Case No:- 3322885/2021;
3322911/2021.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Hinds	v	Mitie Limited

Heard at: Cambridge

On: 31 July, 1, 2, 3 and 4 August, 27 and 31 October 2023, and 1 November 2023; and 1 and 2 November 2023 and 3 January 2024 (Chambers discussion); and 5 January 2024 (Judgment)

Before: Employment Judge Tynan

Members: Mr M Brewis and Mr D Hart

Appearances:
For the Claimant: In person
For the Respondent: Mr Bidnell-Edwards, Counsel

JUDGMENT having been sent to the parties on 14 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By way of a claim form presented to the Employment Tribunals on 15 November 2021, the Claimant pursues complaints against the Respondent that she was unfairly constructively dismissed, discriminated against contrary to sections 13 and 18 of the Equality Act 2010 ("EqA") (in the case of s.13 with reference to the protected characteristic of sex) and subjected to detriments for family reasons contrary to section 47C of the Employment Rights Act 1996, ("ERA") (read in conjunction with Regulation 19 of the Maternity and Parental Leave etc. Regulations 1999).

2. We have not thought it necessary to rehearse the various issues that are said to have arisen between the parties in the course of the proceedings relating to disclosure, preparation of the Hearing Bundle, or exchange of

witness statements, or in respect of the List of Issues, save to note that witness statements were exchanged just a few days prior to the first day of the final hearing and an updated List of Issues sent to the Claimant possibly as late as the evening before, or even the morning of, the first day of the final hearing.

3. For the reasons we gave at the outset of the final hearing, given the late exchange of witness statements we determined that once we heard the Claimant's and her witnesses' evidence it would be necessary in the interests of justice to adjourn the final hearing part-heard to enable the Claimant a reasonable opportunity to review the Respondent's witness statements and prepare her cross examination of its witnesses.

4. During the adjournment, the Respondent served a supplementary witness statement on the Claimant without the Tribunal's prior permission, nor indeed even pending an application to the Tribunal for permission in that regard. Nevertheless, we dealt with the matter at the beginning of the resumed hearing and, with the Claimant's agreement, admitted the statement as evidence.

5. The Claimant gave evidence in support of her claim; we also heard evidence on her behalf from Rob Hughes, Abigail Meads and the Claimant's husband, Gary Hinds. None of the Claimant's witnesses have worked for the Respondent and accordingly they have no first-hand knowledge of the matters about which complaint is made, though particularly in the case of Mr Hinds, he would have directly observed the deterioration in the Claimant's mental health during 2020 and 2021. This is not a case in which the Claimant is said by the Respondent to have been inconsistent in her evidence and to have changed her story such that it might be appropriate to look to family and friends to provide evidence of consistency in her account. The testimony of the three witnesses has not assisted us in our fact finding task.

6. On behalf of the Respondent we heard evidence from Karla Harper, Head of Operations Sainsbury's during the period to which the claim relates. Ms Harper is the witness in respect of whom a supplementary witness statement was served. We also heard evidence from Nav Kalley and Craig Robertson, respectively Account Director and Regional Director during the period to which the claim relates. Ms Harper and Mr Kalley had line management responsibilities in relation to the Claimant at various times. Mr Robertson heard and determined the Claimant's grievance dated 3 September 2021.

7. The Respondent additionally relied upon witness statements from Patrick Ryan, Payroll Operations Manager and Samantha Lowcock, Interim Payroll and Benefits Senior Associate. Although the dates of the adjourned hearing were fixed with the Respondent's witnesses' availability specifically in mind, Mr Ryan was out of the jurisdiction at the time of the hearing in a country from which he was not permitted to give evidence in legal proceedings in the UK. We could not, therefore, hear his testimony. We were not told why Ms Lowcock did not attend Tribunal to give evidence. In each case, the Claimant has been denied the opportunity to cross examine them about their evidence. Nevertheless, for reasons we

will return to, we feel able to rely upon their evidence in reaching our findings and coming to a Judgment.

8. Before setting out the Law, our findings and conclusions, we briefly mention the List of Issues. Notwithstanding Mr Bidnell-Edwards' eleventh hour amendments to the List of Issues and putting aside that these unsettled the Claimant, having reviewed the claim form we are satisfied that the List of Issues accurately captures the complaints that are comprised within the Claimant's claim to the Tribunal, particularly as the final iteration of the List of Issues was substantially rooted in a draft List of Issues prepared by and then amended by the Claimant. In any event, we used the first day of the final hearing to work through Mr Bidnell-Edwards' draft List of Issues with the Claimant to ensure that it accurately captured her complaints, and accordingly the issues the Tribunal would need to determine. We have structured our findings and conclusions with specific reference to that List of Issues.

The Law

Constructive Unfair Dismissal

Part X of the Employment Rights Act 1996

9. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer (s.94 ERA 1996).

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

11. The Claimant claims that she resigned by reason of the Respondent's conduct. The last matter identified by the Claimant as having been relied upon by her is the Respondent's, specifically Mr Kalley's and thereafter his and Helen Young's failure, to respond to her emails of 2 and 3 September 2021.

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

13. The Claimant relies upon Acts 1 to 6 of paragraph 2.9 of the List of Issues, Acts (a) to (u) of paragraph 3 of the List of Issues and Acts (a) to (d) of paragraph 4.11 of the List of Issues, as breaches of the implied term of trust and confidence. There is some element of duplication within them.

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

the employment relationship to an end.

15. In his judgment in Western Excavating v Sharp [1977] IRLR221, Lord Denning said that an employee,

> *"…must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

16. The other classic, more detailed formulation of the principle is the judgment of Mr Justice Browne-Wilkinson (as he then was) in WE Cox Toner (International) Limited v Crook [1981] IRLR443,

> *"The general principles of contract law applicable to a repudiation of contract are that if a party commits a repudiatory breach of contract, the other party can choose either to affirm the contract and insist of further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must, at some stage, elect between those two possible courses: if he affirms the contract, his right to accept the repudiation is at an end… Affirmation of the contract can be implied if the innocent party calls on the guilty party for the performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligations. Moreover, if the innocent party himself does acts which are only consistent with he continued existence of the contract, such acts will normally show affirmation of the contract…"*

17. Under the 'last straw' doctrine, an employee can resign in response to a series of breaches or conduct that cumulatively amount to a breach of trust and confidence, Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ.978. The final incident relied upon by an employee, the so called 'last straw', need not be of the same character as the earlier matters complained of and indeed may be relatively insubstantial. The 'last straw' may resurrect earlier breaches of contract that have otherwise been waived by the employee. The question is whether, viewed objectively, the employer has demonstrated that it no longer intends to be bound by its obligations as an employer. The 'final straw' if it is not itself a repudiatory breach of contract, must contribute something to the cumulative breach, even if what it adds is relatively insignificant, though it must not be trivial or innocuous. A Tribunal will fall into error if it assumes that because an employer acted reasonably in a matter, its actions should therefore be regarded as innocuous, Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19.

Regulations 16 and 18 of the Management of Health and Safety at Work Regulations 1999

18. Regulation 16.1 of the 1999 Regulations requires all employers to maintain a workplace risk assessment in respect of new and expectant mothers. An employer has further specific duties once an employee notifies it in writing that she is pregnant. Once that notification is given, the employer has a duty under Regulation 16.2 to alter the employee's working conditions, or hours of work, if any risks to health and safety cannot be avoided through taking other action. Where it is not reasonable

for the employer to make such alternation, or it would not be effective to avoid any identified risks, the employer must offer the employee suitable alternative work or, in the absence of such work, suspend the employee from work on full pay.

Section 47C of the Employment Rights Act 1996

19. S.47C of ERA 1996 provides that an employee has the right not to be subjected to detriment by her employer done for a prescribed reason. The reasons are prescribed under Regulation 19 of the Maternity and Parental Leave Regulations 1999 and essentially relate to pregnancy and family leave.

§.13 and 18 of the Equality Act 2010

20. S.13(1) of EqA 2010 provides as follows:

> ***13 Direct discrimination***
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

21. S.18(2) of EqA 2010 provides:

> ***18 Pregnancy and maternity discrimination: work cases***
>
> (1) …
>
> (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.

22. The operative causal test under both sections is 'because'.

23. In Nagarajan v London Regional Transport [2000], Lord Nichols when giving Judgment in an Appeal in a race discrimination case under the Race Relations Act 1976, said,

> "Thus in every case it is necessary to enquire why the complainant received less favourable treatment, this is the crucial question. Was it on grounds of race or was it for some other reason, for instance because the Claimant was no so well qualified for the job? Save in obvious cases answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."

24. Nagarajan was referred to by the Supreme Court in R (E) v The Governing

Body of J F S (SC)(E) [1010]. In that case Baroness Hale observed,

> "The distinction between the two types of 'why' questions is plain enough. One is what has caused the treatment in question and one is its motive or purpose. The former is important and the latter is not."

25. Under s.47C of ERA 1996, the question likewise is why the Respondent treated the Claimant as it did and whether the reason for its treatment of her is prescribed under the Regulations.

26. S.18 of EqA 2010 is distinct from s.13 of EqA 2010, in that a complainant under s.18 need only establish that they have experienced unfavourable treatment on the prohibited ground, as opposed to less favourable treatment. It is not a comparative exercise that requires the identification of actual, hypothetical or evidential comparators. However, the Claimant's s.18 EqA 2010 claims do not succeed simply because she was pregnant or suffered illness as a result of pregnancy and experienced unfavourable treatment. Nor do they succeed simply because but for being pregnant or suffering illness as a result of pregnancy, she would not have experienced unfavourable treatment. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in s.136 of EqA 2010, but also long established legal guidance including by the Court of Appeal in Igen Limited v Wong [2005] ICR931.

27. It has often been said that a claimant must establish 'something more' than merely a protected characteristic and that they have been treated unfavourably or less favourably, albeit what is required to be established need not necessarily constitute a great deal more - Lord Justice Sedley in Deman v The Commission for Equality and Human Rights [2010].

28. The grounds for any treatment often have to be deduced or inferred from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference can properly be drawn.

29. In a s.13 EqA 2010 complaint this is often done by a claimant placing before the Tribunal evidential material from which an inference can be drawn, that they were treated less favourably than they would have been treated if they had not been a particular race, gender, religion, etc., Shamoon v Chief Constable of the Royal Ulster Constabulary [2003].

30. Comparators provide evidential material, but ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference. In the absence of actual comparators whose treatment can be contrasted to the claimant, the Tribunal can have regard to how the employer would have treated an hypothetical comparator. Otherwise, particularly in s.18 cases where a claimant need only establish unfavourable as opposed to less favourable treatment, some other material must be identified that is capable of supporting the requisite

inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the claimant may, in some cases, also suffice. Unconvincing denials of a discriminatory intent advanced by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision or action might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable or unfair treatment. This is not an inference from the unreasonable or unfair treatment itself, but from the absence of any explanation for it.

31. Tribunals should always hold in mind that it is important not to conflate unfairness with discrimination; they are two different things.

32. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination so that the absence of an adequate explanation for the differential or unfavourable treatment becomes relevant, Madarassy v Nomura [2007] EWCA Civ.33.

Extension of Time to bring a claim in the Employment Tribunals

33. Tribunals have a wide discretion under s.123(1)(b) of EqA 2010 to determine whether it is just and equitable to extend time in respect of otherwise out of time complaints. The starting point, however, is that time limits are to be applied strictly, Bexley Community Centre t/a Leisure Link v Robertson [2003] IRLR 434.

34. The burden is on a claimant to demonstrate that it is just and equitable to extend time, Miller v Ministry of Justice [2016] UKEAT/0003/15/LA. There is no presumption in favour of an extension of time.

35. Tribunals are required to consider all relevant factors which may include the factors set out in section 33(3) of the Limitation Act 1980, including the length of and reasons for any delay. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ.23, the Court of Appeal cautioned against Tribunals overly relying on the checklist of factors found in s.33, stating that they should assess all the factors in the particular case which they consider relevant to whether it is just and equitable to extend time.

36. A relevant consideration is whether any delay has prejudiced the respondent, for example, by impeding its ability to investigate the claim while the matters were fresh. A respondent is obviously prejudiced by having to meet a claim which would otherwise be defeated by a limitation defence, but it may also experience forensic prejudice caused by fading memories, loss of documents, or losing touch with witnesses.

37. But it not just the potential prejudice to respondents that Tribunals are concerned with. They must equally have regard to the prejudice to a claimant of being denied a remedy in respect of potentially well founded claims.

38. The EAT in eBay (UK) Limited v Miss T Buzzeo UKEAT/0159/13, unreported, held that the first and crucial step for a Tribunal is to make

findings as to the date of expiry of limitation and the date on which the claim was in fact lodged to determine whether the claim was out of time and if so, by how much.

39. In Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13, the EAT observed that the first question in deciding whether to extend time is why it is that the primary time limit has not been met and insofar as it is distinct, the second is the reason why after the expiry of the primary time limit the claim was not brought sooner than it was.

Findings of Fact and Conclusions

40. In the findings and conclusions that follow, we shall deal first with the Claimant's s.18 EqA 2010 complaints, where relevant addressing her s.13 EqA 2010 and s.47C ERA 1996 complaints where these are pursued with reference to the same alleged matters, before going on to consider any outstanding s.13 and s.47C complaints and, thereafter, her complaint that she was unfairly constructively dismissed.

41. The Claimant transferred to the Respondent's employment pursuant to the TUPE Regulations, notionally with effect from 26 October 2018. Accordingly, she transferred with her established terms and conditions of employment, including her continuous service from 13 March 2009. The transfer was confirmed some months later in a letter to the Claimant from the Respondent dated 1 April 2019 (pages 218 – 220 of the Hearing Bundle). This documented amongst other things that the Claimant's job title was Account Manager, that she was contracted to work 37.5 hours per week and that she was eligible for up to 10 weeks' company sick pay in the event of sickness absence. The letter did not accurately reflect the Claimant's sick pay entitlement, though this only came to light or became an issue at a later date; it is at the heart of one of the Claimant's complaints in these proceedings. The Claimant's company car allowance was stated to be a fraction over £553 per four weekly pay period, equating to approximately £7,190 per annum.

42. Notwithstanding the letter of 1 April 2019, the Claimant believes that the transfer may not have been effective until 1 March 2019. Although her evidence in this regard in paragraph 1 of her witness statement was not challenged by the Respondent, nothing turns on the timing of the transfer.

43. Within her first year with the Respondent the Claimant received a pay increase to £44,150 per annum in accordance with the Respondent's normal pay review arrangements. Her other terms and conditions were unchanged.

44. Although her formal job title on transfer was Account Manager, the job undertaken by the Claimant was Regional Account Manager ("RAM"), Logistics Sainsbury's. She was subsequently asked by Mr Kalley to take on the lead role for the Respondent's Argos account, Argos being a subsidiary of Sainsbury's. This was in addition to her existing responsibilities and was something she readily agreed to as she was eager to gain a range of operational experience. In any event, we find it

reflected her positive 'can do' attitude to her work.

45. Towards the end of 2019, Ms Harper was appointed to a newly created role on the Sainsbury's contract as Head of Operations and thereafter the Claimant reported to her. They met on 10 February 2020 for the purposes of the Claimant's Full Year Review ("MiReview"), when the Claimant was assessed as 'Delivering', namely achieving objectives set, demonstrating Mitie values and making a valuable contribution. In the Manager comments section, she was described as extremely dedicated and always striving to deliver the best possible customer service to her client, and that she had taken full accountability for and ownership of the Argos client relationship (which was described as extremely challenging and demanding). She was also described as having tremendous potential.

46. The Claimant completed the penultimate section of the MiReview form, headed 'What would I like my next role to be and how will I achieve this?' as follows,

> "I would like to continue to grow within my current role …"

We accept the Claimant's evidence that she saw any career growth and progression at that point in time as being within her existing role and that she was not seeking a move away from the Sainsbury's contract or her role as a RAM.

47. Around this time, the Claimant was asked by Mr Kalley to undertake an informal secondment to the Sainsbury's Systems contract as performance issues were adversely impacting on the Respondent's relationship with Sainsbury's. Anticipated to last for twelve weeks, the secondment was in place for about eight weeks, with a colleague stepping up at some point to back fill or cover the Claimant's substantive role. It seems that the Claimant was stretched at this point in time as she additionally agreed during her MiReview with Ms Harper on 10 February 2020, that she would take on additional responsibilities including leading Project Management calls. Some of the pressures she would undoubtedly have been under at this time would have abated when the secondment came to an end, coincidentally at or around the time the country entered its first national lockdown towards the end of March 2020, as a result of the Coronavirus pandemic.

48. We heard evidence that the pandemic generated exceptional demands upon the Respondent's business and the people working within it.

49. The Claimant was absent from the business on annual leave the week commencing 6 April 2020. Whilst on leave she discovered that she was pregnant. Although welcome news, the pregnancy was unplanned and unexpected. Two different dates are given in the Respondent's List of Issues as regards the start of the Claimant's protected period, namely 7 and 13 March 2020. However, as the Claimant somewhat wryly observed in the course of her evidence, she evidently had some hand in the matter of her pregnancy. Her child was conceived on 13 March 2020, with the protected period coming to an end on 10 June 2021 when her maternity leave ended.

50. The parties disagree as to when Ms Harper and Mr Kalley first learned of the Claimant's pregnancy. Ms Harper's evidence is that she was told in May 2020 after the Claimant had informed Helen Young, HR Business Partner that she was pregnant. Mr Kalley states that he was first made aware of the Claimant's pregnancy towards the end of May 2020, possibly after the Claimant had a short period of pregnancy related ill health absence.

51. Whilst there is seemingly no mention of the Claimant's pregnancy in any communications between the parties in April and May that year, certainly not in the reasonably extensive documents included in the Hearing Bundle, nevertheless we accept the Claimant's evidence that she told Ms Harper and Mr Kalley that she was pregnant at some point during the first week that she returned from her April 2020 leave.

52. The disclosure by a woman that she is pregnant is a matter of particular importance to her, not least when that disclosure is to colleagues within a workplace. It is something which, in our judgement and experience, a pregnant woman is much more likely to recall that her colleagues, involving as it does the entrustment of sensitive personal information to others at a time when the woman may perceive that she and her unborn child are vulnerable.

53. The Claimant enjoyed a good relationship with Ms Harper and Mr Kalley. Indeed, she and Ms Harper enjoyed a close working relationship, akin to a friendship. It explains why she might have felt comfortable in disclosing the news of her pregnancy to them earlier in the pregnancy than might otherwise often be the case. In any event, there was a more immediate, pressing reason for her to share the news of her pregnancy, namely the significant uncertainties and essentially unknown risks to expectant mothers and their unborn children as a result of Covid-19 in April 2020. Whilst we find that the Claimant disclosed to Ms Harper and Mr Kalley that she was pregnant during the week commencing 13 April 2020, none of the issues in this case turn on that timing.

54. The Claimant formally notified her pregnancy to the Respondent on 23 July 2020 once she was in receipt of Form MATB1 at 20 weeks pregnant. The Claimant initially planned to commence her maternity leave on 7 December 2020, which would have coincided with her child's expected date of birth, and to return to work on 10 May 2021 after 22 weeks' maternity leave.

Issue 3(a)

55. The Claimant complains that Mr Kalley stopped undertaking one-to-ones with her upon learning that she was pregnant. The evidence in this regard is somewhat limited, lacking any further specific detail in terms of the alleged timings. The relevant context is that the Claimant reported directly to Mr Kalley during the short secondment already referred to. On the Claimant's own evidence her role was in flux during this time, with the assumption of myriad additional responsibilities. Ms Harper was new to her role and finding her feet. The secondment was implemented on an informal basis and the Claimant's reporting lines were further blurred when

her colleague back filled on a short term basis. The secondment would seem to have come to an end earlier than expected at or around the time when the world was thrown into turmoil as a result of the pandemic. It is hardly surprising therefore against this backdrop that the transition of the Claimant from Mr Kalley's management and supervision back to Ms Harper may not have coincided exactly with the Claimant's resumption of her substantive role and it explains why Mr Kalley may have remained involved beyond the end of the secondment. In our judgement it is pure happenchance if Mr Kalley stopped undertaking one to ones with the Claimant around the time he learned she was pregnant. There would have to be something more for us to infer this was because the Claimant was pregnant as opposed to because she had resumed her substantive role. Moreover, we would in any event question whether the Claimant could reasonably have regarded what happened as being to her detriment; beyond the fact that one-to-ones with Mr Kalley ceased, there is no discernible detriment, it having not been suggested by the Claimant that the one-to-ones were not then taken forward by Ms Harper as her line manager in the normal way.

56. The Claimant's s.18 EqA 2010 complaint in respect of this issue is not well founded.

Issue 3(b)

57. It is not in dispute that the Claimant was underpaid her car allowance in the sum of £142.86 whilst absent from work as a result of pregnancy related ill health. The Claimant claims that Ms Harper was responsible for the underpayment, whereas the Respondent asserts that it was entirely due to a system error within its SAP system. We can deal with the matter relatively briefly. In so doing, we observe that the Claimant has rather lost sight of the woods for the trees on this particular issue.

58. The Claimant raised a query with Helen Young about the matter at 0836 on 27 May 2020, (page 282 of the Hearing Bundle). By 1425 on the same day, Sam Curry, Payroll Benefits Supervisor at the Respondent's Business Support Centre in Bristol, had acknowledged an error and confirmed that £142.86 would be paid to the Claimant (page 287 of the Bundle). The Respondent employs many thousands of people. There is no suggestion that Mr Curry knew the Claimant, let alone that she was pregnant, or that he had had any previous dealings with her.

59. Mr Curry apologised to the Claimant for any confusion and inconvenience caused. From the outset he explained that there had been a system issue. The Claimant has not explained to us and did not explore with the Respondent's witnesses why Mr Curry might have lied to her in that regard or covered up for Ms Harper. His email evidences a prompt, spontaneous, genuine explanation for an error in her pay, one that we have no hesitation in accepting at face value as an inherently credible, indeed the only likely explanation for the error in her pay.

60. Although Mr Ryan's absence outside the jurisdiction and inability to give evidence remotely meant that we did not hear his testimony, the evidence in his witness statement on this issue is equally straightforward and

inherently credible.

61. The Claimant's persistence in maintaining that there must have been some wrongdoing on the part of Ms Harper is not objectively well founded, rather we think it reflects her mistrust of the Respondent which has been exacerbated by the issues and tensions that have arisen in the course of these proceedings.

62. Critically, on this issue, the Claimant did not challenge Ms Harper in terms of her evidence in her supplementary witness statement, specifically at paragraph 1.17 in which she states that she does not have access to the Respondent's payroll systems or payroll data to be able to influence the Claimant's pay, including any ability to instruct or make deductions from her pay.

63. In our judgement, the underpayment of £142.86 was the result of a genuine system error and nothing whatever to do with the Claimant being pregnant or planning to take a period of maternity leave. Her s.18 EqA 2010 complaint does not succeed.

Issue 3(c)

64. The Claimant complains that a job advert was released that explicitly precluded pregnant women from applying for the role. The Claimant addresses the matter in paragraphs 24 and 25 of her witness statement. The role in question, a Programme Manager role, to which the Claimant was in fact appointed with effect from 1 July 2020, is at the heart of various other complaints by the Claimant in these proceedings. There is something of a contradiction at the heart of the complaint, in that on the one hand the Claimant suggests that pregnant women, presumably including herself, were excluded from consideration for the role, yet she also goes on to complain that she was pressured into taking on the role, indeed effectively manoeuvred into it, notwithstanding her documented career aspirations recorded in her February 2020 MiReview. We have struggled to reconcile the two complaints. Be that as it may we certainly recognise why a pregnant woman might consider that they were being disadvantaged by being excluded from consideration for a role if there was no obvious reason why the role could not safely, and with adjustment if necessary, be performed by a pregnant woman. The offending advert is at page 312 of the Bundle.

65. It was a male colleague, Richard Digger who questioned the relevance of the person requirements within a matter of minutes of Helen Young circulating a link to the role to the Claimant and a number of other colleagues. Within a further few minutes the advert had been revised so that pregnant women were not excluded from applying for it. The speed with which the issue was addressed makes us confident that it was purely an error on the part of the Respondent and that the purported exclusion on pregnant women applying for the role had been carried over from another job advert which had been used as a template. We do not lose sight of the fact that this was at the height of the pandemic when pregnant women were considered potentially at risk, particularly in public facing roles, so that it is understandable why certain other positions might have been

advertised with the caveat that applications from pregnant women could not be considered. We are satisfied beyond doubt that there was no attempt to exclude the Claimant or other pregnant women from consideration for the role of Programme Manager and indeed, that the Claimant did not feel excluded from applying for it. The only reason that she did not immediately apply for the role was because she did not consider that it aligned with her career aspirations at that time. The Claimant did not consider at the time that she had been disadvantaged in any way by the job advert wording, even if she has since come to regard it as being to her detriment. Given that it reflected an error that was quickly correctly, in our judgement a reasonable worker would not have taken the view that it was to their detriment. The s.18 EqA 2010 complaint is not well founded.

66. For the same reason, we do not consider the Claimant to have been discriminated against on grounds of her sex contrary to s.13 EqA 2010 since the wording reflected an error on the part of the Respondent rather than any intention to exclude the Claimant or other women from being considered for the role.

Issues 3(d) to (h)

67. We turn then to the question of whether the Claimant was pressured or manipulated to change role from RAM to Programme Manager, and her related complaints regarding comments allegedly made by Ms Harper, Mr Kalley and Ms Young between 9 and 12 June 2020.

68. The Respondent accepts that Ms Harper said to the Claimant that she was "not taking the bait" in respect of the Programme Manager role, further that,

> *"You don't want to be up and down the motorway with a new baby at home, you don't want to be dealing with the nit shit in operations, this* [Programme Manager] *role will be perfect for you".*

The Respondent denies that Mr Kalley said to the Claimant that,

> *"…being more admin based at home will benefit you now your circumstances have changed"*.

Whilst it does not actively deny Ms Young's alleged comment that,

> *"the role will be a perfect fit for you and was put together with you in mind",*

the Respondent puts the Claimant to proof in this regard. Ms Young was not sufficiently well to give evidence and there was no witness statement from her.

69. Given that the Claimant has accurately recalled very specific comments by Ms Harper from June 2020, the question in our minds is why she might nevertheless be mistaken in relation to Mr Kalley and / or Ms Young. We find she is not mistaken in her recollection as to what each of them said at the time. The accuracy of her recollection in relation to Ms Harper enables us to be confident that she has equally accurately remembered what Mr

Kalley and Ms Young said to her.

70. As regards the Programme Manager role, it is not in issue that the Claimant was considered to have a particular skill set that the Respondent was keen to utilise to the benefit of the business. As Ms Harper and Ms Young said, the Programme Manager role was thought to be a perfect fit for the Claimant. We are satisfied that it was a genuine role and that whilst Ms Harper, Mr Kalley and Ms Young may have had the Claimant firmly in mind for the role, it was certainly not contrived in order to remove the Claimant from her substantive role. Ultimately, had the Claimant declined to apply for the role of Programme Manager, we are satisfied that the Respondent would have left the Claimant in her existing role and recruited someone else to the Programme Manager role notwithstanding the Claimant was their preferred candidate. It may be said that the Respondent acted in furtherance of its own selfish commercial interests in the matter, but that is not the same as having been influenced in the matter by the Claimant's pregnancy or pending maternity leave, or indeed her sex.

71. There is no evidence before us from which we might infer that the Claimant's pregnancy and expected absence on maternity leave would cause difficulties for the Respondent, particularly in its relationship with Sainsbury's, in the specific context that she was a RAM, such that they wanted to secure her transfer to a less operational, client facing role. Even if we accept that the Claimant experienced a degree of pressure to apply for the Programme Manager role, any such pressure was not brought to bear for a prescribed reason. In terms of her section 13 EqA 2010 complaint, we are satisfied that a man in her situation would have been treated no differently.

72. We have given careful consideration to whether stereotypical assumptions were operating in the minds of Ms Harper, Mr Kalley or Ms Young, namely that the Claimant would prefer to spend more time at home with her child and / or that her career aspirations or expectations would likely diminish once she had a young baby to care for. Notwithstanding the Claimant's comments documented in her February 2020 MiReview Form, we accept Ms Harper's evidence that her comments to the Claimant reflected her genuine understanding that the Claimant had felt conflicted about having not spent as much time as she might have done with her first child after he was born, even if this had been some years earlier. In particular, we accept that Ms Harper saw the Programme Manager role as a significant strategic opportunity for the Claimant with echoes of how she had herself procured career progression to the next level. If Ms Harper can be said to have made any assumptions, it was that the Claimant was ready and enthusiastic for the next step in her career. It was not a limiting assumption on her part in any way related to pregnancy of maternity.

73. Ms Young's comments mirrored Ms Harper's comments almost exactly. Although ineloquently expressed, particularly given that the three individuals had evidently discussed the matter amongst themselves, we conclude that Mr Kalley's remarks likewise simply mirrored Ms Harper's understanding that the Programme Manager role would be attractive to the Claimant and that they do not betray stereotypical, limiting assumptions on

his part as to the Claimant's career aspirations as a pregnant woman. Without more and notwithstanding his later comments in October 2020, to which we shall return, we do not infer that Mr Kalley was encouraging the Claimant into the Programme Manager role because it was somehow inconvenient for her to remain in role as a RAM whilst pregnant or subsequently during any period of maternity leave or thereafter once she was a working mother with a very young child to care for.

74. In the circumstances, the Claimant's various s.18 EqA 2010 complaints in respect of Issues 3(d) to (h) are not well founded; likewise, her s.13 EqA 2010 complaint in respect of Issue 3(d).

75. We shall return to the question of whether the Respondent acted in breach of trust and confidence in steering the Claimant towards the Programme Manager role.

Issue 3(i)

76. The Claimant alleges that Mr Kalley pressured her to take a short period of maternity leave, routinely asking her how long she would be off for and stating that a return date of April 2021 would be advantageous. The comments are alleged to have been made between April and July 2020. Whether as a result of her inexperience of litigation or due to an oversight on her part, the Claimant has not addressed the matter in her witness statement. She has the burden of establishing the primary facts upon which her various complaints are based and on this issue she has failed to discharge that burden upon her. There is simply no evidence before the Tribunal to enable us to make any specific findings of fact on this issue. In the circumstances any complaints pursued with reference to this matter cannot succeed.

Issue 3(j)

77. The Claimant complains that the Respondent failed to carry out a risk assessment on her during her pregnancy. The Respondent accepts that no such assessment was undertaken in relation to her. It has sought to explain its failure to do so by reference to a lack of communication between Ms Young and Mr Kalley which led each of them to incorrectly assume that the other was responsible for the matter and had it in hand. Having listened to Mr Kalley's evidence on both this issue and more generally, and having considered the broader evidence in the case as to his management style, we find that he simply gave no thought to the matter rather than having thought about it and incorrectly assumed it was in hand. In the course of his evidence, Mr Kalley demonstrated limited knowledge or awareness of HR issues, including regarding employers' responsibilities towards their pregnant employees. He had a particularly limited grasp of the Respondent's policies and procedures; we observe that he might well benefit from further training and personal development in this area.

78. We have referred already to the provisions of Regulations 16 and 18 of the Management of Health and Safety at Work Regulations 1999. An employer is not legally required to take specific action in relation to

individual employees under Regulations 16 and 18 until notified in writing by an employee that she is pregnant. That does not, of course, mean that the employer will not potentially breach its other obligations to the employee or act in contravention of its own documented policies and procedures should it fail to take action sooner to identify and address potential risks to health and safety.

79. The Respondent's Maternity Guide, (pages 116 – 122), envisages that risk assessments will be completed for pregnant employees, though the Guide is unclear whether such assessments mirror the Regulations in so far as they are dependent upon the Respondent having first received a formal written notification from an employee that they are pregnant. The Maternity Guide documents that risk assessments will be completed by the pregnant employee with their Manager. In this case we believe that would have been Mr Kalley, to whom we understand the Claimant then reported following her appointment as Programme Manager. The responsible person was certainly not Ms Young. The Manager Guide also specifies that any assessment will include an assessment of the mental demands of the job, including hazards, with the potential for referral to Occupational Health as necessary. We shall return to this issue again in a moment when we consider Issue 3(r), namely the Respondent's response to the Claimant's email of 16 October 2020.

80. In our judgement, until the Claimant formally notified her pregnancy on 23 July 2020, the Respondent's failure to complete a risk assessment in relation to her, was because Mr Kalley simply gave the matter no thought rather than because she was pregnant and because that fact somehow caused him to be dismissive or indifferent to the need for an assessment. However, for the reasons below, we infer that the position changed in October 2020. We shall return separately in due course to the question of whether the Respondent breached trust and confidence.

Issue 3(r)

81. What then of the Respondent's response to the Claimant's email of 16 October 2020? The Claimant complains that having expressed certain concerns in an email sent on 16 October 2020, these were ignored by Mr Kalley and not dealt with by the Respondent in line with policy. The email in question is at pages 470 and 471 of the Bundle. It was sent at 12:04pm. It was addressed to Mr Kalley and Ms Harper. Given its length we do not recite its contents in full, though note in summary that the Claimant disclosed she had experienced a panic attack on Monday 12 October and again on Thursday 15 October. The latter attack was sufficiently disabling that the Claimant had to be helped out of the bath by her 12 year old son, something that added to her distress. In her email she wrote of significantly disrupted sleep and that she was *"really struggling"* with aspects of the role, as well as concerned that she might become seriously ill with work stress and anxiety. She clearly identified the likely causes of her issues as being work related. She said she did not want her email to read like a grievance, but that she was struggling mentally and physically with her workload. Her email concluded with a request to establish a handover plan to resolve the situation. In our judgement her email plainly called for urgent action on the part of the Respondent as well

as an immediate response. We note in this regard that the Respondent's duties under the 1999 Regulations had been triggered approximately 12 weeks earlier and, amongst other things, that on receipt of the Claimant's email of 16 October 2020 the Respondent should have given consideration to altering the Claimant's working conditions or hours of work, alternatively redeploying her to a suitable alternative role, or failing that suspending her on full pay. They were already aware that the Claimant was experiencing work related stress as a result of the alleged behaviour of an employee within Sainsbury's with whom she interacted on a regular basis. Aside from the 1999 Regulations, there was an obvious and pressing need for a risk assessment to assess amongst other things whether the Claimant was experiencing pregnancy related ill health that might trigger maternity leave once she was within the final four week period before her baby's due date. However, none of this happened. The Respondent's own mandated pregnancy risk assessment form remained uncompleted and the Maternity Guide was not adhered to. We consider the Respondent handled the situation ineptly. A call was not set up with the Claimant until Monday 19 October 2020 which was then altered as it clashed with a medical appointment scheduled for Mr Kalley, prompting the Claimant to express feelings of disappointment and worthlessness and to take a day's sick leave.

82. As the Claimant did, we acknowledge that Mr Kalley was in the early weeks of his recovery following a heart attack. But that does not, in our judgement, explain or justify the Respondent's treatment of the Claimant. Mr Kalley's attitude and approach are indicated in two respects. Firstly, he did not respond directly to the Claimant; in the context of the difficulties she was then experiencing, we regard that as particularly telling. Secondly, his immediate thoughts in the matter are captured in a short, unsympathetic, indeed insensitively expressed email to Ms Young sent at 1230 on 16 October 2020 in which he wrote,

> *"I was expecting this email as Nicola has become very emotional and tearful especially over the last week or so. I am very frustrated with this as she is certainly not overworked and we have been very supportive in helping her manage her workload. Can we please have a chat as I suggest we allow her to go next week if she wants, on unpaid leave until her paid leave kicks in. I know we have to deal with this very sensitively and I want to try and support Nicola as much as I can but we need to move this forward and if Nicola does go I am sure that Clare can pick this up and we can get Paul to support if required."*

83. We consider that Mr Kalley was stereotyping the Claimant as an emotional, hormonal pregnant woman and that in the particular circumstances his description of her as emotional and tearful was dismissive and belittling. The inference was that she was not fully in control of her emotions because of the pregnancy and that she was making unreasonable demands as a result, when in fact she was experiencing significant work related stress in the advanced stages of her pregnancy, had suffered two panic attacks in short succession, felt overwhelmed, was worried about letting others down but equally concerned that she might become seriously unwell. Rather than genuinely wanting to support the Claimant as he professed, Mr Kalley instead

wanted the Respondent to be seen to be supportive of her in circumstances where he effectively wanted her out of the way as soon as possible so that others could step up in her place. He immediately identified the solution as unpaid leave pending the Claimant's maternity leave, rather than giving any further thought to how the Claimant might be supported and reassured, including as the 1999 Regulations required by making an alteration to her working conditions or hours of work, alternatively by redeploying her to a suitable alternative role and failing that by suspending her on full pay pursuant to s.68 of ERA 1996. Mr Kalley's proposed approach to the situation was not only significantly focused upon his own needs and interests in the matter, more pertinently it was not legally compliant and did not reflect the Respondent's own documented guidance which presumably was intended to ensure that the Respondent complied with applicable Laws and Regulations.

84. Mr Kalley asserts at paragraph 34 of his witness statement that he was very sympathetic to the Claimant's plight. His email to Ms Young of 16 October 2020 does not support the assertion. We find his denial of any discriminatory intent on his part, as well as his assertion that he was sympathetic to the Claimant to be unconvincing. In responding to the situation, he failed to engage in any meaningful way with the events or issues as described by the Claimant. Far from his email indicating concern on his part, it evidences frustration, even irritation, with the Claimant who he perceived as a problem, pregnant employee who was inconveniencing him.

85. These are facts and circumstances from which we infer that Mr Kalley's response or lack of adequate response to the situation, specifically his failure to respond to the Claimant's email as well as his failure following receipt of the email to ensure that a risk assessment was undertaken in relation to her, was because the Claimant was pregnant and seeking to exercise her right to maternity leave. The Respondent has failed to provide a non-discriminatory explanation for Mr Kalley's email and his treatment of the Claimant.

86. The Claimant's complaints identified as Issues 3(j) and (r) are well founded, in the case of Issue 3(j) with effect from 16 October 2020.

Issue 3(k)

87. The Claimant asserts that the Respondent failed to respond to queries raised in her maternity plans about her pay entitlement. Her complaint is factually well founded insofar as Mr Kalley, we find, failed to follow the Respondent's Managers Guide insofar as he did not advise the Claimant that People Support would write to her upon receipt of her MATB1 to outline her maternity pay. It took the Respondent nearly four months to write to the Claimant confirming her entitlement in that regard.

88. We conclude that Mr Kalley did not familiarise himself with the Managers Guide or other relevant documents. In paragraph 28 of his witness statement, Mr Kalley acknowledges that mistakes were made, but states that these were not deliberate, rather they reflected high workload within the payroll department. We find that he was not on top of the issue,

leaving it to others to do whatever might be necessary and failing to take ownership of an issue that was in fact his responsibility. Had he acted on a timely basis, the issue in relation to the Claimant's maternity pay, namely that she was entitled to ten weeks rather than eight weeks of company maternity pay might have been identified and addressed much sooner rather than, as was the case, towards the end of 2020 with the result that the Claimant was paid incorrectly in January 2021, some six months or so after she had formally notified her pregnancy, which under the Respondent's own policy should then have triggered a written outline of her anticipated maternity pay.

89. Whilst this episode does not reflect entirely well upon Mr Kalley, who seemed inclined to blame others in the matter, notwithstanding the events of October 2020, we have not identified more from which we might infer that the shortcomings were because the Claimant was pregnant. Once again, the innocent, if somewhat unsatisfactory explanation, is that Mr Kalley was ill-informed, gave little if any thought to the matter and assumed that others would deal with the Claimant's maternity leave. Whilst the s.18 EqA 2010 complaint does not succeed, we shall return in due course to the question of whether trust and confidence was thereby destroyed or seriously damaged.

Issue 3(l)

90. The Claimant complains that Mr Kalley failed to support her in her use of Keeping in Touch days whilst on maternity leave in line with the Respondent's Maternity Procedure. The section on Keeping in Touch days is light touch (page 144 of the Hearing Bundle), merely stating that employees should talk to their Managers to agree the arrangements for keeping in touch. This is also reflected in the Manager's Guide to the Maternity process which states that Managers should discuss with the employee prior to going on leave whether they wish to utilise the Keeping in Touch days and if so, what they would like to use them for and when. There is no evidence that any such discussion was initiated by Mr Kalley with the Claimant, notwithstanding she had completed her notification form on the basis that she may wish to consider Keeping in Touch days. Indeed, her email to Mr Kalley of 10 February 2021 (at page 548), following her first Keeping in Touch day, evidences that there was no such discussion and that Mr Kalley essentially left it to the Claimant to identify for herself when she might best use her Keeping in Touch days. Even then there is no evidence of Mr Kalley positively engaging with the Claimant in response to her proposals, with Ms Young and Ms Lowcock seemingly taking the lead and prompting Mr Kalley to give his approval.

91. In spite of having received an enthusiastic email from the Claimant, there is no evidence in the Hearing Bundle that Mr Kalley responded directly to the Claimant, let alone that her enthusiasm is reciprocated. Instead his three word email to the Respondent's payroll team was,

> *"This is approved".*

92. Whilst his ongoing failure to engage as a Manager raises questions in our minds, we ultimately conclude that it reflects poor management and poor

communication on his part rather than supporting an inference of discrimination. As above, we shall return to the question of whether there was a breach of trust and confidence.

Issue 3(m)

93. Linked to the issue above, the Claimant complains that she was prevented from taking part in the MiReview process by Mr Kalley on or about 22 February 2021 and again on 8 March 2021. She addresses the matter at paragraphs 59 to 61 of her witness statement. She emailed Mr Kalley on 22 February 2021 with an update following her second Keeping in Touch day which she described as a success and which generated a relatively muted response from Mr Kalley. She wrote,

> *"I know I have missed the MiReview process while being off on maternity leave but I am happy to have something completed if you wanted to use the time on the 8th to do this. I am happy either way."*

The email speaks for itself. The Claimant was not saying that she felt there should be a review, she had no particular view in the matter and was content to leave the decision to Mr Kalley. His response on 25 February 2021 was,

> *"We will have a general catch up and don't overly worry about your MiReview as we will do that when you are back so we can discuss and agree objectives then."*

94. It makes sense that the Claimant's objectives would be discussed and agreed at the point of which the Claimant returned from maternity leave, rather than as part of her Keeping in Touch days when the Claimant was not reasonably in a position to execute any agreed objectives. Mr Kalley was not seeking to avoid a MiReview with the Claimant, rather to schedule it at a more appropriate point in time. Had the Claimant felt that she was being excluded from the MiReview process or that her email of 22 February 2021 had been misunderstood, she might have responded to Mr Kalley's email of 25 February 2021 and pushed back on the issue. She did not do so, which further evidences to us that she had no particular view in the matter and agreed with Mr Kalley's proposed approach. The Respondent's ET3 may well have pleaded the Respondent's position on this issue on the basis of a misunderstanding regarding the 22 February 2021 email, namely that it emanated from Mr Kalley, but nothing turns on the error. The available evidence does not support that the Claimant was precluded from taking part in the MiReview process.

95. Given our findings, the Claimant's complaint cannot succeed in the alternative under s.47C of ERA 1996 or s.13 of EqA 2010 (Issues 4.11(a) and 2.9(Act 3) respectively).

Issue 3(n)

96. The Claimant's complaint that she was discouraged from returning to work in conversations with Ms Young on 22 February and 8 March 2021, is no longer pursued by the Claimant.

Issues 3(o) to (q)

97. The Claimant complains that her return to work Interview on 10 June 2021 was inadequate. She additionally alleges that Mr Kalley told her during their discussion that Clare Orton would no longer be reporting to her and that he removed her training opportunities. The allegations are addressed respectively at paragraphs 67 and 68 and 52 to 57 of the Claimant's and Mr Kalley's witness statements.

98. The Respondent's 'Maternity checklist for Managers' states that when employees return after maternity leave Managers should complete a 'Return From Extended Leave form' and submit this to People Support. The Respondent operates 'Return to Work Plans' which include induction arrangements with built in review dates to ensure an effective return to work. The checklist reminds Managers that a risk assessment should be completed if the employee has given birth in the last six months or they are breast feeding. A Return to Work Plan was seemingly not completed for the Claimant, as the Respondent acknowledged in its decision on her grievance. We find that Mr Kalley failed to give active thought to whether a risk assessment was required for the Claimant; there is no evidence for example that he enquired whether she was breast feeding. A Return to Work Plan having not been completed, review dates were not built in.

99. Mr Robertson's grievance outcome letter suggests that the Claimant's return to work was handled in a similar way to how it would have been handled under the formal structured process. However, we were not taken to any evidence to support this. Instead, we find that Mr Kalley dealt with the Claimant's return to work in such a casual and unstructured way, and that essential checks and safeguards were overlooked, particularly in terms of ensuring the Claimant's health and wellbeing as the mother of a very young child.

100. When interviewed by Mr Robertson on 2 November 2021, Mr Kalley said there was no reason why the return to work interview had not been carried out. He referred to there having been informal undocumented chats. This stands in contrast to his witness statement in which he seeks to suggest some greater depth and structure to their meeting of 10 June 2021. We find that the conversation was not structured or detailed in the way that is now suggested by him. We prefer the Claimant's evidence that it was an unsatisfactory, somewhat perfunctory discussion during which Mr Kalley did not discuss with her the events which had led to her commencing her maternity leave earlier than planned, or seek to identify with her whether she needed any particular support in terms of her return to work, whether because of those events or otherwise. The Claimant's account of her return to work discussion with Mr Kalley, which she set out in some detail in her grievance (page 598), is consistent with what we observe to be Mr Kalley's approach to managing workplace issues. He is not someone who is guided by processes or procedures in his interactions with others, indeed he seems to have limited awareness of the Respondent's policies, procedures and practices.

101. We accept the Claimant's evidence that comments by Mr Kalley in the course of their discussion on 10 June 2021 led the Claimant to believe that Clare Orton would no longer be reporting to her. When interviewed by Mr Robertson in connection with the Claimant's grievance, Ms Harper stated that Ms Orton was to remain under her line management whilst certain large projects were completed (page 777). We can understand why the Claimant came away from her discussion with Mr Kalley on 10 June 2021 with the impression that this was a permanent change, even if Ms Orton herself had a different understanding and believed that she would resume reporting to the Claimant on her return from maternity leave.

102. The Claimant expressed her sense of disappointment around the arrangements, as she understood them, in an email to Mr Kalley on 20 June 2021. If she was labouring under a misunderstanding, this was an obvious opportunity for Mr Kalley to allay her concerns. However, he failed to do so. Whilst we find that her role was not fundamentally changed as she believed, and that it was intended that Ms Orton would resume reporting to her, Mr Kalley's communications with her on this issue could have been clearer, in particular had he followed the relevant checklist and ensured there was a documented Return to Work Plan in place and, failing that, by simply responding to the concerns identified in the Claimant's email.

103. As regards the Claimant's further complaint that Mr Kalley removed training opportunities from her, specifically that she had previously been scheduled to undertake a Project Management Apprenticeship but Mr Kalley struck this from his list without discussing the matter further with her, the Claimant did not raise any concerns in this regard in her email of 20 June 2021 notwithstanding it outlined other concerns she then had, including that Ms Orton would apparently no longer report to her. She only subsequently raised the matter in her formal grievance of 3 September 2021. Thereafter, the issue was briefly touched upon by Mr Robertson when he interviewed Mr Kalley on 2 November 2021. Mr Kalley told him it had been the Claimant's decision not to pursue the Apprenticeship at that time but accepted that there was no evidence to support that this was the case and suggested to Mr Roberston that Ms Young might be able to assist on the issue. We have not been able to identify within the notes or transcript of Mr Robertson's meeting with Ms Young that this issue was explored further in their meeting.

104. We find on the balance of probabilities that Mr Kalley did strike the Apprenticeship from his list without first discussing the matter with the Claimant. We conclude that his focus on operational issues caused him to prioritise these over learning and development opportunities which he viewed as secondary to the needs of the business.

105. Mr Kalley's handling of the return to work discussion, including his comments regarding Ms Orton and the Apprenticeship, reflects a broader issue, namely his failure to adequately manage the Claimant's return to work following her maternity leave, particularly in circumstances where her leave had commenced early as a result of ill-health. His failure to manage her return was compounded by communications that were lacking in clarity and by his lack of adherence to the Respondent's own processes and

procedures. However, we do not infer that this was because he Claimant had been pregnant, taken a period of maternity leave, or was a woman. In the latter regard we consider that a man who returned from a period of extended leave would have experienced the same lack of clarity and failure on Mr Kalley's part to adhere to due process and procedure. The reason why the meeting on 10 June 2021 was handled as it was reflected Mr Kalley's general approach and communication style already referred to.

106. Whilst the Claimant's s.13 and s.18 complaints are not well founded, we shall return to the question of whether trust and confidence was thereby breached.

Issue 3(s)

107. We have already set out our findings and conclusions regarding the Respondent's response to the Claimant's email of 16 October 2020. She makes a similar complaint regarding the Respondent's alleged lack of action when she raised further concerns in an email to Mr Kalley dated 27 July 2021 (page 562). Again, given its length, we do not recite the contents of the email in full. The Claimant submitted a Fit Note and explained that her anxiety medication prescription had been doubled to 100mg. She also disclosed that she was receiving CBT in connection with OCD. She said that she would like to arrange a face to face meeting upon her return to work in the week commencing 6 September 2021 to,

> *"…talk through some of the issues that has lead to this period of absence, but more so to seek support in my return to work after a long period of absence so that I have some kind of structured support around me"*

108. Mr Kalley did not acknowledge or respond to her email. He fails to address the matter in his witness statement so that there is no explanation for his failure to take action on the email. We have given careful thought to whether we should infer from this that the same discriminatory mindset was in play as in October 2020. Whilst Mr Kalley's lack of explanation is troubling, we hesitate to infer from the events of October 2020 that he continued to be influenced by the Claimant's pregnancy or maternity over 9 months later, particularly given that the Claimant had by then returned to work. Notwithstanding the absence of any explanation from him, we have ultimately been unable to identify something more from which we might infer that Mr Kalley's inaction in the matter was because the Claimant had been pregnant and / or exercised her right to maternity leave, including taking compulsory maternity leave, or because she was a woman. Instead, we conclude that he neglected the matter because he expected others, specifically Ms Young and her HR colleagues, to manage the Claimant's sickness absence. The Claimant was by then no longer within her protected period; to the extent that the matter falls to be considered in the alternative as a complaint of sex discrimination (paragraph 2.9(Act 6) of the List of Issues), we consider that a man who took a period of sickness absence following a period of extended family leave would have encountered the same inaction and lack of response on the part of Mr Kalley. In the circumstances, we conclude that the Claimant was not discriminated against in the matter on the grounds of sex.

109. We shall return in a moment to the question of whether, in failing to deal with the issues raised by the Claimant, trust and confidence was thereby destroyed or seriously damaged.

Issue 3(u)

110. The Claimant complains that in July 2021 she was subjected to a deduction in sick pay. As with the car allowance issue that arose in May 2020, we are satisfied that this was the result of a genuine error on the part of the Respondent which had nothing whatever to do with the Claimant having been pregnant, on compulsory maternity leave, or exercising her maternity leave rights. The Claimant raised the issue with the Respondent's payroll team at 1554 on Wednesday 28 July 2021. It was escalated to Mr Kalley within approximately 40 minutes, who requested within a further hour that Ms Young look into the matter. By Tuesday 3 August 2021 the issue was resolved and Mr Kalley authorised a BACS payment of £1,163.29 to the Claimant to make good the outstanding sick pay due to her. There is no basis for us to infer that the Claimant was discriminated against or subjected to detrimental treatment because of a protected characteristic or for a prescribed reason referred to in s.47C of ERA 1996.

Issue 3(t)

111. The Claimant pursues a third complaint regarding Mr Kalley's alleged failure to respond to or deal with her emails, namely emails sent by her on 2 and 3 September 2021.

112. On 27 July 2021, the Claimant was certified unfit for work by her GP on the grounds of post-natal depression (page 561). She was certified from 21 July 2021 to 5 September 2021. We have referred already to her email to Mr Kalley of 27 July 2021. There are copy emails in the Hearing Bundle evidencing discussion between Mr Kalley and Ms Young and Mr Lowcock in August 2021 regarding the Claimant's sick pay entitlement, including Ms Young suggesting a call with the Claimant the week commencing 30 August 2021 to explain the position to her. Mr Kalley sent a brief email to this effect to the Claimant on 1 September 2021. The same day the Claimant was certified unfit for work for a further period of eight weeks, again by reason of post-natal depression.

113. We accept the Claimant's evidence at paragraph 79 of her witness statement regarding her conversation with Mr Kalley on 1 September 2021, namely that during the call Mr Kalley asked the Claimant instead about her return to work plans and that her sick pay entitlement was not discussed. Their call lasted two minutes and ten seconds, evidencing to us that it was a relatively perfunctory discussion consistent with what we observe to be Mr Kalley's management and communication style, including his propensity to avoid detailed discussion of personal issues affecting colleagues. The Claimant was understandably surprised to receive an email the following day from Mr Kalley which referred to her sick pay entitlement given that this had not been discussed during the call. The emails in question are at pages 580 and 581 of the Bundle. The email purported to set out the Claimant's contractual position in relation to

company sick pay, namely that the Claimant was entitled to 10 weeks' company sick pay and thereafter to SSP only. No previous efforts had been made to discuss the matter with the Claimant. Yet it is clear from the emails already referred to that Mr Kalley and Ms Young were fully aware that the records sought to be relied upon regarding the Claimant's contractual sick pay entitlement were at odds with her understanding that she would be paid for up to 16 weeks' absence at full pay and a further 16 weeks at half pay. Indeed, Ms Young had identified at one point that there was a contract on file that potentially conferred a right to six months' absence at full pay, which was a greater entitlement than even the Claimant was asserting (page 578). Further, they, or certainly Ms Young would have understood that the issue was potentially further complicated by reason that the Claimant had TUPE transferred to the Respondent, meaning that the Respondent would need to consider what the Claimant's protected terms and conditions were, regardless of what documentation was held on file in relation to her.

114. On being informed by Mr Kalley on 2 September 2021 that she would revert to SSP as her company sick pay entitlement was limited to 10 weeks, the Claimant responded within a matter of minutes requesting a copy of the contract of employment which Mr Kalley said was held on file in relation to her. Ms Young was copied into the Claimant's email. Although Ms Young emailed Mr Kalley within a further matter of minutes and provided him with an extract of the contract in question, neither of them sent any immediate response to the Claimant, including even a holding email. The Claimant chased them and the payroll team at 0825 the following day, 3 September 2021, once again requesting a copy of the contract referred to, (page 584 of the Bundle). She received no response or acknowledgment that day.

115. There was and to date has been no explanation as to why the contract referred to could not have been provided immediately to the Claimant. It would have taken Mr Kalley or Ms Young seconds to forward a copy to her. They certainly had time to message one another. While the issue was outstanding the Claimant would have understood that she would not be paid in respect of her ongoing sickness absence. This is in the context, as both were fully aware, that she had been diagnosed with post-natal depression, had previously experienced anxiety and panic attacks, and was undergoing CBT for OCD.

116. In our judgement the Respondent had a responsibility to the Claimant to address her request and any reasonable queries regarding her sick pay entitlement without delay and to let her know they had the matter in hand. Instead she went into the weekend having received no further response and with the understanding that her final day of company sick pay was 3 September 2021. Whilst we do not infer that their failure to respond to the Claimant or to provide the documentation requested by her was unlawful discrimination on any prohibited ground or detrimental treatment for a prescribed reason, we return to the issue of whether trust and confidence was thereby breached.

117. As regards the Claimant's s.47C detriment complaints, we have already addressed Issues 4.11(a) and (d) above.

Issues 4.11(b) and (c)

118. The Claimant asserts that she was subjected to detriment in contravention of s.47C of the ERA 1996, by reason of Mr Robertson's alleged failure to adequately deal with her grievance. She complains that there were no notes from Helen Young, no recordings of meetings and that Mr Robertson's outcome letter did not address whether she had been discriminated against. Whilst we understand that these specific complaints are no longer pursued by the Claimant, in any event we do not consider them to be well founded. Mr Robertson's detailed outcome letter engages fully with the issues. It runs to some 9 pages. Mr Robertson upheld part of the grievance and offered the Claimant an unqualified apology in that regard, as well as making certain recommendations to the business to address various issues encountered by the Claimant, including tool box talks with all Managers on the Sainsbury's account to ensure that policies and processes were adhered to. The Claimant may disagree with the outcome to her grievance, but that does not mean that Mr Robertson dealt with the grievance inadequately. We were not taken to evidence in the Bundle, nor was Mr Robertson cross examined in such a way as to enable us to make findings or come to a judgment that his investigation and conclusions were wanting or otherwise outside the band of reasonable responses. It is irrelevant in this regard that we may reached different conclusions to him. And even if there were no notes for Helen Young, no recordings of meetings and the outcome did not specifically address whether the Claimant had been discriminated against, in our judgement this was not because the Claimant was, or had been pregnant or taken maternity leave. At the highest, the Claimant was asserting that the grievance process was handled unfairly or unreasonably rather than in a discriminatory manner. By the time we had heard the evidence in the case, it was apparent that the Claimant had failed to adduce sufficient evidence even to support a finding of unfairness in the grievance process. In any event, the grievance post-dated the Claimant's resignation and as such was not a factor in her decision to resign her employment.

119. In summary therefore and in terms of the List of Issues, the Claimant has failed to establish the primary facts sought to be relied upon by her in respect of Issues: 2.9(Acts (3) and (4)); 3(h), (i) and (m); and 4.11(a), (b) and (c) of the List of Issues.

120. We turn then to the question of whether the Claimant was constructively dismissed.

Issue 3(a)

121. We do not consider that it can be said the Respondent acted without reasonable or proper cause in so far as Mr Kalley stopped undertaking one-to-ones with the Claimant following the end of the secondment. Line management responsibility for the Claimant, including her one-to-ones had reverted to Ms Harper by then. It is not suggested by the Claimant that the one-to-ones were not taken forward by Ms Harper.

Issues 3(b) and (u)

122. Although pay is a fundamental element of the bargain between an employers and their workers, errors in pay are a common occurrence within workplaces. In this case, the May 2020 and July 2021 errors in respect of the car allowance and sick pay were as a result of system issues rather than any carelessness or neglect on the part of the Respondent (we deal separately below with the sick pay issue that arose in September 2021). More importantly, the errors were promptly corrected on being brought to the Respondent's attention. In the circumstances we do not consider the Respondent to have acted in breach of contract in respect of these matters let alone that it committed a repudiatory breach. The Claimant's complaints in this regard are not well founded.

Issues 2.7(Act 1) and 3(c)

123. The 9 June 2020 job advertisement resulted from an error on the Respondent's part and was corrected within a matter of minutes, seemingly before the offending advertisement was seen by the Claimant. Viewed objectively, the Respondent's actions cannot be said to have been destructive or seriously damaging of trust and confidence, indeed it is difficult for us to see that they could even be said to amount to a breach of contract.

Issues 2.9(Act 2) and 3(d) to (g)

124. In our judgement the Respondent was not entirely open and transparent in its dealings with the Claimant, and indeed her colleagues, in relation to the Programme Manager role. As we have observed already, the Respondent could be said to have acted in furtherance of its own selfish commercial interests in the matter and to an extent assumed or allowed itself to believe that these aligned with the Claimant's interests. We conclude that some degree of pressure was brought to bear in the matter. The Respondent failed to disclose to the Claimant at the time that proposals were already afoot to restructure the Senior Leadership on the Sainsbury's account. The presentation dated 20 July 2020 (pages 394 – 408) confirms that the Respondent had undertaken an extensive review of its existing operating model and planned to merge the RAM role with a ZOM role within its retail operations, thereby placing all existing RAMs and ZOMs at risk of redundancy on the basis there would be four new roles for those who were displaced. The plan was to announce the proposals to those who were potentially affected on or around 20 July 2021, with formal consultation commencing the following day. We find that these proposals were already under consideration when the Claimant was approached in connection with the Programme Manager role. If anyone has particular cause to complain in the matter, it is the Claimant's colleagues who, unlike her, were not encouraged to apply for the Programme Manager role, but instead placed at risk of redundancy a few weeks later. It could be said that she was treated more favourably than they were in being preferred for the role and taken outside the 'at risk' pool. As we have already said, it was not a contrived role that was intended to secure the Claimant's removal from her previous role. Whilst the Respondent was not as open and transparent as it might have been with the Claimant, nevertheless we

do not consider by its actions that the Respondent can objectively be said to have destroyed or seriously damaged trust and confidence.

Issues 3(j) and (r)

125. The Respondent failed to undertake a risk assessment in respect of the Claimant during her pregnancy or ahead of or on her return to work following her maternity leave in circumstances where we have determined that it was under a duty to do so. It acted, or failed to act in the matter without reasonable and proper cause, in breach of its duty of care to the Claimant, in breach of its statutory obligations in the matter and in contravention of its own documented policy, procedure and guidance. The health, safety and wellbeing of pregnant workers and women who are returning from maternity leave, including those who may be breast feeding, are a significant consideration. Whether through a lack of relevant training or a lack of thought and attention, or because he failed to prioritise such issues or simply assumed that others would take responsibility for them, Mr Kalley failed to ensure that the organisation discharged its responsibilities to the Claimant. Trust and confidence was thereby significantly compromised, indeed ultimately destroyed, over an extended period of time from at least October 2020 to 6 September 2021 when the Claimant resigned her employment. Mr Kalley's response or lack of effective response to the Claimant's emails of 16 October 2020 and 27 July 2021 was particularly inexcusable.

Issue 3(k)

126. Although not in and of itself destructive or seriously damaging of trust and confidence, in our judgement the Respondent failed in its obligations to the Claimant as her employer by not responding to the queries raised in her maternity plans about her pay entitlement.

Issue 3(l)

127. Similarly, in our judgement, Mr Kalley's communications with the Claimant in the matter of her Keeping in Touch days were not of themselves destructive or seriously damaging of trust and confidence, though they form part of the overall picture of a Manager who failed to deal with the Claimant's pregnancy and the arrangements for her maternity leave and eventual return to work in a satisfactory manner. His interactions and communications with her fell below the standard that might reasonably have been expected of him as a senior Manager.

Issues 3(o) to (q)

128. The same observations as above can be made in respect of the 10 June 2021 return to work interview, including Mr Kalley's failure to clarify the position in relation to Clare Orton when the Claimant expressed concerns in the matter and the way in which he communicated with the Claimant around the issue of her Apprenticeship.

Issue 3(t)

129. Mr Kalley's, and hereafter his and Ms Young's failure to respond on a

more timely basis to the Claimant's emails of 2 and 3 September 2021 can only properly be viewed in the context of the sub-standard communications that preceded them, including Mr Kalley's failure to acknowledge or respond to the Claimant's email of 27 July 2021 immediately before she went sick. As we have already observed, there is no explanation as to why Mr Kalley and Ms Young did not provide the Claimant with a copy of the contract referred to which was relied upon by Mr Kalley when stating that the Claimant had exhausted her right to company sick pay. She had been certified unfit for work due to post-natal depression, was known to have a history of mental health difficulties, including anxiety and OCD, had experienced a significant panic attack in the final weeks of her pregnancy resulting in her commencing her maternity leave sooner than planned, had a young baby to care for and was self-evidently vulnerable. This was not a run of the mill situation in which an employee was querying their pay. Instead, it cried out for an urgent response. The lack of any response exacerbated the situation and the Claimant's underlying worries. In our judgement the Respondent acted without reasonable and proper cause when it failed to acknowledge her emails or to provide a copy of the contract that had been requested by her. Viewed objectively, its failures in that regard breached trust and confidence as it reasonably indicated to the Claimant that the Respondent was not giving priority to an imminent, significant loss of pay in circumstances where the Claimant rightly believed she had an ongoing contractual right to be paid her normal pay in respect of her continued certified sickness absence. We would have said in the alternative that the Respondent's lack of timely communication plainly added something to the Respondent's other earlier repudiatory breaches, such as to amount to a 'last straw', even had it not amounted of itself, as we have concluded it did, to a bale of straw that brought down the relationship.

130. In our judgement, the Claimant did not waive the breaches complained of and affirm the employment relationship. As regards the Respondent's response to the issues raised by the Claimant's 16 October 2020 email, the Claimant went sick two working days later and then brought forward her maternity leave to 16 November 2021. She returned to work on 10 June 2021. We do not infer from her return that she thereby affirmed the contractual relationship, nor do we do so from her failure to resign her employment during her maternity leave when she was focused upon caring for her baby. We consider that it was entirely reasonable for the Claimant to take stock of the situation once she returned to work, including having regard to how her return was handled by the Respondent and what support was made available to her. In resigning her employment the Claimant would be giving up secure employment and would evidently need to give careful consideration to the financial and other implications for herself and her family, including how it might affect her career prospects given she then had a very young child to care for. In the event, as we have identified, her return from maternity leave was not handled as well as it might have been and certain communications were lacking. By 27 July 2021 she was certified unfit for work with post-natal depression. Whilst we do not know when she first experienced symptoms consistent with post-natal depression, her email of 27 July 2021 evidently described ongoing issues, including a bereavement and that the Claimant was having CBT for OCD. In the circumstances, there was little or no effective

opportunity for the Claimant to reflect on the matter before she went sick again. Against that background, we do not infer that the Claimant waived the breaches and affirmed the contract simply because she remained in the Respondent's employment following her return from maternity leave. But in any event, applying Kaur, even if, contrary to our conclusions above, the events of 2 and 3 September could be said not to amount to repudiatory breaches of contract, in our judgement they were of a similar character to the October 2020 breaches and undoubtedly added something to them; in our judgement, viewed objectively they further demonstrated that the Respond no longer intended to be bound by its obligations such that the Claimant was entitled to resign her employment. It is an academic point since in our judgement the Respondent's cumulative treatment of the Claimant over the period following her return from maternity leave until 3 September 2021 was of itself sufficiently serious as to be destructive of trust and confidence thereby entitling the Claimant to resign from her employment. It is not relevant that the Claimant resigned partly in response to alleged breaches that have not been upheld within these proceedings. It is sufficient that the Claimant resigned at least in part in response to the breaches upheld by the Tribunal.

131. In all the circumstances the Claimant has satisfied us that she was constructively dismissed. Her dismissal was unfair since the Respondent acted without reasonable and proper cause in respect of the matters in question. It is not suggested by the Respondent that it had a potentially fair reason within s.98(2) of the ERA 1996 for treating the Claimant as it did or that it acted reasonably in treating such reason as sufficient reason for treating the Claimant as it did.

132. In terms of her discrimination complaint, it is sufficient that any discriminatory treatment of the Claimant contributed to a material extent to her resignation in order for the Claimant to pursue a complaint under EqA 2010 in respect of her constructive dismissal. We are satisfied that the Respondent's failure to undertake a risk assessment in respect of the Claimant, together with Mr Kalley's inaction in October 2020 were material factors in her decision to resign. She wrote in her letter of resignation that her health, safety and wellbeing had been disadvantaged, expanding upon this at some length in numbered paragraph 7 of her letter (pages 595 – 596).

133. In the circumstances, we consider that the Claimant's complaint that she was discriminated against was notified to ACAS and thereafter presented to the Employment Tribunals in time, namely within three months of her constructive dismissal.

134. We would have said in the alternative that it would be just and equitable to extend time in respect of Mr Kalley's failure to respond to her email of 16 October 2020, including his failure to arrange a risk assessment in response to it, in circumstances where the Claimant was thereafter absent from the business and then on maternity leave until 10 June 2021 and thereafter, absent from work with certified post-natal depression with effect from 27 July 2021 until she resigned her employment on 6 September 2021. Even allowing for that sickness absence, the Claimant notified her

claims to ACAS within three months of her return from maternity leave. We cannot identify that any forensic prejudice had been caused to the Respondent in the matter. The only hardship it will suffer if the Claimant could be said to be out of time, is that the Claimant will be permitted to pursue an 'out of time' complaint against it. We balance that against the significance prejudice and hardship to the Claimant in being denied a remedy in respect of a well founded complaint that she was discriminated against, particularly in circumstances where the Respondent was in breach of its duty of care and statutory obligations to her as a pregnant woman, as well as its own policy and guidance in the matter.

135. In our judgement it would be unjust and cause unreasonable hardship to expect a pregnant woman to commence legal proceedings when she is in the advance stages of her pregnancy, not least where as here there are concerns for the health and wellbeing of both herself and the baby, during her maternity leave, or in the months following the birth when she is caring for and potentially breast feeding a new born baby. The Claimant's health issues we have referred to further reinforce the significant injustice and hardship that would result if time was not extended in this case.

136. In our judgement, if the s.18 claim could be said to be out of time, the Claimant pursued it within a reasonable period of time, indeed notifying it to ACAS when she was still suffering with post-natal depression, so that it would be just and equitable to extend time for bringing the claim.

137. The case will be listed for a remedy hearing and case management orders will be issued separately in that regard.

Employment Judge Tynan

Date: ……13 February 2024..

Judgment sent to the parties on

.14 February 2024.....

…….....
For the Tribunal office