EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms K Flanagan **-v-** **Amy Jury (Trading as Envy)**

Heard at: Cambridge

On: 29,30,31 August and 1 September 2023 (by CVP)
8, 9, and 10 January 2024 (by CVP)
10 and 11 January, and 19 April 2024 (In chambers)

Before: Employment Judge L Brown

Members Ms Collette Bailey

Mr Frank Wright

Appearances
For the Claimant: In person.
For the Respondent: Mr Leonhardt, Counsel.

RESERVED JUDGMENT

The Judgment of the Tribunal is:

(1) The Claimant's claim for constructive unfair dismissal succeeds.

(2) The Claimant's claim for unfavourable treatment as a pregnant worker partially succeeds.

(3) The Claimant's claim for victimisation partially succeeds.

(4) The Claimant's claim for harassment fails.

REASONS

Procedure at the Hearing

1. The Claimant gave evidence for herself and did not call any witnesses.

2. The Respondent called Jane Fryatt and also gave evidence by Amy Jury.

3. Counsel produced a List of Issues which incorporated the issues set out at the Preliminary Hearing, [P.83] and which also set out the Claimants amendment application, which we adopted in this hearing.

4. We had a bundle of 580 pages.

5. The Respondent produced a video clip dated the 30 August 2023.

6. The Claimant produced some photographs of other employees' phones showing WhatsApp messages being sent and received.

7. The Claimant produced a PDF document which ran to 11 pages and was a collection of screenshots of various pieces of evidence including Facebook reviews by clients, and emails sent and received.

8. The Claimant also adduced two versions of her contract, one dated the 25 June 2019, and a further version dated the 28 May 2021.

9. The Claimant produced an image of message sent to the Respondent on the 5 December 2019 advising Ms Jury of her pregnancy.

10. The first hearing concluded part-heard and it was relisted and concluded at lunchtime on the 10 January 2024.

Procedural History and Background

11. The Claimant was a hairdresser who worked in the Respondent's Salon. At the time of her resignation, she had been working for the Respondent since 25 June 2019, and had over two years' service when she resigned on the 29 October 2021. This claim has an extremely complex procedural history which is set out below.

12. The Claimant issued her first claim on the 5 July 2020, against Envy Hair and Beauty with claim number 3306360/2020, [P7 - 'First Claim']. She asserted discrimination because of her pregnancy and maternity leave [P.12], but at this time she was still working for the Respondent and was on maternity leave, and had issued her first claim without any legal assistance.

13. The Respondent's Response was filed on the 24 August 2020 to the First Claim [P.45] denying all claims.

14. A preliminary hearing in the First Claim took place before Judge Gumbiti-Zimuto on the 21 October 2021. The Claimant's claims in the First Claim were summarised in a List of Issues set out in a Case Management Order [P.82] putting her claims under s.18, s.26, and s.27 of the ERA 1996, and listing her hearing for the 10-13 October 2022.

15. The Claimant issued her second claim on the 9 March 2022 with claim number 3303236/2022 [P.23 – 'Second Claim'] against Envy Hair and Beauty where she again ticked the box for discrimination on the grounds of pregnancy and maternity.

16. She also brought claims for harassment, victimisation, constructive unfair dismissal, and unfair dismissal. She also ticked the box to indicate unpaid notice pay and unpaid wages [P.28]. The attached Statement of Claim was issued by her then solicitors, L C Law Services. Her attached statement of claim set out the following claims: -

    16.1 Harassment – section 26, Equality Act 2010.

    16.2 Victimisation – section 27, Equality Act 2010.

    16.3 Unfair Dismissal

    16.4 Wrongful Dismissal

17. The Respondent filed its Response to the Second Claim [P.57] on the 1 May 2022 denying all claims. They asserted the correct name of the Respondent was Amy Jury (trading as Envy) and was not 'Envy Hair and Beauty.'

18. A further preliminary hearing in the First Claim took place before Judge Anstis in the First Claim on the 17 March 2022 relating to the First Claim and he ordered that by consent the name of the Respondent be changed to 'Amy Jury (trading as Envy).'

19. Both the First and Second Claim were then consolidated as ordered by Judge Anstis on the 18 June 2022. There was no further PHR following consolidation of the claims and the List of Issues as set out by Judge Gumbiti-Zimuto in the First Claim was not revisited nor updated by the parties in any agreed form to reflect consolidated issues in both claims.

20. A full merits hearing before Judge Tobin in the First Claim was postponed on the 22 October 2022 and was then heard before this Tribunal on the 29-31 August 2023, and then it resumed from the 8-11 January 2024.

First Application to amend the First Claim

21. The Claimant had an outstanding application at the outset of the hearing to amend her First Claim, which had been made [P.88-89] by her then Solicitor on the 4 November 2021. In the case management order of Judge Gumbiti-Zimuto it was ordered that by the 2 December 2021 a decision on the application made by the Claimant to amend her First Claim, would be dealt with on the papers [P.84]. This unfortunately did not occur, so this Tribunal dealt with this application at the outset.

22. The lack of an agreed List of Issues prior to the start of the final hearing, caused by the outstanding amendment application which had been left in abeyance, with no one chasing the Tribunal for over two years, meant that we had to hear both the amendment application and agree the issues at the outset, and we acknowledge that for the Claimant, who no longer had legal representation, in a claim with such a multiplicity of allegations, which engaged three sections of the Equality Act, must have found this very challenging both at the hearing, and following it when further issues arose. In making the decisions we did on both amendment applications by the Claimant both at the hearing and following the conclusion of it we had regard to the Equal Treatment Bench book, which in particular encourages Tribunals to make adjustments for litigants in person who face a professionally represented party. In particular, in relation to the invitation by this Tribunal to the Claimant to clarify which sections of the Equality Act she put her claim under, following this Tribunal telling the Claimant her claim for harassment under s.26 was ill-founded, and in taking into account that when she responded there was some confusion on her part on where her claims and allegations lay, we did take into account the difficulties she faced. We found that the following part of the Equal Treatment Bench book to be of assistance to us [paragraph 30], where the difficulties litigants in person face in labelling their claim correctly was evident when the Claimant made her further application to amend her claim for the second time. It appeared the draft List of Issues had not been sent to the Claimant well in advance of the final hearing, and as such she was at a disadvantage at the final hearing. Her further submissions to us on where her claims lay, in effect, amounted to her re-defining the original draft list of issues produced by the Respondent at the hearing. Whilst we did not consider it proportionate to list another hearing to deal with this issue, we did bear in mind the obstacles the Claimant faced in trying to set out where all her claims lay and the following passage in the Equal Treatment Bench book was pertinent (our emphasis added) and:-

    Particularisation of their case / Issues for hearing: Lawyers find it relatively easy to precis and identify key points of an argument. For many other people, this is extremely difficult. As a result, when ordered to provide particulars, LIPs tend to either miss the deadline, avoid the task altogether, or do it wrongly – either omitting key information or overloading with excess information, often beyond the scope of the original pleading. Similar problems can arise in jurisdictions where parties are required to produce a list of issues for the hearing.

How to help: Where practical, avoid making orders that LIPs must particularise their case beyond one or two very simple questions on a clear point, e.g. 'You say your rent deposit is owing. How much deposit did you pay and on what date?' Ordering LIPs to provide complex schedules of their claim is rarely a good idea. Where necessary, it is better to hold a case management hearing and talk the LIP through their claim, extracting the required particulars and recording them in the case management order. In regard to the list of issues, if the other party is represented, they can be asked to prepare the first draft from what the LIP has so far put in writing.

23. Returning now to the order by Judge Gumbiti-Zimuto, in relation to the claim under s.27 of the EqA 2010, he said as follows: -

    (*10) Equality Act, section 27: victimisation*

    a. Did the Claimant do a protected act? The Claimant relies upon the grievance on 9 March 2020.

    b. Did the Respondent subject the Claimant to any detriments?
    (The Claimant is to provide further information setting out the alleged detriments upon which she relies.)

    c. If so, was this because the Claimant did a protected act and/or because the Respondent believed the Claimant had done, or might do, a protected act?

24. The Further Information of this First Claim as ordered [P.83] by Judge Gumbiti-Zimuto to be supplied i.e., the detriments relied upon for the victimisation claim was then followed by the Claimants solicitors formal application to amend which described the detriments relied upon by the Claimant for her victimisation claim[P.88] in a general sense, and in particular that following the protected act made by her by raising a grievance on the 9 March 2022 that her grievance was not kept confidential, and her training was then denied to her. There was also an application made to amend her s.18 claim and s.26 claim in her First Claim.

25. At the outset of the hearing Counsel for the Respondent helpfully presented an Opening Note setting out much of the above and which incorporated the extant amendment application of the Claimant into their suggested List of Issues. Counsel explained that the List of Issues placed before us had been produced by another Counsel who had previously represented the Respondent in the claims which he then adopted for the hearing.

26. After reviewing the waythe Claimant's amendment application was set out in the List of Issues, and upon being satisfied it incorporated the amendments sought by her previous solicitor [P.88], and after discussing the List of Issues with the parties at the outset. we adopted this List of Issues. This Tribunal did however note that there were a few additional allegations in the claim form, as set out below, which were not in the List of Issues and we raised these with the parties at the outset, and which were as follows: -

First Claim

26.1 Not being allowed to sit behind the reception desk

26.2 No back to work meetings after being off sick in early 2020.

Second Claim

26.3 Laura Meade ostracised the Claimant.

26.4 Some colleagues of the Claimant following her into local shops causing her to abandon her shopping basket and leave the shop.

27. We raised those additional allegations with both parties, and then invited the Claimant to address us on her outstanding application to amend her First Claim initially made in writing on the 4 November 2021 [P.88]. In short, she advised us that initially and prior to the preliminary hearing on the 22 October 2021 she did not have legal representation and had put her claim together without assistance. She said at this time, and then at the preliminary hearing, [P.81] she was then advised by her solicitor to add the further allegations to the First Claim, which we noted were allegations under her existing claims under s.18, s26 and s.27 of the EqA.

28. I said that in relation to the other matters identified by this Tribunal at Paragraphs 26.1 – 26.4 above we would consider whether those should be added to her claim and the List of Issues prepared by Counsel of our initiative under this Tribunals general case management powers pursuant to Rule 29 of the Employment Tribunal Rules of Procedure 2013 (the Rules') .

29. Counsel then addressed us on the amendment application. Some discussion took place as to why the amendment application had not been made at the preliminary hearing before Judge Gumbiti-Zimuto on the 22 October 2021, and Counsel for the Respondent suggested it should have been made then. I pointed out that the issue of an amendment application must have been raised and discussed otherwise no order would have been made about it being made in writing following that hearing, nor would an order have been made to the Claimant to supply further information of her s.27 Victimisation claim identified in that Preliminary Hearing. I said there were no detailed notes as to why the application was not made on that date, but we concluded that the necessity to apply to amend the First Claim was raised and discussed at the hearing.

30. Counsel submitted that in relation to the cardiology appointment allegation that even if this had been included in the First Claim, that the limitation period had expired, as ACAS were contacted on the 12 May 2020, and the claim form was then issued on the 5 July 2020, absent this allegation.

31. In relation to the cardiology appointment (5.a of List of Issues) this incident was said to have occurred on the 18 February 2020. We noted that in fact primary limitation would have expired on the 17 May 2020, and ACAS were contacted

on the 12 May 2020. By the time of the application to amend on the 4 November 2021 therefore, even allowing for the ACAS extension, the amendment was sought approximately 17 months out of time.

32. In relation to the second amendment sought about demotion (5. b at List of Issues) and carrying out menial duties Counsel conceded that was in the initial claim form and he did not object to that amendment sought.

33. In relation to the harassment allegations – (5 (a) and 8 (a) of List of Issues) – not providing gloves and the cardiology appointment, he submitted that these were simple facts the Claimant could easily have included if she wanted to and could have included them, but only sought to do so twenty months after those events took place.

34. In relation to the Claimant's mother contacting the National Hairdressers Federation (paragraph 8. b of List of Issues) and the issue about the folder in the front desk (paragraph 8. c of List of Issues) he said he made the same points in that they related to events some twenty months before the application to amend was made.

35. As to the Claimant being issued with a final warning (8.d of List of Issues), being a s.18 act of unfavourable treatment or a s.26 act of harassment as well as direct discrimination he said he had no objection to that amendment sought.

36. He submitted that no reasons had been given as to why these allegations were not in the initial First Claim and that it was not in the interests of justice for the amendment to be granted.

37. The Claimant submitted that the lateness of the application to amend was due to her mental health being poor and looking after a small baby at that time, that she was not legally trained and she did what she did to the best of her ability and then of course instructed a solicitor for advice at the time the application was then made.

38. In relation to the additional matters identified by this tribunal above at paragraph 26 above, Counsel submitted that he objected to us adding, of our own initiative under our case management powers, extra allegations into the Claims and the List of Issues that she was not allowed to sit on a stool behind reception and that there had been no back to work meetings when she was on sick leave.

39. In relation to Laura Meade again he submitted that there was no detail about how Laura Meade ostracised the Claimant and he said the same about colleagues of the Claimant following her into a shop so that she abandoned her shopping. He said there was no detail about who these individuals were, and the Respondents couldn't respond to such an allegation in the generic form it was in in the claim form.

40. Overall, he submitted that would also be prejudicial for us to add these allegations in this stage.

41. I asked the Claimant for clarification of the dates of the extra matters we had identified at paragraph 26.1-26.4, such as not being able to sit on a stool behind the reception desk, in being forced to leave a shop after being followed into it by her colleagues, and Laura Meade ostracising her. The Claimant confirmed she could not remember any precise dates about those allegations.

42. We then retired and considered the amendment application by the Claimant, together with the extra matters identified by this Tribunal above.

43. We had regard to the balance of prejudice and hardship between the parties. This application had unfortunately been left outstanding until this final hearing, but the Respondent had been on notice of the application for nearly two years by the time of this hearing. We reminded ourselves that we must judge the application at the time the application was made and not when it was considered by this Tribunal.

44. We had regard to the claim form for the First Claim in deciding the amendment application: -

s.18 application to amend

5.a – allegation re cardiology appointment – there was no reference to this in the claim form.

5.b -. Demoting the Claimant – the claim form referred to [P.20] this allegation and this part of the amendment application was conceded by the Respondent. The claim form said: -

Change of role - from the 5th of February 2020 there's been a distinct and clear intent demote and discriminate my role within the salon without any prior notice being given. Virtually all appointments were removed from the calendar.

s.26 application to amend

8.a - Not providing the Claimant with gloves when she asked for them from January 2020 onwards; - there was no reference to this in the claim form.

8.b. Challenging the Claimant after her mother contacted the National Hairdressers Federation on around 26 February 2020; - there was no reference to this in the claim form.

8.c. Keeping a folder of evidence concerning the Claimant in the front desk – there was reference to a data protection breach in the claim form and to breaches of confidentiality with staff in the claim form but there was no specific reference to a folder on the front desk.

8.d. Issuing the Claimant with a final warning - this was referred to in the claim form.

8.e. Not keeping the Claimant’s final warning confidential, enabling other members of staff to joke about it – there was reference to a data protection breach in the claim form and to breaches of confidentiality with staff in the claim form.

s.27 application to amend

12. a. Breaching the Claimant's confidentiality by not securing and/or sharing the contents of the Claimant's grievance; - there was reference to a data protection breach in the claim form and to breaches of confidentiality with staff.

12.b. Denied the Claimant training opportunities afforded to other employees – there was a reference to this in the claim form when she referred to her training being cancelled, and courses booked for other employees. In particular she said: -

Training previously booked and paid for withdrawn without notice. Although company performance and lack of funds was confirmed as the reason for this others had still to continued to attend training only three weeks prior. I have evidence to show the course had already been paid for in November 2019 dash part cash and part loyalty vouchers.’

45. Whilst the Claimant was seeking to add new allegations of acts of unfavourable treatment as a pregnant worker under s.18, and allegations of s.26 harassment, together with allegations of victimisation under s.27, all of these Heads of Claim were identified and defined at the PHR as being part of the Claimant’s claim by Judge Gumbiti-Zimuto, and so these amendment applications did not introduce new Heads of Claim as these were identified as being part of the claim. What Judge Gumbiti-Zimuto clearly did was order the Claimant set out the detail of these claims as an amendment application which it then fell to us to consider.

The applicable law

46. In **Cocking v Sandhurst (Stationers) Ltd and anor** [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting Respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in **Selkent Bus Company Ltd v Moore** [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

47. In **Transport and General Workers’ Union v Safeway** Stores Limited EAT 0092/07 Underhill P, as he then was, overturned a Tribunal’s refusal to allow an amendment because there was no attempt to apply the **Cocking** test, and, specifically, no review of all the circumstances including the relative balance of injustice.

48. The EAT held in **Selkent Bus Company Ltd v Moore** [1996] ICR 836 EAT:

    In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

    48. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

    48. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

    48.3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

49. These factors are not exhaustive and there may be additional factors to consider. The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:

    49.1 - The nature of the proposed amendment: A distinction may be drawn between;

    (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint;

    (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and

    (iii)amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

50. Mummery J in Selkent suggests that this aspect at 49.1(i) should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct

from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see **Foxtons Ltd v Ruwiel** UKEAT/0056/08.

51. Nevertheless, whatever type of amendment is proposed the core test is the same, namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the **Cocking** test as restated in **Selkent).**

52. As to the timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see **Martin v Microgen Wealth Management Systems Ltd** EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

53. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in **Ladbrokes Racing Ltd v Traynor EATS** 0067/06: the Tribunal will need to consider:

(i) why the application is made at the stage at which it is made, and why it was not made earlier;
(ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and
(iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

Decision on Amendment Application to First Claim

54. All of these proposed amendments set out at paragraph 26 above, save for the allegations about the cardiology appointment, the gloves, and challenging the Claimant about her mother contacting the National Hairdressers Federation**,** were already contained within the First Claim form. In that sense we regarded all of those allegations that the Claimant sought to add to her claim as either already included in the claim form, and were overall in our view a relabelling of facts already evident and in the claim form, as set out at (ii) below, in accordance with **Selkent Bus Company Ltd v Moore** [1996] ICR 836 EAT, or where they were new allegations not contained in the claim form they were simply additional allegations under existing heads of claim, as set out at (i) below.

55. Save for the three new allegations at paragraph 26 above the facts were clear on the claim form and were simply being re-labelled as per **Selkent.** In relation to the amendment application to add victimisation to the first claim, which concerned withdrawing training, and breaching confidentiality, whilst the word victimisation was not specifically used by the Claimant in her ET1 Form in the First Claim, it was clear to us that she felt her treatment worsened after raising her grievance on the 9 March 2020 as referred to in the claim form [P.21], and was in our view a relabelling of facts already pleaded.

56. No suggestion was made that the Respondents were unable to respond to the allegations sought to be added, or that they had any difficulties in obtaining evidence to defend the new allegations from relevant witnesses.

57. Ms Amy Jury, the Respondent, was the person who knew exactly what had been alleged and she had first-hand knowledge of the three new allegations, as they were in effect allegations against her personally as the owner of the salon, and she was here to give evidence to this Tribunal. There would be no delay caused as this Tribunal could deal with these proposed amendments sought as part of this hearing. She could be asked supplementary questions about these three new allegations, and so the Respondent was not prejudiced in the sense of being able to defend the allegations. In our view these new allegations did not add significant new lines of enquiry for the Respondent to undertake in order to defend itself.

58. At the time the First Claim was issued the Claimant was a litigant in person. She acted promptly as soon as she was advised to apply to amend the claim following the PHR in October 2021, and the amendment application was made. She also had difficulties with her mental health during the period of time during which she did not act in applying to amend in the eighteen months leading up to the amendment application.

59. The Respondent did not argue that this is a case in which it would be prejudiced by any delay in the sense that the delay would affect the cogency of the Respondent's evidence required to deal with the claim. They also did not at any stage chase the Tribunal to issue a decision on the amendment claim and allowed it to remain in stasis until the commencement of this hearing.

60. This amendment application involved balancing hardship, prejudice and injustice between the parties. If the amendments were not allowed, then the Claimant's additional allegations would never be determined. For the Claimant to pursue her claims, and in particular her victimisation claim in the First Claim which had not been specifically referred to in that claim, then she needed these allegations to be added, in order to pursue them.

61. On the other hand, the Respondent asserted that the potential prejudice against it was significant. It argued that the Claimant's new allegations should be dismissed in their entirety as being out of time as the proposed amendments were all out of time.

62. The Respondents made no submissions on the prospects of success of the amendments sought.

63. In our judgement the greater prejudice would lie against the Claimant. The Respondent would have no difficulty in pointing to their relevant findings on these matters, and adducing evidence on them by asking Ms Jury any necessary supplementary questions. For the Claimant to pursue her allegations contained in the application she needed these allegations to be added. If they were not added those allegations would fall away and that would be a windfall for the Respondent. We asked ourselves the following, in accordance with **Abercrombie & Ors v Aga Rangemaster Ltd** [2013] EWCA Civ 1148, where Justice Underhill as follows: -

    If consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. Chandok whether new significant lines of enquiry would have to be added and we concluded that the amendments would not raise significant new lines of enquiry.

64. We did not consider the new factual allegations raised substantially different areas of enquiry than the old.

65. In addition, although the amendments were sought to be added 18 months out of time, time is only one factor in exercising our discretion in favour of the Claimant.

66. We therefore granted the Claimant’s application to amend her First Claim as sought and allowed all the allegations she sought to be added, and in so doing extended time for those additional allegations to be brought.

67. In relation to the matters identified by this Tribunal at paragraph 26 above we did not permit those allegations to be added to the List of Issues as we felt the lack of specificity on them as to dates and individuals involved would cause the Respondent prejudice in defending these claims, and they had not been identified by the Claimant at any point as part of her amendment application.

Change of name of Respondent in Second Claim

68. We noted that the name of the Respondent had been changed by the consent of both parties in the First Claim by order of Judge Anstis on the 17 March 2022. I therefore proposed, and neither party objected, that the name of the Respondent in the Second Claim also be changed to that of ‘Amy Jury (trading as Envy).’ I therefore made an order to that effect.

S.26 Ill-founded Harassment Claim on the grounds of pregnancy and maternity

69. Following the conclusion of the hearing however, it became plain that the claim under s.26 of the EqA was not well founded as the characteristics of pregnancy and maternity are not protected characteristics for the purposes of a harassment claim. This claim had been introduced by the Claimants solicitor in her Second Claim, and was incorporated into the List of Issues set out in Judge Gumbiti- Zimuto's List of Issues, and were further detailed in her then solicitors amendment application [P.88]. This ill-founded claim was not raised by either of the Counsel for the Respondent at any time prior to or during the final hearing. Upon this coming to my attention following the hearing the parties were therefore invited to make written submissions on this issue. In particular we invited the Claimant to say which allegations under s.26 in fact fell in any event under other sections of the EqA, i.e. s.13 – direct sex discrimination, s.18 – unfavourable treatment arising from pregnancy, or victimisation - s.27. We also invited the Claimant to tell us about the steps she took to take advice prior to the presentation of her Second Claim.

70. The following submissions were made: -

a. The Respondents conceded it should have brought this matter of the ill-founded s.26 claim to the Tribunals attention sooner during this case when it can and should have done so. They stated that the Respondent took the Tribunal's correspondence as inviting the Claimant to amend her claim to bring those factual allegations as claims for alternative forms of discrimination, and that no issue was taken with the Tribunal taking this approach, in the circumstances. They also accepted that the Respondent suffered no real prejudice if those claims were to be "re-labelled" as being s.18 pregnancy and maternity discrimination or s.13 direct sex discrimination (as appropriate). The evidence relevant to those allegations was, they conceded, on the facts of this case, going to be the same as if the claim were to be brought according to the legal tests in s.26.

b. However, the Respondents remained silent on the issue of any of the s.26 allegations being relabelled as allegations under s.27 and so this Tribunal wrote to the parties once more and invited the Respondent to comment on the submissions by the Claimant that some of her allegations under s.26 should be labelled as s.27 allegations.

c. In reply the Respondents said in summary as follows: -

(i) The Respondent had taken a (pre-emptive) pragmatic approach to the relabelling of s.26 claims as being one or other of s.13 or s.18 claims on the basis that the evidence relevant to each of those claims was likely to be the same, on the facts in this case.

(ii) The situation was wholly different in the case of a s.27 victimisation claim, which requires not only some form of unfavourable/less favourable/detrimental treatment but also a causal connection between that treatment

and one or more protected acts. That causal connection is a distinct factual finding the Tribunal must make in respect of each claim, and very often forms the issue to be decided between the parties in such claims. In this case, the Respondent had been given no opportunity to advance evidence on the question of a causal connection between any protected acts and the matters newly claimed to be victimisation. Nor were its witnesses cross-examined on that question.

(iii) It would be severely prejudicial to the Respondent to allow the amendment and deprive it of the opportunity to present any relevant evidence. The Respondent's position is that the amendment must be refused in respect of any "new" s.27 claim.

(iv) The timing of the application, while arising from an unusual set of circumstances, is nonetheless extraordinary. The Tribunal should not lose sight of the nature of what the Claimant is asking of it: that a claim should be amended wholesale after the conclusion of the final hearing.

(v) The Claimant has not advanced any reason why the matters previously pleaded as s.26 claims should now be amended to be s.27 claims, other than by summarising the new claims. The Tribunal (effectively) invited her to make an amendment but that does not remove the requirement on her to justify that amendment.

(vi) The amendment, if granted, would cause extraordinary prejudice to the Respondent.

(vii) There is prejudice to the Claimant is, by contrast, far more limited.

(viii) All of the acts she complains of appear likely to be scrutinised by the Tribunal, albeit through the lens of s.13 and/or s.18;

(ix) The Claimant has already "heavily pleaded" her case, in terms of the number of acts relied upon. The refusal of this amendment application has to be seen in light of the very large number of claims that remain to be determined substantively by the Tribunal.

71. Generally as to the application overall, aside from the objection to the application by the Claimant to replead parts of her claim as s.27 victimisation,

on the amendment application by the Claimant under s.13 and s.18 generally the Respondents did not raise objections to this amendment application and said they accepted that the Respondent suffered no real prejudice if those claims were to be "re-labelled" as being s.18 pregnancy and maternity discrimination or s.13 direct sex discrimination (as appropriate). They conceded that the evidence relevant to those allegations was, on the facts of this case, going to be the same as if the claim were to be brought according to the legal tests in s.26. The Respondent also accepted that, had the Claimant made an application to amend the matters pleaded as harassment as being one or both of s.18 pregnancy and maternity discrimination (or s.13 discrimination based upon pregnancy and maternity), that application would likely have succeeded.

72. They said the Respondent was not in a position, however, to set out on the Claimant's behalf how she might wish to advance the relevant parts of her claim, if not as a claim for harassment. The "related to" test in s.26, if it applied to pregnancy and maternity, would likely apply to both pregnancy, maternity leave, and seeking to make use of rights to maternity leave. They said it could not therefore be inferred from the claim as pleaded what matters the Claimant might assert were because of her pregnancy (per se) and what were because of maternity leave. However in our Judgement whether something related to pregnancy or maternity leave was a matter of simply judging whether the matter complained of occurred when she was pregnant at work or was on maternity leave and we did not consider anything turned on that point, as that was simply a factual matter that we could determine on the evidence we had heard.

73. We treated the Claimant's submissions, which were wide ranging and somewhat vague and confused at times, as to where her claims lay, as an amendment application. In essence she said the following allegations, some of which had only been brought under s.26 of the EqA, also fell under the following sections of the EqA as follows, and the decisions we made on this amendment application are now set out: -

First Claim amendment application

7.a) Removing all stools which prevented the Claimant from sitting down at work:

73.1 This claim had only originally been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.18 of the EqA. She used the erroneous term 'harassment', but we took this to mean a reference to unfavourable treatment arising from pregnancy and maternity. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

7.b) Forcing the Claimant to undertake menial tasks such as cleaning windows.

73.2 This claim in this exact form had only been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.13, s.18, and s.27 of the EqA. She used the erroneous term 'harassment' in relation to s.18, but we took this to mean a reference to unfavourable treatment arising from pregnancy and maternity, and we also took it to mean less favourable treatment because of sex under s.13. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.13, or s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

73.3 However the Claimant also applied to amend to have this as an allegation under s.27 of the EqA. The prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that the Claimant was forced to clean windows as an act of victimisation for having raised a grievance on the 9 March 2020 and we refused this application.

7.c) Failed to follow the contents of the risk assessment conducted for the Claimant.

73.4 This claim had only originally been brought under s.26 of the EqA. The Claimant applied to amend to in effect allege that this was also a breach of s.18 and s.27 of the EqA. In relation to s.18 we found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

73.4 However we refused the application to amend so that this claim also fell under s.27 of the EqA, i.e. The prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that the failure to follow the contents of the risk assessment conducted for the Claimant was an act of victimisation following the raising of her grievance on the 9 March 2020. In any event we noted that the risk assessment was dated the 18 February 2020 [P.120] but the grievance was not raised until the 9 March 2020 and so the protected act relied upon post-dated the detriment complained of, although we acknowledge it was an alleged ongoing detriment, but this claim would have likely failed in any event even had we allowed the amendment due to the chronology involved. The prejudice and hardship caused to the Respondent was clearly greater for the Respondent than the Claimant and so this part of the application to amend was refused.

7.d) Breaching the Claimant's confidentiality by not securing and or sharing the contents of the Claimant's email of 25th February 2020.

73.5 This claim had only been brought under s.26 of the EqA, and the Claimant applied to add it under s.27 of the EqA. However we refused the application to amend so that this claim also fell under s.27 of the EqA, i.e. that the Respondent breached the Claimant's confidentiality as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that this breach of confidentiality occurred because she raised a grievance on the 9 March 2020. Even had we allowed the amendment this claim would likely have failed as the protected act on the 9 March 2020 occurred after the alleged breach of confidentiality following the email sent on the 25 February 2020, albeit we note that no specific date was given as to when the breach occurred.

7.e) Sarcastically questioning the Claimant regarding her lifting of a chair whilst pregnant.

73.6 This claim had only been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.13 and s.27 of the EqA. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.13 of the EqA.

73.7 As to the application to bring it under s.27 of the EqA we refused this application to amend as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that the alleged comment was made as an act of Victimisation against her for having raised a grievance.

8.a) Not providing the Claimant with gloves when she asked for them from January 2020 onwards.

73.8 This claim had only been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.18. and s.27 of the EqA. We allowed the application to bring this claim under s.18 as it caused no real prejudice to the Respondent.

73.9 As to the application to bring it under s.27 of the EqA we refused this application to amend as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that the refusal to provide the Claimant with gloves was done as an act of Victimisation against her for having raised a grievance. We noted that the detriment complained of was said to have started in January 2020 whereas the protected act, which the detriment was said to flow from, did not occur until the Claimant raised her grievance on the 9 March 2020, although we acknowledge the detriment was said to be ongoing. We considered that even had the amendment application been granted this allegation would likely have failed in any event. The prejudice

and hardship caused to the Respondent was clearly greater for the Respondent than the Claimant and so this part of the application was refused.

8.b) Challenging the Claimant after her mother contacted the Hairdressers Federation around 26th February 2020.

73.10 This claim had only originally been brought under s.26 of the EqA as set out in the List of Issues. The Claimant in her amendment application also submitted this claim also fell under s.27 of the EqA. The Claimant cross-examined on this in the general sense of being treated unfavourably because her mother had contacted the Hairdressers Federation about the treatment of her during her pregnancy. We do not hold her to the standards of a professional representative in her second amendment application and even though she only made reference to s.27 in her further amendment application we also treated this as an amendment application under s.18 of unfavourable treatment arising from pregnancy as she did put it to Ms Jury that the treatment of her that day was unfair and no one disputed that it arose from her mother contacting the Hairdressers Federation about the Respondent's treatment of her in the workplace the day before. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

73.11 In any event, of our own volition, and even if it could not be strictly said to be an amendment sought by the Claimant under s.18 of the EqA, we relabelled this allegation so that it fell under s.18 of the EqA, and did so in accordance with the overriding objective so that we dealt with this second amendment application in the interests of justice, and also pursuant to our own case management powers under Rule 29 of the Rules of Procedure 2013, and taking into account the difficulties the Claimant faced in knowing which section of the EqA to place her allegations, and we followed the principles set out in the Equal Treatment Bench book when adopting this approach, as referred to above. It was clearly in the interests of justice not to hold the Claimant to the standards of a professional representative when she did not label this allegation as s.18 for this part of her applications. However in relation to allegation 7.d, above, which had also only been said to fall under s.27, there was a lack of specific cross-examination on the issue, and in any event we concluded that allegation would have been likely to fail due to the fact the alleged breach of confidentiality predated the protected act and so we did not consider it to be in the interests of justice to relabel that allegation of our own volition as falling under s.18 in those circumstances.

73.12 However, we refused the application to amend under s.27 as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that Ms Jury victimised her that day on the 26 February for doing a protected act by raising a grievance on the 9 March 2020. No allegation was ever put to Ms Jury in that manner i.e. that the treatment of her

was caused by the raising of the grievance. In any event that claim would have failed on the facts as the incident took place on the 26 February 2020 which predated the protected act on the 9 March 2020.

8.c) Keeping a folder of evidence concerning the Claimant in the front desk.

73.13 This claim had only originally been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.18 and 27 of the EqA. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with Selkent it was granted.

73.14 However, we refused the application to amend under s.27 as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that Ms Jury victimised her by keeping a folder of evidence about her in the front desk as a result of the protected act, this being the grievance raised on the 9 March 2020.

8.d) Issuing the Claimant with final warning

73.15 This claim had been brought under s.18 and 26 of the EqA. The Claimant also asserted in her further amendment application that it fell under s.13, and s.27. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.13 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

73.16 However, we refused the application to amend under s.27 as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that Ms Jury victimised her by giving her a final warning, as a result of the protected act, this being the grievance raised on the 9 March 2020. In any event even had we allowed this amendment this claim would have failed as the final warning was issued on the 29 January 2020 whereas the protected act relied on for this detriment did not occur until the 9 March 2020.

8.e) Not keeping the Claimants final warning confidential enabling other members of staff to joke about it.

73.17 This claim had originally been brought under s.26 of the EqA. The Claimant submitted this claim also fell under s.13, s.18 and 27 of the EqA. We found that there would be no prejudice caused to the Respondent by allowing

her to amend her claim so that this fell under s.13, and s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

73.18 However, we refused the application to amend under s.27 as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that Ms Jury victimised her by failing to keep her final warning confidential, as a result of the protected act, this being the grievance raised on the 9 March 2020. In any event even if we had allowed this amendment this claim would have failed as the final warning was issued on the on the 29 January 2020 whereas the protected act relied on for this detriment did not occur until the 9 March 2020.

Second Claim amendment application

9.a. Jody Galgy (employee of the Respondent) shouting 'Look at you, ya scabby little cunt with your scabby baby,' when the Claimant's baby was a few weeks old (July/August 2020 approx.)

73.19 This claim had only been brought under s.26 of the EqA and was relied upon also for the s.98 constructive unfair dismissal claim. The Claimant submitted this claim also fell under s.18. of the EqA. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

9.b) The Respondent's employees harassing the Claimant on numerous occasions in 2020 and 2021.

73.20 This was treated as a generic allegation which was covered by the specific allegations set out in this Judgment and it was too generalised for findings of fact to be made.

9.c) The Respondent's employees shouting at the Claimant's father.

73.21 This claim had only been brought under s.26 of the EqA and was relied upon also for the s.98 constructive unfair dismissal claim. The Claimant submitted this claim also fell under s.27. of the EqA. However we refused the application to amend under s.27 as the prejudice and hardship to the Respondent if we granted this application was greater than it was to the Claimant as the Respondents had no opportunity to defend an allegation that Ms Jury's employees shouted at her father as an act of victimisation

against her as a result of the protected act, this being the grievance raised on the 9 March 2020.

9.d) On the 1st of August 2020, Holly Simmons shouted at me 'Oi see you, you scabby little cunt, you won't be getting a single fucking penny outa my sister, do you hear me not a single fucking penny.

73.22 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA. The Claimant submitted this claim also fell under s.13, and s.18 of the EqA. We found that there would be no prejudice caused to the Respondent by allowing her to amend her claim so that this fell under s.13 and s.18 of the EqA and the application to amend her claim in this regard was granted in accordance with all the relevant law set out in relation to her first amendment application above, in that we treated this amendment application as a relabelling application and in accordance with Selkent it was granted.

9.e) On the 24th of December 2020, Amy Jury telling the Claimant's mother that she should watch what would happen to her and her family and that they would not win against her.

73.23 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA as set out at 14.b of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

9.f) On the 10th of March 2021, the Claimant requested her payslips from March 2020 - September 2020 and was told by Mrs Jury that she had already sent these three times and the files had not been backed up.

73.24 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA. The Claimant submitted this claim also fell under s.13 and s.27 of the EqA, although it had already been brought under s.27 of the EqA as set out at 9.f of the List of Issues. As for s.13 we found that there was no real prejudice to the Respondent by allowing the application to amend her claim in this regard and so it was granted in accordance with all the relevant law set out in relation to her amendment application above in that we treated this amendment application as a relabelling application and in accordance with **Selkent** it was granted.

9.g) In late March 2020, Ms Jury 'unfriended' the Claimant on Facebook

73.25 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA as set out at 9.g of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

9.h) In April 2021, Polly Jury approached the Claimant's partner (Cezary Stein) and shouted, 'your girlfriend's a fucking slag.'

73.26 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA as set out at 9.h of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA but this did not amount to an amendment in any event.

9.i) On 10th May 2021, Bianca Bowden shouted 'dickhead' at the Claimant from her car.

73.27 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA at 9.i of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

9.j) On the 15th of July 2021, Ms Jury shouting at the Claimant's mother, 'Sar, I'm still winning, just so you know I'm still winning, I'm the winner'.

73.28 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA as set out at 9.j of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

9.k) In September 2021. Mr Stein was told by a friend that Jody Galgy had said he should stay away from Mr Stein because 'he and his girlfriend would be getting fucked up.'

73.29 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also brought under s.27 of the EqA as set out at 9.k of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

9.l) The Claimant's second grievance (dated 23 September 2021) complaining that her first grievance had not been dealt with properly. This was only partially upheld.

73.30 This claim had originally been brought under s.26 of the EqA, was relied upon also for the s.98 constructive unfair dismissal claim and was also

brought under s.27 of the EqA as set out at 9.I of the List of Issues. The Claimant submitted again that this claim fell under s.27, of the EqA, which did not amount to an amendment in any event.

Issues

74. The issues were agreed at the outset of the hearing, adopting the List of Issues produced by Counsel for the Respondent, and which set out the outstanding amendment application of the Claimant made on the 4 November 2021 [P.88-89], which we dealt with, and allowed, for reasons set out above. In addition, by allowing certain allegations in the Claimants second amendment application to be pleaded under s.13 and s.18, as set out above, and by acknowledging none of the allegations under s.26 could proceed, we now set out the issues as they stood after both the First and Second Amendment applications of the Clamant, and our decisions on those applications, on which we made findings of fact. The amendments allowed in the Second Amendment Application by the Claimant are set out in bold and underlined below for ease of reference. No reference is made below to any allegations standing under s.26 of the EqA as that is an ill-founded claim that fails at law. The issues in this case were therefore as follows:

ISSUES

Jurisdiction

1. Were the Claimant's claims brought in time? The Respondent averred:

a. In relation to the First Claim, any acts that took place prior to 13 February 2020 are, prima facie, out of time (ACAS EC taking place on 12 May 2020).

b. In relation to the second claim, any acts that took place prior to 27 October 2021 are, prima facie, out of time (ACAS EC taking place on 26 January 2022)

2. If not, do any of the acts alleged form part of a series of acts constituting a course of conduct under s123(3)(a) EqA 2010?

3. If not, was it just and equitable to extend time pursuant to s123(1) EqA 2010?

S18 EqA – pregnancy and maternity discrimination

*4. **First Claim:** Did the Respondent treat the Claimant unfavourably/was any of the unfavourable treatment as set out below because of the Claimant's pregnancy in that they: -*

a. Instituted disciplinary proceedings against her (25 January 2020);

b. Instituted a disciplinary sanction against her (30 January 2020);

c. Reassigned the Claimant's clients (February 2020 onwards);

d. Removed the Claimant from the online booking system (February 2020 onwards);

e. Failed to take into account the Claimant's health when allowing for a protracted disciplinary appeal process (February 2020 - March 2020)

f. Excluded the Claimant from a work WhatsApp group (February 2020);

g. Denied the Claimant training opportunities afforded to other employees (February 2020 and March 2020).

*5. **First Claim (First amendment):** Did the Respondent treat the Claimant unfavourably/was any of the unfavourable treatment as set out below because of the Claimant's pregnancy?:-*

a. Not allowing the Claimant paid time off for her appointment with a consultant cardiologist on 18 February 2020;

b. Effectively demoting the Claimant by giving her duties of an apprentice (cleaning and making tea) and witnessing clients being told that there were no staff available to do haircuts when she was present and available.

First Claim (Second Amendment)

c. (previously 7.a harassment in List of Issues)) Removing all stools which prevented the Claimant from sitting down at work:

d. (previously 7.b harassment in List of Issues) Forcing the Claimant to undertake menial tasks such as cleaning windows.

e. (previously 7.c harassment in List of Issues) Failed to follow the contents of the risk assessment conducted for the Claimant.

f. (previously 8.a harassment in List of Issues) Not providing the Claimant with gloves when she asked for them from January 2020 onwards.

g. (previously 8.b harassment in List of Issues) Challenging the Claimant after her mother contacted the hairdresser's federation around 26 February 2020.

h. (previously 8.c harassment in List of Issues) Keeping a folder of evidence concerning the Claimant in the front desk.

i. (previously 8.d harassment in List of Issues) Issuing the Claimant with a final warning.

j. (previously 8.e harassment in List of Issues) Not keeping the Claimants final warning confidential enabling other members of staff to joke about it.

Second Claim (Second Amendment)

k. ***(previously 9.a. harassment in List of Issues) Jody Galgy (employee of the Respondent) shouting 'Look at you, ya scabby little cunt with your scabby baby,' when the Claimant's baby was a few weeks old (July/August 2020 approx.)***

l. ***(previously 9.d harassment in List of Issues) On the 1st of August 2020, Holly Simmons shouted at me 'Oi see you, you scabby little cunt, you won't be getting a single fucking penny outa my sister, do you hear me not a single fucking penny.***

9.6. Was any unfavourable treatment because of the pregnancy?

S27 EqA – victimisation

11. First Claim (first amendment): *The Respondent accepts that the Claimant's grievance on 9 March 2020 was a protected act.*

12. First Claim (first amendment):

Did the Respondent subject the Claimant to any detriments because of the protected act as follows? :-

a. Breaching the Claimant's confidentiality by not securing and/or sharing the contents of the Claimant's grievance dated the 25 February 2020;

a. *Denied the Claimant training opportunities afforded to other employees.*

13. Second claim: The Respondent accepts that lodging the First Claim on 5 July 2020 constituted a protected act.

14. Second claim: Did the Respondent subject the Claimant to any detriments because of the protected act as follows? :-

a. *On 1 August 2020, Holly Simmons shouting at the Claimant 'oi see you, you scabby little cunt you won't be getting a single fucking penny outa my sister, do you hear me not a single fucking penny'.*

b. *On 24 December 2020, Amy Jury telling the Claimant's mother that she should watch what would happen to her and her family and that they would not win against her.*

c. *On 10 March 2021, the Claimant requested her payslips from March 2020-September 2020 and was told by Ms Jury that she had already been sent them three times and the files had not been backed up.*

d. *In late March 2021, Ms Jury 'unfriended' the Claimant on Facebook*

e. *In April 2021, Polly Jury approached the Claimant's partner (Cezary Stein) and shouted, 'your girlfriend's a fucking slag'.*

f. On 10 May 2021, Bianca Bowden shouted 'dickhead' at the Claimant from her car

g. On 15 July 2021, Ms Jury shouting at the Claimant's mother, 'Sar, I'm still winning, just so you know I'm still winning, I'm the winner'.

h. In September 2021, Mr Stein was told by a friend that Jody Galgey had said he should stay away from Mr Stein because 'he and his girlfriend would be getting fucked up'.

i. The Claimant's second grievance (dated 23 September 2021) complaining that her first grievance had not been dealt with properly. This was only partially upheld.

Constructive unfair dismissal

15. Second claim only:

a. Jody Galgey (employee of the Respondent) shouting, 'Look at you ya scabby little cunt with your scabby baby', when the Claimant's baby was a few weeks old (July/August 2020 approx.)

b. The Respondent's employees harassing the Claimant on numerous occasions in 2020 and 2021.

c. The Respondent's employees shouting at the Claimant's father

d. On 1 August 2020, Holly Simmons shouting at the Claimant 'oi see you, you scabby little cunt you won't be getting a single fucking penny outa my sister, do you hear me not a single fucking penny'.

e. On 24 December 2020, Amy Jury telling the Claimant's mother that she should watch what would happen to her and her family and that they would not win against her.

f. On 10 March 2021, the Claimant requested her payslips from March 2020-September 2020 and was told by Ms Jury that she had already been sent them three times and the files had not been backed up.

g. In late March 2021, Ms Jury 'unfriended' the Claimant on Facebook

h. In April 2021, Polly Jury approached the Claimant's partner (Cezary Stein) and shouted, 'your girlfriend's a fucking slag'.

i. On 10 May 2021, Bianca Bowden shouted 'dickhead' at the Claimant from her car

j. On 15 July 2021, Ms Jury shouting at the Claimant's mother, 'Sar, I'm still winning, just so you know I'm still winning, I'm the winner'.

k. In September 2021, Mr Stein was told by a friend that Jody Galgey had said he should stay away from Mr Stein because 'he and his girlfriend would be getting fucked up'.

l. The Claimant's second grievance (dated 23 September 2021) complaining that her first grievance had not been dealt with properly. This was only partially upheld on 22 October 2021.

16. Did the above amount to a breach of the implied term of mutual trust and confidence?

17. If so, was it so serious that it constituted a repudiatory breach of the Claimant's contract?

18. Did the Claimant resign in response to the breach?

19. Did the Claimant delay or otherwise affirm the breach?

Wages claims

20. Was the Claimant paid the correct notice pay?

21. Was the Claimant paid the correct accrued but untaken holiday pay?

Wrongful Dismissal

22. What was the Claimant's notice period?

23. Was the Claimant paid for that notice period?

Sex Discrimination – s.13 of the EqA

24. Additional Claim

a. (previously 7.b harassment in List of Issues) Forcing the Claimant to undertake menial tasks such as cleaning windows.

b. (previously 7.e harassment in List of Issues) Sarcastically questioning the Claimant regarding her lifting of a chair whilst pregnant.

c. (previously 8.d harassment in List of Issues) Issuing the Claimant with final warning.

d. (previously 8.e harassment in List of Issues) Not keeping the Claimants final warning confidential enabling other members of staff to joke about it.

e. (previously 9.d harassment in List of Issues) On the 1st of August 2020, Holly Simmons shouted at me 'Oi see you, you scabby little cunt, you won't be getting a single fucking penny outa my sister, do you hear me not a single fucking penny.

f. ***<u>(previously 9.f harassment in List of Issues) On the 10th of March 2021, the Claimant requested her payslips from March 2020 - September 2020 and was told by Mrs Jury that she had already sent these three times and the files had not been backed up.</u>***

<u>Findings of Fact</u>

75. The Claimant worked for the Respondent, a hair salon, as a Senior Stylist/technician from 25 June 2019 to 9 November 2021 when her employment terminated by reason of her resignation [P.382-383]. Her protected period for the purposes of this claim was from the 30 April 2020 until the 29 April 2021, after which she went on annual leave and then sick leave until her resignation.

76. Ms Amy Jury, the sole trader of the Respondent, owns and runs the Respondent. The following individuals were involved in the dispute.

Cast list

Kayleigh Flanagan - Claimant

Cezary Stein - Claimant's partner

Shaun Flanagan - Claimant's father

Sarah Tingay - Claimant's mother

Howard Tingay - Claimant's stepfather

Amy Jury - Respondent

Polly Jury - Employee of the Respondent (Ms Jury's niece)

Holly Simmons - Respondent's sister (not an employee)

Jodie Galgey - Employee of the Respondent (Claimant's line manager')

Bianca Bowden - Employee of Respondent (receptionist)

Cheryl Carroll-Smith - Employee of Respondent (disciplinary appeal officer)

Deborah Fisk - Investigation officer (first grievance)

William Fursman - Grievance hearing officer (first grievance)

Jane Fryatt - Grievance officer (second grievance)

Key Events

77. On the 5 December 2019 the Claimant announced her pregnancy to the Respondent.

78. Throughout January to March 2020 the Claimant complained of pregnancy discrimination as set out in her First Claim. She asserted that the Respondent's attitude to her changed, and that they began to look for ways to criticise her performance, and also removed her regular customers from her.

79. On the 10 December 2019 a meeting took place between Ms Jury and the Claimant.

80. On the 30 January 2020, following a disciplinary hearing on the 28 January 2020 the Respondent gave the Claimant a final written warning in relation to alleged poor customer service, and for being rude to a client, Sue Bates.

81. The Claimant appealed against the final written warning on the 2 February 2020 [P.108]. This appeal was handled by Cheryl Carrol-Smith the Beauty Manager for the Respondent. Following an appeal meeting on the 12 February 2020 this final written warning was overturned and was substituted with a first written warning [P.139].

82. On the 26 February 2020 the Claimant set out matters to the Respondent at length that she was unhappy about [P.130] but asserted that at this stage she was trying to deal with matters informally. In short, she complained that she had been removed from the online booking system, that there had been major changes to her role, including no longer being able to answer the salon phone, and that there had been no risk assessment in relation to her pregnancy.

83. On the 27 February the Respondents stated that they were treating her email as a formal grievance [P.134]. On the same day a meeting took place between Cheryl Carroll-Smith and the Claimant about her appeal against her final written warning [P.135].

84. On the 3 March 2020 the Claimant was advised her appeal against her final written warning had been upheld and replaced with a first written warning [P.139]. It was concluded that the final written warning issued had been too harsh in the circumstances.

85. On the 9 March 2020 the Claimant raised a formal grievance about the handling of the disciplinary and her treatment by the Respondent generally ('First Grievance') [P.179].

86. On the 10 March the Claimant was advised her course with Toni and Guy had been cancelled [P.189].

87. On the 2 April 2020 a grievance hearing was conducted by a Mr Fursman into the Claimant's First Grievance [P.211].

88. On the 12 April 2020 there was an impromptu meeting on the stairs between the Claimant and Ms Jury to discuss matters relating to the Claimant's mother contacting the Hairdressers Federation about the Claimant and the treatment of her at work.

89. On the 17 April 2020 a grievance outcome was sent by Mr Fursman [P.211].

90. On the 30 April 2020 the Claimant commenced her maternity leave.

91. On the 9 May 2020 the Claimant appealed the outcome of the First Grievance findings [P.217].

92. On the 12 May 2020 the Claimant contacted ACAS and following the issue of the certificate on the 12 June 2020 on the 5 July 2020 she lodged her First Claim [P.7-22].

93. On the 13 May 2020 Ms Jury suggested to the Claimant that her former employer, Ms Backers, dealt with the Claimants appeal against the First Grievance findings [P.219].

94. On the 15 May the Claimant rejected the suggestion her former employer, Ms Backers, deal with her appeal against the grievance findings on behalf of the Respondent [P.220 and P.230], and the appeal by the Claimant at that time against the First Grievance outcome was never dealt with.

95. Throughout July/August 2020-22 further allegations of pregnancy discrimination and fundamental breaches of contract were alleged, including allegations of specific acts of harassment by employees and relatives of. Ms Jury towards the Claimant by the Claimant from August 2020 to September 2021.

96. On the 14 May 2021, at the end of her maternity leave and then annual leave, the Claimant commenced a period of sickness absence [P262].

97. On the 23 September 2021 the Claimant raised a further second grievance [P.286] ('Second Grievance') complaining about the way her First Grievance was dealt with and raised further grievances about the alleged harassment of her by employees and relatives of the Respondent, Ms Amy Jury [P.288].

98. On the 30 September 2021 a grievance hearing took place with Jane Fryatt handling the Second Grievance on the part of the Respondent [P.297].

99. On the 22 October 2021 the Second Grievance findings were issued by Jane Fryatt with the Second Grievance being dismissed [P.350].

100. On the 26 October 2021 after receiving the grievance findings the Claimant then resigned with immediate effect of that date [P.380].

101. On the 9 March 2022 the Claimant lodged her Second Claim [P23-44].

Findings of Fact on Disputed Issues

Contract of Employment

102. The Respondent set out in her witness statement that she had been introduced to the Claimant through the Claimant's mother, Ms Sarah Tingay [Para 7], with whom Ms Jury was friends, and who had also once been her 'associate.'

103. Two further contracts of employment were provided by the Claimant on day four of the first hearing. The first one was dated the 25 June 2019 which described her as a Senior Stylist/ Technician, on a salary of £19,000.00 ('First Contract') and a further version dated the 28 May 2021 ('Second Contract') on a salary of £16,000.00 where she was described as an Apprentice Hairdresser.

104. At this point the Respondent asserted that the only applicable contract was the one in the bundle ('Third Contract') [P.501]. This Third Contract was dated the 1 September 2020 and described the Claimant as a 'Hairstylist' who reported to Amy Jury her Manager on a salary of £16,000.00.

105. The Respondents objected to the First and Second Contract being adduced as evidence on the ground they were disclosed late, and were not adduced by the Claimant until day 3 of the first hearing. They argued that the production of the First and Second Contract was to try and assert proof of the Claimant's actual demotion and it was too late in the day to produce them and that it would prejudice the Respondents defence of the claim, which had been premised on an argument by the Claimant about an 'implied demotion'. This Tribunal therefore concluded that the Claimant could not add the First and Second Contract into evidence due to their late disclosure and the prejudice potentially caused to the Respondent of having to defend the claim on the basis of this late disclosure.

106. However, prior to the second part-heard hearing this Tribunal reviewed its own decision on this issue pursuant to its general case management powers under Rule 29. It was clear that the Second Contract was sent when the Claimant was on maternity leave in May 2021 and needed to be explained by the Respondent and the situation about which contract applied to the Claimant was not clear. It was a key document in this dispute as was the First Contract, and the Third Contract. The Third Contract in the bundle stated a salary of £16,000.00 as did the Second contract sent out in May 2021, whereas the Claimant asserted her starting salary was £19,000.00, as reflected in the First Contract of 2019.

107. We advised the Respondent we were reconsidering our previous case management order on this issue pursuant to Rule 29. The Respondent objected and said it would be wrong of this Tribunal to vary its previous order at this stage of the hearing.

108. We retired and then decided the Second Contract sent in May 2021 must be admitted into evidence and made an order accordingly. We noted later in

the hearing our order had only referred to the Second Contract and not the First Contract as well. The Respondent confirmed they had always proceeded on the basis our order related to the First and Second Contracts and accepted that this made no material difference to the reconsideration of our decision on this. Both the First and Second Contract were therefore confirmed at this point as admitted into evidence by this Tribunal.

109. The Respondents then later conceded that they had inserted the wrong version of the Claimants operative contract of employment into the original bundle and that the Claimant had never seen the Third Contract. It was regrettable that the Respondent had made this error as this issue caused considerable confusion at the hearing, and took up Tribunal time in the form of a disputed disclosure application, and then a further disputed issue when we reconsidered our original case management order, and in the event it became clear the introduction of the First and Second Contract had resulted in the Respondent conceding the Third Contract was incorrect and did not apply to this dispute in any event.

110. The Respondent accepted that the First Contract, which was then superseded by the Second Contract, had both been sent to her with the latter being sent in May 2021, unlike the Third Contract which had never been sent to her, and the Claimant asserted that the sending of the second contract in May 2021, was evidence of her demotion after she became pregnant and went on maternity leave, and then annual leave after it ended.

111. The Third Contract [P.502 - 509] was, it was said by the Respondent, added into the bundle by mistake. It was dated the 1 September 2020, and we noted it was unsigned. The salary was set at £16,000.00 but the Claimant's role was described as 'Hairstylist'. Ms Jury explained that she had given this version of the contract to her Solicitor in error, and in any event at the date this document was created the Claimant was on maternity leave, albeit we note at this date the maternity leave had ended and she was on annual leave, and it was never sent to her. It was not clear to this Tribunal why this further version of the Claimant's contract had been created by the Respondent.

112. In any event the Respondent accepted that the Claimant was then sent the Second Employment Contract, dated the 28 May 2021, on or around that date [P.245], as referred to in an email of around that date. This contract described the Claimants role as follows: -

'You are employed as an apprentice Hairdresser and report to Jody Galgey who is your Manager.'

The salary for this was said to be £16,000.00 per annum as opposed to the original salary she was employed on, i.e., a salary of £19,000.00.

113. The reason for this difference in the job title and salary as set out in the documents was disputed by the parties. The Claimant stated that changes to her title, working hours, and a substantial pay decrease were made without discussion or formal documentation. She said however that the emails from

Mrs. Jury simply referred to changes simply for pay dates and the change of her employer from being Ms Jury herself to Ltd company status. She said this evidenced her demotion during her maternity/annual leave.

114. Ms Jury however said the errors in her job title and salary, in the Second Employment Contract, were due to using another employees contract of employment and were a 'cut and paste' error. She said that at this time she was taking legal advice, and it would have made no sense to proactively demote the Claimant when the Claimant was suing her. She said the lower salary and different job title of ‘Apprentice Hairdresser were a simple administrative error. We preferred the Respondent’s evidence on this issue and did not find the Second Employment Contract was sent out deliberately by the Respondent to formally demote the Claimant.

115. We treated the First Contract of employment produced by the Claimant dated the 25 June 2019 as the operative contract of employment in this claim as this was the Contract that correctly stated her job title of Senior Stylist/ Technician and salary of £19,000.00.

Passing Probationary Period

116. At paragraph 1.2 of the contract of the First Employment Contract a three-month probationary period was referred to and it was not in dispute that no review meeting took place nor was the Claimant ever advised by Ms Jury that she had not passed her probation, and which expired on the 25 September 2019.

117. In addition in the Claimants grievance [P.172] the Claimant said as follows: -

This is probably a place to explain, that when I started at Envy it was agreed that I would have a 3-month review and if at that point we were both happy AJ would book me on training. This review is set out in my contract (clause 1.2). As far as I was concerned, we had already done this as AJ had already booked me on a gent’s course in November 2019 before I found out I was pregnant which I should be attending on the 23rd March 2020 at the (Toni & Guy academy, London.)

118. In evidence Ms Jury said she didn’t have time to carry out a three month review of the Claimant, due to lack of administrative resources, prior to the end of the three month probationary period. We did not accept her evidence on this issue, and preferred the Claimant’s evidence, and found that the period had passed without any complaint by Ms Jury about the Claimants performance, and that because of this no formal review took place due to Ms Jury being content overall with the Claimant’s performance. This was evidenced by the booking of the Claimant on the Toni and Guy training course for the 23 March 2020. In particular on the 15th of November 2019 Ms Jury informed the Claimant she would be attending a men's hair training course on the 23rd of March 2020 at the Toni and Guy London Academy [P.189-191].

Announcement of Pregnancy on the 5 December 2019

119. On the 5 December 2019 the Claimant announced her pregnancy to the Respondent by text message.

120. At paragraph 10 of Ms Amy Jury's witness statement, she said as follows:

I first became aware that the Claimant was pregnant on 5 December 2019. The Claimant informed me of this by text message. As I was away on annual leave at the time, I did not respond to the Claimant's text message. I did, however, congratulate the Claimant on my return to work on 10 December 2019, as I thought this would be more personal. I was happy for the Claimant.

121. Ms Jury asserted that the review meeting of the 10 December 2019, had originally been scheduled to take place on the 5th of December 2019 but was then postponed due to the Claimants sickness absence and her subsequent annual leave until the 9th of December 2019. The Claimant asserted that no review meeting had ever been arranged for the 5th of December 2019.

122. It was Ms Jury's position that she had concerns about the Claimant's performance and had arranged a review meeting prior to learning of her pregnancy on the 5th of December but had been postponed due to the Claimant's sickness absence, and her subsequent annual leave until the 9 December 2019 [Para 10 of WS].

123. The Claimant put it to Ms Jury in cross examination that no review meeting had ever been arranged for the 5 December 2019 and Ms Jury was going to be on holiday that day. Ms Jury asserted that she wasn't going on holiday until that evening and that it had been arranged for that day. However in the document entitled *'Amy Jury's response to Kayleigh Flanagan's grievance,'* [P.207] it simply said the following with no reference to a review meeting arranged for that day: -

' KF sent a text message to me on the 5th of December 2019 to tell me she was pregnant. I was out of the country on annual leave at the time. I did not feel it was appropriate to respond nor did I want to congratulate an employee of mine via text message - I feel this is very impersonal and really wanted to congratulate her in person.'

124. We preferred the Claimants evidence on this issue and found that no review meeting had been arranged by Ms Jury for the 5 December 2021.

Review Meeting on the 10 December 2019 and the Nine Bad Reviews

125. The Claimant alleged that there was an immediate change of attitude towards her after she advised Ms Jury, she was pregnant. On the afternoon of the 10 December 2019 Ms Jury returned to work from her annual leave and advised the Claimant she wished to carry out a six-month review of her

performance. We found there was no prior warning of this meeting given to the Claimant.

126. The Claimant attended the review meeting on the 10 December 2019. The Claimant accepted in her first grievance of the 9 March 2020 [P.170] and in her submissions, that she was spoken to informally about her performance by Ms Jury on this date. However, the Respondent's evidence about complaints from clients about the Claimants services to them, that then led to the issues discussed, i.e. the alleged nine complaints that led to *'refunds and redoes'* as they were referred to by the Respondent, were not in the Bundle. Counsel for the Respondent submitted that where there was so many allegations in this dispute that we should not attach significance to this. However, we noted there were also no minutes of this meeting on the 10 December 2019 and the only record of the meeting was the email from Cheryl Caroll-Smith, the Beauty Manager of the Respondent, who was present at the meeting with the Claimant and Ms Jury. We noted that this email was only written on the 8 April 2020 nearly four months later in connection with the Claimants grievance [P.210].

127. We noted that the relevant dates for the nine alleged complaints which resulted in *'redo's and refunds'* started on the 20 of August 2019 (Oliver Hope), Dawn Dashper on the 27 September 2019, Kate Dickman on the 9 of October 2019, Naomi Willoughby on the 9 of October 2019, a 'redo' carried out for Veronica Monday on the 1 of November 2019, Karen Jury on the 5 of November 2019, Elizabeth Hollinghead on the 21 of November 2019, and James Smith on the 6 of December 2019..

128. At paragraph 11 [P.54] of the Response to the Claimant's claim and at paragraph18.2 of Ms Jury's witness statement it is stated that: -

The Claimant received a total of 9 bad reviews on the Respondents Facebook page and/or on the Respondents own software Phorest following haircuts that she had personally given. The first complaint was raised on the 27th of September 2019. The Claimant was made aware of each complaint at the time that it was raised. I showed the Claimant a series of examples where refunds had been offered [428-437, 440-450). As a result of the bad reviews, I made the decision to remove the Claimant from the Respondents online booking system to monitor her progress/complaints.'

129. The nine complaints referred to by the Respondent emanating from Facebook and their software Phorest did not feature anywhere in the subsequent disciplinary process initiated by the Respondent.

130. The Claimant was taken to these complaints [P.428] and denied that they were put to her in the meeting of the 10 December 2019, and we find on the balance of probabilities that they were not. We noted that there was no follow up e-mail or letter to the Claimant following this meeting on the 10th of December 2019 and if the Respondent was so concerned about her performance that, as admitted by Ms Jury, they then removed her from the Respondent's online booking system to monitor her progress/complaints later

in February 2021 [Para 18.2 of AJ WS] we would have expected to see written confirmation of such concerns.

131. Ms Jury accepted in evidence that she did not tell the Claimant that she had been taken off the online booking system and said during cross-examination she had not told her because '*she did not want to affect her confidence.'* We did not accept this account by Ms Jury, and we found it lacked credibility, and we found that she did this to reduce the amount of clients who could book in with the Claimant, and not to *'monitor her performance'* as she stated under cross-examination.

132. We found that following the grievance being raised by the Claimant on the 26 February 2020, [P.130] that the Respondent set about looking for the detailed evidence they sought to assert had been discussed at the meeting on the 10 December 2019, and we found that this was a hunt for evidence against the Claimant 'after the event'.

133. We were also struck by the fact that the clients alleged to have complained only communicated with the Respondent around a year later with the Respondent. For example, Karen Jury sent an email on the 12 August 2020 [P.441] in relation to her hair cut on the 5 November 2019 yet only complained on the 12 August 2020. In addition, Nicky Hope's daughter had her hair cut on the 20 August 2019 but only detailed her complaint a year later on the 14 August 2020 [P.440].

134. We found that whilst complaints, refunds and redo's had taken place that the Respondent took no action about any of these issues prior to the 10 December 2019 vis-a-vis the Claimant, and some of the matters the Respondent alleged they raised at that meeting were by that time four months old. Even allowing for the fact that these different issues were cumulative in one sense we did not find that the reason for holding an impromptu review meeting on the 10 of December 2019 was because of the client issues but we found on the balance of probabilities that the impromptu meeting being called by Ms Jury was motivated by, and was because of the Claimants announcement of her pregnancy on the 5 of December 2019, and we found this was the start of changed behaviour towards the Claimant where the Respondent sought to find fault with her work.

The Further Three Complaints

135. At paragraph 20.1 of the witness statement of Ms Jury reference was made to a client complaint received on the 2 of January 2020 from a regular client Ms Suzanne Wilde. Further details of this complaint were set out at paragraph 20.2 wherein it was said there was poor communication from the Claimant with the client. It was said the Claimant did not listen to Ms Wilde's requests resulting in a complaint regarding her haircut [P.237]. The Claimant adduced evidence about this which was a Facebook review on the 2 January 220 by Ms Wild and it said as follows: -

‘Wasn't the haircut I was expecting but it's OK. Kylie was attentive to what I wanted but my fringe is too short for my liking. Shape is good just too short. Jodie did my daughters hair which is fab.’

136. We did not find that this initial Facebook review amounted to a client complaint. The review emphasised a short fringe but also mentioned that the shape was good. Whilst this was not a five star review, we found that it could not be said to amount to a complaint.

137. However at page 437 on the 5 January 2020 there also was an e-mail from Ms Wild to Amy Jury which said: -

Both me and my daughter had haircuts with Jodie and Kayleigh. I’m disappointed in mine - a bit of a strange cut and I’m quite gutted to be honest. I feel like I went in with a long sloping fringe for a trim to tidy up and now I've lost that length now and kinda came out with a short Pixie cut! Sorry to moan but I’m quite unhappy with this now.’

138. We found this further email did then however amount to a formal complaint by the client.

139. The second complaint referred to was that by a Ms Hannah Tudgay sent in a private message to Ms Jury on the 9 of January 2020 [P.237]. It was said in the witness statement of Ms Jury that the Claimant had not cut Ms Tudgay’s hair at the correct 45° angle on the 9 of January 2020 resulting in a complaint.

140. The only evidence we had on this were the notes of the disciplinary meeting [P.566] on the 29 January 2020, and the later statement of Jody Galgey [P.237]. We were not provided with the original private message sent by the customer on Facebook to Ms Jury, where she allegedly complained. In the absence of any contemporaneous evidence about this complaint we did not find on the balance of probabilities that a complaint was made. It was never suggested to this Tribunal that the original complaint was no longer available, and we were not able to evaluate whether the message amounted to a complaint or not. The fact that Ms Jury decided to give the customer a further cut did not, we found, mean that a complaint had been made.

141. At paragraph 20.4 of the witness statement of Ms Jury the alleged third complaint was evidenced where it was alleged that the Claimant provided poor customer service on the 11 of January 2020 to a customer Ms Sue Bates. At page 577 was the review on Phorest. In essence it was accepted by the Respondents that the client who was having her hair coloured by the Claimant was *‘unquestionably abrupt’* to the Claimant in asking her to *‘hurry up’* with the colour treatment [P.141]. The Respondents found that the Claimant had not communicated in an appropriate manner with the client, which was part of the reason they issued the final written warning, amongst other things. Whilst we found that this client did complain we address below the response of the Respondent to this complaint and the other two complaints referred to above.

Disciplinary Proceedings – 25.1.23

142. The Claimant was spoken to about the customer complaints. She was then called to a disciplinary meeting set for the 29 January 2020 [P.101].

List of Issues - 4. S.18 of the EqA - First Claim: Did the Respondent treat the Claimant unfavourably/was any of the unfavourable treatment as set out below because of the Claimant's pregnancy in that they: -

a. Instituted disciplinary proceedings against her (25 January 2020);

b. Instituted a disciplinary sanction against her (30 January 2020);

143. Having regard to the evidence before us and on the balance of probabilities we asked ourselves whether or not the institution and outcome of the disciplinary was influenced by the Claimants pregnancy. The three client complaints led to the Respondents taking formal action against the Claimant, whereas the previous nine complaints ('refunds and redoes') that had taken place at the end of 2019 had not been actioned in any formal way by the Respondent. We found on the balance of probabilities that both instituting disciplinary proceedings and then issuing a final written warning to the Claimant as part of disciplinary proceedings was motivated by the fact of, and because of the Claimants pregnancy.

144. In particular we had regard to the fact that two of the complaints were about her alleged underperformance and we would have expected to see the Respondent to deal with this through its performance management process and to set the Claimant some goals to improve her performance, as set out in the Handbook where poor performance was provided for in relation to performance management procedures at page 522..

145. In relation to the complaint by the customer that the Claimant had spoken rudely to her, whilst the Respondents did have some evidence that the Claimant became defensive in response to the customer it was also accepted by witnesses that the customer had spoken very abruptly to the Claimant prior to the Claimant responding, and where a customer had been rude to her, as we found they had been, then this in our judgment was a situation that merited an informal discussion and not the institution of disciplinary proceedings.

146. Having instituted disciplinary proceedings in our judgement the most that could have reasonably ensued from that was a first written warning, having regard to the undisputed evidence about the rude behaviour of the client towards the Claimant. We found that instituting the disciplinary proceedings and giving a final written warning was something from which we could infer unfavourable treatment because of pregnancy, as it established facts from which we could infer discrimination.

147. Therefore, having established facts from which we could infer unfavourable treatment of a pregnant worker, the burden of proof shifted to the

Respondent and we asked ourselves whether the Respondents had an explanation for the decision to discipline her and issue with her with a final written warning.

148. We found that the disciplining of the Claimant of itself, was harsh, and we did not accept the Respondent's evidence that the reason for doing so was non-discriminatory. On the balance of probabilities we found the decision to institute disciplinary proceedings and then discipline with a final warning was because she was a pregnant worker. Instead of following their performance management procedures on her performance and in relation to the customer to acknowledge she was spoken to rudely and offer advice on how to deal with difficult clients they proceeded straight to disciplinary proceedings and a final written warning was given. We found no evidence before us as to why the Respondent, for non-discriminatory reasons, gave a first and final written warning instead of giving her a first written warning and we concluded it was because of her pregnancy.

149. After the Claimant appealed against the Final Written Warning the Respondents downgraded this final written warning to a first written warning.

List of Issues – s.18 of EqA-

4.c. Reassigned the Claimant's clients - (February 2020 onwards);

4.d Removed the Claimant from the online booking system- (February 2020 onwards);

150. We found that there was ample evidence that the Respondent reassigned the Claimant's clients to other stylists. She complained about this to Ms Jury. Some extra documents were added into evidence by the Claimant in the hearing and one of these was a message sent by her on the 12th of February 2020 to Ms Jury. In particular she said as follows: -

'hi Amy just wanted to make you aware that one of my clients came into the salon yesterday to alter her appointment for next week. We had discussed the change to her present haircut at her last visit and even went over it again yesterday before she left. I checked my appointments today for the coming week as I was also sure I had a client booked in the morning, after checking yesterday notice that both clients had been moved. The lady who came in yesterday has actually been moved to Laura's column next Wednesdays and I know she wanted to be booked in with me. I've also had several clients including one just now asking why I'm not on the online booking system and I haven't been made aware that I'm not. This is making it awkward for me as they're asking me why I'm not doing their hair. I was just wondering why this is? Kayleigh.'

151. The burden of proof therefore shifted to the Respondent on the issue of reassigning the Claimant's clients and no evidence was offered by the Respondent that this was done for non-discriminatory reasons and we therefore found that this was done because the Claimant was a pregnant worker.

152. It was not disputed by Ms Jury that she removed the Claimant from the online booking system [Para 18.2 of AJ Witness Statement]. She also accepted that she did it without telling the Claimant. Her evidence to this Tribunal was that by removing the Claimant from the online booking system the receptionist could control how many appointments were booked in with the Claimant, and she could monitor the Claimant's performance. In particular she said that she did this because whereas dissatisfied clients who were new clients may simply go elsewhere regulars were more likely to complain.

153. However this evidence did not make sense to this Tribunal, as we found it was the Claimant's regular clients who were being removed from her in any event, in that Ms Jury, by removing the Claimant from the online booking system, prevented the Claimant's regulars from booking in with the Claimant online. We found the removal of the Claimant from the online booking system as more evidence of the changed attitude by the Respondent to the Claimant following the announcement of her pregnancy.

154. During cross examination the Claimant said that during this period of time in January and February 2020, when she was working and not off sick, she could carry out some haircuts but these were as a result of customers *'walking in'* to enquire if anybody was available to cut their hair and she was able to offer her services on the spot.

155. We concluded that if Ms Jury had concerns about the Claimants performance, she could have taken her through the performance management process in accordance with its policy [Page 522]. and could instead have set the Claimant goals to improve her performance and reduce customer complaints. Instead the Claimant was deprived of the opportunity to carry out repeat appointments with her regulars and to receive new appointments through the online booking system. We found this did not enable Ms Jury to monitor her performance it did the reverse, and it simply removed the Claimant's opportunity to do her job. The Respondents offered no evidence as to why they didn't follow their performance improvement plan set out in the bundle. We therefore concluded they removed the Claimant from the online booking system and also reassigned the Claimants clients from February 2020 to other stylist and that these actions were motivated by the fact she was pregnant and would soon be absent on maternity leave.

List of Issues – s.18 of the EqA - 4.e. Failed to take into account the Claimant's health when allowing for a protracted disciplinary appeal process – (February – March 2022).

156. We had regard to the length of time taken to take the Claimant through a disciplinary process, and then deal with an appeal against the final written warning. In particular the Claimant was invited to a disciplinary meeting on the 29th of January 2020. That day the Claimant was given the outcome of the disciplinary hearing, and she was advised of it forty-five minutes after the hearing ended by phone and it was then later confirmed in writing [Para 26 of AJ witness statement].

157. The Claimant appealed the issue of the final written warning [P.106-108] on the 2 February 2020, and the Claimant was invited to attend an appeal hearing on the 12 of February 2020 [P.109-110] and was advised of her right to be accompanied. The appeal hearing was led by Ms Cheryl-Carole Smith.

158. Having regards to the size of the Respondent we did not find that the disciplinary appeal process was protracted. The outcome on the appeal was issued on the 3 March 2020 [P.139] three weeks after the appeal hearing took place. Ms Jury stated that the appeal process took longer than she wanted but it was due to the Claimant's sickness absence and Ms Cheryl-Carole Smith working part time and the Respondents not being open on a Monday.

159. As to the allegation that they failed to take her health into account in that time frame we made no finding that there was a failure to take her health into account. This was a vague allegation and the Claimant never put it in cross examination to Ms Jury that the process should have been expedited because she was pregnant and unwell and therefore this allegation that there was a failure to take her health into account was not upheld.

Proposal of Ms Backers to handle Claimant's grievance

160. Whilst this was not a defined issue in the claim it was clearly an important allegation about Ms Jury's treatment of the Claimant. Following concerns raised by the Claimant, that the appeal process had not been dealt with fairly or professionally [Para. 30 of AJ WS] and that she was being treated differently due to her pregnancy, the Claimant was invited to make a formal grievance about this.

161. We found that Ms Jury was aware that the Claimant had left the employment of a previous employer, this being a Ms S Backers, of Toni and Guy, under difficult circumstances, resulting in them parting company on bad terms. In particular we found Ms Jury had exchanged messages with the Claimants mother Ms Sarah Tingay on this topic as evidenced by text messages in the bundle [p.327-328], and as referred to by the Claimant in her email of the 13 May 2020 [P.202]. Ms Jury referred to this in her witness statement [Para.7 AJ WS] and referred to the text messages on this [P.94]. We found that this was a reference to the Claimant working with Ms Backers at Toni and Guy, and was not, as Ms Jury later tried to assert, a reference to the next employer the Claimant worked for after Toni and Guy. This was significant as Ms Jury had proposed Ms Backers as a person to handle the Claimants appeal against the first grievance findings [P.202].

162. The Claimant asserted that this was a deliberate tactic to demoralise her as she asserted Ms Jury was well aware of her poor relationship with Ms Backers. We preferred the Claimant's evidence on this and found it was inappropriate to suggest a previous employer of the Claimant handle her appeal against the grievance findings of the Respondent, in circumstances where she had left Ms Backers employment on bad terms, and we found that Ms Jury was

aware of this fact when she proposed Ms Backers handle the appeal, and did so knowing it would distress the Claimant.

163. One week later on the 3 March 2020 the Claimant was notified that the decision to issue a final written warning had been overturned and downgraded to a first written warning.

List of Issues – s.18 of the EqA - 4.f - Excluded the Claimant from a work WhatsApp group (February 2020)

164. There was an *'Envy'* WhatsApp group which the Claimant was part of, and we saw messages between the Claimants and the Respondents and her employees on that group.

165. There was also another WhatsApp group referred to as *'@work shit'* which the Claimant did not belong to. We heard evidence from Ms Jury, and we accepted such evidence that that the *'@work shit'* WhatsApp group had been set up prior to the Claimant becoming employed by the Respondent. We also accepted her evidence that that WhatsApp group was not just to discuss work matters but was largely, in Ms Jurys words, used to *'complain about husbands and children'* and was used to exchange messages of a personal nature.

166. We also heard evidence from Ms Jury that this group did not just include some of her employees from Envy Hairdressing, but also included her friends who didn't work there, and also some of her relatives. Despite the name of the WhatsApp *'@work shit'* group we found therefore that it was not a WhatsApp group set up simply for work purposes as was suggested by the Claimant and from which she was excluded.

167. We found that the Claimants case on this issue, at its highest, was that the Respondent and other employees were using the *'@work shit'* WhatsApp group instead of communicating on the *'Envy'* WhatsApp group. However, there was no evidence before us about what was being discussed on the this *@work shit* WhatsApp group and we accepted Ms Jury's evidence that these were messages of a personal nature.

168. There was also reference to another WhatsApp group referred to as the *'Birthday'* WhatsApp group which related to Ms Jury's birthday plans, but Ms Jury gave firm evidence throughout that she did not regard the Claimant as one of her friends and that she was simply an employee. We preferred Ms Jurys evidence on this to that of the Claimant's which was that this group deliberately excluded her.

169. Whilst we found that communications between the Respondent's employees did seem to move from the *Envy* WhatsApp Group to the *@work shit* WhatsApp group, we had no evidence about what was being discussed in the *'@ work shit'* WhatsApp group and we found on the balance of probabilities they were messages of a personal nature. Whilst we understand that the Claimant would have felt hurt and upset that she was no longer being messaged on the '*Envy'* WhatsApp group in relation to general chitchat

throughout the day we found that this was not because she was a pregnant worker in particular, but simply was because the relationship between her and Ms Jury, and others had become more strained and less friendly due to disciplinary processes in a small salon.

List of Issues – s.18 of the EqA - 4.g - Denied the Claimant training opportunities afforded to other employees (February 2020 and March 2020).

170. We found the evidence on this issue from the Respondent unconvincing, and we preferred the Claimant's evidence on this. In the Respondent's original Response to the Second Claim, [Para. 23] it said that the course had been cancelled for *'financial reasons'* [P.56]. During the hearing however Ms Jury said that the points that they had accrued from product sales were then used for to pay for training courses, in the form of a loyalty card that earned points. She said these points were going to expire and therefore they needed to use the points up before they expired and that this was why she cancelled the training course that had been booked for the Claimant with Toni and Guy in March 2020. We did not accept this evidence from the Respondent. If the course had already been booked, then the points had been used up and there was no risk of them expiring. Her explanation then changed and she said she was able to swap the points between different booked courses which undermined her initial evidence that it was done to prevent the points expiring.

171. Ms Jury's evidence then evolved a third time and it was said that due to the pressures created by COVID and a reduction in income that she felt the points would be better spent on her and Jody Galgey attending a colouring course and in effect cancelled the Claimant's course so that that they could she and Jody Galgey could both attend that course instead, this being a *'Balayage colouring course.'* However, we noted that the Claimant found her course had been cancelled on the 10 March 2020 as she emailed Ms Jury about this. Ms Jury then referred to this Balayage course that she and Jody Galgey attended as taking place in February 2020. This explanation was not believable in terms of chronology or generally. Ms Jury at times was not a credible witness and her evidence on this point lacked any credibility.

172. Having originally booked the Claimant on the men's cutting course there was no explanation that satisfied us as to why Ms Jury then cancelled that booking for the Claimant for a reason not connected with her pregnancy. The burden of proof therefore shifted to the Respondent on this issue. There was no explanation as to why she had not spoken to the Claimant about this before doing so. We found that this would undoubtedly have been upsetting for the Claimant and added to her sense that she was no longer a valued worker due to being a pregnant worker. This also then added to the Claimant's increasing sense of isolation that as a pregnant worker she had become a problem and a burden to the Respondent that the Respondent now resented.

173. We found that the failure to discuss the cancellation of the course of the Claimant prior to doing so, and then cancelling the course booked for the Claimant, was because the Claimant was a pregnant worker, and they were no

longer invested in her. We did not accept the explanation of the Respondent that the reasons for cancelling it were commercial reasons.

174. We noted in making these findings that the Claimant did attend a pre-booked Loreal Colouring Session on the 15 January 2020, but this did not detract from the later cancellation of the Toni and Guy training course, and our findings of fact on that cancellation.

List of Issues – s.18 of the EqA - 5.a - Not allowing the Claimant paid time off for her appointment with a consultant cardiologist on 18 February 2020

175. The Claimant alleged that she asked her manager, Jody Galgay, for time off to attend a cardiology appointment. The Claimant gave evidence that the cardiology appointment was linked to her pregnancy as there were medical concerns about her heart, following her becoming pregnant, and this needed to be checked. The Claimant stated that Jodie Galgay then came back to her and said that her request for paid leave to attend this appointment had been refused. We found that this was an antenatal appointment in the sense that it was connected to her pregnancy. We therefore asked ourselves whether her right to take time off for an antenatal appointment had been refused.

176. Ms Jury's evidence was that the Claimant had discussed the appointment with her and had said that she wished to take a long weekend to celebrate her pregnancy with her partner and that she was happy to book it as annual leave. Ms Jury said she would never force a pregnant worker to use annual leave for an antenatal appointment.

177. On the balance of probabilities, we found that the Claimant did wish to celebrate her pregnancy with her partner and that it suited her to take annual leave on the Friday, and have a long weekend celebrating her pregnancy. We therefore preferred the Respondent’s evidence on this issue and found that this was not unfavourable treatment because of the Claimants pregnancy.

List of Issues – s.18 of the EqA - 5.b Effectively demoting the Claimant by giving her duties of an apprentice (cleaning and making tea) and witnessing clients being told that there were no staff available to do haircuts when she was present and available.

178. Having found that the Claimant had been removed from the online booking system, and that when her ‘regulars’ asked for her other stylists were instead assigned to her regulars, and that the Claimant was reduced to ‘*grabbing walk-ins’* as they came into the salon, we found that the Claimant had nothing else to do but to clean the salon and make tea. We thought it was to her credit that she did this without being asked to. We found that the fact that she chose to clean, and as she admitted in her evidence everybody did if they had some spare time, did not however mean that she had not been effectively demoted. Having had the majority of her hairdressing duties removed from her by Ms Jury to a very significant degree, as a result we found most of the duties she carried out were those of an apprentice i.e., cleaning and making tea and

we found she was effectively demoted by virtue of her main duties of cutting and colouring being removed from her to a large degree.

179. Some extra documents were added into evidence by the Claimant in the hearing and one of these was a message sent by her on the 12th of February 2020 to Ms Jury. In particular she said as follows: -

'hi Amy just wanted to make you aware that one of my clients came into the salon yesterday to alter her appointment for next week. We had discussed the change to her present haircut at her last visit and even went over it again yesterday before she left. I checked my appointments today for the coming week as I was also sure I had a client booked in the morning, after checking yesterday notice that both clients had been moved. The lady who came in yesterday has actually been moved to Laura's column next Wednesdays and I know she wanted to be booked in with me. I've also had several clients including one just now asking why I'm not on the online booking system and I haven't been made aware that I'm not. This is making it awkward for me as they're asking me why I'm not doing their hair. I was just wondering why this is? Kayleigh.'

180. This evidenced to us, and we found, that whilst the Claimant may not have actually overheard clients being told there was nobody available to do haircuts when she was present and available, she did discover her clients were not able to book in with her, and were being moved from her to other stylists. This was not disputed by Ms Jury, nor was it ever put to the Claimant in cross examination that her clients had not been advised that she was unavailable to do their hair. We therefore found this allegation was made out in the sense that she had been demoted in that her availability to cut and colour hair was to a large extent removed from her, and that her clients were prevented from booking in with her, and when did they book in with her they were then moved to other stylists.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.a)</u> 5.c - Removing all stools which prevented the Claimant from sitting down at work

181. The Claimant alleged that stools were removed both in the staff room and the salon so that she could not sit down and rest. In particular the reference to stools was a reference to stools on wheels that stylists would use to sit on when cutting hair in the salon and also stools in the staff room.

182. The Respondent denied that she had removed all the stools from the salon to prevent the Claimant from sitting down at work and said that it would have been a very strange thing for her to do when her staff needed stools to sit on whilst cutting hair.

183. We preferred the Respondent's evidence on this matter and did not find that the Respondent removed stools to prevent the Claimant from sitting down at work. We found that this would have been detrimental to the Respondent's

business in that it would have interfered with other staff carrying out their duties who needed a stool to sit on while performing their duties, and we found that this did not occur.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.b)</u> 5.d - Forcing the Claimant to undertake menial tasks such as cleaning windows

184. Part of the Claimant's case about her demotion was that, having had all her regulars removed from her and being removed from the online booking system, she was forced to do all the menial tasks in the salon such as cleaning windows.

185. Having found that she carried out cleaning duties in the salon by choice, because most of her usual duties had been removed, and she had little to do, we therefore asked ourselves whether, taking this a step further, the Respondents gave her instructions purposely to take on menial tasks such as window cleaning.

186. Ms Jury gave evidence that she had had someone cleaning the windows of her salon for many years and would never ask a hairdresser to clean the windows.

187. We preferred the Respondent's evidence on this and found that there was no direct instruction to the Claimant to carry out window cleaning.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.c)</u> 5.e - Failed to follow the contents of the Risk Assessment conducted for the Claimant

188. At page 120 of the bundle was a risk assessment relating to the Claimant dated the 18 February 2020. The Respondent's case was this was carried out by Bianca Bowden [p.120-121, 236, 448-445]. The Claimant's case was that this risk assessment was never discussed with her at any point, or in any event followed, whereas the Respondent asserted that it was. In the Claimant's grievance [P.175] she set out that there had been no risk assessment carried out, which we took to mean in the sense of one that was discussed with her and then followed. The date of the grievance was the 9 March 2020. We found that it was extremely unlikely that if a risk assessment had been completed and discussed with her at the time of the risk assessment, this being the 18 of February 2020, that she would then have gone on to raise a grievance about the failure to carry out such a risk assessment, such grievance being dated the 9 March 2020 [P.170 & P175] where she said as follows:-

'I have raised these concerns face to face and in emails shown on the timeline. As my employer had not responded and just dismissed this, I had no option but to make contact with Health and Safety executive direct who advised me that my employer should have a generic Risk assessment in place for pregnant women. However, if I have raised concerns about risks my employer should be consulting with me and advising me of what measures are in place to protect

me whilst pregnant. They also advised that if things are raised that are not in place that these would need to be reviewed. I made my employer aware that I was pregnant on the 5th of December 2019 since this date no one has spoken to me about my plans and my pregnancy or about risks. Carrying hoovers downstairs has been highlighted in an email dated 26th February 2020 (sent to my employer AJ at 12.26). I was asked by Polly Jury who is an apprentice and niece to AJ to bring the hoover downstairs and hoover. I said that I did not feel that it was safe to carry down a large hoover from the first flight of stairs. I was happy to hoover though. Only this week on Tuesday the 3rd of March I was cleaning the floors and moved one of the chairs. My employer shouts over 'should you be lifting that chair' this was not in a concerned manner but more in a sarcastic manner which made me feel uncomfortable and embarrassed.'

189. We find that, regardless of the date that the risk assessment form was filled in and signed by Ms Bowden, it was never discussed with the Claimant, contrary to what was said about this [P.236], where Ms Bowden asserted that she discussed the risk assessment with the Claimant when she came into work the next day on the 19 February 2020.

190. It was not in dispute that the Respondent was aware the Claimant was pregnant from the 5 of December 2019 by text. The date of this risk assessment was the 18 of February 2020. The explanation from the Respondent about this delay of over two months before carrying out a risk assessment was that they were waiting for the MAT B1 form. However the Respondent's obligations under the Health and Safety at Work Act to carry out a specific risk assessment for a pregnant woman arose when they received her written notification by text of her pregnancy and so we found that the risk assessment did not take place within in a reasonable period of time of around one month but instead they delayed for over two months. Even then we did not find that the risk assessment was followed.

191. We found that where you know you are employing a pregnant worker in an environment where there are chemicals it is incumbent upon any employer to carry out a timely risk assessment without delay. On this issue, we noted that the question in the risk assessment which related to risks associated with chemicals and substances, and which had the potential to harm the unborn child, was not ticked. We were struck by the fact that the most obvious risk to the Claimant and her unborn child in this environment, this being chemicals and substances such as hair dyes, peroxide and bleach was not ticked. We did not find it credible that the most relevant question was ignored on the form, and this led to us finding it was not discussed, and specifically on the allegation made that it was not followed in any sense of the word for that period of the 18 February 2020 until she went on maternity leave on the 30 April for over two months.

192. In support of the finding it was never followed for a period of two months we noted that in relation to the request that the Claimant clean, and that Polly Jury asked her to hoover and to collect the hoover from upstairs, Ms Jury's evidence on this was that she was only 16 and wouldn't have realised that you shouldn't ask a pregnant worker to go and get a hoover and carry it down the

stairs. However, she did not deny that this incident had occurred. We found that the risk assessment been discussed with her, as alleged, she would have told Polly Jury that there was a risk assessment in place that stated she must not perform manual handling. We therefore found that the contents of the risk assessment in particular were not discussed with her and were also in any event not followed and this related in particular to the section that stated; -

'The worker is not required to perform hazardous manual handling.'

193. We therefore found that the hazards that were identified, were then ignored and were not followed by the Respondent in the following two months from the 18 February 2020 until she went on maternity leave on the 30 April this being during the Claimants first and second trimester.

194. The Claimant also alleged that she was asked to stand on a stool and clean the salon window from the outside, and also alleged that she was asked to take the Christmas decorations down, which involved using and standing on a stool.

195. Ms Jury denied that she was ever asked to clean windows as referred to above and we found that she was not. In relation to being asked to take the Christmas decorations down we found on the balance of probabilities she was not asked to stand on a stool and take the Christmas decorations down.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.a)</u> 5.f - Not providing the Claimant with gloves when she asked for them from January 2020 onwards

196. On this issue we preferred the Respondent's evidence to the Claimants evidence. We found it most unlikely that the Respondent would refuse to provide one member of staff with gloves yet provide them to the rest of its staff and we did not find this allegation was made out.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.b)</u> 5.g – Challenging the Claimant after her mother contacted the Hairdressers Federation around the 26 February 2020.

197. Ms Jury, [P.133] gave evidence in relation to the incident of the conversation with the Claimant which took place on the stairs and concerning the Claimant's mother telephoning the National Hairdressers Federation in relation to the treatment of the Claimant in the workplace, and said that: -

'it was an informal chat to discuss the next stage we sat on the stairs as that's where KF felt most comfortable.'

198. However, under cross examination Ms Jury confirmed that she said she had initiated the impromptu conversation with the Claimant following advice from her HR advisor that she should ask the Claimant to put any matters she wished to complain about in writing as part of her formal grievance. She said

that this advice was in response to her telling her HR representative that the Claimant's mother had contacted the National Hairdressers Federation.

199. She also gave evidence that she had gone into the salon that day unannounced to discuss this issue as she was no longer working there every day. She confirmed that she took Bianca Bowden with her to take minutes of any conversation with the Claimant. It was undisputed that the Claimant said that she didn't want to have the conversation.

200. Ms Jury gave evidence that she pursued the request for a discussion with the Claimant and said, *'it wouldn't take long'* and in effect confirmed the evidence of the Claimant which was that she was put under pressure to have the discussion on the spot. We also found that the Claimant stated that she wanted a representative with her in the meeting, but this was ignored by Ms Jury who went on with the meeting regardless.

201. We found on the balance of probabilities that Ms Jury challenged the Claimant on the spot about her mother phoning the National Hairdressers Federation. We found that this would have been intimidating for the Claimant as it was unannounced and Ms Jury had Amy Bowden with her, and we found that the Claimant was distressed by that meeting. In addition, the Claimant's request that the meeting be postponed so that she could have somebody with her [P.133] was ignored by Ms Jury. Whilst we accepted that Ms Jury only wanted to have *'an informal discussion'* nonetheless we found it would have been intimidating for the Claimant, and that she did challenge the Claimant about her mother's actions in contacting the National Hairdressers Federation, in a salon where the Claimant was carrying out her duties.

202. The burden of proof shifting to the Respondent on this allegation we did not find there was a non-discriminatory reason for the treatment of the Claimant and that it was because the Claimant was a pregnant worker that she was treated in this manner. We found on the balance of probabilities that the Respondent did challenge the Claimant unannounced about her mother contacting the Hairdressers Federation on her behalf, and that she forced the Claimant to have that impromptu discussion against her will, and that it was unfavourable treatment of a pregnant worker.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.c)</u>
5.h - Keeping a folder of evidence concerning the Claimant in the front desk

203. The evidence presented by the Claimant on this issue was vague. The Claimant's witness statement [Para.24] referred to becoming aware that a *'folder of evidence'* was being collected against her. She said it was retained at the front desk marked *'private and confidential'* and goes on to say that, despite this marking, all her colleagues were permitted to open it and *'add items to it'* and that this felt like orchestrated bullying that was being encouraged by the Respondent against her.

204. However, the Claimant never gave any evidence that she had looked inside the folder and knew what was contained in it. We found therefore that this was pure conjecture on the Claimant's part, and she had no actual proof that her colleagues were opening it and adding items to it that related to her.

205. In the next paragraph in her witness statement [Para. 25] she alleges that she was asked personal questions about her pregnancy in front of clients and that she thought this was so they could *'add notes'* when she gave an answer and that this would *be 'in line with previous notes that I had found in the draw'.* We took this to mean notes that she had found about herself in the drawer in the beauty room as opposed to the reception desk.

206. On cross examination Counsel asked the Claimant how she knew that the notes she said were being added to the folder were about her. Her reply was that as she was the only person not allowed to add notes to the folder it must have concerned her.

207. We found that there was not enough evidence for us to conclude that there was another folder about the Claimant kept in the front desk in the reception area. We did not therefore find on the balance of probabilities that there was a separate folder in addition to the one kept in the drawer in the beauty room, about the Claimant and this allegation was not made out.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.d) -</u> 5.i – Issuing the Claimant with a final written warning

208. Having found above that the Claimant being issued with a final warning was inappropriate in relation to the matters that had led to the disciplinary, and as conceded by the Respondents in her appeal against the final written warning, when they downgraded it to a first written warning, then in relation to this allegation that she was issued with a final warning, and that this was unfavourable treatment arising from her pregnancy, we find that this allegation is made out.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.e) -</u> 5.j - Not keeping the Claimants final written warning confidential, enabling other members of staff to joke about it.

209. The Claimant's evidence on this issue was that she heard her colleagues make jokes in her presence along the lines of *'oh I'd better be careful or I might get a final written warning for this,'* which she said would provoke laughter, but she was not included in the joke, and the gist of her evidence was that she was the butt of the joke. The Claimant asserts that the final written warning she was given ought to have been kept confidential.

210. It was not in dispute that the fact of the Claimant's final written warning was general knowledge in the salon. Counsel's submissions on this was that in a small business where various employees had been involved in the disciplinary process that it was inevitable, but they would know about the outcome. We did not accept this submission. Whilst it was an inevitable everybody knew that the

Claimant was being disciplined and was being taken through a procedure, due to the number of employees interviewed about the allegations put to the Claimant, the outcome ought to have been kept confidential. We found on the balance of the probabilities that either Bianca Bowden or Ms Jury made it public knowledge to the team and that should not have occurred and was distressing for the Claimant. We found this occurred because she was a pregnant worker. This allegation that this was unfavourable treatment arising from pregnancy was therefore made out.

Second Claim

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 9.a)</u> - 5.k - Jodi Galgey shouting, look at you ya scabby little cunt with your scabby baby, when the Claimant's baby was a few weeks old (July/August 2020 approx)

211. At paragraph 34 of the Claimant's witness statement, she refers to this incident. She said that the comment was shouted to her in the street from the salon. She said Jodi Galgey said it to her on more than one occasion. She said she felt traumatised and knew most of the staff at the salon hated her but hearing such language and lack of respect for her baby was truly shocking. By a majority of two to one, with myself and Mr Wright in agreement, and with Ms Bailey dissenting, this tribunal found on the balance of probabilities that Jodie Galgey, an employee of the Respondent, shouted that insult to the Claimant in the street. We found there was a culture of unpleasant language and inflammatory words being spoken to the Claimant by others and that this treatment was because the Claimant was a worker on maternity leave. This allegation of unfavourable treatment arising from pregnancy and maternity therefore succeeds.

212. The dissenting member Ms Bailey did not feel there was enough supporting evidence for this allegation. She found that it was most unlikely any employee of the salon would do this when members of the public on the street would hear it and that this would be bad for the salons reputation generally.

List of Issues – s.18 – <u>(amended from harassment - previously 9.d)</u> - 5.l - On the 1 of August 2020 Holly Simmons shouting at the Claimant ‘Oi see you, you scabby little cunt you won't be getting a single fucking penny out of my sister, do you hear me not a single fucking penny’.

213. It was not in dispute that this incident occurred. Following it occurring the Claimant reported it to the police. Holly Simmons was Ms Jury's sister. After the police spoke to the Respondent, they were assured it would not happen again. Holly Simmons then apologised in writing to the Claimant for this incident [P.379].

214. However, Holly Simmons was not the employee of Ms Jury and was simply a family member, and we asked ourselves whether she was acting as an agent for Ms Jury, or was in some way induced by Ms Jury to shout this to the Claimant in the street.

215. No evidence was adduced by the Claimant that Holly Simmons was acting as the agent of Amy Jury and we found that she was not acting on the specific instructions, as the agent of Ms Jury, when she shouted this at the Claimant. We also found that there was no evidence of inducement by the Respondent of Holly Simmons to shout this to the Claimant. This allegation was not therefore made out in terms of the Respondent either being represented by an agent, Holly Simmons, or in the sense that they induced her to do this. We found that on the balance of probabilities that Holly Simmons did this of her own volition without any encouragement by Ms Jury. This allegation therefore fails.

S.27 EqA – Victimisation – First Claim

11. The Respondent accepts that the Claimant's grievance on the 8th of March 2020 was a protected act.

12. First Claim - Did the Respondents subject the Claimant to any detriments because of the protected act?

12 (a) - Breaching the Claimant's confidentiality by not securing and sharing the contents of the Claimant's grievance?

216. The Claimant's grievance was dated the 9 March 2020, [P.179] and she complained that the contents were not kept confidential [Paragraph 29 WS].

217. Having found that the details of the Claimant's disciplinary were not kept confidential in that they were left in an unlocked drawer in the beauty room above, and having found that the details of the Claimant's final warning was not kept confidential above, we found on the balance of probabilities that the Respondent also failed to keep the contents of the Claimant's grievance confidential, and also made it public knowledge generally amongst the other employees. We did not find that the Respondent tried to confine it to those they had to interview in relation to the grievance nor was any evidence offered that they tried to do so. Counsel's only submission on this was that it was 'impossible' to keep in confidential in such a small business.

218. However, we found that efforts should have been made to protect the Claimant's confidentiality in relation to the grievance raised, and as no evidence was offered by the Respondent on this we found that it was not kept confidential and that the Respondents breached the Claimants right to confidentiality in relation to her grievance raised.

219. We found that this was an act of victimisation by the Respondent against the Claimant for having raised the grievance on the 9 March 2020. We found that Ms Jury was aggrieved at the Claimant raising this grievance and found on the balance of probabilities she failed to keep it confidential, and also shared its contents with other employees of the Respondent in a general sense, because the Claimant had made a protected act. This allegation therefore succeeds.

12 (b) - Denied the Claimant training opportunities afforded to other employees.

220. We repeat our findings in relation to this same issue at 4 (g) of the List of Issues and set out at paragraphs 170 - 174 above. Having originally booked the Claimant on the men's cutting course with Toni and Guy there was no explanation that satisfied us as to why Ms Jury then cancelled that booking for the Claimant for a reason not connected with her pregnancy and also for making a protected act. There was also no explanation as to why she had not spoken to the Claimant about this before doing so.

221. We found that the failure to discuss the cancellation of the course of the Claimant prior to doing so, and then cancelling the course booked for the Claimant, was evidence of a discriminatory mindset towards a pregnant worker and amounted to a detriment suffered by the Claimant.

222. We also found that the cancellation of the course took place on 10 March 2020 only one day after the Claimant’s grievance was raised on the 9 March 2020, and after the Claimant had enquired about this course that she was booked on by email on 7 March [P. 190]. We found that Ms Jury was so aggrieved by the Claimant raising her grievance she then cancelled the training course with Toni and Guy only two days after the grievance was raised. This allegation of victimisation therefore succeeds.

Victimisation - Second Claim

Second Claim - the Respondent accepts that lodging the first claim on the 5th of July 2020 constituted a protected act.

Did the Respondents subject to the Claimant to any detriments because of the protected act?

14 (a) - On the 1st of August 2020, Holly Simmons shouting at the Claimant, ‘Oi see you, you scabby little cunt you won't be getting a single fucking penny out of my sister, do you hear me not a single fucking penny.’

223. We repeat our findings at paragraphs 211-213 above. It was not in dispute this incident occurred and the Respondent’s sister, Holly Simmons apologised for this in writing after she was interviewed by the police [P.379].

224. No evidence was adduced by the Claimant that Holly Simmons was acting as the agent of Amy Jury and we found that she was not acting on the specific instructions, as the agent of Amy Jury when she shouted this insult at the Claimant.

225. There was also no evidence that she was induced by Ms Jury her sister to shout that insult at the Claimant and we found that she acted of her own volition. Accordingly, this claim fails.

14 (b) - On 24th December 2020 Amy Jury telling the Claimant's mother that she should watch what would happen to her and her family and that they would not win against her

226. We did not find this was said by Amy Jury as this allegation included an implied threat of violence, and whilst on some matters we preferred the evidence of the Claimant to that of Ms Jury on this allegation on the balance of probabilities we did not find that after the first set of proceedings had been issued that Ms Jury would make an implied threat of violence to the Claimant and her family and we found that this did not occur, and so this allegation fails.

14 (c) on the 10th of March 2021 the Claimant requested her pay slips from March 2020 September 2020 and was told by Ms Jury that she'd already been sent them three times and the files had not been backed up

227. The Respondent's evidence on this was that due to an administrative problem they no longer had copies of these documents. The Claimant did not suggest to the Respondent this was not true. We accepted the Respondents evidence on this, and we found that this allegation was not made out.

14 (d) in late March 2021 Ms Jury unfriended the Claimant on Facebook

228. We did not find the issue of whether the Claimant blocked Ms Jury first or whether Ms Jury blocked the Claimant first on Facebook to have any bearing on this case. As Ms Jury stated in evidence, which we accepted, they were not friends and the Claimant until her resignation was simply her employee. It did not surprise us after the severe deterioration in this relationship that Ms Jury would no longer want to be friends with the Claimant on Facebook and we did not find that this issue was because she had issued proceedings against the Respondent. We did not find this allegation was made out.

14 (e) in April 2021, Polly Jury approached the Claimant's partner Cezary Stein and shouted your girlfriends a 'fucking slag'

229. At page 304 of the bundle, it is set out that Polly Jury had an altercation with Mr Stein. Polly Jury's version of events is that he was shouting at her and threatened to throw dog poo in her friend's face after he passed her. She said but in response she did say '*Your girlfriends a fucking slag.'* She denied having to be held back by other persons when the altercation happened full stop.

230. Having found that an altercation took place in the street between Polly Jury and Mr Stein we do not find on the balance of probabilities that Polly jury initiated the altercation. We found there was not enough evidence to prove the altercation was started by Miss Polly Jury.

231. We did not find this allegation was made out in the way described and find that the comment was made by Polly Jury in response to Cezary Stein first threatening to throw dog excrement at her. We do not therefore find that this incident was initiated by Miss Polly Jury or that it was an act of victimisation

because the Claimant had issued proceedings against the Respondent and the allegation fails.

14 (f) on 10th of May 2021 Bianca Bowden shouted 'Dickhead' at the Claimant from her car

232. At paragraph 45 of Ms Jury's witness statement, she described the alleged incident. In particular she states that, [Para 46] the Claimant could not provide further information and the details were vague. The Claimant did provide a description of the car.

233. We noted during the grievance investigation that Ms Bowden flatly denied the incident taking place and went on to say that the time she was at home with her two children and husband who could corroborate her story. We did not find on the balance of probabilities that this allegation was made out.

14 (g) On 15th of July 2021, Ms Jury shouting at the Claimant's mother, Sar, I'm still winning just so you know I'm still winning, I'm the winner.

234. Ms Jury had described that she used to be extremely friendly with Sarah Tindgay, the Claimant's mother. The use of the word 'Sar' in the words said were indicative of that friendly relationship, this being the abbreviation of Ms Tindgay's first name. We found on the balance of probabilities that the Respondent did say this to the Claimant's mother.

235. Having found that she shouted this to the Claimant's mother, and by virtue of the reference to the word 'winning' which was clearly a reference to the first claim having been issued by the Claimant, we found Ms Jury shouted this at the Claimants mother because the Claimant had issued the first set of proceedings against her, and we found that this was a clear act of victimisation against the Claimant for Ms Jury to shout at her mother in this fashion in the street and this allegation therefore succeeds.

14 (h) - In September 2021, Mr Stein was told by a friend that Jody Galgey had said he should stay away from Mr Stein because he and his girlfriend would be getting fucked up

236. This allegation included double hearsay. On the balance of probabilities, we did not find that this allegation was made out.

14 (i) - the Claimant's second grievance (dated 23rd of September 2021) complaining that her first grievance had not been dealt with properly. This was only partially upheld.

237. We did not find this allegation was made out in the sense that it was because of the Claimant's pregnancy or that it was due to her making protected acts.

Constructive Unfair Dismissal

238. We found by a majority, that the allegation at 15 a, where it was said that Jody Galgey, an employee of the Respondents shouted, *'look at you, you scabby little cunt with your scabby baby,'* in July/August 2020 did occur, with Ms Bailey dissenting for the reasons set out at paragraph 211-212 above. This was a clear breach of the implied term of trust and confidence between the Claimant and the Respondent.

239. We found that allegations 15 b, c, 15 e, 15 f, 15 g, 15 h, 15 i, and 15 k failed. Allegation 15.b was too vague for us to make findings on and as a general allegation was not made out.

240. We found that the allegation at 15 d, where it was said that Holly Simmons shouted at the Claimant, *'Oi see you you scabby little cunt you won't be getting a single fucking penny out of my sister, do you hear me not a single fucking penny'* did occur as set out at paragraphs 213-215 above. However for us to find that this was a breach of the implied term of trust and confidence it would have to be shown that it was done with the Respondents knowledge and approval, as otherwise it cannot be proven that it was intended to or likely to breach the implied term of trust and confidence. We did not find that it was done with her knowledge or approval i.e. that of Ms Jury so we do not find that this amounts to a breach of the implied term of trust and confidence.

241. We found that the allegation at 15 (j) where it was said on the 15th of July 2021, that Ms Jury shouted at the Claimant's mother, *'Sar I'm still winning just so you know I'm still winning. I'm the winner,'* did occur on the balance of probabilities, and that this amounted to a fundamental and repudiatory breach of the implied term of trust and confidence.

242. In relation to the allegation at 15 (l) that *'..the Claimant's second grievance dated the 23rd of September 2021, complaining that her first grievance had not been dealt with properly, and was only partially upheld on the 22nd of October 2021..',* when analysed in relation to this being a final straw set against the other breaches of the implied term of trust and confidence, we found that this allegation was made out for reasons we now set out.

243. In the Claimants first grievance, raised on the 9 March 2020 [P.179], she complained, amongst other things, about not having a risk assessment carried out [P.184]. She notified her employer in writing about her pregnancy by text on the 5 December 2020, and by later providing her MATB1 form on the 14 February 2020. At paragraph 48 of the Claimant's witness statement, she refers to raising her second grievance which was raised on the 23 September 2021[P.286].

244. As set out above, the Respondent's case was that, after Bianca Bowden had carried out this risk assessment on the 18 February 2021, the next day when the Claimant came to work on the 19 of February 2021 that it was discussed with her. The Claimant denied this. We found on the balance of

probabilities it was not discussed with her at any point as evidenced by the fact the most obvious risk to her, that of chemicals, had been left unticked. Had it been discussed with her we found that box relating to the risk of chemicals would have been ticked, as she was pregnant and had eczema, and an issue in this claim was about not being provided with gloves, and her skin coming into contact with chemicals was a clear concern for the Claimant, and an obvious risk to her as a pregnant woman in addition.

245. The Claimant having read the first grievance findings, which she said were only partially upheld by Ms Fryatt, gave evidence [Paragraph 48 of WS] that the Respondents had lied by alleging a risk assessment had been carried out.

246. The Claimant said the first time she saw mention of a risk assessment was in the first outcome of the first grievance [P.201 and Appendix 6] and we found that that was the first time she saw mention of a risk assessment. In particular she said in an email to the Ms Jury, dated the 9 May 2020, after receiving the outcome of the first grievance on the 7 May 2020, as follows:-

'In particular a risk assessment has appeared from nowhere, been dated on a day I was not in work and has never before been seen by myself, this is very concerning going forward.'

247. She confirmed she was appealing the grievance. She therefore raised this issue of the non-existent risk assessment as part of her second grievance, and also raised it in the grievance hearing, and we found that the Claimant's complaint about this was an important part of her grievance.

248. In the second grievance hearing she told Ms Fryatt [Paragraph 48 WS] that in the grievance findings from her first grievance they had lied and claimed a risk assessment had taken place [P.298].

249. Ms Fryat's grievance findings [p.352] said that part of its terms of reference were: -

'30 September 2021 -1.4 Terms of reference: Review any documentation relating to the grievance and/or past informal concerns.'

250. It was clear therefore, and we found, that any matters raised by the Claimant in her appeal against the first grievance outcome, in relation to the way the first grievance was handled, were to be addressed by Ms Fryat in her second grievance.

251. However, we noted that Ms Fryatt's grievance findings report [P.352] failed to address the issue of the risk assessment and in particular the Claimant's allegation that the Respondents lied about carrying one out. We also noted that when she interviewed Bianca Bowden as part of the Claimants second grievance this issue was not raised by Ms Fryatt [P.309].

252. After paragraph 48 in the Claimants witness statement, where she stated the grievance was entirely thrown out, she said in the following paragraph that in those circumstances she could not face returning to work and submitted her resignation on the 27th of October 2021.

253. The findings by Ms Fryatt acknowledged some of the incidents she complained of did occur where it said as follows: -

On the allegation that you have been subject to ongoing harassment to you and towards your family members throughout your maternity leave and post maternity leave there are two events where it is clear that incidents took place: The first involving Amy Jury's sister, Holly Simmons on 1 August 2020 and the second involving Polly Jury in April 2021. Both of these incidents took place outside of work. With regard to the incident with Holly Simmons, there is evidence of mitigating circumstances in that Holly had recently found out of her mother's serious illness. In the case of Polly Jury, the version of events differs between your partners and Polly Jury in that Polly Jury alleges that her outburst was provoked by your partners conduct towards her and her friends. On both occasions, Amy Jury has taken steps to speak with the individuals, to remind them that this conduct is not acceptable and has ensured that no similar incidences occur again, which they have not. On the first incident, the police were involved, but no action was taken against Amy Jury or the salon. Holly Simmons has offered an apology for her conduct on 1 August 2020, which is enclosed.

254. The failure by the grievance handler to deal at all with the issue of the risk assessment that had been discussed with her, and to address what the Claimant said were lies about the risk assessment, we found would have distressed the Claimant, and the overall outcome of the second grievance operated as a final straw, set against the fundamental and repudiatory previous beaches of contract and caused her to resign.

255. We therefore find that the final straw that caused the Claimant to resign on the 27th of October 2021, was receiving and reading the grievance outcome on the 22nd of October 2021, and we find that the absence of any findings on the issue of the risk assessment resulted in an inadequate investigation and grievance outcome, and added to the sense that no impartial investigation or thorough investigation had been carried out as the Claimant clearly set out in her resignation letter to Ms Jury.

256. The Claimant said as follows when she resigned (our emphasis added): -

As a way of trying to have a resolution, I eventually submitted a second grievance in September 2021. I received the outcome on 22 October 2021. I was pleased that the investigator partially upheld my grievance in respect of the incidents involving your sisters Holly Simmons and Polly Jury. However, I am disappointed that the rest of my grievance was not upheld, <u>and in particular that</u>

the investigator consistently chose to believe my abusers rather than me. I am extremely disappointed that you have untruthfully represented the events which you were personally involved in, and that in spite of arranging for a grievance investigator, you gave a totally inaccurate version of events to her. I also found the contents of her report to be inaccurate, with dates being incorrect. I do not view her actions as having been impartial or particularly thorough.

I am considering appealing the grievance outcome; however I have now lost faith in the process. I do not believe that the abuse and unfair treatment from you and my colleagues at Envy will ever stop. I know that you offered mediation, but the untruths which you told in the evidence given to the investigator has meant that I feel that it will be unproductive. You clearly don't want me back. As you said to my mum in Waitrose that day that you abused her, you view this as some sort of battle, that you have to win. I've got no will left in me to fight this anymore, and you are clearly going to be armed with the grievance outcome – totally in your favour - to further abuse me.

My mental health has seriously deteriorated, so that I now fear for my safety as well as that of my family. I do not see how I can return to work.

In these circumstances, I have no choice but to resign. I consider my resignation to be constructive dismissal, with the recent grievance outcome being the last straw.

257. We also found that despite acknowledging confusion around the Claimants holiday request, and that two of the incidents of harassment did take place, that there was a wholesale failure to formally uphold those parts of her grievance despite the admission these things occurred. We could not see anywhere in the findings where any of the matters were partially but formally upheld, despite the Claimant saying they had been partially upheld. The admission by Ms Fryatt however, that those incidents of harassment took place was inevitable as at least one was admitted to the police, this being the Holly Simmons incident. In these circumstances parts of her grievance should have been formally upheld and we find they were not.

258. We therefore found that the previous breaches of contract, which were the effective demotion of the Claimant by the removal of her duties in the workplace, and the other incidents of victimisation and unfavourable treatment on the grounds of pregnancy, taken together with the inadequate grievance investigation, and its inadequate findings, operated as the final straw for the Claimant, and which set against the earlier breaches of contract, then led to her resignation.

259. Much was made by Counsel of the delay between the incidents occurring and the date the Claimant then resigned.

260. The Claimant went on maternity leave on 30 April 2020 and was due to return on 30 April 2021, but in the event took additional time off as annual leave and then sick leave (see copy of letter dated 21 March 2020 (reproduced in later email) at p252). The protected period therefore ended on 29 April 2021.

From the 30 April the Claimant remained an employee until she resigned, such resignation expiring on the 9 November 2021.

261. However, the Claimant was awaiting the outcome of her second grievance before deciding whether or not to resign. She was caring for a young baby. We did not find the delay unreasonable in view of the fact incidents were still occurring throughout this period she was on maternity leave which started in April 2020 and then ended on the 29 April 2021, with annual leave and then sick leave which commenced on the 14 May 2021.

262. The last incident of unfavourable treatment and victimisation we found occurred was during the Claimants sick leave, when Ms Jury shouted at the Claimant's mother in the street; this occurred on the 15 July 2021, and the Claimant then raised a grievance about that, amongst other things, on the 23 September 2021 [P.286]. We find it was entirely reasonable for the Claimant to await the outcome of the second grievance for one month before resigning. Shortly after receiving the grievance outcome on the 22 October 2021 [P.375-378] she then resigned on the 29 October 2021 only 7 days later, and we did not find the time period within which the Claimant took to resign to indicate that she accepted the treatment of her by the Respondent. To the contrary she was protesting about it while she was still employed and was on sick leave with a further act of unfavourable treatment and victimisation occurring while she was on sick leave, which in part led to her raising a second grievance. We did not find the Claimant's actions to amount to an affirmation of her contract of employment at any point in the history of the dispute between the parties.

263. The Claimant then contacted ACAS about her second claim in January 2022 [P.2] and after taking legal advice, she obtained cover for her claim from her legal expense's insurer, and the second set of proceedings were then issued on the 9 March 2022 [P.23-44].

Submissions

264. Counsel for the Respondent made his submissions orally which we do not repeat here but they were fully considered in reaching this decision.

265. He did however at my request prepare a helpful note on the provisions of the liability of an employer for the acts of a third party pursuant to the EqA and he said as follows: -

265.1 In the case before the Tribunal this point was relevant to Holly Simmonds, Ms Jury's sister, but not Polly Jury who was at all relevant times a fellow employee.

265.2 Sections 39 and 40 of the Act are the sections which apply the prohibition of the various forms of discrimination in the Act to the employment relationship. Each subsection relates to a different form of discrimination (or circumstance in which a person may be discriminated against in an employment context), and each is framed in terms of the prohibition being against an "employer".

265.3 Part 8 of the Act, ss.108-112, extended the liability of employers to the acts of other categories of person with whom they have some relationship. In particular:

a) s.109(1) makes an employer liable for actions of their employee done in the course of their employment;

b) s.109(2) makes a principal liable for the actions of their agent, where those actions are done with the authority of the principal.

c) The provisions in s.111(1)-(3) prohibit a person "instructing", "causing", or "inducing" a contravention of the Act by some third party. This section is not limited in terms of any particular relationship between that third party and either the alleged tortfeasor or the target of the contravention.

265.4 He submitted that there was no caselaw particularly applying Part 8 of the Act to situations analogous to this case and that he had not found any caselaw suggesting that, for example, a family member can assumed to be an agent of an employer, and that such authority would be very surprising.

265.5 He said that claims in discrimination, and the Employment Tribunal's jurisdiction to determine them, are statutory in nature. The Equality Act sets out a series of statutory torts, including comprehensive provisions for the kinds of relationships governed, the categories of act prohibited and the methods of enforcement.

265.6 He said there is (unsurprisingly) no specific provision in the Equality Act which would make an employer liable for the actions of their family members. Nor is there any more general provision making a person liable for the actions of a person who, for example, has a sufficiently close connection to them.

265.7 He said this was in contrast to the express provisions extending liability for the acts of persons in particular kinds of relationship with an employer, at s.109, and in other specified circumstances in s.111 which deals with inducing discrimination.

265.8 He said that what followed was that unless Ms Simmonds was employed by the Respondent or acting as an agent, there is potential liability only where Ms Jury (or another person for whom she is liable) instructed, caused or induced a contravention of the Act, and that none of those are things that had been suggested by the Claimant.

265.9 He said the absence of caselaw on this matter suggested that Tribunals had generally found the provisions in the Equality Act sufficiently clear that no real question arises on this point.

266. The Claimant read out a prepared statement in making her submissions, which we do not repeat here, but it was fully considered in reaching this decision.

The Law

Liability of the Respondent for the actions of third parties – this being Ms Holly Simmonds Ms Jury's sister

267. S.109 of the EqA provides as follows: -

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

268. Section 109(2) of the Equality Act 2010 (EqA) makes a principal liable for discriminatory acts committed by an agent while acting under the principal's authority. It provides that 'anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal'. It does not matter whether that thing is done with the principal's knowledge or approval — S.109(3).

269. S.109(2) must be relied on if there is no 'employment relationship' for the purpose of establishing employers' liability under S.109(1) EqA.

270. In **Ministry of Defence v Kemeh** 2014 ICR 625, CA, the Court of Appeal held that common law principles are relevant when deciding whether there is a principal-agent relationship for the purposes of the predecessor provisions found in S.32(2) of the Race Relations Act 1976 (RRA). Lord Justice Elias (giving the leading judgment) referred to **Yearwood v Commissioner of Police of the Metropolis and anor** and other cases 2004 ICR 1660, EAT, where the EAT held that the terms 'agent' and principal' are common law concepts and Parliament must therefore have intended to transpose the common law concept of agency into the discrimination legislation.

271. In Elias LJ's view, the concept of agency under S.32 RRA 'must at least reflect the essence of the legal concept' under common law. However, he noted that the concept of agency at common law cannot be readily encapsulated in a simple definition. Furthermore — and contrary to what the EAT stated in **Yearwood** — an ability to affect relations with third parties is not a prerequisite of an agency relationship. Elias LJ went on to note that even under the alternative formulation of agency advanced in **Yearwood**, it would

be necessary to show that a person is acting on behalf of another and with that other's authority.

272. In his view, this did not materially differ from the common law position. Lord Justice Lewison (giving a short concurring judgment) observed that, under S.32(2) RRA, Parliament had chosen to attribute liability by reference to 'well established legal concepts'. It must, therefore, have intended those legal concepts to be interpreted 'in accordance with ordinary legal parlance'.

273. Section 111 of the EqA provides as follows: -

111 Instructing, causing or inducing contraventions

(1)A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2)A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3)A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a)by B, if B is subjected to a detriment as a result of A's conduct;

(b)by C, if C is subjected to a detriment as a result of A's conduct;

(c)by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a)the basic contravention occurs;

(b)any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8)A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a)in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b)in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

274. Section 111 makes it unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the Act, regardless of whether the person so instructed, etc, actually does so.

275. Section 111(1)– (3) states that a person (A) must not instruct, cause or induce another person (B) to do in relation to a third person (C) anything which contravenes Parts 3–7, S.108(1) or (2), or S.112(1) of the EqA. This is referred to in the legislation as 'a basic contravention' and covers, among other things, all forms of discrimination, victimisation and harassment in employment.

276. Inducement in this context can be direct or indirect — S.111(4). The Equality and Human Rights Commission's Statutory Code of Practice on Employment (2011) ('the EHRC Employment Code') echoes this, adding that inducement 'may amount to no more than persuasion and need not necessarily involve a benefit or loss' — para 9.18. S.111(8) further provides that a reference to causing or inducing something includes a reference to attempting to cause or induce it.

277. The Code gives the example of a managing partner of an accountancy firm who, on becoming aware that the head of the administrative team plans to appoint a senior receptionist with a physical disability, does not issue a direct instruction but instead suggests that this would reflect poorly on the administrative team leader's judgement and thus affect his or her future with the firm. This would amount to causing or attempting to cause or induce the head of the administration team to commit an act of discrimination (see para 9.18).

<u>S.13 of the EqA</u>

278. Section 13 of the 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.

………………………………..

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy [F1, childbirth or maternity].

279. The difference in treatment must be shown to have been 'because of her sex.' Before the introduction of the EqA 2010, the test was 'on the ground of her sex', and the new wording is intended to have the same meaning. The general principles of legal causation apply. These were identified by Mummery J in **Neill v Governors of St Thomas More RCVA Upper School and Bedfordshire County Council** [1997] ICR 33, [1996] IRLR 372 (EAT) at 376 as follows:

'(b) The relevant principles are these:

1. *The tribunal's approach to the question of causation should be simple, pragmatic and common sense;*

2. *The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of. It is not simply a matter of a factual, scientific or historical explanation of a sequence of events, let alone a matter for philosophical speculation. The basic question is: what, out of the whole or complex of facts before the tribunal is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as a cause of the crucial event for the purpose of attributing legal liability for consequences.*

3. *The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of (though it must provide more than the occasion for the result complained of.) 'It is enough if it is an effective cause.''*

280. The correct approach to establish causation for unlawful discrimination is to ask whether sex was the effective and predominant cause, i.e. to ask 'why' the woman was treated as she was. This test is set out in **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL); **Chief Constable of**

West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830 and **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] IRLR 285, all of which were confirmed in **Martin v Lancehawk Ltd (t/a European Telecom Solutions)** [2004] All ER (D) 400 (Mar), and **Amnesty International v Ahmed** [2009] ICR 1450. In the latter case the EAT considered the application of the 'but for' test on the Respondent's mental processes leading up to the alleged discriminatory act, and commented that 'all that matters is that the proscribed factor operated on his mind', equally, that 'the fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason for that treatment'.

281. The discriminator's motives are irrelevant in deciding whether there has been discrimination. The correct test is objective rather than subjective and, in the words of Lord Bridge, 'the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex'. Considerations of motive may, however, be relevant to the assessment of compensation (see **Chief Constable of Greater Manchester Police v Hope** [1999] ICR 338(EAT)).

<u>s.18 of the EqA 2010</u>

282. Section 18 EqA provides that an employer (A) discriminates against a woman if, in the ‘protected period’ in relation to a pregnancy of hers, A treats her unfavourably:

(i) because of the pregnancy — S.18(2)(a), or

(ii) because of illness suffered by her as a result of it — S.18(2)(b).

283. An employer also discriminates against a woman if it treats her unfavourably:

(i) because she is on compulsory maternity leave — S.18(3), or

(ii) •because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave — S.18(4).

284. The ‘protected period’, in relation to a woman’s pregnancy, starts when the pregnancy begins and, if she has the right to ordinary and additional maternity leave, ends either at the end of additional maternity leave or when she returns to work, if earlier.

Burden of Proof

285. S.136 of the EqA provides as follows: -

136 Burden of proof

…………..

(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.

286. In four key cases, all of which were decided under the antecedent legislation guidance on the two-stage approach to the shifting of the burden of proof in discrimination cases were set out: **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases** 2005 ICR 931, CA; **Laing v Manchester City Council and anor** 2006 ICR 1519, EAT; **Madarassy v Nomura International plc** 2007 ICR 867, CA; and **Hewage v Grampian Health Board** 2012 ICR 1054, SC.

287. In **Hewage** Lord Hope (giving a judgment with which all members of the Court agreed) endorsed the two earlier decisions of the Court of Appeal in **Igen** and **Madarassy** as providing ample guidance.

288. **Igen** still remains the leading case in this area. There, the Court of Appeal established that the correct approach for a tribunal to take to the burden of proof entails a two-stage analysis.

289. At the first stage the Claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the Respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

290. The Court of Appeal in **Hewage** repeated the guidelines previously set down by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination. The guidelines in short were as follows:

(i) it is for the Claimant to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. If the Claimant does not prove such facts, the claim will fail.

(ii) in deciding whether there are such facts, we bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many

cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in.'

(iii) the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(iv) the tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn.

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(vi) when there are facts from which inferences could be drawn that the Respondent has treated the Claimant less favourably on a protected ground, the burden of proof moves to the Respondent.

(vii) it is then for the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(viii) to discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever on the protected ground

(ix) not only must the Respondent provide an explanation for the facts proved by the Claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.

291. In **Madarassy**, Lord Justice Mummery noted that most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. Another point made by Mummery LJ, when dealing with S.136 EqA, is that: -

'*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination'.*

292. The shifting burden of proof rule in S.136 of the EqA, operates in a claim of pregnancy and maternity discrimination under s.18 of the EqA in the same way as it does in a claim of direct discrimination under s.13 of the EqA, albeit that there is no need for a Claimant to point to an actual or hypothetical comparator in a claim under S.18 as established in **Webb v EMO Air Cargo (UK) Ltd** [1993] IRLR 27, [1993] ICR 175, HL, and as reiterated in **Fletcher v**

Blackpool Fylde & Wyre Hospitals NHS Trust [2005] IRLR 689, [2005] ICR 1458, EAT.

293. In order to establish a prima facie case of pregnancy and maternity discrimination and shift the burden to the employer to provide a non-discriminatory explanation, a Claimant will need to prove, on the balance of probabilities, that she has suffered unfavourable treatment and that there are facts from which it can be inferred that the reason for such treatment was one of the four reasons prohibited in S.18 as set out above**.** Caselaw establishes that such an inference might be drawn where there is a close temporal link between the unfavourable treatment and the Claimant informing the employer of her pregnancy. Furthermore, although pregnancy and maternity discrimination claims do not require a comparator, the treatment afforded to employees or job applicants who are not pregnant or on maternity leave might shed light on the reasons for the Claimant's treatment.

294. Pursuant to the approach adopted in disability discrimination as set out in **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65, [2019] IRLR 306, 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. As was stated in the EAT by Langstaff P in Williams: -

'treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous … Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.'

295. In cases, like this one, where there are allegations of pregnancy or maternity discrimination, it is imperative to find that there is a causal connection between the treatment and the pregnancy, and put simply a Tribunal must ask itself why the complainant was treated less favourably? This test was stated in **Johal v Commission for Equality and Human Rights** UKEAT/0541/09, [2010] All ER (D) 23 (Sep)).

296. This test was re-stated in **Interserve FM Ltd v Tuleikyte** [2017] IRLR 615 where, Simler P, as she then was, said that: -

'The mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination'.

297. We reminded ourselves that the test in this case was to ask ourselves, was whether the Claimant's pregnancy was an 'effective cause' of the treatment complained of during her pregnancy, and ordinary and extended maternity leave, as set out in **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School** [1996] IRLR 372, [1997] ICR 33, EAT).

298. Counsel made helpful written submissions in relation to the Claimants second application to amend and how this engaged with the relevant statutory provisions and said as follows: -

298.1 Treatment cannot constitute s.13 direct sex discrimination if it constitutes s.18 pregnancy and maternity discrimination, by virtue of s.18(7).

298.2 On the face of s.18(2), unfavourable treatment because of pregnancy (or pregnancy-related illness) is only discriminatory if it is within the protected period. EU caselaw, however, allowed claims to be brought on the basis of unfavourable treatment after the protected period which was because of pregnancy during the protected period (**Brown v Rentokil (C-384/96)).**

298.3 Following the Retained EU Law (Revocation and Reform) Act 2023, that interpretive effect was replicated by amendments to s.18 effected by The Equality Act 2010 (Amendment) Regulations 2023 which came into force on 1 January 2024.

298.4 All of the allegations pre-date the bringing into force of that Act and those Regulations. There is no practical difference to which legal basis applies, but the Respondent's position is that the relevant law is that which applied at the time (i.e. the unamended version of s.18 as interpreted by the **Brown v Rentokil** case).

298.5 There is, in any case, no requirement for unfavourable treatment to occur in the protected period where the treatment is alleged (or found to be) because of a woman being on compulsory maternity leave, or because she is exercising or seeking to exercise, or exercised or sought to exercise, her right to maternity leave (s.18(3) and s.18(4)).

Written Notification of Pregnancy and Risk Assessment

299. Regulation 16 of The Management of Health and Safety at Work Regulations 1999 ("the Regulations") sets out as follows: -

Risk assessment in respect of new or expectant mothers

16.— (1) Where—

(a)the persons working in an undertaking include women of child-bearing age; and

(b)the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC(1) on the introduction of measures to encourage improvements in the safety and health at work of pregnant

workers and workers who have recently given birth or are breastfeeding, the assessment required by regulation 3(1) shall also include an assessment of such risk.

(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

(3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.

300. An employer is not obliged to take any action under the Regulations until, as in the circumstances of this case, the employee has notified it in writing that she is pregnant, as set out in Regulation 18(1) of the Regulations.

301. Furthermore, the employer is not required to maintain action taken in relation to an employee where the employee has notified the employer that she is pregnant but has failed, within a reasonable time of being asked to do so in writing by the employer, to produce a certificate from a registered medical practitioner or registered midwife stating that she is pregnant, as set out in Regulation 18 (2) (a).

302. Although Regulation 18(1) states that an employer is not required to take any action in relation to a pregnant worker, until she has notified it in writing that she is pregnant, the EAT has taken a purposive approach to the construction of this requirement, as set out in **Day V T Pickles Farms Ltd** 1999, IRLR 217, EAT. In that case, D told her employer that she was pregnant and provided medical certificates from her doctor saying that she suffered from morning sickness. Some of the certificates stated that she was suffering from 'hyperemesis gravidarum', which is severe vomiting associated with pregnancy. Her employer also knew that she was going to an ante-natal clinic. Nonetheless, an employment tribunal held that the employer had been under no obligation under the Regulations as she had failed to give written notice that she was pregnant in accordance with Regulation 18. The EAT disagreed. It said that common sense suggested that D was either pregnant or suffering from a condition that was more probably than not an indication of pregnancy.

303. We noted that in this claim it was not in dispute that the Respondent received a text from the Claimant on the 5 December 2020 telling her employer she was pregnant.

304. The EAT in **O'Neill v Buckinghamshire County Council** 2010 IRLR 384, EAT set out that the obligation to carry out a risk assessment of a pregnant worker arose only where;-

(a) the employee notified the employer in writing that she was pregnant;

(b) the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby, and

(c) the risk arose from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of the Pregnant Workers Directive.

305. In that case there had been no material before the tribunal from which it could have concluded that the kind of work carried out by the Claimant involved a risk of harm or danger to her as a pregnant worker as defined by the Directive and the 1999 Regulations. However, if a Tribunal is satisfied that the kind of work carried out is of a type that involves a risk of harm or danger to her as a pregnant worker then this can amount to unfavourable treatment as a pregnant worker contrary to s.18 of the EqA.

306. In addition, **O'Neill** established that once a Tribunal is satisfied that the preconditions have been met it can uphold a s.18 complaint based on a failure to carry out a proper satisfactory pregnancy-specific risk assessment and/or to implement the provisions of such an assessment.

307. In a first instance case, **Onigbanjo v London Borough of Croydon ET Case No.2301468/16** we noted the approach taken. The Claimant provided formal written notification of her pregnancy to her employer. During a subsequent supervision meeting with her manager, the subject of a risk assessment was raised, and the manager agreed to speak with HR as soon as possible about this. On 13 June a generic (as opposed to a pregnancy-specific) risk assessment took place, which was emailed to O a few days later. O subsequently brought various tribunal claims, including a claim of pregnancy discrimination under s.18 regarding an alleged failure to carry out a pregnancy-specific risk assessment within a reasonable time as required by Regulations 3 and 16 of the 1999 Regulations. The tribunal noted that the obligation to undertake a pregnancy-specific risk assessment arose once O had informed her employer in writing of her pregnancy. It also found that O's work was of a kind that could involve risk, by reason of her pregnancy, to her health and safety or that of her unborn child given that it involved contact with potentially violent young people. Furthermore, that risk arose from processes/working conditions or physical, biological or chemical agents within the terms of Regulation 16(1)(b). On that basis, it was satisfied that employer had failed to comply with the statutory obligation to undertake an appropriate risk assessment and that the risk assessment that was undertaken by the manager in mid-June 2016 was too little, too late.

S.27 of the EqA 2010

308. S.27(1) provides:

'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

309. S.27(1) therefore means that a Claimant seeking to establish victimisation must show two things: first, that he or she has been subjected to a detriment; and, secondly, that he or she was subjected to that detriment because of a protected act. There is no need for the Claimant to show that the treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act.

310. . Protected acts' for the purposes of S.27(1) includes making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the EqA — S.27(2), and also includes bringing proceedings under the EqA.

311. Section 39(4) provides as follows: -

(4) An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;
(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

312. In this claim the Respondent accepted in its List of Issues that the Claimant's grievance of the 9 March 2023, and issuing her First Claim on the 5 July 2020 both constituted protected acts.

313. We reminded ourselves that tribunals need to make findings as to the precise detriment pleaded. In **Ladiende and ors v Royal Mail Group Ltd** EAT 0197/15 the tribunal rejected the Claimants' victimisation claim on the basis that there was no detriment because their grievances had been investigated. However, as the EAT found in that case, that was not the point at issue. The tribunal had to consider not whether there was an investigation, but whether the investigation carried out had been adequate, or rather whether such inadequacies as the tribunal found had amounted to detriments.

314. The EHRC Employment Code, drawing on the case law under the previous discrimination legislation, contains a useful summary of treatment that may amount to a 'detriment':

‘Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment’ — paras 9.8 and 9.9.

315. As this summary shows, detriment can include a wide variety of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage. In **Kashmiri v Metropolitan Police Authority and ors** ET Case No.2202363/09, for example, a tribunal upheld K’s complaint that she had been victimised by a false allegation that she had eaten cake during Ramadan. K was upset about the allegation — it questioned her honesty and integrity and suggested she had lied to gain an advantage, i.e. a change in working hours while she was fasting.

316. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL, which concerned the meaning of ‘detriment’ in Article 8(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976 SR 1976/1042, this case established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether a Claimant has been disadvantaged is to be viewed subjectively.

317. The definition of detriment was then visited again in **Warburton v Chief Constable of Northamptonshire Police 2022 EAT.** The EAT allowed W’s appeal, holding that the tribunal had failed to apply the correct approach to the meaning of ‘detriment’, as set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary** and **Chief Constable of West Yorkshire Police v Khan**. Although the test is framed by reference to ‘a reasonable worker’, it is not a wholly objective test. It is sufficient that a reasonable worker might take the view that the conduct in question was detrimental. This meant that the answer to the question of whether there has been a detriment cannot be found solely in the view taken by the tribunal. According to the EAT, a tribunal could reasonably take the view that certain conduct did not constitute a detriment. However, if a reasonable worker (even if not all reasonable workers) might take the view that, in all the circumstances, the conduct was to the worker’s detriment, the test is satisfied. Therefore, the test of detriment has both subjective and objective elements to it and both must be considered by the tribunal hearing the claim.

318. We therefore reminded ourselves that the situation must be looked at from the Claimant’s point of view, but the Claimant’s perception must be

'reasonable' in the circumstances as to whether the treatment of her did amount to a detriment.

319. We also reminded ourselves that whether or not a Claimant's sense of grievance is justified will be a matter for the tribunal to decide with regard to all the circumstances. In **Deer v University of Oxford** 2015 ICR 1213, CA: D, an ex-employee of the University, had brought, then later settled, a sex discrimination claim during her employment. After she left the University's employment, they refused to provide her with a reference and she raised a grievance claiming that the refusal was influenced by her earlier claim and so amounted to victimisation. When the University rejected her grievance and subsequent appeal, D brought tribunal claims alleging that the way in which the University conducted the grievance and appeal proceedings also amounted to victimisation. However, the employment tribunal struck out D's claims, finding that it could not be said that D had been treated less favourably or suffered any detriment as her grievance had so little merit that a more favourable application of those procedures would have made no difference to the outcome of the grievance. However, on appeal, the Court of Appeal held that if D could establish that she had been treated less favourably in the application of the grievance procedures because of her earlier claim, she would have a legitimate sense of injustice that would itself amount to a detriment. The fact that the grievance outcome would not have changed would be relevant to any assessment of compensation but should not defeat the substantive victimisation claim.

320. To succeed in a claim of victimisation the Claimant must show that he or she was subjected to the detriment because of doing a protected act. If there has been a detriment and a protected act, but the detrimental treatment was due to another reason, e.g. absenteeism or misconduct, a claim of victimisation cannot succeed.

321. In **Amnesty International v Ahmed** 2009 ICR 1450, EAT (a race discrimination case), Mr Justice Underhill, then President of the EAT, noted that:

'Some of the authorities use a third phrase, asking whether the treatment in question was "because of" the proscribed factor. There can be no objection to this as a synonym for the statutory language.'

322. Thus, the words 'on grounds of', 'by reason that' and 'because of' all mean much the same thing. The meaning of 'because of' arises in the context of direct discrimination and the same principles will not apply to claims of victimisation.

323. To determine the reason for the Claimant's treatment we must ask ourselves what, consciously or subconsciously, motivated the employer to subject the Claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

324. In **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL, the Court of Appeal held set out that the test was not one of strict causation, but it required the tribunal to identify 'the real reason, the core reason, the causa causans, the motive' (our stress) for the treatment complained of. Lord Scott concluded that the real reason for the refusal to provide the reference in that case was that the provision of a reference might compromise the Chief Constable's handling of the case being brought against the West Yorkshire Police, which was a legitimate reason for refusing to accede to the request. Their Lordships were unanimous in their conclusion that K had not been refused a reference because he had done a protected act.

325. In **JJ Food Service Ltd v Mohamud** EAT 0310/15 M came to work in jeans, in breach of his employer's dress code. When challenged about this he alleged that the dress code was discriminatory as it was applied differently in relation to women. He was dismissed for breaching the dress code and disobeying management instructions, but he brought proceedings alleging that he had been victimised. A tribunal upheld his claim on the basis that the fact that he had 'questioned the application of the dress code policy' was a significant contributory factor in the decision to dismiss him. However, the EAT allowed the employer's appeal on the basis that the tribunal should have asked itself whether M's allegations of sex discrimination amounted to a significant contributory factor. It was held that this was a case where it might have been open to the tribunal to conclude that it was, for example, the manner or persistence of M's complaints rather than the content of them which had led to his dismissal. Accordingly, it was important for the tribunal to focus its mind on exactly what it needed to be satisfied of before reaching its conclusion.

326. The principle that a tribunal is limited to considering and ruling on the act of which complaint was made, as established in the direct discrimination case of **Chapman v Simon** 1994 IRLR 124, CA, applied equally to victimisation claims. On the facts of the case, the tribunal had erred in making findings on a claim of victimisation which was qualitatively different from the one that had been pleaded: the employee had relied on the submission of an equal pay questionnaire as the protected act, whereas the tribunal had impermissibly considered the pleaded protected act in combination with another (unpleaded) protected act, i.e. the presentation of an equal pay claim.

<u>Unfair Dismissal</u>

Constructive Unfair Dismissal under s.95(1)(c) and s.98 Employment Rights Act 1996('ERA');

327. In relation to the claim of constructive unfair dismissal Section 95(1)(c) ERA 1996 provides as follows: -

95 Circumstances in which an employee is dismissed.

> *(1) For the purposes of this Part an employee is dismissed by his employer if—*
>
> *(a) …*
>
> *(b) …*
>
> *(c) the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct.*

328. For a constructive unfair dismissal to occur the following must be established:

    a. The employer committed a fundamental and repudiatory breach of contract, which goes to the root, or heart of the contract;

    b. The employee resigned partly because of this breach and not for another unconnected reason;

    c. The employee has not affirmed the breach of contract by a delay in resigning *(***Western Excavating (ECC) Ltd v Sharp** *[1978] ICR 221).*

Implied Term of Trust and Confidence

329. The relationship of employer and employee is premised on the subsistence of mutual trust and confidence between the parties. The test was formulated in **Courtaulds Northern Textiles Ltd v Andrew** *1979 IRLR 84*, EAT where it was held by the EAT that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. In **Woods v WM Car Services (Peterborough) Ltd** *1981 ICR 666, EAT*, Mr Justice Browne-Wilkinson set out as follows:

> *'To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'*

330. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** *1997 ICR 606, HL.* There, it was confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

331. In the case of **Sharfudeen v TJ Morris Ltd t/a Home Bargains** *EAT 0272/16* the issue of whether objectively the employers conduct was 'without reasonable and proper cause' i.e., whether the conduct complained of was unreasonable, was considered. There, the EAT confirmed that, even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if — viewed objectively — the employer's conduct was not unreasonable.

332. The final requirement for establishing a breach of the implied term as expressed in **Malik,** is that the conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence'. A breach of this fundamental term will not occur simply because the employee subjectively considers such a breach has occurred, no matter how deeply and genuinely they hold that belief. The legal test involves considering the events complained of objectively — i.e. from the perspective of a reasonable person in the Claimant's position — as established by the case of **Tullett Prebon plc and ors v BGC Brokers LP and ors** *2011 IRLR 420, CA.*

Last Straw Doctrine

333. A breach of the implied term of trust and confidence can consist of a series of actions by the employer that cumulatively amounts to a repudiation of the contract. Typically, the employee resigns in response to a final issue that arises that they regard as 'the straw that breaks the camel's back'. The last straw does not, of itself, have to amount to a breach of contract, nor does it have to be a fundamental breach in its own right as established in the case of **Lewis v Motoworld Garages Ltd** *1986 ICR 157, CA.* In that case the Court of Appeal emphasised that it does not matter if one of the events complained of was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by immediately resigning.

334. A repudiatory breach of contract may consist of a series of individual incidents over a period of time which individually may not amount to a breach of contract but do when taken together cumulatively amount to a breach of contract. The "last straw" doctrine means that if a person resigns in response to a series of actions which, together, constitute a fundamental breach, the last of the actions (the "last straw") must be more than trivial: **London Borough of Waltham Forest v Omilaju** *[2004] EWCA Civ 1493.* It must contribute, however slightly, to the breach of the implied term of trust and confidence (paragraph 20).

Affirmation of Breach of Contract

335. The recent case of **Dr Paul Leaney v Loughborough University** *[2023] UKEAT 155* summarises the law succinctly. In this case it was said that the Tribunal had relied too heavily on the simple passage of time. In particular the

following passages from that Judgment usefully summarise the law as follows:-

> *19. For our purposes the relevant general principles may be summarised as follows. The starting point is that, where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation. Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party's conduct as having brought the contract to an end (unless or until there is thereafter further relevant conduct on the part of the offending party, a point discussed in* ***Kaur v Leeds Teaching Hospital NHS Trust*** *[2018] EWCA Civ 978; [2019] ICR 1).*
>
> *20. The innocent party may indicate by some express communication that they have decided to affirm, but affirmation may also be implied (that is, inferred) from conduct. Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period.*
>
> *21. In particular, acts of the innocent party which are consistent only with the contract continuing are liable to be treated as evidence of implied affirmation. Where the injured party is the employee, the proactive carrying out of duties falling on him and/or the acceptance of significant performance by the employer by way of payment of wages, will place him at potential risk of being treated as having affirmed. However, if the injured party communicates that he is considering and, in some sense, reserving, his position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then if, in the meantime, he continues to give some performance or to draw pay, he may not necessarily be taken to have thereby affirmed the breach.*

Applying The Law To The Facts

List of Issues - 4. S.18 of the EqA - First Claim: Did the Respondent treat the Claimant unfavourably/was any of the unfavourable treatment as set out below because of the Claimant's pregnancy in that they: -

4. a. Instituted disciplinary proceedings against her? (25 January 2020)
4. b. Instituted a disciplinary sanction against her? (30 January 2020)

336. As set out at paragraph 143-149 above we found facts were established by the Claimant, from which inferences could be drawn that the Respondent has treated the Claimant unfavourably in a protected ground, because of her pregnancy.

337. Those facts were that a review took place of the Claimants performance on the 10 December 2020 only five days after she advised the Respondent she was pregnant on the 5 December 2020, which ultimately resulted in a final written warning, albeit it was then downgraded to a first written warning on appeal.

338. We drew an inference from the fact the nine alleged poor reviews/complaints that led up to her announcement of her pregnancy on the 5 December 2020 were not actioned in any formal way, and instead she was, shortly after the expiry of her three month probation period on the 25 September 2020, booked onto a Toni and Guy training course, and that the disciplinary proceedings and final written warning may have occurred for discriminatory reasons.

339. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed those acts of unfavourable treatment because of her pregnancy. They failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker.

340. They produced no evidence about the alleged nine complaints that led to ‘refunds and redoes’. In addition, the explanation by the Respondent that no review took place during the three-month probation period when this alleged poor performance occurred due to lack of administrative resources was not credible. The Respondent was in fact quite able without difficulty to commence formal review and disciplinary procedures five days after the Claimant advised them she was pregnant.

341. The Respondent failed to provide a non-discriminatory explanation about disciplining the Claimant instead of applying its performance management processes and giving her a chance to improve, and speaking informally to her about the interaction with the customer where there was evidence the customer was rude to her, and instead instituting disciplinary procedures and giving her a final written warning, and so allegations 4 (a) and (b) in the List of Issues succeed, and we find the unfavourable treatment was because of her pregnancy.

4.c. Reassigned the Claimants clients - (February 2020 onwards);

4.d Removed the Claimant from the online booking system- (February 2020 onwards);

342. We repeat our findings of fact at paragraphs 150-155 above. It was not disputed by Ms Jury that a client told the Claimant her appointment with her had been moved to another stylist. It was also not disputed that she removed the Claimant from the online booking system [Para 18.2 of AJ Witness Statement] without telling the Claimant. Her explanation that she did so to control how many appointments were booked in with the Claimant, and so she could monitor the Claimant's performance was not credible for the reasons set out. We did not therefore accept the Respondents explanation that preventing online bookings with the Claimant would enable her to monitor her performance in some way.

343. We drew an inference from the fact that the removal of the Claimant's clients, and the removal of the Claimant from the online booking system, so her regulars could not book in with her online, and moving clients booked in with her to other stylists, followed just a few months after the announcement of her pregnancy, and that no performance management processes were followed, and that the removal of her from the online booking system was done without telling the Claimant and was covert.

344. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act of unfavourable treatment because of her pregnancy. They failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker.

345. The Respondents offered no evidence as to why they didn't follow their performance improvement plan set out in the bundle. The Respondents did not offer any credible explanation as to why they removed the Claimants ability to receive work on the online booking system and we therefore concluded they removed the Claimant from the online booking system and reassigned the Claimants clients from February 2020 because of her pregnancy.

346. The Respondent having failed to provide a non-discriminatory explanation for reassigning the Claimants clients to others, and by removing the Claimant from the online booking system which resulted in her clients

having to book in with other stylists, as defined in paragraph 4 (c) and (d) in the List of Issues therefore succeeds, and we find the unfavourable treatment was because of her pregnancy.

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List of Issues – s.18 of the EqA - 4.e. Failed to take into account the Claimant's health when allowing for a protracted disciplinary appeal process – (February – March 2022).

347. We repeat our findings of fact at paragraph 156– 159 above. We did not find that the disciplinary appeal process was protracted having regard to the size of the Respondent, and this allegation is not made out and fails.

List of Issues – s.18 of the EqA - 4.f - Excluded the Claimant from a work Whatsapp group (February 2020)

348. We repeat our findings of fact at paragraphs 164-169 above. We did not find that the Claimant was excluded from a work WhatsApp group and this allegation is not made out and fails.

List of Issues – s.18 of the EqA – 4.g - denied the Claimant training opportunities afforded to other employees February 2020 and March 2020

349. As set out at paragraph 170-174 above we found that the Claimant was denied training opportunities afforded to other employees. We repeat our findings there.

350. In particular we found that the failure to discuss the cancellation of the Toni and Guy course of the Claimant prior to doing so, and then cancelling the course booked for the Claimant, was evidence of a discriminatory mindset towards a pregnant worker. [Para. 33 of KF WS]. We preferred the Claimants evidence on this matter. It established facts from which we drew an inference that unfavourable treatment may have occurred.

351. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act of unfavourable treatment because of her pregnancy. They failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker

352. We found the evidence on this issue from the Respondent unconvincing. Initially Ms Jury said that the points that they had accrued from product sales were then used for, and paid for training courses, in the form of a loyalty card that earned points. She said these points were going to expire and therefore they needed to use the points up before they expired and that this was why she cancelled the training course that had been booked for the Claimant with Toni and Guy in March 2020. We did not accept this evidence from the Respondent. If the course had been booked, then the points had been used up and there was no risk of them expiring. We found the way her evidence evolved during cross-examination to lack credibility.

353. Her evidence then changed again and it was said that due to the pressures created by COVID and a reduction in income that she felt the points would be better spent on her and Jody Galgey attending a colouring course and in effect cancelled the Claimants course so that that they could she and Jody Galgey could both attend that course instead, this being a 'Balayage colouring course.' We did not accept this evidence was the true reason for cancelling the Claimants course.

354. Having originally booked the Claimant on the men's cutting course there was no explanation that satisfied us as to why Ms Jury then cancelled that booking for the Claimant for a reason not connected with her pregnancy. There was no explanation as to why she had not spoken to the Claimant about this before doing so. We found that this would undoubtedly have been upsetting for the Claimant and added to her sense that she was no longer valued worker due to being a pregnant worker. This also then added to the Claimant's increasing sense of isolation that as a pregnant worker she had become a problem and a burden to the Respondent that the Respondent now resented.

355. The Respondent having failed to provide a non-discriminatory explanation for cancelling the Claimant's Toni and Guy training then the allegation in relation to the cancellation of this course succeed, and we find the unfavourable treatment was because of her pregnancy.

List of Issues – s.18 of the EqA - 5 (a) – not allowing the Claimant paid time off for her appointment with a consultant cardiologist on 18th of February 2020

356. In accordance with our findings paragraph 175-177 above and having found that the Respondent did not refuse to give the Claimant paid time off for her appointment with the consultant cardiologist then this allegation is not made out and fails.

List of Issues – s.18 of the EqA - 5 (b) – effectively demoting the Claimant by giving her duties of an apprentice cleaning and making tea and witnessing clients being told that there were no staff available to do haircuts when she was present and available.

357. We repeat our findings at paragraph 178-180 above. Having found that the Claimant had been removed from the online booking system, and that when her 'regulars' asked for her other stylists were instead assigned to her regulars, and that the Claimant was reduced to 'grabbing walk-ins' as they came into the salon, we found that the Claimant had nothing else to do but to clean the salon and make tea. Having had the majority of her hairdressing duties removed from her by Ms Jury to a very significant degree, as a result we found most of the duties she carried out were those of an apprentice i.e., cleaning and making tea and we found she was effectively demoted. We found, that whilst the Claimant may not have actually overheard clients being told there was nobody available to do haircuts when she was present and available, she did indirectly hear from her clients that this is what they were

being told when trying to book in with her. This established facts from which we drew an inference that unfavourable treatment may have occurred.

358. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act of unfavourable treatment because of her pregnancy. They failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker.

359. The Respondent failed to provide any evidence that the removal of the Claimants duties, in large part, was not a demotion. It was not denied that she was asked to go and fetch the hoover from upstairs by Polly Jury, an apprentice hairdresser, and to hoover. As set out at paragraph 192 above in relation to the request that the Claimant clean and Polly Jury asking her to clean, Ms Jury's evidence was that she was only 16 and wouldn't have realised that you shouldn't ask a pregnant worker to go and get a Hoover and carry it down the stairs. We found this evidence of someone, who was only 16 years old, and can only have been working as an apprentice at this age, asking someone employed as a senior hairstylist to go upstairs and to collect the hoover to clean compelling evidence of the fact the Claimant had been demoted.

360. It was never denied by the Respondent that her clients had been told she was not available to do their hair. In relation to clients being told that she was not available to do their hair, as noted at paragraph 179 above, the Claimant sent a message on the 12th of February 2020 to Ms Jury, querying this but we were not directed to any evidence from the Respondent about any reply to this email.

361. The Respondent having failed to provide a non-discriminatory explanation for the Claimant being effectively demoted i.e., by being asked to hoover by an apprentice, and having failed to prove a non-discriminatory reason for her clients being told she was not available to do their hair, and combined with us finding she was taken off the online booking system, then the allegation about the effective demotion of the Claimant succeeds, and we find the unfavourable treatment was because of her pregnancy.

362. We therefore conclude and find that the Claimants claims for unfavourable treatment as a pregnant worker succeeds in part on this allegation but do not find she actually overheard clients being told she was unavailable. However as a matter of fact we find they were told that, albeit not in her presence.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.a)</u> 5.c - Removing all stools which prevented the Claimant from sitting down at work

363. The Claimant alleged that stools were removed both in the staff room and the salon so that she could not sit down and rest. In particular the reference to stools was a reference to stools on wheels that stylists would use to sit on when cutting hair in the salon and also stools in the staff room.

364. The Respondent denied that she had removed all the stools from the salon to prevent the Claimant from sitting down at work and said that it would have been a very strange thing for her to do when her staff needed stools to sit on whilst cutting hair.

365. We preferred the Respondents evidence on this matter and did not find that the Respondent removed stools to prevent the Claimant from sitting down at work. We found that this would have been detrimental to the Respondents business in that it would have interfered with other staff carrying out their duties when needed a stool to sit on while performing their duties, and that this did not occur.

366. Having found no facts were established from which we could infer discrimination, and which shifted the burden of proof from the Claimant to the Respondent on this allegation then this allegation fails.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.b)</u> 5.d - Forcing the Claimant to undertake menial tasks such as cleaning windows

367. Part of the Claimants case about her demotion was that, having had all her regulars removed from her and being removed from the online booking system, she was forced to do all the menial tasks in the salon such as cleaning windows.

368. Having found that she carried out cleaning duties in the salon by choice, because most of her usual duties had been removed, and she had little to do, we therefore asked ourselves whether, taking this a step further, the Respondents gave her instructions purposely to take on menial tasks such as window cleaning.

369. We preferred the Respondents evidence on this and found that there was no direct instruction to the Claimant to carry out window cleaning.

370. Having found no facts were established from which we could infer discrimination, and which shifted the burden of proof from the Claimant to the Respondent on this allegation then this allegation fails.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 7.c)</u> 5.e - Failed to follow the contents of the Risk Assessment conducted for the Claimant

371. We repeat our findings of fact at paragraph 188-195 above. We found that the risk assessment was never discussed with the Claimant, and such as it was, it was not followed. We were particularly troubled by this part of the claim and concluded that it was filled in 'after the event' and in all likelihood after the grievance was raised about various issues including this issue by the Claimant. We reached that conclusion reluctantly, but it was simply not tenable that the risk assessment had been filled in and discussed with the Claimant, and that the Claimant would then raise a grievance about the absence of any risk assessment.

372. We found that whenever it was completed, and after the event, and sometime after the Claimant raised her grievance on the 9 March 2020, it was never followed in any event. We found that from sometime after it was filled in in February 2020 to when she started her maternity leave in April 2020 there was a period of around two months where the risk assessment was not followed, and throughout this time that the Claimant was exposed to chemicals and manual handling i.e., when she was asked to move the hoover and carry it down the stairs.

373. As per **O Neil** we found that having notified the Respondent in writing that she was pregnant and that the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby, and that the risk arose from processes, working conditions, and physical, biological or chemical agents, including those specified in Annexes I and II of the Pregnant Workers Directive, we concluded that the Claimant was at risk of harm and danger, and that pursuant to s.18 that this amounted to unfavourable treatment of a pregnant worker to fail to follow its own risk assessment.

374. In a claim of pregnancy discrimination there is no requirement to identify a comparator who has been treated less favourably, but the Claimant must establish that she has experienced unfavourable treatment *'because of' her pregnancy or an illness related to it — S.18(2) EqA,* and it is not sufficient that pregnancy was merely the 'background' to the unfavourable treatment; it must be the 'reason why' she was treated in that way. In this case, while there was a risk assessment produced in an 'after the event way' after the Claimant had raised her grievance, we asked ourselves why they had not produced a risk assessment which they then discussed with her, and which they then followed. In essence we asked ourselves whether this was because she was a pregnant worker? We found that the reason they did not discuss the risk assessment with her and then follow it was because she was a pregnant worker. There was ample evidence of Ms Jury's discriminatory poor attitude to the Claimant as a pregnant worker such as cancelling her training, and taking her off the online booking system all of which we concluded was because the Claimant was pregnant and would soon be on maternity leave, and we concluded that on this issue too the reason Ms Jury did not follow the risk assessment was

because the Claimant was a pregnant worker and she was no longer invested in the Claimant as an employee who would be taking maternity leave in the near future.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.a)</u> 5.f - Not providing the Claimant with gloves when she asked for them from January 2020 onwards

375. On this issue we preferred the Respondent's evidence to the Claimants evidence. We found it most unlikely that the Respondent would refuse to provide one member of staff with gloves yet provide them to the rest of its staff and we did not find this allegation was made out.

376. Having found no facts were established from which we could infer discrimination, and which shifted the burden of proof from the Claimant to the Respondent on this allegation then this allegation fails.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.b)</u> 5.g – Challenging the Claimant after her mother contacted the Hairdressers Federation around the 26 February 2020.

377. Having found, as set out in paragraphs 197-202 above, that the Claimant was forced to have a conversation with Ms Jury, about her mother contacting the Hairdressers Federation the day before about her treatment at work as a pregnant worker, we concluded that the Claimant was forced to have this impromptu meeting against her will, and was challenged about it, and this occurred because she was a pregnant worker. This established facts from which we drew an inference that unfavourable treatment may have occurred.

378. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act of unfavourable treatment because of her pregnancy.

379. No evidence was adduced as to why it was necessary to subject the Claimant to an impromptu meeting of which she had no notice, and as to why Ms Jury challenged her in that manner, for non-discriminatory reasons, and the Respondents failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker. We concluded the incident was because she was a pregnant woman.

380. We therefore conclude and find that the Claimant's claim for unfavourable treatment as a pregnant worker succeeds on this allegation.

List of Issues – s.18 of the EqA – (amended from harassment - previously 8.c) 5.h - Keeping a folder of evidence concerning the Claimant in the front desk.

381. We refer to our findings of fact that no folder of evidence concerning the Claimant was kept at the front desk.

382. Having found no facts were established from which we could infer discrimination, and which shifted the burden of proof from the Claimant to the Respondent on this allegation then this allegation fails.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.d) -</u> 5.i – Issuing the Claimant with a final written warning.

383. Having found as set out in paragraphs 143-149 above, that the Claimant was issued with a final written warning when that sanction was too harsh, and that there had been a failure by the Respondent to follows its own performance management procedures, this established facts from which we drew an inference that unfavourable treatment may have occurred.

384. The burden of proof therefore shifted to the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act of unfavourable treatment because of her pregnancy.

385. No evidence was adduced as to why a final written warning was deemed necessary in the light of the nature of the client complaints and it was simply presented as a decision that was then overturned on appeal.

386. The Respondent failed to prove that this should not be treated as having committed unfavourable treatment because she was a pregnant worker. We concluded the issuing of a final written warning was because she was a pregnant woman.

387. We therefore conclude and find that the Claimants claims for unfavourable treatment as a pregnant worker succeeds on this allegation.

List of Issues – s.18 of the EqA – <u>(amended from harassment - previously 8.e) -</u> 5.j - Not keeping the Claimants final written warning confidential, enabling other members of staff to joke about it.

388. We found that the final written warning was not kept confidential

389. Having found that there was a failure to keep the Claimants final written warning confidential, as set out at paragraphs 209-210 above, which caused others to make jokes in the Claimants presence about getting final written warnings, this established facts from we drew an inference that unfavourable treatment because of pregnancy may have occurred.

390. The evidence adduced as to why the final written warning was not kept confidential was simply that it was impossible to keep this secret in such a small organisation. We did not accept this evidence and concluded it could have been kept confidential. The Respondent failed to prove that this should not be treated as having committed unfavourable treatment because she was

a pregnant worker. We concluded the failure to do so was because she was a pregnant worker.

391. We therefore conclude and find that the Claimants claims for unfavourable treatment as a pregnant worker succeeds on this allegation.

Second Claim

List of Issues – s.18 of the EqA – (amended from harassment - previously 9.a) - 5.k - Jodi Galgey shouting, look at you ya scabby little cunt with your scabby baby, when the Claimant's baby was a few weeks old (July/August 2020 approx)

392. Having concluded by a majority that this incident occurred in accordance with our findings at paragraphs 211-212 above this established facts from which we drew an inference that unfavourable treatment because of pregnancy may have occurred.

393. The evidence adduced about this was simply that it never occurred. Having found that it did occur the Respondent failed to prove that this should not be treated as an employee of theirs having committed unfavourable treatment because the Claimant was or had been a pregnant worker or was taking maternity leave or had done so.

394. We concluded the incident occurred because she had been on maternity leave with her baby.

395. We therefore conclude and find that the Claimants claims for unfavourable treatment as a pregnant worker who had taken maternity leave succeeds on this allegation

List of Issues – s.18 – (amended from harassment - previously 9.d) - 5.l - On the 1 of August 2020 Holly Simmons shouting at the Claimant 'Oi see you, you scabby little cunt you won't be getting a single fucking penny out of my sister, do you hear me not a single fucking penny'.
S.27 Victimisation of the EqA

396. It was not in dispute that this occurred, and Ms Simmons wrote a letter of apology to the Claimant.

397. We refer to our findings of fact at paragraphs 213-215 above and our analysis of the law below in relation to this allegation being put as an act of victimisation, and as we find that Ms Simmons neither acted as the agent of the Respondent when shouting this insult at the Claimant, nor that she was induced to shout that insult by the Respondent, and having found that she acted of her own volition in shouting that insult to the Claimant, then no liability can attach to Ms Jury for the actions of her sister Ms Simmons and so this claim fails at law.

Victimisation claim

11. First Claim – The Respondent accepts that the Claimant's grievance on the 8th of March 2020 was a protected act

12. First Claim (First Amendment) Did the Respondent subject the Claimant to any detriments because of the protected act?

a. **Breaching the Claimants confidentiality by not securing and/or sharing the contents of the Claimants grievance**

398. We repeat our findings at paragraph 216-219 above. Having found that the Respondent did not keep the Claimant's grievance confidential this established facts from which we drew an inference that unfavourable treatment/detriment because of the protected act may have occurred.

399. The submissions mad about this was simply that it was impossible to keep things confidential in a small organisation. Having found that it did occur the Respondent failed to prove that this should not be treated as an act of victimisation because the Claimant had made a protected act.

400. We asked ourselves if this was because of the fact that the Claimant had raised the grievance, and the Respondents were thereby victimising her for doing so? We asked ourselves in accordance with **Mohamud** whether the protected act was a significant contributory factor, i.e. the raising of the grievance alleging discrimination on the grounds of pregnancy?

401. We found that Ms Jury did resent the Claimant raising a grievance and complaining of pregnancy discrimination and on the balance of probabilities we find that she reacted to this by complaining about the Claimant to her other employees, and by sharing the Claimant's grievance with them, and we find that her resentment towards the Claimant because of the protected act was a significant contributory factor.

402. It was never in dispute that everybody in the salon knew about the Claimant's disciplinary process. We therefore found that it would have been general knowledge that everybody knew about her grievance that she raised following that disciplinary process.

403. The only submissions were received on this from counsel was that it was inevitable in a small business that everybody would find out and that it was

impossible to keep it confidential. We did not find this a satisfactory explanation for the lack of confidentiality.

404. We therefore found that this victimisation allegation was made out.

b. Denied the Claimant training opportunities afforded to other employees

405. We had regard to s.39 (4)(b) of the EqA and asked whether the Respondent victimised the Claimant in '.*not affording B (the Claimant) access, to opportunities for promotion, transfer or training or for any other benefit, facility or service*.'

406. We refer to our findings of fact at paragraphs 170-174 and 220-222 above. Having found that the Claimant was denied training opportunities afforded to other employees in that her Toni and Guy training course was cancelled, and having found that this treatment of her was because of her pregnancy, we also asked ourselves if it was also because of the fact she had raised a grievance on the 8th of March 2020 complaining of pregnancy discrimination.

407. Having already found that the burden of proof shifted to the Respondent on this issue and upon finding that the Respondent failed to provide a non-discriminatory reason for the cancellation of the course we do also find that Ms Jury resented the Claimant for raising a grievance on the 9 March 2020 and only one day later on the 10 March 2020 that she then victimised the Claimant by cancelling the Claimants training course, and we find the protected act was the main contributory factor. This allegation of victimisation therefore succeeds.

Second Claim - the Respondent accepts that lodging the first claim on the 5th of July 2020 constituted a protected act

Second Claim - Did the Respondents subject the Claimant to any detriments because of the protected act?

14.a. On 1st of August 2020, Holly Simmons shouting at the Claimant, 'Oi see you, you scabby little cunt you won't be getting a single fucking penny outa of my sister, do you hear me not a single fucking penny.'

408. Whilst we found that this incident occurred, and Holly Simmons apologised to the Claimant for it, we asked ourselves firstly if it could be said that Ms Simmons, the Respondent's sister was acting as agent for the Respondent.

409. Applying the common law principles of Principal and Agent we asked ourselves if, in accordance with S.109(2), which must be relied on if there is

no ‘employment relationship’ for the purpose of establishing employers’ liability under S.109(1) EqA, as here where Ms Simmons was not employed by her sister the Respondent, whether there was any Principal and Agent relationship.

410. As set out in **Ministry of Defence v Kemeh** 2014 ICR 625, CA, the Court of Appeal held that common law principles are relevant when deciding whether there is a principal-agent relationship for the purposes of the predecessor provisions found in S.32(2) of the Race Relations Act 1976 (RRA). Lord Justice Elias (giving the leading judgment) referred to **Yearwood v Commissioner of Police of the Metropolis and anor** and other cases 2004 ICR 1660, EAT, where the EAT held that the terms ‘agent’ and principal’ are common law concepts and Parliament must therefore have intended to transpose the common law concept of agency into the discrimination legislation.

411. For an Agent and Principal relationship to exist we noted the common law principles. Where a principal gives their agent express authority to do a particular act which is wrongful in itself, or which necessarily results in a wrongful act, the principal is responsible, jointly and severally with the agent, to third persons for any loss or damage occasioned as a result. **Schuster v McKellar** (1857) 7 E & B 704; **Parkes v Prescott** (1869) LR 4 Exch 169, and **Glynn v Houston** (1841) 2 Man & G 337.

412. It was never put to the Respondent by the Claimant that Ms Simmons acted as her agent when she shouted that to the Claimant in the street. It was not possible for us to find therefore that she did it as agent for Ms Jury. We therefore found that although this incident occurred, and was undoubtedly distressing for the Claimant, that Ms Simmons was not acting as the Respondents agent when she shouted this to the Claimant.

413. We then asked ourselves if this was inducement to victimise the Claimant pursuant to s.111 of the EqA. There was no cross examination or evidence offered on this and we found that Ms Simmons was not induced by Amy Jury to make this statement and so this allegation fails.

14.g On 15th of July 2021, Ms Jury shouting at the Claimant's mother, Sar I'm still winning just so you know I'm still winning, I'm the winner.

414. Having found that this incident occurred as set out at paragraphs 234-235 above we asked ourselves if it was also because of the fact, she had raised a grievance on the 8th of March 2020 complaining of pregnancy discrimination?

415. Having found in relation to the s.18 complaint that the burden of proof passed to the Respondent and that they failed to discharge it we asked if the same incident also amounted to victimisation?

416. We do find that Ms Jury resented the Claimant and was aggrieved that the Claimant issued the First Claim against her on the 5 July 2020 which complained of pregnancy discrimination and victimisation, and that she did react to this by shouting out that statement to her mother Ms Tindgay.

417. We found the reason she shouted this out to the Claimant's mother was because she was referring to the claim issued against her when she said, *'Sar I'm still winning just so you know I'm still winning, I'm the winner.'* We find the protected act was the sole factor in causing this outburst from Ms Jury to the Claimant's mother, and this allegation of this incident amounting to an act of victimisation against the Claimant therefore succeeds.

14. b - on the 20th of December 2020 Amy Jury telling the Claimants mother that she should watch what would happen to her and her family and they would not win against her.

14.c - On 10th of March 2021 the Claimant requested her pay slips from March 2020 to September 2020 and was told by miss jury that she'd already been sent them three times and the files had not been backed up.

14.d - in late March 2021, Ms Jury unfriended the Claimant on Facebook.

14. e - in April 2021, Polly Jury approached the Claimants partner Cezary Stein and shouted 'your girlfriends a fucking slag'.

14.f - on 10th of May 2021 Bianca Bowden shouted 'dickhead' at the Claimant from her car

14.h - in September 2021, Mr Stein was told by a friend that Jody Galgay had said he should stay away from Mr Stein because he and his girlfriend would be getting 'fucked up.'

14.i - the Claimants second grievance - 23rd of September 2021 - complaining that her first grievance had not been dealt with properly. This was only partially upheld.

418. We did not find that any of the allegations as listed above, these being 14 (b), 14 (c), 14 (d), 14 (e), 14 (f), and 14 (h) as acts of victimisation were made out on the facts and these allegations asserted to be acts of victimisation therefore fail.

419. In relation to 14 (i), in the list of issues and whether the findings of the second grievance were acts of victimisation by the Respondent against the Claimant we found that they were not. Jane Fryatt was an independent Human Resources advisor and we found that she was independent in the true sense of the word and was not influenced by the animus of the Respondent to the Claimant and this claim that the grievance findings amounted to an act of victimisation therefore fails.

Constructive Unfair Dismissal

420. We found the following claims that succeeded also amounted to a breach of the implied term of trust and confidence both in an individual sense, and in a cumulative sense as follows, with number 420.15 operating as a final straw:-

420.1 **Issue 4. a.** Instituted disciplinary proceedings against her (25 January 2020)

420.2 **Issue 4. b.** Instituted a disciplinary sanction against her (30 January 2020)

420.3 **Issue 4.c.** Reassigned the Claimants clients - (February 2020 onwards);

420.4 **Issue 4.d** Removed the Claimant from the online booking system- (February 2020 onwards);

420.5 **List of Issues 4.g -** Denied the Claimant training opportunities afforded to other employees (February 2020 and March 2020).

420.6 **List of Issues 5.b -** Effectively demoting the Claimant by giving her duties of an apprentice (cleaning and making tea) and witnessing clients being told that there were no staff available to do haircuts when she was present and available. (until maternity leave in April 2020).

420.7 **List of Issues 5.e -** Failed to follow the contents of the Risk Assessment conducted for the Claimant. (until maternity leave in April 2020).

420.8 **List of Issues 5.g –** Challenging the Claimant after her mother contacted the Hairdressers Federation around the 26 February 2020.

420.9 **List of Issues 5.i –** Issuing the Claimant with a final written warning. (January 2020)

420.10 **List of Issues 5.j -** Not keeping the Claimants final written warning confidential, enabling other members of staff to joke about it. (January 2020 onwards)

420.11 **List of Issues 5.k -** Jodi Galgey shouting, look at you ya scabby little cunt with your scabby baby, when the Claimant's baby was a few weeks old (July/August 2020 approx).

420.12 **List of Issues 12(a) -** Breaching the Claimants confidentiality by not securing and sharing the contents of the Claimants grievance (9 March 2020 onwards)

420.13 **List of Issues 12 (b) -** Denied the Claimant training opportunities afforded to other employees. (10 March 2020 onwards)

420.14 **List of Issues 14 (g) -** On 15th of July 2021, Ms Jury shouting at the Claimant's mother, '*Sar, I'm still winning just so you know I'm still winning, I'm the winner*.'

420.15 **List of Issues - 14 (i) -** the Claimant's second grievance (dated 23rd of September 2021) complaining that her first grievance had not been dealt with properly. This was only partially upheld.

421. We found, in relation to issue 420.15 above, when the Claimant raised a second grievance and alleged her first grievance had not been dealt with properly, and that second grievance was only partially upheld, as follows:

421.1 The Claimant told Ms Jury a risk assessment had *'appeared out of nowhere'* in the first grievance findings, and also told Ms Fryatt the Respondent had lied about carrying out her risk assessment, We found Ms Fryatt failed wholesale to investigate that allegation thus creating an impression she had not dealt with the grievance impartially or thoroughly.

421.3 We found the grievance investigation and findings were inadequate as they were not thorough and created an impression of impartiality by failing to address one major allegation about the way the first grievance had been with.

422. In light of our findings on this issue of the second grievance investigation and the investigation and findings being inadequate, we therefore found that the second grievance findings operated as a final straw and caused the Claimant to resign set against the previous breaches of contract and in particular set against the incident three months earlier when Ms Jury shouted at the Claimants mother, Ms Tindgay in the street that she was in effect going to be *'the winner'* in relation to the claim the Claimant had brought.

423. Whilst there had been a long delay since the matters in 2020 earlier breaches of contract can be reawakened by a final straw, which in this case we found were the grievance findings, and, in any event, the latest breach of contract in relation to Ms Jury shouting at Ms Tindgay had only taken place three months before the Claimants resignation. During that time, she was protesting at the way she had been treated and was awaiting the outcome of the second grievance.

424. We found the findings of the second grievance operated as a 'last straw' and were 'more than trivial' as per **London Borough of Waltham Forest v Omilaju**, and did contribute, however slightly, to the breach of the implied term of trust and confidence.

425. As per **Dr Paul Leaney** we also considered whether it could be said the Claimant had affirmed the breach before the last straw occurred? We had particular regard to this passage of that Judgement (our emphasis added): -

> *21. In particular, acts of the innocent party which are consistent only with the contract continuing are liable to be treated as evidence of implied affirmation. Where the injured party is the employee, the proactive carrying out of duties falling on him and/or the acceptance of significant performance by the employer by way of payment of wages, will place him at potential risk of being treated as having affirmed.* ***However, if the injured party communicates that he is considering and, in some sense, reserving, his position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then if, in the meantime, he continues to give some performance or to draw pay, he may not necessarily be taken to have thereby affirmed the breach.***

426. In our judgement the Claimant had clearly reserved her position while raising another grievance and was waiting for the outcome of it for a period of one month, which was raised a few months after the last breach of the implied term of trust and confidence had occurred in July 2021. During that time, she was on sick leave, and it cannot be said in our view that during that short passage of time, since that last breach of the implied term of trust and confidence, that she affirmed that last breach of contract in some way. She was not at work performing any duties she simply remained on the Respondents payroll while awaiting the outcome of the second grievance which included the incident in July 2021, and the outcome of which she received on the 22 October 2021.

427. Having found that she did not affirm earlier breaches of contract, or at the very least did not affirm the last breach of contract in July 2021, and the grievance findings being inadequate, in that they did not address the risk assessment issue and an allegation the Respondents had lied about this, we find that the grievance findings operated as a final straw and reawakened all previous breaches of contract in any event.

428. The Claimants claim for constructive unfair dismissal therefore succeeds.

Harassment

429. All claims for harassment failed as pregnancy and maternity is not a protected characteristic under s.26 of the EqA.

Sex Discrimination

430. Allegations 7.b, 7.e, 9.d, and 9.f were not made out on the facts for the reasons set out above and those allegations as acts of sex discrimination against the Claimant must fail.

431. Having found that issuing the Claimant with a final written warning was unfavourable treatment of a pregnant worker contrary to s.18 this could not also amount to an act of sex discrimination due to the provisions of s.18 (7) which states that treatment cannot constitute s.13 direct sex discrimination if it constitutes s.18 pregnancy and maternity discrimination.

Notice Pay, Holiday Pay and Wrongful Dismissal

432. No evidence was offered on these claims, nor did we receive any submissions on them from the Claimant and so these claims fail. In any event having found that the Claimant was unfairly dismissed compensation will be awarded in any event for the period of time during which she would have received notice pay.

Jurisdiction and Time Points

433. The Claimant only instructed her solicitor sometime before the preliminary hearing on or around 20 October 2021. Very shortly after the Claimant applied to amend her First Claim and did so on the 4 November 2021.

434. She resigned on the 26 October and was told by the Respondent her employment would end on the 9 November 2021 [P.384].

435. Primary limitation therefore was set to expire on the claim for constructive unfair dismissal on the 8 February 2022 this being the date by which the Claimant must contact ACAS. She contacted them on the 26 January 2021 and so her constructive unfair dismissal claim was lodged in time.

436. All of the claims that were allowed to proceed by way of amendment in the First and Second amendment applications encompassed any limitation points and so whilst some new allegations and the claim of victimisation were out of time at the time of the applications made, this Tribunal considered those jurisdictional issues as one of the factors but granted the amendment applications and in so doing extended time for the claims to be brought under this Tribunals just and equitable jurisdiction.

437. However as to the following allegation which was not the subject of an amendment application, and it having succeeded, this being the incident that took place on the 15 July 2021 when Ms Jury victimised the Claimant for bringing the first claim against her, the issue of this Tribunals jurisdiction on this allegation is now addressed.

438. At the time the incident occurred on the 15 July 2021 the Claimant was on sick leave and was contemplating a return to work in a situation where her First Claim was ongoing. She said that navigating the tribunal process without legal expertise was daunting, and that this was compounded by the emotional toll of reliving and enduring traumatic experiences. She also told us that she had to seek counselling to help with the trauma she had endured. Sometime after that incident in July 2021, and in September 2021, the Claimant then engaged a Solicitor and started obtaining legal expenses cover for her First Claim, and forthcoming Second Claim, and was struggling with her mental health, while caring for a young child.

439. The primary limitation period on the incident that occurred on the 15 July 2021 expired on the 14 October 2021 whereas the Claimant did not contact ACAS by that date and instead contacted them on the 26 January 2022 just over three months outside the primary limitation period. The proceedings were then issued on the 9 March 2022 so at the time of the presentation of the second claim the claim about being victimised on the 15 July 2021 was out of time by just under five months.

440. This Tribunal finds it would be just and equitable to extend time for the presentation of this claim to the date of issue on the 9 March 2022. In so doing we have taken into account the Claimants mental health issues, that she was caring for a young baby, and was awaiting the outcome of her second grievance. When the primary limitation period expired on the 15 October 2021 this was only around one month after seeking advice on all her claims in September 2021, and she was then represented by a solicitor on the 20 October 2021 at the preliminary hearing.

441. We were mindful that at this time the Solicitor for the Claimant would still have been gathering information about her claims and in any event we had regard to the case of **Virdi v Met Police and Centrex** [2007] IRLR 24 where it was said it is not legitimate to refuse to extend time solely on the basis that a party's solicitor has been negligent and they will have a legal action against that solicitor. This does not mean however that a party's possible negligence action against their solicitor should be ignored when weighing up whether to extend time mistakes of a professional advisor.

442. It was not clear to us if there was any negligence by the Solicitor acting in this case by not contacting ACAS by the 15 October 2021, as we had no evidence about how much information the Claimant had supplied about her claim. In any even if there was any negligence, we found that this should not be visited on the Claimant and so we extended time accordingly.

443. The parties should now provide the Tribunal with its dates of availability for a two-day remedy hearing if settlement cannot be achieved.

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Employment Judge L Brown

Date: …27 April 2024………………….

Sent to the parties on:29 April 2024....

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For the Tribunal Office