiarism) for disciplinary action, without prior notice. The Claimant was not able to comment on or explain why this was inaccurate.
2.1.13 The Respondent conducted a second meeting about the Claimant but did not invite the Claimant to the meeting .
2.1.14 Dismiss the Claimant;
2.2 Did the unfavourable treatment take place in a protected period? The Claimants protected period started with her pregnancy 17 September 2021.
2.3 If not did it implement a decision taken in the protected period?
2.4 Was the unfavourable treatment because of the pregnancy?
2.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

3. Disability
3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
3.1.1 Whether the Claimant had a physical. She asserts that she is epileptic and that this is a disability. She says that she told the Respondent of her impairment at the start of her employment.
3.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
3.1.5.2 if not, were they likely to recur?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)
4.2 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
4.3 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
4.3.1 The disciplinary porvedure
4.3.2 The time frmes set out in the Discipinary procedures….;
4.3.3 A practice of sending emails at evening and at weekends
4.4 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was at greater risk of suffering a seizure if subjected to stress.?
4.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
4.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
4.6.1 Adjusting the time frames within the procedure to allow more time to comply or respond or attend;
4.6.2 To restrict sending emails to office hours only
4.7 Was it reasonable for the Respondent to have to take those steps and when?
4.8 Did the Respondent fail to take those steps?

5. Victimisation (Equality Act 2010 s. 27)
5.1 Did the Claimant do a protected act as follows:
5.1.1 Tell her employer in an email to Simon Firkins, on 23 February 2022, that she felt discriminated against at work
5.2 Did the Respondent do the following things:
4.1.1 Lock the Claimant out of her computer on 25 February 2022
4.1.2 Fail to invite the Claimant to a works social on 4 March 2022
4.1.3 Fail to provide the Claimant with a payslip for February or March 2022
4.1.4 Start an internal investigation into the Claimant for gross misconduct
4.1.5 Accuse the Claimant of gross misconduct on 18 March 2022
5.2.1 during the disciplinary meeting, which the Claimant did not attend the employer introduced a fourth reason (plagiarism) for disciplinary action, without prior notice. The Claimant was not able to comment on or explain why this was inaccurate.
4.1.6 The Respondent conducted a second meeting about the Claimant but did not invite the Claimant to the meeting .
5.2.2 Dismiss the Claimant;
5.3 By doing so, did the Respondent subject the Claimant to detriment?
5.4 If so, was it because the Claimant had done the protected acts?

6. Remedy
Detriment (MAPLE 1999)
6.1 What financial losses has the detrimental treatment caused the Claimant?

6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.3 If not, for what period of loss should the Claimant be compensated?
6.4 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?
6.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
6.6 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

Discrimination or victimisation
6.7 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
6.8 What financial losses has the discrimination caused the Claimant?
6.9 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
6.10 If not, for what period of loss should the Claimant be compensated for?
6.11 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
6.12 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
6.13 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
6.14 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it by the Claimant failing to appeal the dismissal deceion ? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
6.15 hould[2] interest be awarded? How much?

The hearing

10. The hearing was held at Bristol on 16th – 19th October 2023. The hearing had been listed for 4 days. We were able to hear the evidence and submissions (going to liability only in each case) within that time but were not able to deliberate on our decision. We therefore reserved the decision on liability, which we now give.

11. At the hearing, the Claimant initially represented herself. On the second day, the Claimant asked if her father, who had attended to support her, could address us. Thereafter, it was largely he who conducted the

[2] We think this was intended to read "should".

questioning of witnesses, although the Claimant herself addressed us in closing.

12. The Respondent was represented by counsel. We are grateful to those who addressed us for their courtesy and helpfulness.

What happened

The Claimant joins the Respondent

13. In early 2021, the Respondent wanted to recruit a graduate planner. This is a role suitable for a recent university leaver, with little or no planning experience. It was the time of the Covid-19 pandemic, and thus the recruitment exercise was undertaken remotely.

14. The Claimant applied for the post. Mr Firkins told us that he was impressed with her application, and that she already had some formal planning experience. She showed him examples of her planning work. She said that she had undertaken this work on a freelance basis.

The Claimant's contract

15. The Claimant's contract of employment was in the bundle before us. It is dated 12.05.2021, but it is not disputed that the Claimant's employment started on 03.05.2021.

16. The following provisions of the contract were referred to in the hearing or are otherwise germane to the issues:

…Our company policies are not contractual, but you must make sure you know them, understand them, and comply with them. Copies are available in the staff handbook.

5.1 You will normally be working from home, but may be required to attend the Company's offices either Cheltenham or Gloucester, or such other place which the Company may reasonably require in for the proper performance and exercise of your duties.

6.5 You must not at any time participate directly or indirectly or be concerned in any kind of business which competes with or is detrimental to the business of the Company, or which impinges upon your ability to fulfil your duties under this contract.

8.2 In addition[3], you are entitled to:

- *Payment by ST Planning of your annual RTPJ subscription as and when applicable*

10.1 If you are going to be off work because you are unwell or have been injured, you must tell us as soon as possible. Our Sickness Absence Policy in the staff handbook sets out our rules about who you must contact and when, and other steps you must take.
10.2 During your probationary period (and any agreed extension to this period), if you are absent from work due to sickness or injury, you will be entitled to statutory sick pay (SSP) only (provided that you otherwise qualify for this). You will not be eligible for any contractual sick pay until you have successfully completed your probationary period.
10.3 Once you have successfully completed your probationary period, during any period of sickness absence you will, in any 12-month period, receive sick pay from the Company of basic salary only at your normal rate of pay for a total of two weeks. This will be followed by SSP for any remaining periods of absence. The Company has sole discretion on whether to extend this period of full pay, depending on the individual circumstances.
…

13. Training

During your employment the Company will either pay for or contribute towards your costs for CPD (Continuing Professional Development). More information is provided in the staff handbook

17. Disciplinary and grievance

17.1 Our disciplinary and grievance procedures are in the staff handbook. These procedures do not form part of your employment contract, but it is important that you comply with them.
17.2 You must maintain a good standard of work performance and conduct at all times. If standards fall below the reasonable levels acceptable to the Company, you may be liable to disciplinary action which could ultimately result in dismissal if satisfactory improvements are not made.
17.3 If an allegation of misconduct is made against you, we may suspend you while we investigate. We will continue to pay you while you are on suspension. If you are signed off work sick while on suspension, we may decide to pay Statutory Sick Pay only, and not any normal pay that would otherwise be payable during suspension.
17.4 We may impose one or more of a range of potential sanctions under our Disciplinary Policy. These include a warning or an extension of a warning, a change of duties, redeployment to another role (at the same or lower level - including demotion with a reduction in salary), and dismissal.
17.5 If you are not satisfied with any disciplinary decision relating to you, you should appeal in writing as set out in our Disciplinary Policy.
17.6 If you are unhappy about anything at work, you are entitled to raise a grievance. Our Grievance Policy sets out the process you must follow.

19. Keeping things confidential

…

[3] To the Claimant's salary.

19.2 Confidential Information includes (but is not limited to) information about our products, services, finances, funding, personnel, commercial contracts and arrangements, business contacts, trade secrets, know-how, plans and forecasts and business ideas.
19.3 You must not (unless in the proper course of your work and/or with our express prior authorisation, or in the situations outlined in clause 19.6 below) use Confidential Information, make or use copies of Confidential Information, or disclose Confidential Information to anyone or any entity. That obligation applies during your employment and after it has ended.

20. Post-termination restrictions

20.3 Non-compete (not doing the same type of work for a competitor)
• You will not, for 6 months from the Termination Date, be directly or indirectly involved, either on your own behalf or with or on behalf of another person or entity, with a business (including one that you have set up) that competes, or intends to compete, with the work you were materially engaged in for us during the 12 months leading to the Termination Date.
• This does not prevent you from holding investment shares in a competing company, as long as those shares are less than 5% of the company's total issued share capital

…

21.1 Either you or we may terminate your employment by giving written notice in advance as follows:

Notice: From Employee	***Notice: By the Company***
After one month and until satisfactory completion of your probationary period – one week	*After one month and until satisfactory completion of your probationary period – one week*
Thereafter - two months (notice must be given in writing)	*Thereafter and up to eight complete years' continuous service - two months rising by one additional week for each additional year of service to a maximum of twelve weeks' notice after twelve years' service.*

…
21.6 If we decide to dismiss you for any of the following reasons, we will not have to give you notice nor will we pay you in lieu of notice (known as a summary dismissal):
• are guilty of any gross misconduct affecting the business of the Company;

• commit any serious or repeated breach or non-observance of any of the provisions of this agreement or refuses or neglects to comply with any reasonable and lawful directions of the Company;
• are, in the reasonable opinion of the Company, negligent and incompetent in the performance of your duties;
• are declared bankrupt or make any arrangement with or for the benefit of your creditors or have a county court administration order made against you under the County Court Act 1984;
• are convicted of any criminal offence for which a fine or non-custodial penalty is imposed;
• cease to be legally entitled to work in the UK;
• are guilty of any fraud or dishonesty or act in any manner which in the opinion of the Company brings, or is likely to bring, you or the Company into disrepute or is materially averse to the interests of the Company; or
• are guilty of a serious breach of any rules issued by the Company from time to time regarding its electronic communications systems.

26. Entire agreement
26.1 This agreement and any document referred to in it, sets out everything we have agreed and supersedes all previous agreements whether written or oral, relating to its subject matter.
…

Oral agreement

17. It is not in dispute that the Claimant and Mr Firkins had a discussion about the Claimant's planning experience and reached an oral agreement relating to it. She said to Mr Firkins that she had a number of outstanding jobs, in some of which the planning application had yet to be submitted. She says she offered to supply him with a list of outstanding jobs.

18. Mr Firkins told us that the Claimant had indicated that the applications on which she was working were 90% complete, just needing to be monitored through the process. He was clear that his understanding was that all had been submitted.

19. We consider that Mr Firkins' account of what was agreed is more probable than that of the Claimant. We find that Mr Firkins agreed that the Claimant could finish off work on applications that had been submitted. We find that he was probably given to understand by the Claimant that applications had been submitted on all matters on which she had worked. We accept that the Claimant may well have offered to prepare a list of matters on which she was working. Mr Firkins did not accept this offer, probably because he

understood that the applications were few in number and already submitted.

20. Our reason for preferring Mr Firkins' account is primarily that it accords more with what would be expected from a professional service business recruiting a new professional. It would be surprising, we consider, if the Respondent had been content for the Claimant to continue to work on planning applications other than in the course of its employment for it. It may be considered rather generous of the Respondent to allow the Claimant to continue to oversee the applications that had been submitted.

21. More generally, the Claimant was not an impressive witness. At times she appeared to split-hairs and to take an artificially pedantic approach to the English language. In contrast, Mr Firkins was an impressive witness. He was willing to give answers that involved concessions to the Claimant.

22. We are mindful that the Claimant was not professionally represented. Although an intelligent woman, she was operating in an environment with which she is not familiar and which she must have found stressful. In contrast, Mr Firkins has given evidence in planning enquiries and had the appearance of a man accustomed to giving evidence and at ease doing so. Demeanour is a very poor tool for factfinders at the best of times, and these considerations increase the need for caution about it. We have relied as little as possible on the demeanour of witnesses, and we prefer to rely on contemporary documents where such are available.

How the Respondent worked

23. We have mentioned already that the Respondent is a small business, employing only two non-planning staff. Internally, the Claimant was assigned to a team led by Mrs Brown, which included another planner named Nathan.

24. We were told, and we accept, that the Respondent did not expect its staff to work in silos. People were expected to "muck-in". If one team had spare capacity, its people were expected to help out busier teams. The same went for individuals. None of this strikes us as either surprising in a small business of this sort, or objectionable.

25. Enquiries to the Respondent by potential clients would result in what were termed “X-files” being created. Mrs Brown sometimes created these herself, although she would often ask more junior staff to do so. We understand that an X-file would be a research document containing information to allow the Respondent to provide a quote for a client.

26. Another example of how people would not work in silos was that another planner, Hannah, had specialist knowledge of policy, and was asked to look at the policy aspects of planning applications. In one instance dealt with before us, the Claimant was asked to work on the other aspects of a job, whilst Hannah dealt with the policy aspects. This strikes us as unobjectionable.

27. The Claimant gave as examples of tasks with which she was unhappy being charged, listening to a local planning committee meeting, and taking notes to update a client. Mrs Brown said that all of the planners attend committee meetings, remotely or in-person, from time to time, whether or not they are speaking at the meeting. Even now, she will listen in on meetings. She will download historic applications and decision notices.

28. We accept Mrs Brown’s evidence. It is entirely reasonable that a planner should seek to keep up-to-date with a planning committee, that they should consider historic decision notices or applications, as these might contain material relevant to current and future applications. It was not unreasonable to ask the Claimant to do likewise, or to attend a meeting with a view to updating a client. To the extent that the Claimant was unhappy at being asked to undertake such tasks, or with the working culture and practices at the Respondent, we find that she had a somewhat unrealistic notion of what work would be like in a professional services business of the Respondent’s size.

<u>The Claimant’s epilepsy</u>

29. The Claimant suffers from epilepsy. She prepared a Disability Impact statement for these proceedings, on which she was not cross-examined. The Respondent accepted in its further amended Grounds of Response of

13.03.2023, that the Claimant was disabled[4]. Mrs Brown told us that the Respondent had been aware of this from the start of the Claimant's employment.

30. The Claimant described the effects of her epilepsy, and the side-effects of the medication she takes to control it, as including fatigue, which in turn can increase the risk of seizure. She also often experiences nausea and headaches (to cope with which, she tries to reduce screen time when possible). She also suffers from anxiety.

31. The Claimant referred in her Disability Impact Statement to the possibility that, without medication, she would experience seizures and be unable to drive. The Tribunal accepts that this is likely to be so.

The Claimant's work

32. In her first two months working for the Respondent, the Claimant was asked to create X-files. She told us that, after a couple of months, she was asked to liaise with local planning authorities about applications on which the Respondent was instructed. She was working alongside studying for a master's degree, and was concerned about juggling this with her responsibilities to the Respondent, but was keen to progress her career. We accept that she was keen to progress her career, and that the Respondent considered her a capable and promising planner. The timescale she gives, however, appears to be in some tension with the sick leave to which we turn next.

33. In July 2021, the Claimant had a time off work sick. She subsequently learned that she had experienced what was referred to in the hearing as a "chemical pregnancy". The exact nature of this was not explored in any detail before us, and does not impact on any matter we need to determine. Insofar as it was explored, we were told that it was a pregnancy that was never going to be viable, and one that would have ended before the Claimant learnt of its existence. We put the term in inverted commas simply because we are unsure whether it is an accepted medical term. It

[4] Paragraph 8 of the document.

was not suggested that the Claimant's account of having experienced this was untrue, and we accept it as true.

34. On 21 July, at 17:46hrs, Mr Firkins sent the Claimant a text message, in the following terms:

Sorry you've been unwell Amy.

Take care, and make sure you give yourself time to get properly well before attempting to return to work.

Speak to you as and when.

Thanks.

35. The Claimant responded:

Thanks for your message Simon and for understanding. I will see how I feel in the morning if ok.

Thank you.

36. In her evidence, the Claimant told us that she was unhappy at receiving this message. She acknowledged that it was supportive, but considered that it was inappropriate, because Mr Firkins knew that she was off sick, and because it was sent outside her normal working hours.

37. We do not accept that the Claimant genuinely thought this message to be objectionable. It was sent outside normal working hours – albeit only marginally – but it did not ask her to do any work. Its terms were, as the Claimant herself recognised, wholly supportive. Although one might not necessarily expect her to have sent a remonstrative reply to Mr Firkins even if she had been upset, her reply appropriately acknowledged the message, and is consistent with her not having thought it objectionable.

38. This criticism had not been made before the hearing. Mr Roberts suggested that it was an example of the Claimant criticising Mr Firkins without just cause. We think this suggestion, albeit denied by the Claimant, was well-founded.

39. The Claimant had a return-to-work meeting with Mrs Brown. This was held on Microsoft Teams. The Claimant told us that, during the meeting, Mrs Brown asked her if her pregnancy had been planned, and if she planned to get pregnant again in the near future. Mrs Brown denied this.

40. We accept Mrs Brown's denial of this. There is no independent evidence to support this. Although Mrs Brown – as we deal with below – was, on one instance at least, unnecessarily pointed in a remark about the Claimant, her approach to dealing with the Claimant was generally professional.

41. After the Claimant returned to work, she was asked to come into the office to work once a week. The Claimant found this objectionable. She points to her contract of employment stating that her normal place of work was her home.

42. On 11.08.2021, the Claimant emailed Mrs Brown. She wrote:

> *Hi Becky,*
>
> *Thank you so much for your time to listen to my concerns about working from the office and the associated commute. As discussed, I almost have a feeling of anxiety the night before needing to attend the office for a day's work as I know I will be away from home 7am-7pm. This does also affect the contact time I have with my partner's son as he is either in bed when I leave for work and potentially in bed when I return home. This drive does also make me more tired during the subsequent days.*
>
> *I do see the benefits of coming to the office, in terms of the better working relationship I will have with colleagues and a greater understanding of my discipline, as well as feeling like an integral part of the team, it's just the 7-7 and the tiredness in the following days that are an issue for me. I am also about to reapply for my driving licence on medical grounds and this is at the back of my mind and any tests the DVLA may require me to undergo (such as an EEG which they previously requested).*
>
> *I hope you can understand that I wish to remain working with SF Planning on a 4 day basis, predominantly from home and attending the office for perhaps a shorter day if this is possible.*

43. The Claimant was cross examined about the absence of any reference to epilepsy in this email. Although epilepsy is not expressly mentioned in the Claimant's email, Mrs Brown was aware of the Claimant's condition, and a reasonable reader of the email who knew of her epilepsy, would, we

consider, read the Claimant's concerns as relating to her epilepsy. It is difficult to see how a reasonable reader could not understand the reference to an EEG, to needing to reapply for her driving licence on medical grounds, as not being related to her epilepsy. The risks involved in the potential for a seizure whilst at the wheel are obvious.

44. Mrs Brown said that she did not believe she was aware at the time that stress and fatigue were triggers for the Claimant's epilepsy, and didn't associate the reference to the DVLA with epilepsy. For the reasons we have given, we think a reasonable reader of the email who knew that the Claimant had epilepsy, would have considered her reference to the DVLA and to an EEG to relate to her epilepsy. It seems unlikely that Mrs Brown – an intelligent woman – would not have made the link at the time. We think that she probably did, and that her evidence that she did not, is not reliable.

45. Mrs Brown responded to the Claimant on 24.08.2021, in the following terms:

Hi Amy.

Just so I'm clear as to what you're asking, are you wanting stay working Mon-Thurs with 1 day in the office per week and the other 3 from home? And to drop your hours by 3.5 hours a week so that you only work 4 hours on a Monday? This would enable you to commute into the office on a Monday but only be away from home for approx. 7.5 hours.

Or are you only wanting another arrangement e.g. in the office one day a fortnight?

If you could spell it out for me, that would be good. Then I can chat to others that I need to.

This is a starting point for a discussion. If we feel we can't accommodate what you're asking, we'll suggest an alternative.

Thanks Amy.

Becky

46. Five minutes after the above email was sent, Mrs Brown emailed Mr Firkins. She wrote:

Hi Simon.

As there are a few emails bouncing around about staff, I thought I'd send on Amy's request for flexible working hours (although it doesn't sound very flexible from her perspective if I'm honest!).

See the below short trail of emails and my initial response to her (attached) explaining what she needed to do to submit a request. The telecon she refers to below - it was only a suggestion by me that we could possibly accommodate a shorter working day on the day she comes into the office.

Ultimately she wants to continue working from home 4 days a week except for the odd occasion when she comes into Choffice.

Happy to discuss at some point. Is it time we had another shareholder's meeting?

47. It was put to Mrs Brown that the comment that "*it doesn't sound very flexible from her perspective if I'm honest!"* was sarcastic. She denied that it "*necessarily*" was. We do not agree. Mrs Brown's email to Mr Firkins did engage with the Claimant's request. It may be that "*sarcastic*" was not the most apt adjective to describe the comment, maybe "*unnecessarily pointed*" would have suited it better. But it was not a kind comment, albeit one made as what looks like a passing remark in an otherwise unobjectionable email.

48. The Claimant did not receive an answer to her request for flexible working. Asked why, Mrs Brown explained that the idea of her coming into the office once a week was tied in with the Respondent generally trying to get staff back into the office, as restrictions introduced in response to the Covid-19 pandemic were eased. She explained that periods of leave in September and October made it difficult for herself, Mr Firkins, and the Respondent's external HR adviser to meet, combined with the Claimant's later pregnancy, meant her request "*morphed into a different request*".

49. The Claimant's interpretation of clause 5.1 of her contract was criticised. It was put to her that the clause did not say what she contended it to say in paragraph 9 of her statement. In her statement, she had said "*…the Claimant was asked to attend the office once a week, despite her contract of employment stating that my normal place of work was at home*". We consider that is a fair reflection of clause 5.1 of the contract. The

Respondent's criticism of her on this point placed much emphasis on the contractual entitlement to ask her to go into the office, but appeared to overlook the fact that it identified her normal workplace as being her home.

50. However, whilst the Respondent's attitude towards this may be open to criticism, the Claimant has not based her claim on this. She has not claimed, for example, that the Respondent asked her to come into the office once a week for a prohibited reason, or that asking her to do so was a PCP that amounted to indirect discrimination, or that the failure to agree to not doing so was a failure to make a reasonable adjustment.

51. On 02.11.2021, the Claimant informed the Respondent that she was pregnant.

52. On the following day, a pregnancy risk assessment took place. It was carried out by Mrs Brown. It identified a possible adjustment to the Claimant's working hours (see below), which would be discussed on 06.12.2021. It also recorded:

Midwife suggested considering whether to stop working due to risks associated with epilepsy. Amy is a high risk pregnancy. Seizure triggers are fatigue & stress. Amy has considered this but would like to continue working at present, keeping under review. See notes above re. working hours.

53. On the same day, Mrs Brown emailed the Claimant in the following terms:

Hi Amy.

Further to our discussion earlier, I've sought advice from both Simon & Sarah and we need you to submit your request for changes to your working hours in writing please. It will effectively be amending the request you submitted back in August.

Items for you to cover off:
• Amount of hours per week
• Which days and suggested hours
• Which days in Choffice
• When you'd like to start the new hours
• The effects on you (explaining the background to the request NB This is confidential; only shared between you, me, Simon & Sarah)
• The effects on the company

Hope that all makes sense. No rush. Perhaps think carefully when you'd like the requested new hours to start; beginning of 2022 or sooner.

54. This email was considerate, and sought to accommodate the Claimant.

55. On 11.11.2021, she told the Respondent that she'd been advised by a midwife that her pregnancy was high-risk. On 22.11.2021, the Claimant asked to change her working hours to 22 hours per week, and to work permanently from home (save for every second Wednesday). The Respondent agreed to this.

56. It is self-evident that the midwife's suggestion, recorded in the risk assessment, that the Claimant consider stopping working, did not result in the Claimant voluntarily stopping working.

25th January 2022

57. The Claimant said in her statement referred to an exchange of emails on this date. At 11:32 Mr Firkins approved a letter drafted by the Claimant. At 12:07, the Claimant emailed Mr Firkins, to confirm that the item had been submitted. She said that Mr Firkins "…*He then rang the Claimant to berate her for submitting a letter he had previously sanctioned as he had decided to make changes*". She continued in her statement:

The Respondent[5] was also upset that the Claimant was leaving to go to a scan and asked "will you be returning today to complete this for me?" Aware that my scan was at 2pm, the Claimant finished work at 3:30pm and the hospital was 40 minutes from home. The Claimant had put him on speaker and, in shock her aunt asked if she was OK and if this was usual for him (the Respondent) to talk to her in this manner. Unfortunately, the Claimant said that this is how it was now at her place of work. The Respondent emailed again shortly after the telephone conversation at 13:13 "ready to go when changed to a PDF" (pg.138). The Claimant was clearly acting as a PA for the Respondent by converting word documents to PDFs, something that she was not previously asked to do for colleagues.

58. The Claimant accepted in cross-examination that the call berating her, on her account, occurred immediately or shortly after the email at 12:07.

[5] By which, she meant Mr Firkins.

59. To consider this allegation, it is necessary to set out the email exchange in some detail. At 12:12, Mr Firkins emailed the Claimant:

Thanks Amy

Does it have my name on again? If so can I just check it through before it goes in?

Thanks

60. At 12:13, the Claimant responded:

I put your name but I have just submitted it. The only change I made was address it to Emma and put this is a revised application.
Thanks

61. At 12:14, Mr Firkins wrote:

Ah, ok. Did you also refer to her request for changes to the scheme as she was not comfortable with the materials of the original submission?

62. At 12:15, the Claimant replied:

This is the letter I submitted...

63. Mr Firkins replied at 12:33:

Thanks Amy

This will probably do what it needs to do in terms of getting us PP; but personally I would have made it clearer (and hopefully easier) for the planning officer by explaining why we withdrew the previous application (and given the ref number for that) and how the changes we have made make this fresh submission completely acceptable.

It doesn't need much more, just an extra para or two to clearly 'tell the story'.

I think the height of the building is also less now, so I feel we should cover/correct that too as it helps address the neighbours concerns.

How do you think we should handle this from here? 🙂

Thanks

64. At 12:47, the Claimant replied:

Hi Simon,

Please see revisions in yellow. Let me know if I can upload this to PP/other changes needed.

Thanks

65. There was what looks like a separate exchange of emails on the same subject, overlapping those just mentioned. At 12:38, the Claimant had written:

Ok I will make changes and send them across. PP website is allowing me to amend the supporting docs but I have a hospital appointment shortly so only have a small window to receive your amendments/go ahead?

Ill email the letter when I've added your changes.

Thanks

66. Mr Firkins responded at 12:47:

It's no biggie Amy, and no rush - we can sort it later.

I really appreciate your proactiveness of cracking on and getting it submitted.

What time are you heading off for your appointment, and are you back later or tomorrow?

Thanks

67. At 13:13hrs, Mr Firkins emailed:

Thanks Amy

I've checked through and done some minor tweaks. Version in the folder ready to go when changed to a pdf.

Thank you, and please don't stress about this. Hope the appointment goes ok this afternoon.

68. The Claimant replied at 13:23hrs:

Thank you for looking quickly. The application had already gone to CBC so I cc'd you into the email I sent their validations team.

Thanks

69. We do not accept that Mr Firkins called the Claimant and berated her on 25.01.2022. In the email exchange, Mr Firkins' communications are appropriate, professional and supportive. Although it is theoretically possible that he could have called her and communicated something dramatically different to what he said in emails, it seems to us to be improbable that he did so. The emails allow only a short time in which such a call could have been made. And the improbability increases when one considers the telephone records included in the bundle, showing calls made from Mr Firkins' mobile phone on that day, do not include the Claimant's number.

70. The Claimant's account is therefore at odds with the contemporary emails and with the telephone records. The Claimant argues that the call could have been made from a landline. That is a possibility. But the Tribunal has to find facts on a balance of probabilities, and for the reasons explained, the Claimant's account is, we consider, highly improbable.

71. The Claimant's reliability, and indeed credibility, are not helped by the other things she said in the passage from her statement quoted above. She put the alleged call onto speaker, so her aunt could hear it. But her aunt did not give evidence to this Tribunal. Asked why, she responded that she did not appreciate that someone who didn't work for the Respondent could give evidence. Even making generous allowance for the fact that the Claimant is not used to the procedure before this Tribunal, that answer we find simply incredible. She cannot fail to have noticed that the Respondent sent her a statement from Ms Shield, who at the time she made her statement did not work for it.

72. As for the comment that the Claimant was being asked to act as a PA, we do not accept this characterisation of the exchange. It is the sort of exchange that one might expect between a senior professional and a more junior colleague, and we see nothing exceptional about it.

73. On 31.01.2022, the Claimant commenced sick leave. She remained on sick leave for the remainder of her time in the Respondent's employ.

74. On 11.02,2022, the following exchange of text messages took place between the Claimant and Mrs Brown:

Hi Becky, I am seeing the midwife tomorrow so will ask her then. Thank you. a. c „

Okey dokey. Thank you. Hope there's something she can do to help.

Hi Amy. Just wondering how you're doing?

Hi Becky, I'm feeling ok thanks, trying to avoid tv and phone as much as I can which does seem to be helping. The midwife said I might also have antenatal depression but to let her know if I'm feeling worse. I did ask her about a sick note but she said I can self cert for the first week?

75. On the same day, Mrs Brown emailed Sarah Wilkinson, the independent HR adviser the Respondent used, to seek advice re the Claimant's query about the sick note, and also to discuss whether to exercise the Respondent's discretion to pay the Claimant more than her statutory sick pay.

76. Ms Wilkinson responded on 14.02.2022. The response raised a number of questions, on which Mrs Brown commented (the questions in bold, Mrs Brown's comment in non-bold):

With regards to company vs SSP, this is entirely at your discretion, and you'd need to consider things such as:
• If it's extended, how long would this be for? *A good point. When would we stop? See below - I can imagine she's going to have more time off before the birth but of course I don't know this for sure.*
• If you do extend it, could you do the same for other employees, and, would you? *Depending on the circumstances, I think we'd need to do it for other employees if that situation ever arose of course.*
• If it is not extended, is there a risk that Amy might feel pressured financially to return to work? *I'm not sure about this. I get the impression that they're not stretched financially but of course I don't know for sure.*
• What is the probability/likelihood of further or continued absence throughout her pregnancy? *I think pretty high based on how ill she's been ill thus far and now the added possibility of antenatal depression.*
• The date you'd need to advise HATs of any payroll changes ie reduction in salary if SSP only. *I'm unsure of this.*

The amount of time she's been with SFP I would think should also be a consideration

77. The Claimant took exception to the comment that Mrs Brown made, that she did not have the impression that the Claimant was financial stretched. In fact, the Claimant told us that she was financially stretched.

78. We struggle to see how Mrs Brown could have reached this conclusion. In November, Mrs Brown had noted that the Claimant had been advised by her midwife to consider stopping work. Mrs Brown agreed in evidence that people do not generally work as a hobby. However, it is important to distinguish between things that upset the Claimant, and things that are germane to her claim. We can understand that this comment upset the Claimant. Whether it assists us in determining the matters we have to decide, we are more doubtful.

79. On the same day, Mrs Brown emailed Mr Firkins, sending him her comments. She canvassed whether the Claimant might be entitled the counselling through "*our programme"*.

80. On the same day, Mr Firkins had a text message exchange with the Claimant. It read:

Hi Amy. I'm so sorry that you're having a tough time there. Let me know it there is anything we can do to help/assist. Take care and I hope you recover soon.

Hi Simon, thank you for your message. Yes I never thought I'd feel like I have been during pregnancy, I do also feel a bit disengaged with work which I suppose doesn't help when I spend most of my days doing it Sorry to spring this on you but after talking with Rus he said I should mention it

81. Mr Firkins forwarded the exchange to Ms Wilkinson and Mrs Brown. His email included the comment, "…*Given her situation I really appreciate her honesty, albeit I'm not really sure why Amy is telling me/what I should do with the info. Any thoughts Sarah? My inkling is to message back and ask if she'd like to have a chat around this. But that could be completely the wrong thing in this situation!?.*"

82. It is not in dispute that the Claimant and Mr Firkins spoke on the phone on 16.02.2022.

83. The Claimant's account is that she tried to speak to Mr Firkins about her reasons for feeling disengaged at work, about how she felt like a 'PA for hire' for any colleague needing letters or reports written, and about how much potential she felt she had. She says that she referred to freelance work she had done in the past. She has Mr Firkins responding with, "*why are you telling me this? What are you hoping to gain by telling me this?"* and "*well, you don't need to be that honest"*.

84. Mr Firkins agrees that the Claimant expressed frustration. She wanted more responsibility, and better feedback. He gained the impression that the Claimant thought many tasks were beneath her. He was unclear as to what she wanted to achieve, wondering whether it may be a pretext for resigning or perhaps hoping for a promotion. He also has the Claimant referring to submitting planning applications during the call, using the present tense.

85. Mr Firkins made a manuscript note of the conversation. This was not disclosed when it should have been, but was disclosed on the first day of the hearing. This is unsatisfactory, but we do not think there is anything sinister in it – it is simply one of those mistakes that shouldn't happen, but do happen from time to time.

86. Mr Firkins was cross-examined on the absence of the verb "to submit" in the manuscript note. The verb is not there. But there is a reference to continuing work. After this reference, in brackets, one sees "SF check". Mr Firkins told us that this was a note for him to check up on the impression he had gained, that the Claimant was continuing to do planning work outside her work for the Respondent.

87. It was suggested to Mr Firkins in cross-examination that the words "SF check" might have been added to the document at a later date, to give it some more sinister effect. We consider this a fanciful suggestion. We

accept that the document, whilst not a verbatim record of the conversation, is Mr Firkins honest attempt to take notes of it.

88. Mr Firkins emailed Ms Wilkinson about this conversation on 11.03.2022. That email is long, and to set it out would extend already lengthy reasons unduly.

89. Mr Firkins was challenged that the verb "to submit", absent from the manuscript note, was present in his email to Ms Wilkinson. We do not think there is anything sinister in the verb appearing in the email. It was something that Mr Firkins said struck him, and we accept that it did. We accept that, regardless of the exact wording, Mr Firkins was given to understand that the Claimant was submitting planning applications – present tense – outside her employment by the Respondent. We note, however, that in her submissions to the disciplinary meeting subsequently held, she wrote:

In your disciplinary letter, you mention that I was 'submitting' (present tense) planning applications. I was referring to my own application for an extension and a self-build home for myself and my family to occupy. Becky was very aware of my live application for an extension and the subsequent one for a new build home as she asked me how it went…

90. That is very far from a denial that either the verb "to submit" was used, or that it was employed in the present tense. On the contrary, it is an admission, and an attempt to explain the use of the word.

91. We do not accept the Claimant's account, that Mr Firkins said, "*well, you don't need to be that honest*". He was unclear as to what the Claimant wanted, and we find that he probably did say that he was unclear about that. But he did not do so in a way so as to dismiss or belittle the Claimant. He did so because he was genuinely interested in finding a solution to matters.

<u>23.02.2023</u>

92. On this date, at 10:41hrs, the Claimant was advised that she would be paid SSP for at least some of that month.

93. The Claimant responded with an email, which read:

Hi Simon,
Thank you for your email. I must say, I feel that the timing of paying SSP aligns with our conversation last week and how your comments were, frankly, quite upsetting. If you are following contractual obligations regarding sick pay, why has my sickness never been an issue in the past (ie I have had more than the 14 days) and as a general rule, when an employee triggers SSP rather than full pay, this is discussed during a return to work meeting whereby the employee s advised than any future absences would not be covered by full pay. It feels that the decision has been made based on the conversation we had last week and if I am being honest with you, I feel that I have been discriminated against because I am pregnant (I have various examples I am happy to share with you); stopping full pay without a prior conversation as part of a return to work is further indication of this.

On the phone last week, I informed you that I may be suffering with antenatal depression, to which you responded "why are you telling me this?" This was demeaning and upsetting as I had thought long and hard about discussing such a sensitive and personal matter with you. I also did not understand why you said to me "what are you hoping to achieve by telling me this?" You also kept dropping suggestions about me leaving, which does not make me feel welcome at my place of employment at a time when I have been advised to protect my mental wellbeing. I was hoping that after our conversation that I would feel well enough to return to work but from what you said, it made me feel so much worse. I spoke with my GP practice two days later about what was said and how it had made me feel, to which they concluded that I am not well enough to return to work and advised me to speak with ACAS about potential discrimination at work. Overall, your reactions and comments to me came as a shock and were not what I expected when discussing issues with you and now, before any prior notification, I am being informed that I am no longer entitled to full pay.

ACAS have advised me to raise a formal grievance outlining my concerns. Initially, I was reluctant to do this and was hopeful we could discuss my feelings, how your comments had made me feel, in the hope of coming to a resolution. However, receipt of this email is making me feel that informal conversations is becoming an increasingly less viable option.

94. Mr Firkins responded the following day, saying:

Thank you for your swift reply. There are a number of points here that I would like to respond to, so will do so in turn.

Firstly, please accept my apologies that my comments upset you. That was certainly not my intention and it is helpful to know how you felt.

My recollection and notes of the discussion is quite different though, and I will explain. My question(s) about why you were letting me know about your situation was not in any way connected with the point about your possible ante-natal depression. That question related solely to you saying you had been feeling disengaged from work for 4 to 5 months; and followed your earlier text to me saying that you were feeling disengaged. For me that is a completely separate issue to your ante-natal depression, which had no bearing whatsoever on my questions.

Me seeking to be clear at the time about why you had told me you had felt disengaged from work for 4 - 5 months felt like the easiest way to open up the conversation around it. It was to explore openly (bearing in mind the first time you had said anything about feeling disengaged was in your text of 14th February 2022 and it was during our conversation on 16th February that you said you'd been feeling that way for 4 – 5 months) whether or not the extent of your disengagement had got to the point/was leading you to think you would prefer to work elsewhere where you might feel more engaged, or if there was a way to resolve things. I am sorry if you felt I was dropping suggestions about you leaving. That was certainly not the case. Rather I was seeking to have an open and honest conversation about how you feel in connection with work and in turn to see what we could do, if anything, about you feeling that way.

Please be assured that your sickness record is not an issue at all - for you we have
recorded 12 days off for sickness prior to the end of January 2022 - people are ill at times and there is nothing anyone can do about that. We are simply following the contractual obligations regarding sick pay.

I advised you about the SSP in advance of salary being processed and in accordance with your contract. I felt that was the right thing to do, and as you have been signed off for another month, it was not possible for the company to conduct a return to work meeting before salaries were due. A conversation around SSP in advance as part of a return to work discussion was therefore unfortunately not possible. Please be assured this is nothing at all to do with your pregnancy or any reason for being off sick, it is purely a reflection of your contract and the company acting in accordance with that.

I honestly do not believe the company has in any way discriminated against you. I
would be happy to consider other examples of where you feel this may have been the case, so please do provide these so that I can respond accordingly.

It is your choice of course, but I very much hope I will be able to respond to your
concerns and allay those without the need for any formal procedures. I would be happy to meet with you at your home, or elsewhere nearby, if you feel it would be beneficial to do that, and I am sure that Sarah would be available to attend too to ensure an objective view point. I am mindful of how you feel about travelling distances and the impact it can have on you; hence the offer/suggestion of coming to you. I'm also mindful of the advice (from the mid wife I believe) you have had about reducing/limiting

your screen time as much as possible, again hence the suggestion of coming to Melksham rather than you feeling you have to have a meeting remotely.

Separately, in case you do not recall, the company has an income protection policy with Canada Life. I have attached some details about that, which includes links to further information. I do not know all the details/requirements to make use of this policy, having never made use of it myself, but I thought I would send this on for you to look into if you feel it might be of benefit. For reference, the policy number is E18739/1/H.

Thank you again for expressing how you feel and I hope we can keep the lines of communication open.

With best regards

95. On 02.03.2022, the Claimant responded, saying that she would be happy to meet.

96. On 04.03.2022, Mr Firkins responded. He said that he was in a public inquiry the following week, but would liaise with Ms Wilkinson and revert re a meeting. In fact, he did not revert for a few weeks. It was suggested in submissions that a positive Covid test might explain that, but it appears that the Covid test was in February. The public inquiry we accept will have taken a lot of Mr Firkins' attention.

Claimant locked out of her computer

97. On 25.02.2022, the Respondent locked the Claimant's computer. The Respondent did so because it was concerned that she was submitting planning applications other than in the course of her employment with it, and in doing so would have access to the resources available on the Respondent's system, such as subscription material.

98. The Claimant was aggrieved by her computer access being locked. It meant, amongst other things, that she was not able to access her payslips. Eventually these were provided to her, but only after several requests. She was also aggrieved that it inhibited her ability to gather evidence to support her claim that she had suffered discrimination. Mr Firkins agreed that it would have that impact, at least potentially. However, further down the line (on 22.04.2022) the Claimant wrote, in the context of refusing a meeting, that she would "*…reveal my evidence as and when*

the [Tribunal] *process requests this from me…"*. This indicates that the Claimant did not believe herself at that stage to be without evidence of discrimination.

99. We also note that, on 23.02.2022, the Claimant said that she had examples of discrimination she was happy to share. Admittedly that was before she was locked out of the computer system, but she should have been in a position to identify for the Respondent the sort of documents she anticipated being able to access, but wasn't able to do so after being locked out.

100. The argument that the Claimant was impeded in her ability to gather evidence appears to us therefore to be more theoretical than practical. We think this argument has been pursued for forensic affect rather than because of any genuine sense the Claimant has that she has not been able to access evidence that might help her case.

Social event

101. In March 2022, another employee of the Respondent left the company. An informal drinks meet-up was arranged. The Claimant says that it was obvious that the entire office was invited, save for her.

102. The Claimant was, we understand, part of the WhatsApp group on which discussion about the meet-up took place. Whilst it is right that no venue was mentioned in the WhatsApp messages in the bundle, we do not think they support the suggestion that the Claimant was deliberately excluded.

Disciplinary investigation started

103. On 18.03.2022, the Respondent notified the Claimant that it had opened a formal disciplinary investigation. The letter explained that 7 applications for planning permission had been submitted to Wiltshire Council in the previous 12 months, with "Hallett" as the agent. Two of those are said to have related to applications of which she had made the Respondent aware. One was said to relate to the Claimant's own home.

104. The letter also said that the Claimant was an active director of Poulsom.

105. The Claimant was invited to attend a meeting on 22.03.2022. She was asked to send in any documents upon which she wished to rely by noon on 21.03.2022.

106. The Claimant declined to attend the meeting, but made written representations. In summary, her position was:

(a) That she had told the Respondent that she had outstanding work before joining it;
(b) That she did not think that having a 1% interest in Poulsom was a conflict of interest, that Poulsom's email footer had stated clearly "*Architectural design and planning services*", that the Respondent had seen this and not hitherto seen it as a problem;
(c) That, although she had referred to submitting (present tense) a planning application in her conversation with Mr Firkins, she had referred to her own application for an extension and a self-build home;
(d) That she had not carried out paid planning work whilst employed by the Respondent, even recommending them to her parents;
(e) That, being off work sick relating to discrimination whilst pregnant, she was entitled to present her own applications for her own home.

107. The Claimant also made representations, it appearing to be her intention to say that the disciplinary was related to the fact that she had raised an allegation of discrimination on 23.02.2022.

108. There followed communications between the parties, which is not disclosable.

109. On 21.04.2022, the Respondent wrote to the Claimant, inviting her to a disciplinary meeting. The meeting was to be conducted by Mr Jenkins, with Ms Wilkinson in attendance. It was proposed to hold the meeting on 27.04.2022 at 14:00. The letter was emailed to the Claimant shortly before 20:00 on 21.04.2022.

110. The communication set out the detail of the allegations against her. It included a link at which it was said that 6 planning applications could be seen to have been submitted by the Claimant within the previous 12 months. It identified two pieces of work published on the Wiltshire Council website, whilst she was signed off sick. And it identified that she was an active director of Poulsom, which was a competitor to the Respondent.

111. The letter advised that any further written representations had to be sent within 5 working days of the date of the letter.

112. That was an impossible task. The letter was dated 21.04.2022. That was a Thursday. The meeting was to take place the following Wednesday. Unless one counts the day of the letter – in some tension with 5 working days from the date of the letter – 5 working days would take the Claimant until past the day of the meeting. And the lateness of the delivery of the letter on 21.04.2022 compounded that problem.

113. The letter also asked the Claimant to submit any documentation by noon on 26.04.2022.

114. The Claimant chose not to attend the meeting, but asked the Claimant to consider her representations of 21.03.2022.

115. The meeting started. It was adjourned so that Mr Jenkins could investigate the allegation of plagiarism. By "plagiarism, the Respondent meant using its precedents as a source for preparing documentation for use other than through the Respondent. Although the description "plagiarism" struck the Tribunal as an unusual term for this allegation, it had been used by the Respondent and became a convenient shorthand for the allegation during the hearing. We use the term in that sense.

116. On 11.05.2022, the meeting was reconvened. It is not disputed that the Claimant was not invited to the reconvened meeting. The reason advanced for this was that it was not a new meeting, but the same meeting to which she had been invited and chosen not to attend. Mr Jenkins described the failure to invite the Claimant to the re-convened meeting as a "*learning point*" for the Respondent.

117. The Respondent's explanation strikes us as unconvincing. The failure to invite the Claimant to the re-convened meeting was a serious shortcoming, for which no sensible explanation was offered. We are not persuaded that there was anything sinister in it, rather we think it is an illustration of a flawed process – as was shown by asking the Claimant to submit representations on a timescale that went beyond the date of the meeting.

118. At the reconvened meeting, Mr Jenkins found 3 allegations against the Claimant proven: that she had submitted 3 applications in breach of her contract, that she was a director of a competing business, and that she had used the Respondent's report template for her own use. Mr Jenkins concluded that the proven allegations amounted to gross misconduct, and also breached the implied term of trust and confidence. He decided to dismiss the Claimant, with effect from 30.05.2022.

119. The Claimant did not appeal the decision to dismiss her.

Other factual matters
Administrative tasks

120. The Claimant contends that she was asked to do administrative tasks such as taking notes, amending spreadsheets or downloading planning applications. The implication was that the Claimant considered some tasks to be beneath her. Mr Roberts described her attitude as "*entitled*" in his submission, a description to which the Claimant took exception.

121. We understand why the Claimant might bristle at the word "*entitled*". It may be an unkind word, but it is not wholly inapt. We find that the Claimant had an unrealistic attitude to what the working world is like in a small business. We find that she was reticent about the mucking-in that was reasonably required by the Respondent.

122. In her statement, she identified two administrative tasks she was asked to do. One was to take a note of a meeting that she had with Mrs Brown and Nathan, and to delete all applications no longer live from the Respondent's spreadsheet.

123. Such meetings were a weekly occurrence. Mrs Brown could not recall a specific meeting such as the Claimant described. She said there was no designated minute-taker for such meetings, that different people might delete applications from the spreadsheet, sometimes the individual concerned, sometimes another would be asked to do it.

124. We accept Mrs Brown's evidence on this. The Claimant was not a reliable witness, and there is nothing to suggest that her account is correct.

125. The Claimant also identified in her statement being asked by Mr Jenkins to write reports for him and his team. She had not done this before telling the Respondent of her pregnancy.

126. This was explored in cross-examination. Rather than persist in the contention that writing reports was a purely administrative task, the Claimant changed tack. She contended that it showed how her time was available to everyone in the office. Earlier, work had been done within the team of the line manager to whom it was allocated. After she told the Respondent of her pregnancy, she was working for all teams.

127. This is not only a significant change in how the Claimant put her case, it is also something that we find wholly unsurprising. The Respondent didn't want its staff to work in silos. If the Claimant's time was available, there is no reason why she should not work across other teams. Indeed, it may be thought that an ambitious planner would welcome the opportunities to show her abilities to a range of people within the Respondent.

<u>RTPI membership</u>

128. The allegation is identified in the list of issues as "hushing up" conversations about becoming a chartered member of the RTPI. We understood this to mean that the Claimant was not offered appropriate support to become a member of the RTPI, which could, in turn, lead to chartered status.

129. On 21.06.2021, there were a number of emails exchanged on the subject of RTPI membership. At 13:44, the Claimant emailed the RTPI, to ask about the appropriate membership route. At 14:08, she received a reply, which contained a number of links. It appeared to point her in the direction of associate membership, although affiliate membership was mentioned (albeit in terms that suggested it may not be appropriate for the Claimant, as this category of membership did not require any planning experience).

130. The Claimant forwarded this to Mrs Brown, adding the following:

I emailed the RTRI and they came back to me quickly. It looks like my membership will need to be an Associate Membership, which requires 2 years experience (1 year must be post qualification). Although I would say that the sum of all hours worked on planning specifically over the past years could equate to 1 full time year. I guess what I will need to do is perhaps apply in 15 months' time (additional 2.4
months for working 4 days a week) and see what the RTPI come back with perhaps?

Thank you

131. Mrs Brown forwarded the email to Mr Firkins, but there was no reply to the Claimant.

132. The Claimant took this to be a lack of support in progressing the matter. She inferred, from her contractual right to have RTPI subscription paid by the Respondent, to a degree of assistance in progressing her membership. But the Claimant herself had identified a course of action – waiting and applying in 15 months' time. In the circumstances, it is difficult to see what immediate action could reasonably be expected from the Respondent.

<u>The substantiated allegations of submitting applications</u>

133. The report of the disciplinary meeting identified applications it held to be a breach of the Claimant's contract as follows:

(a) An application dated 18.05.2021, relating to 3 Centurion Close;
(b) An application for Fleetwood Rise, dated 14.07.2021;
(c) An application for Fieldways Hotel, dated 30.09.2021;

(d) An application dated 17.11.2021, also relating to Fieldways Hotel.

134. The bundle contained a message dated 01.03.2021, reading as follows:

Re Fleetwood Rise

Hi Amy

Sorry to hear of your loss which I failed to mention on our telephone conversation; hindsight is no excuse.

Although on the lower end of the spectrum, personally I feel one more shot at this application is justifiable with professionals who know the system, rather than me muddling through hopelessly.

So yes, on that note, please make waves as best as you can, I will leave it in your hands.

Let me know how, and when you require payments; cash, cheque, or bacs are all acceptable with me.

Kind regards and good luck

Karl

135. Mr Firkins accepted that this message indicated that someone was asking the Claimant to have one more shot at something. We consider this message indicates that the Claimant was initially instructed – whether independently or through Poulsom – before she was employed by the Respondent. But it was not disputed that the application was not submitted until after she had been employed by the Respondent.

136. The bundle also contained a message dated 24,02.2021, which reads as follows:

Good afternoon Paul and Rob.
Thank you for the opportunity to meet with you both and discuss a potential way forward for your property, Fieldways. I have now had a chance to review ad documents and consider a viable approach for the site. My initial observations are as follows:

• The Conservation Officer commented under the pre-app that they prefer to see Fieldways as housing rather than high density properties. However, due to the layout of the site, housing is not a viable option due to a lack of

private garden space and therefore selling large properties with no private gardens would only appeal to a very niche clientele. I would recommend that this were flats, but done in a sympathetic way to maintain the integrity of the building's history. Rus and I feet that more units could be borne from this part of the site;

• The leisure centre could be re-built with varying storey heights m order to be sub-servient to the main building and appease the Conservatfon Officer. I believe we could comfortably have eight units here;

• The new block could remain as six large units. Although there is potertial for some densification on this element.

137. Mr Firkins agreed that this looked like part of a planning conversation between the Claimant and clients. He said that his concern was that the application identified was for a change of use from a hotel to one dwelling, submitted in July 2021. The message self-evidently did not contemplate a single dwelling.

138. There was discussion about the possibility of applying for permission for change of use, for example to establish a principle of residential use, and then applying to vary the residential use, for example from single-dwelling to multiple units. Although that can happen, it does not change the fact that the application was filed in July, after the Claimant had started working for the Respondent.

139. We did not hear evidence about the November application re the same property.

140. There was also a message, or part of a message, dated 12.11.2020. It reads:

Centurion Close Planning
Application

Good afternoon Stacey and Simon,

I have had correspondence with your Case Officer who has raised some concerns regarding the potential overshadowing of the double storey element where there is a bedroom over the garage. I suggested perhaps a single storey element to this
elevation (just the garage) and this seemed to be more appealing to her. I have also spoken with Rus who will look at the…

141. Mr Firkins told us that he would have anticipated that the bulk of the work re the application, filed on 18.05.2021, would have been done before the Claimant started work for the Respondent.

Law

Employment Rights Act 1996 ("ERA")

142. ERA s47B provides as follows:

> ***47B.— Protected disclosures.***
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
> *(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
> *(a) by another worker of W's employer in the course of that other worker's employment, or*
> *(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.*
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*
> *(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*
> *(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*
> *(a) from doing that thing, or*
> *(b) from doing anything of that description.*
> *(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*
> *(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*
> *(b) it is reasonable for the worker or agent to rely on the statement.*
> *But this does not prevent the employer from being liable by reason of subsection (1B).*
> *(2) This section does not apply where—*
> *(a) the worker is an employee, and*
> *(b) the detriment in question amounts to dismissal (within the meaning of Part X4).*
> *(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker" , "worker's contract" , "employment" and "employer" have the extended meaning given by section 43K.*

Maternity and Parental Leave Regulations 1999 ("MAPLE")

143. Reg 19 of Maple provides as follows;

19.— Protection from detriment

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee–

(a) is pregnant;

(b) has given birth to a child;

(c) is the subject of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;

(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

(e) took or sought to take–

(ii) parental leave, or

(iii) time off under section 57A of the 1996 Act;

(ee) failed to return after a period of ordinary or additional maternity leave in a case where—

(i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or

(ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;

(eee) undertook, considered undertaking or refused to undertake work in accordance with regulation 12A;

(f) declined to sign a workforce agreement for the purpose of these Regulations, or

(g) being–

(i) a representative of members of the workforce for the purpose of Schedule 1, or

(ii) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

(3) For the purpose of paragraph (2)(d), a woman avails herself of the benefits of ordinary maternity leave if, during her ordinary maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by section 71 of the 1996 Act and regulation 9 during that period.

(3A) For the purposes of paragraph (2)(d), a woman avails herself of the benefits of additional maternity leave if, during her additional maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by section 73 of the 1996 Act and regulation 9 during that period.

(4) Paragraph (1) does not apply in a case where the detriment in question amounts to dismissal within the meaning of Part X of the 1996 Act.

(5) Paragraph (2)(b) only applies where the act or failure to act takes place during the employee's ordinary or additional maternity leave period.
(6) For the purpose of paragraph(5)–
(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period, and
(b) a failure to act is to be treated as done when it was decided on.
(7) For the purposes of paragraph (6), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure act–
(a) when he does an act inconsistent with doing the failed act, or
(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it were to be done.

144. Reg 20 of Maple provides:

20.— Unfair dismissal
(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if–
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.
(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if–
(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
(3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with–
(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;
(e) the fact that she took or sought to take–
(ii) parental leave, or
(iii) time off under section 57A of the 1996 Act;
(ee) the fact that she failed to return after a period of ordinary or additional maternity leave in a case where—
(i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in

question would end, and she reasonably believed that that period had not ended, or
(ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;
(eee) the fact that she undertook, considered undertaking or refused to undertake work in accordance with regulation 12A;
(f) the fact that she declined to sign a workforce agreement for the purposes of these Regulations, or
(g) the fact that the employee, being–
(i) a representative of members of the workforce for the purposes of Schedule 1, or
(ii) a candidate in an election in which any person elected will, on being elected, become such a representative,
performed (or proposed to perform) any functions or activities as such a representative or candidate.
(4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.
(5) Paragraphs (3) and (3A) of regulation 19 apply for the purposes of paragraph (3)(d) as they apply for the purposes of paragraph (2)(d) of that regulation.
(7) Paragraph (1) does not apply in relation to an employee if–
(a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances;
(b) an associated employer offers her a job of that kind, and
(c) she accepts or unreasonably refuses that offer.
(8) Where on a complaint of unfair dismissal any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph (7), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

Equality Act 2010 (EA")

145. EA s18 provides as follows:

18 Pregnancy and maternity discrimination: work cases
(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.
(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

146. EA s20 provides:

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	***Applicable Schedule***
Part 3 (services and public functions)	*Schedule 2*
Part 4 (premises)	*Schedule 4*
Part 5 (work)	*Schedule 8*
Part 6 (education)	*Schedule 13*
Part 7 (associations)	*Schedule 15*
Each of the Parts mentioned above	*Schedule 21*

147. EA s27 provides:

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

148. The provisions of the Claimant's contract relevant to the claim have been referred to above.

Law relating to time limits

149. The time limit for bringing a claim for being subject to a detriment contrary to the MAPLE is provided for by S48 of the ERA, which reads as follows as follows:

48.— Complaints to employment tribunals.
(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G]2.

(1XA) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).

(1YA) A shop worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45ZA.

(1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(1AA) An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.

(1B) A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.

(2) On [a complaint under subsection (1), (1XA),]10 (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures , the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5) In this section and section 49 any reference to the employer includes—
(a) where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3));
(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6) In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/ 93)—
- *"agency worker";*
- *"hirer";*
- *"temporary work agency".*

150. EA s123 provides as follows:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

151. Where a new claim is introduced by amendment, The Respondent contended that it is deemed to have been accepted on the date the Tribunal granted permission, relying on Gillett -v- Bridge 86 Ltd[6]. The discussion of this case in the *IDS Employment Law Handbooks*[7] cites Gillett as authority for the proposition that whether a proposed amendment could be brought as a new claim within the appropriate time limit is a 'factor of considerable weight' for the Tribunal to take into account when considering whether to allow an amendment, but the same paragraph does state;

Where, however, the claimant cannot show a causative link between the grounds of complaint set out in the ET1 and the proposed amendment, the claimant will be regarded as raising an entirely new cause of action….

152. The time question for the ERA/Maple claims is different to that relevant to the EA claim. Insofar as the former is concerned, the question is, was it reasonably practicable for the Claimant to present the claim within the time limit, subject to adjustment for the early conciliation period.

[6] UKEAT/0051/17/DM.
[7] Vol 6, para 8.40.

If it was, and a claim is not presented within that time limit, the Tribunal has no discretion to exercise, and lacks jurisdiction to consider the claim.

153. IDS Employment Law Handbooks, Vol 6, identifies 3 general rules as applying where a Claimant says that it was not reasonably practicable to present the claim on time:

- *S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' — Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*
- *what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Wall's Meat Co Ltd v Khan 1979 ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'*
- *the onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd 1978 ICR 943, CA. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — Sterling v United Learning Trust EAT 0439/14.*

154. If the Tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, there is then a further question – was it presented within such further period as the Tribunal considers reasonable?

155. Where the Claimant relies on a number of acts, the Tribunal must decide whether the acts are distinct acts, or a continuing act or course of conduct. In Barclays Bank plc -v- Kapur[8], the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an

employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

156. In Commissioner of Police of the Metropolis v Hendricks[9], the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. In Lyfar -v- Brighton and Sussex University Hospitals Trust[10], the Court of Appeal confirmed that tribunals should look as the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer.

157. The position is different insofar as claims under the EA are concerned. In such claims, the Tribunal has the widest possible discretion to allow proceedings to be brought within such period as it considers just and equitable. Almost always relevant to such a consideration are, the length of and reasons for any delay, and whether the delay had prejudiced the respondent. But there is not to be read into the EA any requirement that there be a good reason for the delay, still less a provision that time cannot be extended in the absence of such good reason: see Abertawe Bro Morgannwg University Local Health Board -v- Morgan[11].

Conclusions on the issues

158. Although time issues are identified first in the list of issues, we think it better to go to the substance of the issues. Firstly, because the time question under the ERA requires there to be a determination of whether there was a series of similar acts or failures and whether the claim – or, as we understand the Respondent's contention, the amendment – was

[8] [1991] 2 AC 355
[9] [2003] ICR 530
[10] [2006] EWCA Civ 1548
[11] [2018] EWCA Civ 640 [2018] I.C.R. 1194

presented within the relevant time period. Secondly, a determination of the facts may be relevant to how our discretion under the EA is exercised.

Wrongful dismissal

159. The Claimant's notice period, or that she was not paid for it, are not in dispute. The real issue here is, was the Claimant guilty of gross misconduct such that the Respondent was entitled to dismiss her without notice.

160. This requires a determination of whether the Claimant was in breach of her contract. That, in turn, requires, at least insofar as the allegation re submitting applications is concerned, a finding re the oral agreement. We have already stated our finding re the oral agreement, and our factual findings. It was not disputed that the applications re the three addresses in respect of which Mr Jenkins found there to be a breach, were submitted after the Claimant had started work for the Respondent. We find that she was therefore in breach of her contract of employment.

161. The Claimant was also clearly in breach of clause 6.5 of her contract. She was a director and shareholder, albeit with only 1%, in a business that offered planning services. We note that it was never satisfactorily identified in what capacity the Claimant had performed her other work, whether as a genuine freelancer or through Poulsom. This is not necessarily surprising – in her evidence, the Claimant did not distinguish between the Respondent and Mr Firkins. And we do not think it matters. Poulsom was offering planning services. It was plainly in competition, at least to some degree, with the Respondent. Although the Claimant says that she did not take an active part in the running of Poulsom, the fact remains that she was a director and therefore concerned in that business. She was therefore in breach of clause 6.5

162. The allegation of plagiarism was first notified to the Claimant in the decision letter dismissing her. That is plainly unsatisfactory. But this is not a conventional unfair dismissal claim. The question insofar as unfair dismissal is concerned is, was the Claimant guilty of plagiarism?

163. We are not satisfied that she was. Although the Respondent genuinely believed it, it has not been demonstrated to our satisfaction. No alleged source documents were produced, on which the Claimant could be cross-examined as to the extent of any similarities. Although there was some relevant documentation in the bundle, the Claimant was not cross-examined on it. We were, in effect, asked to treat Mr Jenkins belief that there was plagiarism, as evidence of plagiarism. Just because Mr Jenkins thinks it was so, doesn't make it so. Something more was needed, and was missing.

Automatic unfair dismissal

164. We find that the Claimant's pregnancy played no part in the decision to dismiss her. She was dismissed because the Respondent believed she was guilty of gross misconduct.

Detriment Maternity and Paternity Leave, pregnancy and maternity discrimination

165. There are separate lists setting out the particularisation of the allegations relied upon for each of the above. We will focus on the particularisation of the claim for pregnancy and maternity discrimination, which lists 14 points. All of those points are in the list for detriment, and separate findings on that list will not be required.

166. The Respondent did not stop providing the Claimant with feedback. We have identified above the Claimant being provided with constructive feedback by Mr Firkins. The extent of her sick leave will have impacted on the opportunities to receive feedback.

167. We do not accept that the Claimant's responsibilities were reduced. She was expected to muck-in, as were all. She was not treated as a PA. She was treated as a capable if not particularly experienced planner, whose skills were at the disposal of her employer.

168. There was no hushing up of conversations about the Claimant obtaining chartered status, or any failure to support her in doing so. She identified a course of action, that she should apply in 15 months' time. That course self-evidently did not require immediate action. Had she

identified a different course – which may well have been available – the Respondent may have been able to offer immediate support. But it does not seem to be for the Respondent to identify the route.

169. The Respondent did not make up excuses for not meeting the Claimant to discuss her complaints. It did not arrange a meeting immediately, and probably could have gone about arranging one more energetically. But it did not make up excuses.

170. We have not accepted the Claimant's allegations re the meeting on 16.02.2022.

171. The Claimant was locked out of her computer. This was unfavourable treatment, and it took place in the protected period. But it was not done because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

172. The Respondent – or someone working for it – did fail to invite the Claimant to the social event in March 2022. That too was unfavourable treatment, and occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

173. The Respondent did fail to provide the Claimant with payslips for February and March 2022, at least not without her asking a number of times. This was unfavourable conduct, and occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

174. The Respondent did start an internal investigation into the Claimant for gross misconduct. It was not argued that this was not unfavourable conduct, and we accept that it was. It occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

175. The Respondent did accuse the Claimant of gross misconduct on 18.03.2022. This was unfavourable conduct, and occurred within the

protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

176. The Respondent did introduce a fourth reason for disciplinary action, without prior notice. This was unfavourable conduct, and occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

177. The Respondent did conduct a second meeting about the Claimant, without inviting her. That it was called a re-convening of the earlier meeting might be described as sophistry. It was a meeting on a different day, to which she could and should have been invited, notwithstanding her decision not to attend the earlier meeting. This was unfavourable conduct, and occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

178. The Respondent did dismiss the Claimant. This was unfavourable conduct, and occurred within the protected period. But it was not because the Claimant was pregnant, or because of any illness, whether or not that illness was caused by the pregnancy.

Disability

179. As noted above, the Respondent admits that the Claimant was disabled.

Reasonable adjustments

180. The Respondent knew that the Claimant suffered from epilepsy from the start of her employment. It knew she was disabled from that time.

181. The Respondent did have the PCPs asserted – it had the disciplinary procedure, the time frames set out therein, and it did have a practice of sending emails in the evening and at weekends.

182. We do not find that the PCPs placed the Claimant at a substantial disadvantage compared to someone who did not suffer from epilepsy. Communications outside of normal working hours were not of a "please do X" nature. As for the disciplinary process and the timescales, the Claimant acknowledged that a disciplinary process will inevitably cause stress and anxiety, whatever the timescales involved.

183. It follows that the question of whether the Respondent knew of any disadvantage the PCPs caused falls away, as does the question of reasonable adjustments.

Victimisation

184. The Claimant did tell Mr Firkins that she felt discriminated against in work.

185. We have already made factual findings as to the particular things set out in the CMO under this heading. By doing those things we found it to have done, the Respondent did subject the Claimant to a detriment. But it did not do so because the Claimant had done any protected act.

Time

186. The CMO identified the relevant times as follows: the Claim was presented on 10.05.2022. Allowing for the ACAS Early Conciliation process, any act or omission which took place before 19.12.2021 was identified as potentially out of time, and outwith the Tribunal's jurisdiction.

187. The ERA time limit question is identified in the list of issues to apply to the claim for a detriment.

188. Counsel for the Respondent addressed us, principally in his written submissions, on the relevant date in the case of amendment. But that may have been something of a red herring. The amendment which the Claimant sought, and was granted, permission to make, is recorded in the CMO as having been to add a claim for unfair dismissal. In the circumstances of the case, the Respondent rightly observed that this must mean automatic unfair dismissal pursuant to Maple Reg 20. The Claimant emailed the Tribunal, seeking to add that amendment, on 20.06.2022. The

effective date of termination was 30.05.2022, and it is not arguable that the cause of action added by that amendment was out of time.

189. The key date, therefore, is 19.12.2021. Of the specified issues in the CMO that include a specific date, none has a date before 19.12.2021.

190. Before that date, the Claimant says that she was asked to create X-files. She mentions Mr Firkins' message of 21.07.2021, and being asked about her pregnancy and future pregnancy plans at the return-to-work meetings. She refers to the email exchange in August 2021. She told the Respondent that she was pregnant in November 2021, and there was the risk assessment of the following month.

191. It seems to us that the first question is, do any of the undated factual issues identified in the CMO, rely on allegations before 19.12.2021?

(a) It does not seem to us that the Claimant alleged that the feedback stopped before that date;
(b) It does not seem to us that the Claimant alleged that the reduction in her responsibilities took place before that date;
(c) It does not seem to us that the Claimant alleged that she was asked to do administrative asks before that date, or at least, that being asked to so formed the basis of her complaint;
(d) Conversations regarding the Claimant becoming a member of the RTPI took place in June 2021. It does seem to us that allegation relating to the "hushing up" of that subject relates to the time before 19.12.2021;
(e) The allegation re making excuses not to meet the Claimant to discuss her complaints appears to us to relate to the complaint that she raised in February 2022;
(f) The internal investigation for gross misconduct was started after 19.12.2021;
(g) The entirety of the disciplinary process took place after 19.12.2021.

192. It therefore seems to us that the only matters that might be out of time, are the matters relating to conversations regarding her membership of the RTPI.

193. We have found that we would reject the Claimant's case on the facts, if we have jurisdiction to consider this claim. In South Western Ambulance Service NHS Foundation Trust -v- King[12] , it was held that any act not established on the facts, or found not to be discriminatory, cannot form part of a continuing act.

194. The Respondent did not address us at length on how the time points relate to specific allegations, and the Claimant did not address us at all on time.

195. We find that the Claimant's claim for a detriment under Maple reg 19, insofar as it concerns the allegation of hushing up conversations about her becoming a member of the RTPI, was not presented within the time limit provided for by ERA s48. We have heard no evidence to suggest that it would not have been reasonably practicable for the Claimant to present that claim within the time period. We therefore find that the Tribunal has no jurisdiction to consider that claim. That may be academic, however, as, had we had jurisdiction to consider it, we would not have upheld it.

196. The same factual analysis applies to that allegation, insofar as it forms part of the Claimant's claim under the EA. However, in that case, we have a broad discretion to exercise. That we have heard no explanation, let alone a good explanation, for why it was not issued in time, is a relevant consideration, but not a determinative one. Any prejudice to the Respondent would also be a relevant consideration.

197. We have had to hear the substance of the dispute. The part in respect of which time is a real issue, is only a small element of it. Having heard the substance of it, we are of the view that we should exercise our discretion, and find that the claim was brought within a time period that we think just and reasonable. We are mindful that the Claimant underwent the 'chemical pregnancy', and then, a short time later, a further pregnancy

which was described as “high risk”. In the circumstances, and in particular in the light of the absence of any prejudice to the Respondent (in the light of our factual findings), this seems to us to be the just and equitable approach.

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Employment Judge David Hughes

Date 30 October 2023

Reserved Judgment & Reasons sent to the Parties on 22 November 2023

For the Tribunal Office

[12] [2020] IRLR 168