



EMPLOYMENT TRIBUNALS

Claimant: Mrs Philippa Ratcliffe (Nee Burgess)

Respondents: Ezytrac Employment Services Limited

Record of an Attended Hearing at the Employment Tribunal

Heard at: Lincoln

Heard on: 11, 14, 16 & 17 August 2023

14 September 2023 (In chambers)

Before: Employment Judge M Butler

Members: Ms B Tidd
Mr C Goldson

Appearances:

Claimant: Ms L Redman, Counsel
Respondent: Mr G Gunstone, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claims of unfair dismissal and pregnancy and maternity discrimination are not well-founded and are dismissed.

REASONS

Background

1. The Claimant presented her claim to the Tribunal on 11 May 2022 after a period of early conciliation from 10 March 2022 to 20 April 2022. She commenced employment with the Respondent on 20 March 2017 as a Lettings Co-ordinator dealing with the property management of rental properties. Her employment (we find) ended on 11 February 2022 by which time her job title was Associate Director and she was on maternity leave having given birth to her fourth child in December 2021.
2. She brings claims of unfair dismissal or, in the alternative, constructive unfair dismissal, pregnancy and maternity discrimination. The incidents of which she complains in support of her claims are relevant to both the unfair dismissal and discrimination claims. In essence, she relies on unfavourable treatment due to her pregnancy and maternity leave by the Respondent towards her and the details of those incidents are set out below. They are also set out in her particulars of claim which are complicated by the fact that the allegations are set out twice.
3. The Respondent denies dismissing the Claimant and denies engaging in any unfavourable treatment towards her because of her pregnancy or maternity. It further denies that it engaged in any conduct which amounted to a fundamental breach of the implied term of trust and confidence contained within the Claimant's contract of employment.
4. The unfair dismissal claim arises out of the Claimant's letter emailed to the Respondent on 10 January 2022 which was headed "Without Prejudice as to Save Costs". Whether this letter was privileged was addressed in the two Preliminary Case Management Hearings before my colleagues Employment Judges Blackwell and Hutchinson. This was to be a matter to be addressed at this hearing but, at the commencement of the hearing, Ms Redman confirmed that privilege was being waived. This was entirely the correct course of action as the Tribunal would not have been able to determine the claim of unfair dismissal without reference to that letter.

The Issues

5. The issues were agreed between the parties and appear at pages 69-73 of the hearing bundle. They are not repeated here but are appended to this Judgment.

The Evidence

6. The Tribunal heard evidence from the Claimant, Ms R Hansell, a former employee of the Respondent, and Ms O Aloji, another former employee of the Respondent. For the Respondent we heard evidence from Ms D Parker, Director of Business Management and General Manager, Ms C Bevis who at the relevant time was carrying out a Human Resources role, Mr C Hough, Associate Director of

Compliance and Training and Acting Head of Lettings, Mr J Smyth, Maintenance Team Leader, Ms E Messam, Associate Director Property Management, Mrs A Alegre-Wood, Director and Chairwomen and Mr B Alegre-Wood, Director. All witnesses produced witness statements and were cross-examined.

7. There was a bundle of documents comprising 420 pages which was supplemented by a few further documents relating to the Respondent's Flexible Working Policy as became relevant during the hearing.
8. References to page numbers in this Judgment are to page numbers in the bundle.

The Facts

9. We make our findings of fact on the balance of probabilities having considered the evidence before us given orally by the witnesses and the documentary evidence within the bundle. Where there was a conflict in the evidence between the parties we preferred the evidence of the Respondent's witnesses which we found to be more credible and reliable than that of the Claimant and her witnesses.
10. We found the Claimant's evidence for the most part to be lacking in credibility and, in relation to certain factual issues, unreliable. Whilst we are not obliged to consider every single issue which illustrates this lack of credibility or unreliability, we set out in the following paragraphs examples of where the Claimant's evidence fell into these categories.
11. The Claimant complains that the Respondent's Directors told Ms Messam that she would be taking over the Claimant's role permanently. There is absolutely no evidence that this happened. Ms Messam's evidence was that the Respondent's Directors had been talking for some time about opening a branch to deal with London properties and the Claimant was well aware of this. On 31 December 2021 Miss Messam, having just been told of her promotion to Associate Director, telephoned the Claimant to advise her of this promotion. Her evidence was that the Claimant was well aware of the Respondent's plans and that Ms Messam would be involved in running the new branch. There is not a shred of evidence that Ms Messam would take over the Claimant's duties and the Claimant's allegation in this regard is at best unsubstantiated conjecture and at worst made up to bolster her claim.
12. The Claimant also complains about being excluded from meetings. We find no evidence to support this claim. She intimates that this exclusion began after she announced her pregnancy but she received invitations to meetings as evidenced at pages 129, 174 and 175 and these invitations all post-dated the announcement of her pregnancy. Further, at page 188, the Claimant sent a message to a colleague saying "*I haven't even really participated in meetings. Emma is looking after everything now*". This was in July 2021. There is also evidence of the Claimant having to miss meetings because one of her children was ill (page 236). There is also confirmation at page 240 that the Claimant had asked to be taken off Heads of Teams meetings and then asked why she was not in them. She then attended a

meeting but at page 241 in a message to Mrs Alegre-Wood the Claimant said of a meeting taking place on 10 June 2021, *"I'm going to jump in with Emma today and hand it over for her to take them going forward..."*. Accordingly, the Claimant's evidence in respect of alleged exclusion from meetings is unreliable in light of the documentary evidence in the bundle.

13. The Claimant also complains that during her pregnancy risk assessment it was suggested that any stress she was feeling was solely down to her pregnancy. In her oral evidence she said the questions she was asked were *"all related to stress"*. However, in conversation with Mrs Alegre-Wood on 27 April 2021 the Claimant said she felt mentally overwhelmed by all of the changes brought about by being pregnant (page 222) and freely volunteered to the Risk Assessor that she was receiving counselling for anxiety and stress (page 150). The Claimant signed the risk assessment with no comments. It seems clear to us, however, that any suggestion of stress being solely down to her pregnancy came from the Claimant herself.
14. The Claimant further alleges that on 4 October 2021 having indicated that her midwife had suggested she begin her maternity leave early, she was *"marched out of the office"* and denied the opportunity to continue working until the end of the week when she indicated her maternity leave essentially would begin. The Claimant returned to work after seeing the midwife and met with Ms Bevis. Ms Bevis then contacted Mrs Alegre-Wood and spoke to the Claimant again and told her to go home to work. What the Claimant omits to say in her statement is that it was suggested to her that she visit her GP the following day to get advice on whether she could remain at work in the office for the remainder of the week. The Claimant did not consult her GP and we would have thought if she felt strongly enough about being asked to work from home she would certainly have done so. The Claimant was very friendly with Ms Messam whose witness statement makes clear that the Claimant was not marched out of the office as if she was being disciplined. She was accompanied by Ms Messam who helped carry her things to her car and because she was good friends with the Claimant and wanted to be able to give her a hug as she left. As we mention below, we accept entirely the evidence of the Respondent's witnesses in relation to this incident.
15. Another issue raised by the Claimant in support of her claims is that the Employee Commission Structure was changed without consultation with her whilst she was on maternity leave and this would have reduced her earnings.
16. In fact, we accept the Respondent's evidence that the change in the Commission Structure would have increased the Claimant's earnings. In cross-examination she accepted that as renewals were to be added to the scheme she would have been better off and in response to a question from the Employment Judge she said, *"it was conjecture on my part that I would have been worse off. It had nothing to do with my pregnancy"*. This was just one example of the Claimant making assertions in her witness statement which did not stand up to scrutiny in cross-examination and in questions from the Tribunal. There is also significant inconsistency with the

documentary evidence before us and the contentions of the Claimant. At page 277 in a conversation with Mrs Alegre-Wood the Claimant said, *"I am sorry I have not been able to stick things out longer but I have discussed sterilisation when I have the C-section so at least you know I won't be doing this again"*. On the following day 5 October 2021, the Claimant said, *"Still processing yesterday. Just heading to physio now and should have my Doctor's note this afternoon x"*. These comments do not support the Claimant's assertion that she was forced to leave work and was marched out of the office. On the following day (page 277) Mrs Alegre-Wood pointed out that the Claimant could opt to go on sick leave but that would mean she would receive SSP. The Claimant replied that, *"SSP was £95.00 per week"* and *"I would rather start MAT leave early"*. This suggests that the Claimant also had in mind her financial situation rather than an uncorroborated allegation of unfavourable treatment by the Respondent.

17. The final example we refer to is the Claimant's allegation that the Respondent refused to allow her work towards the Level 4 Fellow of the Association of Residential Lettings Qualification (FARLA) after she requested this on 29 June 2021. The Claimant already had the Level 3 qualification and there was no dispute between the parties that Level 4 is more demanding being a written essay based test with 6 examinations. The Claimant said she wished to study with Ms Messam who would also be working towards the qualification but we note the Claimant gave up some of her responsibilities and attendance at meetings to Ms Messam and we were unsure how she proposed to carry out work whilst holding down a job, looking after three children at home, not always being in the office at the same time as Ms Messam and also suffering from various pregnancy related medical issues. There is no evidence before us that the Respondent in the form of Mrs Alegre-Wood ever refused to allow the Claimant to undertake this course. At page 254 there is a conversation between the Claimant and Mrs Alegre-Wood where Mrs Alegre-Wood queries whether it would be better for the Claimant to consider the course once back from maternity leave and referred to the Claimant's workload and that it might be better for the Claimant to take the course the following year due to everything she had on at the present time. She added that she wanted to be sure the Claimant was okay workwise without loading any more work on her. The Claimant replies, *"Okay"* with a thumbs up emoji and says that this was in response to Mrs Alegre-Wood saying she would speak to Mr Alegre-Wood about it. This is a convenient interpretation by the Claimant since her response was not to the reference to speaking to Mr Alegre-Wood but the reference to not wishing to overload the Claimant with work.

18. In many other areas in relation to the issues before us, the Claimant's evidence lacked credibility. We note she did not at anytime raise a grievance about any of the things of which she now complains. Her evidence was she did not have access to her contract of employment whilst on maternity leave and so did not know what the procedure was. However, in her role as a Team Leader she dealt with grievances raised by other employees and was perfectly well aware of the procedure to be followed.

19. The Claimant produced two witnesses in support of her claim. The first was Ms Aloï whose evidence we have to say we found to be totally unreliable. In essence she attempted to support the Claimant's claims by saying that she herself had made requests for flexible working upon returning from maternity leave and these were dismissed without any consideration. The documents produced by the Respondent tell an entirely different story. Not only were the requests given serious consideration, the Respondent produced its letters in relation to the initial request and the appeal it granted to Ms Aloï giving explicit detail within the statutory framework as to why her request could not be granted. Indeed, in the light of the evidence produced by the Respondent to counter Ms Aloï's allegation, we were surprised she was actually called to give evidence.
20. The Claimant's second witness was Ms Hansell, a former employee who resigned after what she referred to as "*unwarranted disciplinary action by the Respondent*". Ms Hansell made a series of allegations against the Respondent's Directors and management which were not corroborated by any documentary evidence. We gained a strong impression that the evidence was given to assist the Claimant and to criticise the Respondent's Directors solely for this purpose.
21. In contrast, we found the Respondent's witnesses gave their evidence in an open and straightforward manner and answered each question put to them promptly and, we consider, honestly. They did not shirk from answering difficult questions and, unlike the Claimant, did not need to pause to consider the question before giving an answer. Again, unlike the Claimant's evidence, the Respondent's witnesses could rely on documentary evidence to corroborate their statements. It was also apparent to us that the Directors of the Respondent held the Claimant in very high regard and there was a particularly special and friendly relationship between the Claimant and Mrs Alegre-Wood. This was also illustrated at pages 352 and 353 of the bundle showing gifts totalling £3,750 from them to the Claimant, the sum of £3,000 being to assist the Claimant with the purchase of a house.
22. In relation to the issues to be determined and having carefully considered the witness and documentary evidence before us, we find the following facts on the balance of probabilities:
- 22.1. The Claimant was born on 23 March 1988. She commenced employment with the Respondent as a Lettings Co-ordinator on 20 March 2017. Essentially, the business of the Respondent is to manage property lettings for landlords. The two Directors of the Respondent, Mr and Mrs Alegre-Wood live mainly in Singapore but made fairly regular visits to the Respondent's office in Lincoln.
- 22.2. The Claimant performed well in her role and this led to her promotion to Associate Director running a team of Lettings Co-ordinators. One of those was Ms Messam with whom the Claimant developed a good friendship. The Claimant had also developed a very good relationship with Mr and Mrs Alegre-Wood and Mrs Alegre-Wood in particular. In conversations and

correspondence between the Claimant and Mrs Alegre-Wood, the closeness of their friendship was often recorded and just one example is at page 228 in the bundle, where during a conversation, Mrs Alegre-Wood said, *“Hang in there x your a super women bt yr human so take a breather if u need to ok. Yes we love u and u are a very important part of the business but first and foremost we care bout u xxx”*. The Claimant was a divorced mother of three children the youngest being 7 years old. She had a new relationship with a former employee of the Respondent. She was living in accommodation which was not acceptable to her but did not have enough money for a deposit to buy a house. On 7 July 2020, the Respondent gave the Claimant £3,000 towards a deposit for a house which was then purchased (page 353).

- 22.3. The Claimant became pregnant and advised Mrs Alegre-Wood and some colleagues that she was pregnant on 19 April 2021.
- 22.4. The pregnancy gave rise to a number of pregnancy related issues including morning sickness, sciatica and anxiety for which she said she received counselling. She recorded her issues with morning sickness throughout May 2021 and in particular to an email (rather unhelpfully with the recipients name redacted) at page 114.
- 22.5. The Claimant continued to receive invitations to morning meetings and Heads meetings. She was open with colleagues about missing meetings for various reasons connected to her pregnancy and looking after her children, two such incidents being recorded on 10 and 18 May 2021 (pages 230 and 236). During this period, the Claimant asked Ms Messam to take some meetings for her and asked Mrs Alegre-Wood if she could not attend meetings and if someone could cover the Heads meeting and presentation and figures which is what had led to Ms Messam doing this (page 240). On 10 June 2021 the Claimant confirmed to Mrs Alegre-Wood that she would join a meeting with Ms Messam and hand over to her to take the meetings going forward (page 241). At no time was the Claimant excluded from meetings by the Respondent and she actively encouraged Ms Messam to take over some of her duties in this regard.
- 22.6. The Claimant provided her MATB1 certificate to the Respondent on 6 August 2021 and subsequently on 9 August 2021 advised that her maternity leave would commence on 26 October 2021. In line with its obligations, the Respondent carried out a maternity risk assessment during which she advised that she was suffering from pregnancy related anxiety which prompted further reasonable questions about this. The Claimant was given an opportunity to make her own comments at the end of the risk assessment but made none.
- 22.7. Both during and after the Covid lockdown the Respondent, in accordance with Government Guidelines, ran a rota for staff who would attend the office. The Claimant was not told she had to work from home as she maintains.

The Respondent took reasonable measures to comply with guidelines to ensure the safety of its employees. On several occasions, the Claimant actually asked to work from home, for example, to look after her children, and on 22 September 2021 when she said she had a suspected blood clot.

- 22.8. On 4 October 2021 the Claimant attended a morning midwife's appointment. She returned to the office to advise Ms Bevis that her midwife had advised her to commence maternity leave early. Ms Bevis spoke to Mr and Mrs Alegre-Wood and, out of concern for the Claimant, Ms Bevis told the Claimant to go home where she could work if she wished and a further discussion would take place on the following day when the Claimant would have seen her GP to obtain further advice. We find it highly likely that the Claimant's subsequent objection to emails sent by Ms Bevis indicating the Claimant's midwife had told her to cease work immediately were prompted by the Claimant's concern that this might mean she would only be in receipt of SSP as opposed to maternity pay. Before leaving the Respondent's office, the Claimant spent some time waiting for her friend, Ms Messam, to conclude a telephone conversation before leaving. She was not "*marched out of the office*" but merely accompanied by Ms Messam who was upset that the Claimant was not being given the kind of send off that had been anticipated.
- 22.9. The Claimant's colleagues confirmed that they would organise a baby shower for the Claimant. Despite confirming that she was to see her GP the following day for further advice, the Claimant has produced no evidence that she did so or, if she did, no evidence of the advice she received. The Claimant began her maternity leave on 8 October 2021. She attended the office for her baby shower with colleagues on 15 October 2021.
- 22.10. The Claimant continued to correspond with Mrs Alegre-Wood during November in a very friendly fashion and sent pictures of her new-born baby in December which prompted expressions of happiness and joy for the Claimant from Mrs Alegre-Wood.
- 22.11. In relation to Ms Messam's position within the Respondent Company and for the avoidance of doubt, we find that there was never an offer to Ms Messam that she would take over the Claimant's role permanently. Further, there is no basis for the Claimant's argument that she was not consulted about Ms Messam's promotion to Associate Director as she was simply not entitled to be consulted.
- 22.12. The Claimant's allegation that she would suffer financially with the introduction of the new Commission Structure is unfounded and mere conjecture on her part. Had she remained with the Respondent, she would actually have been financially better off.
- 22.13. We accept Ms Messam's evidence to the Tribunal that the Claimant had indicated that she might not return to work and that the availability of her

mother to childmind was a significant factor in whatever decision she made.

22.14. On 10 January 2022 the Claimant sent the email at page 324 and 325 to the Respondent in which she resigned threatening to take her case to an Employment Tribunal if the Respondent did not within 14 days agree to pay her 12 months gross salary and provide a mutually agreed reference. Mr Alegre-Wood replied to that email on 14 January 2022 (page 325) in which he answered in detail all of the allegations contained within the Claimant's resignation letter. On 4 February 2022 the Claimant replied to Mr Alegre-Wood saying she had not resigned (page 336). The email said, *"my email of 10 January 2022 was a without prejudice email which was clearly intended as an offer to settle. Such a letter was not a resignation"*.

Submissions

23. Ms Redman produced written submissions which she spoke to in outline. Mr Gunstone made oral submissions. We do not rehearse these submissions in detail here but confirm we considered them carefully in determining the issues before us.

The Law

24. We note below the statutory provisions which are relevant to this case.

Section 18 Equality Act 2010 ("EqA")

"Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be

regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

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

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

(b) it is for a reason mentioned in subsection (3) or (4)."

Section 136 Equality Act 2010 ("EqA")

"Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Section 95 Employment Rights Act 1996 ("ERA")

"Circumstances in which an employee is dismissed.

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) **F1**. . . , only if)—*

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[F2(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

Section 98 Employments Rights Act 1996 (“ERA”)

“General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*

[F1(ba)F2.]

- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

[F3(2A)F2.]

(3) In subsection (2)(a)—

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[F4(3A)F2.]

(4) **[F5Where]** the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case”.

Section 99 Employments Rights Act 1996 (“ERA”)

“Leave for family reasons.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a)the reason or principal reason for the dismissal is of a prescribed kind, or

(b)the dismissal takes place in prescribed circumstances.

(2)In this section “prescribed” means prescribed by regulations made by the Secretary of State.

(3)A reason or set of circumstances prescribed under this section must relate to—

(a)pregnancy, childbirth or maternity,

[F2(aa)time off under section 57ZE,]

[F3(ab)time off under section 57ZJ or 57ZL,]

(b)ordinary, compulsory or additional maternity leave,

[F4(ba)ordinary or additional adoption leave,]

[F5(bb)shared parental leave,]

(c)parental leave,

[F6[F7(ca)[F8paternity leave],]

[F9(cb)parental bereavement leave,] or

(d)time off under section 57A;

and it may also relate to redundancy or other factors.

(4)A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee—

(a)takes,

(b)agrees to take, or

(c)refuses to take,

under or in respect of a collective or workforce agreement which deals with parental leave.”

25. We were referred to a significant number of cases during submissions and refer to those cases which we consider to be relevant to our deliberations below.

Discussion and Conclusions

26. We first consider whether the Claimant resigned or was dismissed by the Respondent. We find it rather odd that the Claimant pleads constructive unfair dismissal as an alternative to “ordinary” unfair dismissal as this seems to acknowledge that, contrary to her main argument, she may actually have resigned.

27. The Claimant, in support of her argument that she did not resign, seems to rely on the principle of ambiguity in relation to the resignation and that the test to be applied is what a reasonable recipient would have understood in light of the particular circumstances known to the recipient when the notice was received (***East Kent Hospitals University NHS Foundation Trust v Levy [2018] 6WLUK36***). In that case an employee sent a letter seeking one months’ notice pay because she had received an offer of alternative employment; her resignation was accepted but she tried to retract the resignation when her offer of employment was withdrawn

which the employer refused. The EAT found the letter was ambiguous and looking at the context in which it was given decided that the employee had been dismissed.

28. With respect to that argument, the surrounding circumstances in the case before us are completely different. Looking at the relevant part of the resignation letter (page 324) the Claimant says,

“Due to this treatment, I feel that I have no alternative but to terminate my employment at Ezytrac. However, I have to take into account my financial position and the problems which ending my employment will cause me. I have worked hard to build my career with Ezytrac and ending my employment may set back my future career aspirations on a long-term basis with many years of lost earnings. In order to avoid the need for litigation, I am willing to forgo my right to apply to an Employment Tribunal in connection with the sex discrimination I have been a victim of in return for payment of 12 month (sic) gross salary together with a mutually agreed reference.

Please let me know within 14 days whether you wish to take up my suggestion. If no agreement is possible, regrettably I will have to take my case to an Employment Tribunal”.

29. This letter is poorly drafted. The Claimant said she took legal advice before sending it but we do not know nor, are we entitled to know, the precise advice given. It is headed *“Without Prejudice as to Save Costs”* which is not the usual heading for such a letter. Regardless of the extent of the advice received, we note, in particular, that the Claimant said she has no alternative but to terminate her employment with the Respondent and accepts that her financial position will be adversely affected by *“Ending my employment”*. She goes on to suggest that she will not pursue an Employment Tribunal claim if she is paid a years gross salary and given a reference and says that if no agreement is possible she will take the matter to an Employment Tribunal.

30. We considered that the words used by the Claimant, after taking legal advice she says to the effect that her claim of pregnancy and maternity discrimination has good prospects of success, are unambiguous. She says that she has no alternative but to terminate her employment and if the Respondent does not agree to pay her a year’s salary and give a mutually agreed reference she wants to take her case to an Employment Tribunal. We struggle to see on what basis the Claimant can argue her Employment could continue after such a letter. The circumstances indicate a clear intention to resign with immediate effect and to present a claim to the Employment Tribunal if her financial demand is not met thus the Judgment of The Court of Appeal in ***Willoughby v CF Capital Plc [2012] ICR1038*** is easily distinguished as the Respondent was left in no doubt that the Claimant intended to bring her employment to an end. We also note that in a text message to Ms Messam, the Claimant said she had written to the Respondent and that *“...I can’t go back...”* (page 327A).

31. Having determined that the Claimant resigned, we must consider the reason for her

resignation. In light of section 95(1)(c) ERA following the decision of the Court of Appeal in ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA***, we must decide:

- (a) Whether there was a fundamental breach of contract or an implied term on the part of the Respondent;
- (b) The Respondent's breach caused the Claimant to resign; and
- (c) The Claimant did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

32. If we understand the Claimant's case correctly, she relies on there being a fundamental breach of the implied term of trust and confidence causing her to resign. At the time of her letter of resignation, she set out what she referred to as "*some of the reasons*" that persuaded her she had been unfairly treated. We have, of course, considered these matters in connection with the Claimant's claim of pregnancy and maternity discrimination and concluded that the Claimant's evidence in relation to them lack credibility or reliability. Some of her allegations are mere conjecture, for example, she says she thought a change in the Commissions Structure proposed by the Respondent would have adversely affect her whereas in actual fact her commission payable monthly would have increased by over £600. She has absolutely no basis whatsoever for arguing that Ms Messam took over her role or was given her job. Accordingly, given our findings of fact, we find there is no fundamental breach of any express or implied term of the Claimant's contract of employment nor can she rely on the other matters which we discuss below.

33. In considering the claims of maternity and/or pregnancy discrimination, we take into account sections 18 and 136 EqA and the decisions in ***Igen Ltd v Wong [2005] ICR93***, ***Indigo Design Build and Management Ltd v Martinez UKEAT/0020/14/DM*** and ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL1***.

34. Section 136 EqA was developed by the Court of Appeal in ***Igen Ltd*** which sets out a two stage process:

- (a) Firstly, the Claimant has to prove facts from which the Tribunal could infer the discrimination has taken place. This places a burden on the Claimant to establish a prima facie case of discrimination;
- (b) Only if such facts are made out to the Tribunals satisfaction on the balance of probabilities, is the second stage engaged by which the burden shifts to the Respondent to prove on the balance of probabilities that the treatment in question was in no sense whatsoever on the protected ground.

35. As our findings of fact show, we do not consider the Claimant's allegations to have any merit. Some of them, as highlighted above, lack credibility and others are simply unreliable. There is only one of the allegations which may at first blush indicate some less favourable treatment and this referred to at paragraph 33 of the Claimant's witness statement where she accuses Ms Bevis of "*from June 2021 onwards Carolyn... kept saying to me, "you are not as young as you were", and "you are no spring chicken"*". Firstly, this is potentially only an oblique reference to the Claimant's pregnancy. The Claimant was 33 years old at the time which nowadays is not old to have a child. The fact that Ms Bevis freely admitted to saying "*none of us are spring chickens anymore*" reinforces our view of the reliability of the Respondent's witness evidence. She said the comment was made during the Claimant's pregnancy risk assessment and was made in a light-hearted and caring manner. Ms Bevis was not challenged on her evidence that she only made this comment once and we consider the Claimant's allegation that she "*kept on*" on saying it from June 2021 onwards to be a gross exaggeration especially since she does not specify when or in what context further comments were made by Ms Bevis. Further, the Claimant herself told others, "*I feel so old*" as illustrated on page 272 in a conversation on 15 September 2021 with Mrs Alegre-Wood at 18.17pm.
36. We have already commented and do not rehearse further here the Claimant's allegations of being excluded from meetings and Ms Messam taking over her role. We cannot see how these allegations stand up to any scrutiny in light of clear documentary evidence to the contrary.
37. We also take into account the context of the allegations made by the Claimant. She had a very close relationship with Mrs Alegre-Wood. She was treated quite staggeringly well by Mr and Mrs Alegre-Wood. The Claimant said she initially lived in an undesirable neighbourhood with her three children and needed to buy a house. She was given £3,000 towards the deposit on a house. This was not a loan but a gift from Mr and Mrs Alegre-Wood through the Respondent. The evidence throughout her pregnancy is of genuine sympathy and understanding from Mrs Alegre-Wood when the Claimant frequently had time off due to issues with her pregnancy and asked to work from home at a moments notice. The Claimant expressed on several occasions to Mrs Alegre-Wood that she was struggling. It was not less favourable treatment due to her pregnancy for Mrs Alegre-Wood to suggest she might want to postpone undertaking a fairly onerous FARLA course until after her maternity leave. This was genuine consideration by Mrs Alegre-Wood and was not followed up at all by the Claimant. Similarly, the Claimant made no complaint about the spring chicken comment made by Ms Bevis. Again, in directing that the Claimant should go home when she had had a midwife's appointment and been told to consider commencing maternity leave early, it was entirely appropriate for the Respondent to direct her to go home. What the Claimant rather conveniently omits mentioning in relation to this episode is the fact that the direction to go home on the day was made on the understanding that the Claimant would see her Doctor the following day for further advice. There is no evidence before us that she saw her Doctor and, and if she did, she passed on no information about the consultation

or what was advised to the Respondent.

38. We also found there is an element of conspiracy in what the Claimant alleged. Her text message to Ms Messam saying she had written to the Respondent and they would not be happy about it. This message at page 327A also adds weight to the finding that she had in fact resigned when she says, “... *but I can’t go back and I would rather sort this out now than wait*”.
39. Following one of the principles discussed in Shamoon, we may also ask whether the Claimant’s treatment was of such a kind that a reasonable worker would consider it to amount to less favourable treatment. In our view, on the balance of probabilities, this is most unlikely.
40. Accordingly, on the balance of probabilities, the Claimant does not establish a prima facie case of less favourable treatment. It follows, therefore, that her claim of discrimination on the grounds of pregnancy and maternity must fail as must any claim of automatically unfair dismissal under section 99 ERA.

Employment Judge M Butler

Date: 10 November 2023

JUDGMENT SENT TO THE PARTIES ON
13th November 2023

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FOR THE TRIBUNAL OFFICE

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