EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106175/2017

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Held in Glasgow on 29, 30 and 31 October 2018, Members' meeting 5 December

Employment Judge: Robert Gall
10 **Members: Laura Crooks and William Muir**

Ms K McColl	**Claimant** **Represented by:** **Ms L Hunter - Solicitor**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill - Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

1. The claimant resigned from employment with the respondents in
25 circumstances where she was entitled so do by reason of the respondents' conduct. In terms therefore of Section 95 (1) (c) of The Employment Rights Act 1996. That is a dismissal by the respondents. It was an unfair dismissal.

2. The respondents are ordered to pay to the claimant by way of compensation for unfair dismissal, the following:-

30 (a) a basic award of £2,185 (Two Thousand One Hundred and Eighty Five Pounds)

(b) a compensatory award of £2,174.54 (Two Thousand One Hundred and Seventy Four Pounds Fifty Four Pence).

(c) £500 (Five Hundred Pounds) in compensation for loss of statutory rights.

3. The respondents are ordered to pay to the claimant the sum of £8,000 (Eight Thousand Pounds) by way of compensation for injury to feelings. Interest thereon is awarded at 8 % from 5 March 2017, the date the Tribunal regards discriminatory conduct as having taken place, until date of issue hereof, 12 December 2018. The sum awarded by way of interest is £1,132.31 (One Thousand One Hundred and Thirty Two Pounds Thirty One Pence). The respondents are ordered to pay that sum to the claimant.

REASONS

1. This case called for hearing at Glasgow. The hearing took place on 29, 30 and 31 October 2018. The claimant was represented by Ms Hunter. The respondents were represented by Mr O'Neill. A joint bundle of productions was lodged. During the hearing, payslips were lodged by the respondents without objection from the claimant.

2. Evidence was heard from the following parties:-

   (i) The claimant.
   (ii) Ian Gibson, who had been a senior care worker within the respondents' organisation.
   (iii) Debra Allison, care home manager within the care home where the claimant worked immediately prior to her employment with the respondents ending.
   (iv) Faye Meldrum, personnel officer with the respondents.
   (v) Rhona Grant, senior social worker with the respondents and the claimant's line manager around 2014 or 2015.

3. The following parties were not witnesses but are relevantly mentioned at this time:-

   (i) Stephen Smellie, branch secretary with Unison and the trade union representative assisting the claimant.

(ii) Gail Robertson, personnel advisor within the respondents' organisation.

(iii) Evelyn Devlin, line manager of Ms Allison.

(iv) Eileen Smyth, who heard the grievance of the claimant.

5 (v) Julie Glen, former care home manager at the home within which the claimant worked. When she left in December 2014, Ms Allison took over this role.

Facts

4. The following were found to be the relevant and essential facts as admitted
10 or proved.

Background

5. The claimant was born on 14 March 1985. She commenced working for the respondents on 26 July 2004. Her employment with the respondents ended when she resigned on 22 June 2017.

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6. As at date of termination of her employment, the claimant had therefore been employed by the respondents for over 12 years but under 13 years. She was, at time of termination of her employment, aged 32. At time of termination of her employment, the claimant's contractual hours of work
20 were 22.5 per week. She received £198.68 per week gross, £193.44 per week net.

7. The claimant obtained employment with a different employer to the respondents, commencing that new employment on 27 July 2017. In her
25 new employment, her rate of pay was 70p per hour less than that which she received from the respondents. Her loss to date of the Tribunal is £1,071. She did not claim any government benefit between jobs.

30 ## Maternity leave of the claimant

8. The claimant worked on a full-time basis with the respondents from date of commencement of her employment until return from her first maternity leave. She is mother to 3 children. She had a period of maternity leave associated with birth of her first son. As detailed below, she returned to work after that period of maternity leave with her hours being varied so that they became 22.5 hours per week. She had a period of maternity leave associated with birth of her second son. She returned to work after his birth, resuming the hours and pattern of work which had been in place prior to commencement of this period of maternity leave. Again, this is detailed below. The claimant then had a period of maternity leave associated with the birth of her third son. It was during that period of maternity leave that she resigned and brought her employment with the respondents to an end.

9. The first period of maternity leave which the claimant had commenced in July 2013. The claimant returned to work on 29 April 2014.

10. The second period of maternity leave which the claimant had commenced in December 2014. The claimant returned to work in September 2015.

11. The third period of maternity leave which the claimant had commenced in November 2016 and was scheduled to end with the claimant returning to work in November 2017 at the latest.

12. On return from her first period of maternity leave, although the claimant was correctly recorded as recommencing work on 29 April 2014, she did not actually work for a short period thereafter.

Policies of the respondents

13. The respondents have a policy on flexible working. A copy of that appeared at pages 120 to 127 of the bundle.

14. In paragraph 4 of that policy, page 123 of the bundle, the process of making a request for flexible working is set out. It is said that normally eight weeks' notice is required of when the new working pattern would commence.

15. Paragraph 4 goes on to state, in a passage at page 124 of the bundle, that a meeting may not always be required but that the manager may convene a meeting of the employee within 28 days of receipt of the request.

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16. Paragraph 5 of the policy, at page 124 of the bundle, states the following: -

> *"Having considered the changes the employee is requesting, the manager will give the employee written notice of their decision on the application within 28 days of receipt of the request, or within 14 days of any meeting. This will be to either: -*
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> - *Accept the request, (confirming the changes to be made to the employee's terms and conditions) and establish the start date and any other action; or*
> - *Confirm a compromise agreed at the discussion, such as a temporary arrangement to work flexibly (perhaps for a trial period, where it is unsure whether the arrangements requests (*sic*) are sustainable in the business or about the possible impact on other employees' requests for flexible working).*
> - *Reject the request, setting out clear business reasons, how these apply to the application and details of the appeal process.*
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> *Should the manager decide to refuse the request, they will advise the employee in writing setting out the grounds for refusal and notifying the employee of the right of appeal.*
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> *There will be no occasion where a request is refused without a meeting having been held to enable a full discussion on the request and any alternatives to take place."*

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17. Paragraph 6 of the policy which appeared at page 125 of the bundle, details the right of appeal. The appeal is to a more senior manager who has not

previously been involved in the matter. It is to be submitted within 14 days of the date of receipt of the decision.

18. The respondents also have a policy in relation to Maternity, Adoption, Paternity Leave, Additional Paternity Leave, Shared Parental Leave and Pay. A copy of that appeared at pages 128 to 145 of the bundle.

19. That policy states in clause 3.3, at page 131 of the bundle, that an employee must actually return to and remain at work for a three-month period after additional maternity leave. This is on the basis that if that does not occur then monies in respect of twelve weeks leave at half pay, which will have been paid to that employee, must be repaid by her to the respondents.

20. Clauses 5.4 and 5.5 of this policy, which appeared at page 133 of the bundle, state the following: -

> *"**5.4 Right to return***
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> *An employee has the right to return to the job in which she was employed under her original contract of employment and on terms and conditions no less favourable than those applicable if she had not been absent on maternity leave. "Job" for this purpose means the nature of the work which she is employed to do and the capacity and place in which she is employed.*
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> ***5.5 Right to be kept informed***
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> *An Employee's Resource will make suitable arrangements to maintain contact with her while she is on maternity leave, for example by sending copies of "The Works" and other information. The Resource will also ensure that she is kept fully informed about any vacancies in the Council and any other relevant matters affecting her rights and conditions of employment, including any proposals for any*

restructuring or other developments within the Resource which affect her."

21. These policies were in place at the time of the claimant's employment with the respondents and the ending of that employment.

Employment contract of the claimant – written terms

22. The respondents issued to the claimant a letter dated 20 September 2006 confirming her terms and conditions of employment. A copy of the first page of that letter appeared at page 58 of the bundle. It confirmed that her period of employment had commenced from 26 July 2004. It confirmed that she was appointed to the post of social care assistant from 29 September 2006 stating that she should report for duty to Julie Glen, the unit manager. The claimant was to work at David Walker House in Rutherglen. The facility operated by the respondents at that address moved at a later point to a building located in David Walker Gardens. Those who had worked at David Walker House, including the claimant and Ms Glen, moved to the premises at David Walker Gardens. The premises at David Walker House were no longer utilised by the respondents.

23. As stated above, when the claimant planned to return to work after birth of her first child, she sought a reduction in hours. She did this by way of a flexible working request. The respondent's decision upon that request was set out in a letter of 2 June 2014, a copy of which appeared at page 59 of the bundle.

24. The letter from the respondents confirmed that the application had been accepted on a permanent basis. It contained the following: -

"Your new working pattern commenced on 29 April 2014, when you decreased your hours from 37 to 22.5 hours per week to be worked in accordance with a roster which is available for inspection within your workplace."

Agreement between the claimant and Ms Glen as to days worked

25. At time of the claimant returning to work after her first period of maternity leave, she spoke with Ms Glen, care home manager, regarding days which she would work.

26. The claimant and Ms Glen agreed that the claimant would work Tuesdays and Wednesdays of each week and every alternate weekend. These were to be set or fixed days. Childcare arrangements were put in place by the claimant for Tuesdays and Wednesdays of each week. Her partner was able to look after her child when the claimant had to work at weekends. The claimant made Ms Glen aware of these childcare arrangements.

27. The respondents operate with some employees working nightshift. The claimant was not scheduled to work nightshift. There are two dayshifts, one early and one late. The early shift is 7.15am until 3.15pm. The late shift is 2.30pm to 10.15pm.

28. The claimant was able to work either the late or early shifts on the Tuesday and Wednesday. She was the primary carer for her children from time of their birth. Her partner worked full time during the time of the claimant's employment with the respondents.

Working agreement in Practice

29. Following upon the agreement between the claimant and Ms Glen, the claimant returned to work at the end of April or early May 2014. She continued working until commencement of her second period of maternity leave in December 2014.

30. Between end of April or beginning of May 2014 and December 2014, the claimant always worked on a Tuesday and Wednesday of each week. She was never asked to work any days other than those during the week.

31. A roster is prepared by the respondents setting out who is on and who is off shifts on particular days. It is drawn up for the 6 weeks immediately after its preparation. It is then in the office and available to staff.

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32. The claimant would attend the office to look at the roster each time a fresh roster became available. She did this so that she could establish whether she was scheduled to work the early or late shift on the Tuesdays and Wednesdays.

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33. On occasion the respondents would ask the claimant to work a split shift at the weekend. Any such discussion was initiated by the respondents. The claimant could accommodate that due to her partner being able to look after their children at the weekends. She would therefore agree to work a
15 split shift at the weekend if asked to do this. In those circumstances she would however then take off either the Tuesday or Wednesday of the subsequent week so that overall her weekly hours remained at 22.5.

34. Copies of rosters relative to the working hours of the claimant appeared at
20 pages 146 to 194 of the bundle. Those rosters are prepared each six weeks by the respondents on a template basis with certain details being included in the standard forms. The standard or template roster included the working days of the claimant being shown as each Tuesday and Wednesday and alternate weekends.

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35. The agreement between the claimant and the respondents was that her set hours of work were Tuesdays and Wednesdays each week and alternate weekends. This agreement was reflected in the “pre-completed” rosters. There was certainty therefore as to the set days on which the claimant was
30 scheduled to work for the respondents. The claimant knew that she would be working Tuesdays, Wednesdays and alternate weekends. She could therefore, and did, make arrangements with her childminder so that her first and subsequently second and third children were with the childminder on

Tuesdays and Wednesdays of each week. Ms Glen was aware of this arrangement with the childminder by the claimant.

36. The claimant was never asked by the respondents to work weekdays other than Tuesdays or Wednesdays. The few times on which she did vary one of those days were at her instigation due to personal arrangements. Those occasions were very infrequent and, insofar as established by evidence, are noted below.

37. As mentioned, the respondents would on occasion ask the claimant to work a weekend shift when she was not scheduled to do that. She would accommodate that and then take off a working day the following week as mentioned above.

38. As mentioned, the claimant was absent on her second period of maternity leave from December 2014 until September 2015.

39. On her return from this second period of maternity leave, it did not cross her mind that she would not be returning to the working pattern in place prior to commencement of maternity leave, the one which had applied since early May 2014, namely Tuesdays, Wednesdays and alternate weekends. The claimant simply resumed working those days from September 2015. Her second child joined her first child at the childminders on Tuesdays and Wednesdays of each week.

40. Ms Glen remained the care home manager at this point. There was no discussion between Ms Glen and the claimant on return by the claimant to work after her second period of maternity leave as to which days the claimant would be working. The claimant's working pattern resumed. Rosters continued to be produced with the claimant shown on the template as working Tuesdays, Wednesdays and alternate weekends.

41. The set working days for the claimant continued from September 2015 until commencement of the third period of maternity leave by the claimant in November 2016.

Variations from Tuesday, Wednesday working for the claimant

42. The period covered by the copy roster sheets produced was March/April 2014 to November 2016.

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43. In that time, there were five occasions when the claimant worked an additional Saturday and, as a result, was then off from work on one of the two weekdays in the subsequent week when she was scheduled to work and would otherwise have worked. All of these rearrangements occurred at the instigation of the respondents. They were shown by handwritten alterations to the template roster. The template roster showed the claimant as working alternate weekends and each Tuesday and Wednesday. Any alterations to those arrangements were made by hand on the roster sheet and initialled by the manager.

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44. There were, in the period covered by the roster sheets, four occasions on which the claimant had moved one of her days of work from the Tuesday or Wednesday to a different day of the week. It was the claimant who initiated these changes.

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45. Page 150 of the productions showed the claimant as being off on Tuesday 3 June 2014, working the late shift on Wednesday 4 June and working the early shift on Thursday 5 June. The claimant could not recall what lay behind this change. Mrs Grant, who completed the rosters at this point, believes it may have been because the claimant had a class to attend on the Tuesday.

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46. Page 184 of the bundle was the roster sheet relative to June 2016. It showed a day when the claimant was scheduled to be off, Monday 6 June, as being changed to show the claimant working a late shift that day. The following day, Tuesday 7 June, when the claimant had been scheduled to be on duty, was altered to show that she was now to be off duty. The

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claimant initiated this change. She cannot recall the reason for this change which is shown by a hand noted alteration.

47. The remaining two occasions on which the claimant did not work her scheduled Tuesday/Wednesday weekdays related to time at the festive period.

48. In January 2016, the claimant was shown as working Friday 1 January, Saturday 2 January, Sunday 3 January and Monday 4 January. She was then shown as being off work on Tuesday 5 January and Wednesday 6 January and again on Tuesday 12 and Wednesday 13 January. On Tuesday 22 December, believed to be 2015, in the roster which appeared at page 172 of the bundle, the claimant was shown as working Wednesday 23 and Thursday 24 December, being off work on Tuesday 22 December 2018. The festive period is not one in which the typical rosters are worked. Staff are typically asked to work different hours over the festive period.

Finding in fact and law

49. The claimant had a term implied into her contract that her days of work, subject to any agreement by her to vary those, were to be Tuesdays and Wednesdays of each week and alternate weekends. That was the practice which operated for her working time with the respondents after her return from maternity leave at the end of April or beginning of May of 2014 until the ending of her employment in June 2017. It was evidenced by those being her working hours other than as agreed to by her on a very infrequent basis. The roster template included those days of work in relation to the claimant. Ms Glen agreed those days of work as being the ones which the claimant would work and did work. The claimant was never asked to work any other weekday hours by the respondents.

Change of care home manager, Ms Glen to Ms Allison

50. In December 2016, Ms Glen was to be leaving post as the care home manager. Ms Alison was identified as being the person who was to replace her as care home manager at David Walker Gardens. This was initially to be a temporary appointment, although it became permanent.

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51. Ms Allison started work at David Walker Gardens whilst Ms Glen remained in post. Ms Allison arrived around 14 December 2016. Ms Glen then left the role and Ms Allison became *"officially"* the care home manager at David Walker Gardens in January 2017. At that point the claimant was absent on maternity leave in connection with her third pregnancy.

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52. Ms Allison became aware of various matters within the care home which required to be addressed in her view. Mrs Grant was the person who completed the rosters. She spoke with Ms Allison. She expressed concern that when the roster was produced, there were approaches made to her by employees to request that the working times shown for them in the roster were varied. The claimant was not one such employee as her days shown on the roster conformed with the pattern which she had agreed with Ms Glen, being Tuesdays, Wednesdays and every alternate weekend.

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53. Ms Grant explained to Ms Allison that whilst Mrs Grant *"stood firm"* on the basis that the working times on the roster were entered to suit the demands of the care home for carers on particular days, an employee seeking to have a different day as a working day would then speak with Ms Glen directly. Ms Glen would then say to Mrs Grant that the request by that employee should be accommodated. This meant that the care home was not working efficiently when it came to allocation of staff. There would be overprovision of staff on some days when employees had made requests to have particular working days. On the other hand, there was under provision on other days. The under provision resulted in overtime having to be offered to employees, with consequent increase in pay levels.

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54. Ms Allison considered the position. Her view was that it was inappropriate that care home staff had set hours. She communicated this to staff who

were present in the building and arranged meetings with those staff where this could be explored with them on an informal basis. Her position was that the care home could not have employees with specific set working times albeit employees might have a preference for particular times. Ms Allison was of the view that with the roster being published six weeks in advance, there was time for anyone who was allocated to work a particular day, but who wished to alter that, to swap with a colleague or to use annual leave to ensure that they were not at work on a particular day which did not suit them due to, for example, any private or domestic reason.

55. The claimant received no communication in this regard from Ms Allison. She was not informed by Ms Allison or any member of management that there was an issue with regard to set days of work. She was not informed that there had been an approach to staff and that meetings were being organised to discuss this point.

56. It was of much significance to the claimant that she worked her agreed days of Tuesdays and Wednesdays given that she had childcare arrangements in place for her children. By January 2017, she had made contact with the child minder who had confirmed that a place existed with her on Tuesdays and Wednesdays for all three children.

57. Ms Allison was of the view that due to the way in which the roster had been operated with staff requests for changes to it being agreed, often by Ms Glen contrary to the wishes of the compiler of the roster, the then current way of operating was *"not fit for purpose".* Discussion of the roster was one of the main areas upon which Ms Allison initiated discussion with staff. A meeting with staff was held in February 2017. An email was sent inviting staff to that meeting, or staff were spoken to to alert them to it. The claimant however was not alerted whether by phone call, email or in person. Those who were not present at work through being absent through sickness, maternity leave or holiday were not alerted to this meeting and to the discussion. Ms Allison's intention and approach with

staff was to discuss the concerns regarding shift patterns with them and to negotiate with staff in relation to any particular issues which arose.

The claimant becomes aware of proposals at work

58. The claimant was in 2017 part of a Whats app group who were able to communicate with each other through texts in the group. A copy of texts exchanged between the claimant and members of the group appeared at pages 218 to 225 of the bundle.

59. In the part of the group chat which appeared at page 218, the claimant on 14 February 2017 wrote: -

> *"Just phoned work in spoke way ian about set days as my childminder has place fr archy but don't want to say yes to her when I don't even know if I will get them.. so he says come in and speak to debrah if use are in work can use let me know when she's in guys… probably wasting my time here lol but need to get things sorted x"* (sic)

60. The claimant indicated through the group chat her intention to go into the care home on 15 February 2017. She did that in the hope of being able to speak with Ms Allison. She had not arranged this in advance with Ms Allison.

61. Ms Allison was not able to speak with the claimant on 15 February 2017. She said that she was too busy. The possibility of meeting some other time was mentioned. No date was however suggested and no such meeting took place.

62. The claimant spoke with Mrs Grant that day. Mrs Grant said to her that returning to work on her set days would be fine but that she should keep quiet about it.

63. In a post on the Whats app group on 15 February 2017, a copy of which appeared at page 219 of the bundle, the claimant wrote: -

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"Went into work an been told off senior staff that it will be okay fr me coming back to work on my set days but think I meant to be keeping quiet about it but not fair on use… also big ian said to me that debrah said.. she thinks she's going to have to accommodate these ppl way there set days so maybe things will change now 😉" (sic).

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64. The claimant attended David Walker Gardens on 5 March 2017 to hand in her application for her ordinary/occupational maternity leave. A copy of that form appeared at pages 64 and 65 of the bundle. By letter of 6 March 2017, the respondents confirmed receipt of the application form and that the claimant was entitled to maternity leave and pay. It was narrated that she required to return to work for at least three months otherwise she would require to refund to the respondents the amount paid to her for the twelve-week period at 5/10ths pay. This was on the basis that she received 9/10ths of pay for the first six weeks of maternity leave, 5/10ths pay and statutory maternity pay for the next twelve weeks and statutory maternity pay for the following 21 weeks. No pay was to be received during the additional leave period.

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65. The claimant was unable to meet with Ms Allison when visiting the care home on 5 March 2017. She sought to contact Ms Allison by telephone a few times that day and the subsequent day. Ultimately, she spoke to Ms Allison on 6 March 2017.

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66. On 5 March 2017, the claimant posted the following in the group Whats app chat, a copy appearing at page 220 of the bundle: -

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"😒 hey guys has anybody got any updates about these set days?? As I am now going to spk to debrah again.. and as much info would help me??? as the senior who told me it was okay fr my set days to continue when I returned to work has now told me weeks later that I may need to get shift swaps at times but will help me as much as possible.. but don't feel you can believe that as I know ppl have had

theirs taken away without explanation & others are told its okay to have them but be quiet.. so angry 😒 xxx"

67. In the posting immediately above the claimant was referring to a further discussion which she had with Mrs Grant who had said to her that the set days would now not be "okay".

68. On 6 March 2017, the claimant spoke with Ms Allison. The claimant was very concerned at this point given that she had not had contact from Ms Allison to initiate any discussion. She had also had conflicting messages from Mrs Grant. She was keen to finalise arrangements with her childminder. She was very concerned that she could not rely upon the set days which she had agreed with the respondents as being working days.

69. When the claimant spoke with Ms Allison on 6 March 2017, she expressed her concerns about her set hours to Ms Allison. She said that she needed some answers. She asked for a meeting with Ms Allison. Ms Allison said that she would contact personnel and then would plan to meet with the claimant. She said, without explaining the comment, that she might not be the manager of the care home when the claimant returned to work. This was as, unknown to the claimant, the appointment of Ms Allison was initially intended to be a short term one. The impression which the claimant had was that Ms Allison was keen to get her off the phone. Ms Allison said to the claimant that she thought she was being over anxious.

70. After the call, the claimant posted further on the group chat. Her post appears at page 221 of the bundle. It reads as follows: -

"Spoke with debrah.. she asked me why im phoning and thinks im getting overly anxious as nobody has told me it will be any different when I return to work re set day!!!! or have a heard through the greatvine????.. said well yes ive heard loads of different things in basicaly she told me at the end of the day she might not be here so might all be different when I return to work but will have a meeting with

me anyway…. but then she told me no care homes she knows of do set days.. said to her well cause u might not be working here isn't good enough fr me I need to know answers told her I am contacting personnel now because if nobody gets help in any care homes what's the point in your child friendly policy as anybody can get a swap of shift that's not really helping anyone… felt she was just trying to get me off the phone quick as possible and using her not working there by time a return to work as a way out of listening to me xxx"

71. The claimant then spoke with personnel within the respondents' offices. She spoke with Acas and spoke with Citizens Advice Bureau. She was informed by Acas that with there being a pattern over three years she should be able to return to the same pattern after maternity leave. She spoke with Ms Allison and relayed the fact that she had spoken to the three parties mentioned. She also relayed the view which Acas had given her. Ms Allison told her what personnel had said to Ms Allison.

72. The exchange between Ms Allison and personnel was produced in the bundle. It comprised an email from Ms Allison to her line manager Ms Devlin and also to Ms Robertson of personnel. That appeared at page 196 of the bundle. Subsequent correspondence was also produced.

73. The email at page 196 of the bundle contained the following passage with the copy only extending as far as now set out: -

"It is my understanding that we do not have set shift patterns, however I am aware as undertaking Rotas we provide six weeks rotas informing staff of their shifts required to work, this allows for planned leave etc being entered into the rota prior to print. When printed staff are free to swap their shift with a colleague and advise senior of same and it also goes without saying in emergency situations staff only need to inform us of same and we would try to assist where possible.

I have found this to be part of the norm for some staff here at DWG and find that it is taking up a lot of my time and now yours. Also feel as if I don't comply, staff…"

74. The conversation between the claimant and Ms Allison is reflected in the posting to the Whats app group which the claimant made on 20 March 2017. That posting, insofar as relevant, reads: -

"Had Debora just off phone saying she spoke way personnel & said no such things as set days u can apply fr flexible working but not to say you will get it.. u can get swaps or use annual leave.. said well as long as it's the same fr everybody then!!!! She says well I don't know what happened in the past.. & you wouldn't know as not working at the moment.. 😂… & it wouldn't be professional fr her to get into others business.. which I wasn't asking about just saying it had to be fair lol.. xxx"

75. Notes completed on a confidential basis by senior care assistants within the respondents' organisation who worked at David Walker Gardens appeared at page 68 of the bundle. Those contain a note prepared by Mr Gibson on 17 March 2018 recording two calls he received from the claimant looking to speak to Ms Allison about her shifts. He notes that he spoke with Ms Allison. Ms Allison asked that he contact the claimant to say that she was still waiting to hear what would happen with fixed days and that there would be a call as soon as this was known. Mr Gibson notes that he relayed this to the claimant who said that she would have to speak to "*someone above Debora*" as she couldn't wait any longer to arrange childcare.

76. The claimant attended her GP on 15 March 2017 with symptoms of stress. A letter from her GP confirming that anxiety symptoms were exhibited by the claimant and that she had narrated work issues around the hours she was being asked to work, with this leading to difficulties with childcare, appeared at pages 209 and 210 of the bundle.

77. As part of the discussion between the claimant and Mr Gibson mentioned above, Mr Gibson said to the claimant that Ms Allison had nothing else to say at present. On 2 May 2017, the claimant telephoned the respondents seeking access to her personnel file in order to see what written agreement, if any, was present there. Page 197 of the bundle is an email from the claimant requesting information from her personnel file. That is dated 10 May 2017. The respondents were unable to accommodate that at time of her phone calls. A note of those two calls appears in the production at page 68 of the bundle. The claimant mentioned in these calls that she was speaking with Citizens Advice Bureau regarding her position. Ms Allison was made aware of these calls and of the contact the claimant had made with Citizens Advice Bureau.

Flexible working request

78. At the instigation of Ms Allison, the claimant collected from the respondents and completed a flexible working application. She did not regard submission of such an application as being a step she required to take.

79. The flexible working application was submitted on 24 May 2017. A copy of it appeared at page 70 of the bundle.

80. In that application form, the claimant described her current working pattern as being 22½ hours, set days Tuesday and Wednesday and every second weekend. She sought a permanent working pattern with effect from 11 August 2017, her intended return date. That pattern was to be in accordance with the current pattern as she had described it.

81. In the part of the form where she is asked why she wishes to apply for flexible working, she stated that she had a young family and that her childminder required set days. She said that there would be no effect on the respondents as there was no change. She said she had set days for approximately three years agreed by the previous manager, Julie Glen, when the claimant's hours were reduced.

Consideration of Alternative Job

82. The claimant had become aware of the possibility of an alternative job at this point. The mother of her friend had told her of a job involving care in the community. It had been said to her that her prospective new employers could accommodate the claimant working on Tuesdays, Wednesdays and alternate weekends. The claimant remained keen to stay in employment with the respondents given that she had worked there for 13 years. She enjoyed her job with them. She felt however hurt and let down and badly treated. She was concerned as she had not been spoken to about the potential change to the arrangement in terms of which she had set days of work. She was also concerned and upset that Ms Allison had not made time to talk with her on some occasions. Her view was that Ms Allison showed no interest in assisting her and was not sympathetic to her position.

83. Page 92 of the bundle was an application for this alternative post completed by the claimant. She completed and submitted the application on 25 May 2017.

Further Discussion regarding existing job

84. Notwithstanding the fact that she had applied for this alternative post, the claimant continued to discuss with the respondents working set days and what could be done to achieve that.

85. In light of her concerns as to the interaction between herself and Ms Allison, the claimant commenced writing contemporaneous notes of conversations. A copy of those regarded as being relevant to this case appeared at pages 203 to 207 of the bundle.

86. The claimant was told on 1 June 2017 by Mr Smellie, trade union representative, that the issue of hours had been resolved. Having had that conversation with him, the claimant posted in the group chat on 1 June 2017. A copy of that posting appeared at page 224 of the bundle. It recorded the fact that Mr Smellie had said to her that everyone had their

set days sorted out. It went on to state that the claimant had not been informed by Ms Allison of that although it was said that this had been confirmed nearly two weeks ago.

87. The claimant spoke with Ms Allison on 1 June 2017. A copy of the claimant's note of that call appeared at page 203 of the bundle. The note reads:-

> *"Deborah phoned to inform myself my holidays would cover the three month return and that there was no records of anything in writing regarding set days. I informed her Stephen told me that days were confirmed. Deborah was telling me different. Told her its becoming a game, been three months now and no further. Gave her info on Acas."*

88. In the interim, on 19 May 2017, Mr Smellie had sent an email to Ms Allison. A copy of that email appeared at page 198 of the bundle. It read: -

> *"Debra*
>
> *Kirsty McColl, care assistant, has contacted me for advice whilst on maternity leave in regard to her shift pattern when she returns to work. She previously, for the past three years, had a fixed pattern of working Tuesdays, Wednesdays and every second weekend. This allowed her to arrange childcare.*
>
> *She believes she has been told that this pattern cannot be confirmed as continuing when she returns to work and that she now has to apply for this and complete a flexible working form.*
>
> *Clearly taking maternity leave is no reason to change shift patterns and I think it is reasonable for her to assume that her shift pattern will remain as was before her leave. Whilst I therefore believe that she*

should not require to "apply" for what she already has I have advised her to complete the form as requested and return it to the workplace.

I would appreciate if you could let me know if there is likely to be a problem regarding her returning to her previous pattern."

89. On 22 May 2017, Ms Robertson, personnel advisor, had written to Ms Allison by email. She copied in Ms Devlin, Ms Allison's line manager. A copy of the email with a response by Mr Smellie appeared at page 201 of the bundle.

90. Ms Robertson informed Ms Allison that if the employee had a confirmed work pattern before going on leave, as Mr Smellie had said, then that should continue on her return from maternity leave unless there was a service reason why it could not be accommodated. She stated that Ms Allison would need to check with the transactional team regarding the claimant's previous work pattern before she went on leave to see if this had been agreed formally.

91. Mr Smellie states that he notes that Ms Robertson's advice was that the claimant should be able to resume her confirmed work pattern but that this information had not been passed to the claimant. He requested that occur. It is believed that it was this exchange which informed the discussion between the claimant and Ms Allison on 1 June 2017.

92. A further call took place between the claimant and Ms Allison on 2 June 2017. A copy of the claimant's note of that call appears at page 206. It reads: -

"She returned call (Deborah) 14.42. Stated there was flexible working letter 2014. Stated it states in accordance with a roster.

That she cant give out set days as every tom, dick, harry would ask for them.

Would only commit to set days 3-6 months but would not be set in stone.

5 *So informed her this other job could accommodate. Shouldn't be in this situation on my mat leave.*

Feel don't have much choice, but will let her know decision on Monday."

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93. On 2 June 2017, Ms Allison sent to Ms Robertson and Ms Devlin an email. A copy of that appeared at page 73 of the bundle.

94. In that email, Ms Allison refers to an agreed shift pattern which the claimant
15 believed she had in place, saying the claimant thought this had been sorted out by Mr Smellie. She also refers to the claimant enquiring about her annual leave entitlement prior to and on return from maternity leave, saying that the claimant has gained another post out with the organisation where she will work set days to suit her childcare. Ms Allison goes on to say: -

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"I updated Kirsty today on both enquiries. I advised Kirsty that her new flexible working request dated 24th would be considered as the previous flexible working request in place was out of date."

25 95. As at 2 June 2017 therefore, no decision had been made by the respondents upon the flexible working request made by the claimant in which she sought to work set days. Those days were in fact those which had become her set days given agreement from the respondents and the set working pattern which had applied since time of the agreement in April
30 2014.

96. Ultimately a grievance was lodged by the claimant. Notes of the grievance meeting appeared at pages 75 to 80 of the bundle. The outcome of the

grievance was intimated by letter of 2 October 2017. A copy of that letter appeared at page 81 of the bundle. In that letter, Ms Smyth referred to a discussion between Ms Allison and the claimant on 1 June 2017. She said that Ms Allison had confirmed during that conversation that the claimant's flexible working request to work Tuesdays and Wednesdays would be granted for a period of six months subject to review at the end of that time. That was not in fact what was communicated to the claimant by Ms Allison when she discussed the matter with the claimant on 1 June 2017. What was said to her was as detailed above.

97. On Monday 5 June 2017 the claimant spoke with Mr Smellie. She was very concerned that although Mr Smellie had said that her work times were agreed, this was not what Ms Allison was saying to her. A note of the conversation appears at page 206 of the bundle.

98. The note sets out the conversation which the claimant had subsequently with Ms Allison. The claimant said to Ms Allison that she (the claimant) was *"swaying"* with the other job due to the treatment she had and the issue over set days. Her note states that she *"can't cope with any more stress or wasted time with my maternity leave".*

Resignation of the claimant

99. Around 5 June 2017, the claimant came to the view that she would be likely to resign from employment with the respondents. She did not wish to do this. She had however lost trust and confidence in the respondents. This was due to the actions of the respondents including their refusal to accept that she had a set working pattern of Tuesdays, Wednesdays and every alternate weekend which she would then resume on return from maternity leave in August 2017. It was also due to their requirement that she make a flexible working request with a view to obtaining working days which she already had as set working days and to the response to that flexible working request. The response to the request that she work those set days on a permanent basis had been a statement to her that it had been granted for a period of six months, that the period for which it was granted was three

months and that there was no period set in stone. The claimant had also had contradictory information from Mr Smellie who had said to her that her request had been granted by the respondents. These actings by the respondents built upon the fact that the claimant had not been informed about the potential change to working arrangements in terms of which no set days were to be agreed with employees, and that no meeting had been arranged with the claimant despite her requests. It was also the case that there was an offer of an alternative post with set days involving Tuesdays and Wednesdays of each week. The claimant wished to continue working with the respondents but no longer had trust and confidence in the respondents.

100. The claimant spoke with a senior, Ms Thompson, to intimate that she was resigning. This was on 22 June 2017. A note of that conversation appeared at page 68 of the bundle. Ms Thompson requested the claimant to put her resignation in writing.

101. By letter of the same day, the claimant resigned. Her letter of resignation appeared at page 74 of the bundle. It read: -

> *"due to disappointing and unexpected circumstances during my maternity leave, I have no choice in this matter but to notify you I am resigning from my position as care assistant with immediate effect."*

102. Pages 83 to 87 of the bundle comprised a letter which the claimant sent to the head of department, line manager to Evelyn Devlin. The claimant addresses the letter to "Brenda". The letter is a complaint. The claimant sets out her complaint saying that she was off on maternity leave and felt forced out of her position as a care assistant having been treated poorly and unfairly over the past 3/4 months. She referred to the stress and worry which had been current since February or March of 2017 and had taken away precious time bonding with her new born baby and focusing on her family. She detailed the set days which she had by agreement and which she had worked and the change which was intimated to her. She said that

Ms Allison was *"evasive and unsupportive".* She said that she felt *"strung along".* She detailed the conversation which she had with Ms Allison on 1 June as noted above. Her letter concluded as follows: -

> *"I never felt listened to again however in the end with a lot of thought for my health and personal life and my young family's sake, I couldn't take much more. I went out and got another job who would accommodate, I felt I had no choice but to leave as Debra was not willing to accommodate something I already had in place for 3 years, I also informed my manager on many occasions my kids were my priority and they didn't deserve there* (sic) *mum to be stressed over this situation any longer, I felt let down, upset and frustrated I had to go through all this during my maternity leave.*
>
> *I feel extremely upset that I have had to leave my job of 13 years, undervalued and again let down by South Lanarkshire Council. I am looking for acknowledgement of discrimination on the grounds of maternity/pregnancy, treated unfairly and compensation."*

The claimant's new employment

103. The claimant commenced work with her new employers on 27 July 2017. In that new role, she receives 70p an hour less than she received with the respondents. Her weekly loss is £15.75.

Repayment of Pay During Maternity Leave

104. Due to the claimant resigning and thereby terminating her employment, she did not return to work with the respondents after her period of maternity leave. The respondents reclaimed from her the sum of £703.54 which had been paid to her as part of the maternity pay provisions. Had the respondents not acted as they did resulting in resignation by the claimant she would have returned to work and would have been able to retain the said sum paid to her.

The issues

105. The issues for the Tribunal were set out in the Note of the Preliminary Hearing held on 11 May 2018 as being the following:-

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(i) Whether there was a breach of regulation 18 (2) of the Maternity and Parental Leave Regulations 1999 ("MAPL") by the respondent's failure to allow the claimant to return after maternity leave?

(ii) Whether there was a breach of the implied term of mutual trust and confidence and therefore a repudiatory breach of contract?

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(iii) If so, whether this amounts to automatically unfair dismissal in terms of section 99 of the Employment Rights Act 1996 ("ERA")?

(iv) If not a repudiatory breach, did the claimant suffer a detriment in terms of regulation 19 of the 1999 Regulations?

(v) Whether the employer's conduct (in refusing to meet the claimant) in

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their patronising treatment; in failing to agree the working pattern and in requiring her to submit a fresh flexible working application while on maternity leave) amounted to a breach of section 18 of the Equality Act 2010)?

(vi) Esto, if the respondent's position (that she was not engaged to work

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fixed days) was accepted, was there a PCP which disproportionately affected women because of their childcare obligations, contrary to section 19 of the Equality Act 2010?

106. The other matter for determination by the Tribunal was the level of

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compensation to be awarded to the claimant in the event of success on her part.

Applicable law

107. Regulation 18 (2) MAPL states that an employee who returns to work after a period of additional maternity leave *"is entitled to return from leave to the*

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job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another

job which is both suitable for her and appropriate for her to do in the circumstances."

108. Regulation 19 of MAPL states that an employee is entitled not to be subjected to any detriment by any act or deliberate failure to act by her employer done for any of the reasons specified. Those reasons include being pregnant, having given birth to a child and having taken maternity leave or additional maternity leave.

109. Section 18 of the 2010 Act states that a woman is discriminated against if in the protected period (as defined in that Section), she is treated unfavourably because of her pregnancy.

110. A term may be implied into a contract of employment by the way in which the contract operates in practice. Performance of the contract may confirm that a particular term exists even though not expressly agreed.

111. In relation to a term being implied in the contract of employment, the case of ***Borrer v Cardinal Security Limited EAT 0416/12 ("Borrer")*** is of relevance. In that case, a security guard was held to be contractually entitled to 48 hours of work each week, although his terms of employment stated that his hours would be specified by his line manager. He had worked 48 hours per week for two years. The Employment Appeal Tribunal ("EAT") found that the true agreement between the parties was that the employee would work 48 hours per week.

112. A term being implied into a contract through the reality of operation in practice is a different basis of there being an implied term as compared to a situation where it is said a term is implied by business efficacy or necessity. It is also different to the situation where an officious bystander might have a view as to a term potentially having been implied into a contract.

113. In relation to constructive dismissal, the well-known case of ***Western Excavating (E.C.C.) Limited v Sharp 1978 IRLR 27 ("Western Excavating")*** remains a key case. That case saw Lord Denning state:

> *"If the employer is guilty of conduct which is a significant breach going to the route of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

114. The case of ***Malik v Bank of Credit and Commerce International S.A. (in compulsory liquidation) 1997 WL 1105408 ("Malik")*** is also a well-known case. It confirms that there is an obligation imposed on an employer that it will not:

> *"without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

115. Case law has confirmed in relation to constructive unfair dismissal that the test does not involve applying the range of reasonable responses. It is not necessary that the intention of an employer must be demonstrated. The employer's conduct must be looked at in the round. Relevant cases in that regard are ***Woods v W.M. Car Services (Peterborough) Limited 1982 ICR 693 ("Woods")*** and ***Lewis v Motor World Garages Limited 1985 WL311068 ("Lewis").***

116. It is not necessary for an employer to have intended to act in a way such as to permit an employee to terminate the contract. That is confirmed in the ***Leeds Dental Team Limited v Rose 2013 WL5328723 ("Leeds Dental Team").***

117. As to the right to return to a job, relevant cases are ***Blundell v Governing Body of St Andrews' Catholic Primary School 2007 ICR 1451 ("Blundell")***, and ***Kelly v Secretary of State for Justice UK EAT/0227/13 ("Kelly").***

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118. ***Blundell*** and ***Kelly*** clarify the position as to the right to return to the job which existed prior to maternity leave. The nature, capacity and place are to be considered by the Tribunal. The Tribunal should also keep in mind, it was confirmed, that the purpose of the legislation which was to ensure as little dislocation as was reasonably possible in the employee's working life should occur. ***Kelly*** in paragraph 11 (2) says that the Tribunal could, and should, have considered in their assessment of whether the job being offered to the claimant upon her return, the fact that the job would inow nvolve her working at weekends contrary to how she had worked for the previous 15 years. That would be a valid factor taken into account in assessing whether the job she was now to do was appropriate or suitable.

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119. The case of ***Wright v North Ayrshire Council 2014 ICR 77 ("Wright")*** confirms that in considering a situation where an employee has resigned and assessing whether a repudiatory breach by the employer founds a claim based on resignation, the breach need not be <u>the</u> effective cause. It is enough that it played a part in the dismissal.

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120. The case of ***Vento v Chief Constable of West Yorkshire Police (No 2) 2003 IRLR 102 ("Vento")*** provided guidance as to levels of compensation for injury to feelings. The bands were between £500 and £5,000 in respect of less serious cases, such as when the act of discrimination is an isolated or one-off occurrence. The middle band was set between £5,000 and £15,000. It is to be used for serious cases which should not however merit an award in the highest band. In terms of ***Vento,*** the top band should normally be between £15,000 and £25,000. That would be in respect of the more serious cases such as where there had been a lengthy campaign

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of discriminatory harassment on the grounds of sex or race. An award would exceed £25,000 in the most exceptional case.

121. The bands were increased in value by the case of ***Da'Bell v NSPCC 2010 IRLR 19.*** The lower band was raised to between £600 and £6,000. The middle band was raised to between £6,000 and £18,000. The upper band was raised to between £18,000 and £30,000.

122. Further cases relevant to the levels of compensation are those of ***Simmons v Castle 2013 1WLR 1239 ("Simmons")*** and ***De Souza v Vinci Construction (UK) Limited 2017 EWCA Civ 879 ("De Souza").***

123. Presidential guidance was issued relating to Employment Tribunal Awards for injury to feelings and psychiatric injury following in particular the case of ***De Souza***. That presidential guidance was dated 5 September 2017.

124. In paragraph 10 of the presidential guidance, revision to the ***Vento*** bands was set out in respect of claims presented on or after 11 September 2017. The claim in this case was presented on 16 November 2017.

125. Presidential guidance provided in respect of claims presented on or after 11 September 2017 that the bands would be £800 to £8,400 (lower band for less serious cases), £8,400 to £25,200 (middle band for cases which do not merit an award in the upper band) and £25,200 to £42,000 (being the upper band for the most serious of cases, with the most exceptional cases being awarded a sum in respect of injury to feelings exceeding £42,000). These figures were fixed taking account of ***De Souza*** and also ***Simmons***.

126. Interest is to be added to awards made in respect of injury to feelings. The applicable rate is currently 8% per annum. The starting point for calculation of interest is the date of discriminatory conduct. The concluding date is the date of the Judgment. This is in terms of The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

Submissions

127. Ms Hunter tendered written submissions. She spoke to those. Mr O'Neill made oral submissions. The following summarises the submissions made for each party.

5 **Submissions for the claimant**

128. Ms Hunter submitted that the claimant had been denied her right to return from maternity leave to the job in which she was employed before her absence.

10 129. That job had been working Tuesdays and Wednesdays and alternate weekends. Whilst not in writing, those days of work had become part of the claimant's contract. There had been agreement between the claimant and Ms Glen. Although not in writing, agreement existed. Practice demonstrated implementation of that agreement after the claimant's return 15 to work from her first maternity leave and indeed after her return from her second period of maternity leave. There were only two occasions when she worked a different midday week in the entire three-year period, other than the festive period. The rota had pre-completed elements to it showing the claimant working on Tuesdays and Wednesdays. There was no 20 evidence that Ms Glen had not agreed this variation with the claimant. There was no evidence that there was a prohibition to variation by mutual consent or oral agreement.

130. The claimant was therefore entitled to return to her job on those days with 25 occasional swaps at the weekend to accommodate split shifts. She was denied that right. That was a fundamental breach of the obligation of mutual trust and confidence and entitled her to resign and to claim constructive dismissal.

30 131. Taking the respondents' position at its highest, Ms Hunter said, the claimant had been offered a trial period of six months working Tuesdays

and Wednesdays with alternate weekends. That was not a return to her role, it was a return to a trial period.

132. The claimant was in any event entitled, Ms Hunter submitted, to return to work and not simply to her contractual role. The right to return was broader and more generous. She referred to ***Blundell*** and to ***Kelly***.

133. In ***Blundell***, the EAT had said that a Tribunal should have in mind both the purpose of the legislation and the fact that the regulations provided for exceptional cases where it was not possible to return to the previous case. ***Kelly*** saw the EAT state that the Tribunal had fallen back on the contractual position and that was an error.

134. There had been no argument in the current case by the respondents that it was not reasonably practicable for the claimant to return to her role. In ***Kelly,*** the EAT had suggested that the Tribunal should go beyond contractual documentation in considering the role to which someone was to return.

135. It was, said Ms Hunter, an error for the respondents to consider only the contractual documentation when looking at the role which the claimant would be offered upon return from maternity leave. Regard should be had to the capacity in which the claimant worked rather than simply to her contractual position. She worked 22.5 hours per week with fixed days of Tuesdays and Wednesdays and alternate weekends. She was denied a return to that role.

136. There was therefore a proper basis for the claim of constructive unfair dismissal, namely that a repudiatory breach of contract and breach of the obligation of mutual trust and confidence had occurred. The denial of the right to return was repudiatory and the dismissal was automatically unfair in terms of section 99 of ERA.

137. There had therefore been a breach of contract by the respondents in denying the claimant the right to return. That was sufficiently important to

justify her in resigning. She had left in response to that reason. Her evidence was that she had loved her job and did not wish to leave. She had not delayed too long in terminating the contract.

5 138. The case of ***Nelson v Kingston Cables 2000 UKEAT 662*** was mentioned by Ms Hunter. Paragraphs 20 and 24 were of particular relevance, she said. The EAT had said that an employer evidenced an intention not to continue performing his part of the contract if, when an employee was absent, the employer intimated that on return to work of that employee, the
10 old conditions of her job would no longer be available and that a fundamental change would require to be accepted if and when she did return. The view of the EAT was that the employee in that situation could treat the contract as being brought to an end straightaway. Further, the EAT had also confirmed in that case that an employee faced with an
15 anticipatory repudiation who took the *"natural and understandable step"* of making sure that he or she had another job to go to before notifying acceptance of the repudiation did not of itself mean that the reason for having to seek another job and accept the repudiation was anything other than the employer's anticipatory breach. It was accepted that the issue
20 was one of fact.

139. Ms Hunter also submitted that if there was a denial of the right to return but the Tribunal was of the view that there had been no breach of the implied term of trust and confidence, there had been a series of detriments
25 sufficient to found a claim in terms of regulation 19 of MAPL.

140. Ms Hunter rehearsed the history with the flexible working application submitted by the claimant in May 2017. The claimant ought not to have been asked to make that application as her days were already fixed.
30 Further, the way in which the respondents had handled the flexible working request was dreadful, she said. The respondents employed some 14,000 people and had a dedicated HR department. They had not followed their own policy. Ms Allison's evidence was that the flexible working request had been granted. That was not in fact the case having regard to the

evidence of the claimant as to what had been said to her about her three-month trial, six-month trial and nothing being set in stone. Ms Allison herself had referred to a six-month trial. The email chain however did not back that up as having been said to the claimant. The claimant had been clear to Ms Allison that she was looking at the possibility of an alternative job although she had said to Ms Allison that she did not in fact wish to follow that course and hoped to resolve the position. She lost faith and trust however in the respondents. The union had told her that matters had been resolved but Ms Allison did not ever confirm that to her. She had loved her job and wanted to return to it. Although 28 days had passed from time of her application for flexible working, no decision had been intimated in writing to her by the respondents. That was a serious breach of their responsibilities to the claimant. The claimant was quite entitled in those circumstances to resign.

141. The failure by the respondents to adhere to their own policy and to fix a meeting to discuss the application was a detriment. Ms Allison had used the words "considering" and "granting" interchangeably in referring to the treatment of the flexible working application. Ms Allison had authority to agree the flexible working application subject, it appeared, to a final *"rubber stamp".* That had not been made clear to the claimant. The absence of written communication and clarity in communication caused confusion and detriment to the claimant. The claimant had been told that her conversation with Ms Glen did not count as it was not recorded in writing. That was untenable. There was no written decision about which the claimant could appeal in terms of the policy.

142. A further detriment was that Ms Allison had not met with the claimant during her entire period of maternity leave. The claimant had sought a meeting on various occasions. It appeared however that the claimant had been ignored in the consultation and negotiation process over proposed changed to the rota and set days to make it *"fit for purpose"* as Ms Allison had said. Negotiation and consultation with those at work had taken place

but not with the claimant. Ms Allison had indicated in cross examination that she was unaware that the claimant was one of the individuals upon whom the change from set days would impact. It was accepted by her that the claimant was not invited to any of the meetings to discuss the changes. The respondents had not adhered to their own maternity policy to consult and advise the claimant of what were considerable changes being implemented to working practices. In fact the claimant herself initiated discussion with Ms Allison. Ms Allison said that she had been reassuring and supporting. That was not however the claimant's evidence. The claimant had a set pattern of working for three years. That was key to her childcare arrangements. She had then been told that there was no such thing as set days. That had been devastating to the claimant.

143. Ms Allison was, Ms Hunter submitted, patronising, unhelpful and misleading to the claimant. That was discriminatory. This treatment was directly referable to her pregnancy and constituted direct discrimination.

144. As to compensation, Ms Hunter said that given the claimant's evidence as to the loss of her job and the impact on her health, an award in the middle band in the ***Vento*** scale was appropriate.

145. Ms Hunter then made a submission on an *esto* basis that indirect discrimination had occurred.

Submissions for the respondent

146. Mr O'Neill said that many of the facts were agreed. The written contract, the submission of the flexible working form both in 2014 and 2017 were agreed, as were the dates of the claimant's maternity leave. It was also agreed that Ms Glen was the former manager of the care home and that Ms Allison had taken over in that role.

147. The claimant had returned to work after her first period of maternity leave on the basis of working reduced hours. The letter confirming her return was clear in that it said that she returned to work the hours in accordance with the roster. It was agreed that with the childcare arrangements which the claimant had, she had arranged with Ms Glen that she would work Tuesdays, Wednesdays and alternate weekends. Those were not however set days. That was the critical point of difference between the position of the claimant and the respondents.

148. Ms Allison had sought to introduce changes to work patterns in February 2017. The claimant had sought clarification in early March that she would be able to return to a shift pattern involving working Tuesdays and Wednesdays during the week. Ms Allison had checked the file and had checked with personnel. There was nothing from either source to suggest that the hours were to be worked by the claimant other than in accordance with the roster which would be issued six weeks prior to commencement of the working period.

149. The evidence was that Mrs Grant who had completed the roster would see times set down by her for particular people to work being altered by Ms Glen agreeing to grant an employee's request as to working times.

150. The claimant relied at Tribunal upon the copy rosters. Those did not however invariably show her as working Tuesdays and Wednesdays and alternate weekends. There were no fixed days unless those were confirmed by the outcome of a flexible working application. Management discretion had been involved in relation to particular circumstances.

151. Mr O'Neill referred to ***Lister v Romford Ice Cold Storage 1957 1 ER 125.*** A term would be implied into a contract if it was absolutely necessary to fill a gap. Whether parties intended that there be a term in the contract would be determined, he said, by reference to the *"officious bystander"* test, or by the behaviour of parties or custom and practice.

152. A term had to be so obvious that both parties would instantly agree that it existed if they were asked. The respondents would certainly not agree that the claimant's terms were as she claimed. The behaviour of parties did not support there having been a variation to the contract. The roster was, he said, *"pitted"* with changes.

153. The Tribunal raised with Mr O'Neill the case of ***Borrer*** in order that he had the opportunity to comment upon it. His position was that Ms Glen had decided to assist the claimant for a period and had been willing, on return of the claimant, to carry on a similar type of arrangement. That was at her discretion however. The working days could have been altered. He agreed that there was no evidence regarding an initial period having been agreed or as to it having been agreed or said to the claimant that the days which she was to work were agreed as a matter of discretion for the respondents. Ms Glen had no authority to enter an agreement varying the contract, he said. The Tribunal raised with Mr O'Neill that there had been no cross examination of the claimant or evidence led by the respondents to the effect that Ms Glen did not have actual or ostensible authority to enter into an agreement with the claimant in relation to her days of working. The days worked after return from maternity leave by the claimant both on the first occasion and on the second occasion were the same. There was no evidence the Tribunal could recall of there being a discussion between the claimant and Ms Glen as to whether those hours would apply. Mr O'Neill accepted that. He said that there had been nothing formally put down in writing fixing the days. It had been an informal arrangement which suited both sides.

154. Mr O'Neill highlighted that the grant of the flexible working request in 2014 referred simply to the number of hours to be worked by the claimant. It did not refer to specific days as having been agreed. It could have specified those days. The days in question were therefore an informal arrangement rather than being of any contractual nature, he said. The days actually worked were relatively few given that the claimant returned from maternity

leave for a period of nine months or so and then went on a further period of maternity leave. The events which had led to the Tribunal related to her return from that third period of maternity leave.

155. Ms Allison's evidence had been that there was no right to work a preferred pattern, however applications for flexible working would be accommodated where possible. The claimant's application was accommodated with a trial period of six months being involved. Ms Allison had agreed that, subject to it being rubber-stamped. That had been agreed in principle and communicated to the claimant prior to her resignation. The respondents accepted that a letter ought to have been sent to the claimant. It was not however.

156. The claimant had said that she accepted her new job on 29 May 2018. The claimant had then directed her mind to the question of whether she would be required to repay some maternity pay on the basis that she was not to work with the respondents for three months following her return.

157. It was raised with Mr O'Neill that from the notes of conversations prepared by the respondents themselves, the claimant was still deciding around this time whether to take up the new post or not. Mr O'Neill said that the evidence was that she was 99% certain that she was leaving.

158. Mr O'Neill's submission was that at time of her return to work, the claimant had not been denied the right to return under her usual conditions. She was returning to work with Ms Allison as her new manager. The claimant had not reacted well to Ms Allison, saying that from the first call she had viewed Ms Allison negatively. Ms Allison had however simply wanted the claimant to work hours in accordance with her contract. That contract could be varied by granting of the flexible working application.

159. Turning to the constructive unfair dismissal claim, Mr O'Neill mentioned ***Western Excavating, Malik*** and also ***Tullett Prebon PLC & others v BGC Brokers LP & others 2011 EWCA Civ 131.*** He also mentioned

Leeds Dental Team, Woods and Lewis. These cases helped to clarify what would constitute a fundamental breach of contract justifying resignation. It was not necessary that an employer intended there to be a breach of contract. The employer's conduct would be looked at as a whole with the Tribunal evaluating what, on a reasonable and sensible basis, an employee could not be expected to put up with. A last straw situation could pertain.

160. In summary, the respondents had not denied the claimant the right to return. They had sought to assist her to return via a flexible working arrangement allowing her to work the pattern which she wanted. Permanent set days were not in place. The claimant had been able to appeal against the outcome of the flexible working application.

161. Viewed objectively, Mr O'Neill submitted, the behaviour of the respondents and what Ms Allison had tried to do to assist the claimant to return to work did not entitle the claimant to resign. There had not been repudiatory breach of contract.

162. Further, the respondents submitted that there had been no detriment in terms of regulation 19 of MAPL. Ms Allison had not been patronising in saying that the claimant was being overly anxious. She genuinely cared as to the claimant's anxiety. Ms Grant had said that the claimant sounded anxious. Ms Allison had responded in a fitting manner. She had said that she did not know whether she would be in post when the claimant returned. That was accurate as she held a temporary appointment.

163. As to seeking a meeting, the claimant had simply turned up at the workplace. Ms Allison had not been able to meet the claimant. There was no evidence the claimant had formally sought a meeting. There had been some confusion between Ms Allison and the union. Ms Allison had not misled the union. She had granted the flexible working request in principle. She had checked at an earlier time whether the previous working pattern of the claimant had been formally agreed and had found that it had

not been. Via the flexible working application, the claimant was being offered the opportunity to gain certainty as to her working days, albeit she thought that she had a right to those days. The Tribunal was urged to accept Ms Allison's evidence that she had said to the claimant that the flexible working application had been granted for a period of six months.

164. Mr O'Neill addressed the claim of indirect discrimination. He said that if the Tribunal was inclined to find that indirect discrimination had occurred, the respondents argued that the PCP which they said applied was one which was justified.

165. Turning to the extent of harm and distress about which the claimant had given evidence, Mr O'Neill said that it was regrettable that this situation had arisen. It could not however reasonably be seen to have been caused by the respondents' actions when viewed objectively. The GP report said what the claimant had reported to the GP. That was not caused by the fault of the respondents. The GP had said that there was no ongoing effect or residual effect. If there was a finding against the respondents, the award should lie in the middle to lower end of the lower band of the ***Vento*** scale.

166. Turning briefly to the evidence from the witnesses, Mr O'Neill said that where there was a conflict, the evidence of the respondents' witnesses should be accepted. They had been credible and had been willing to make concessions. If there was any conflict between the evidence of those working on site and of the personnel department, the evidence of the personnel department should be accepted.

Brief reply from the claimant

167. Ms Hunter replied briefly to the respondents' submissions.

168. In relation to the suggestion that the respondents had agreed to a six month period for the flexible working requests and had communicated that to the claimant, Ms Hunter reminded the Tribunal of the difference in evidence between the position of the respondents at time of the grievance and the

contemporaneous evidence of the email of 2 June from Ms Allison, those appearing at pages 73 and 68 of the bundle respectively. The email of 2 June made it clear that there was no agreement at that point to a six month period for the hours in the flexible working request.

169. As to appealing the flexible working application decision, the claimant had never been told what the outcome of that application was. An appeal was provided for in the policy. Given the absence of notification to the claimant, it was entirely unfair to criticise her for not appealing the decision said to have been made upon the flexible working application.

Discussion and decision

Was there a contractual term, express or implied, that the claimant would work Tuesdays and Wednesdays each week and alternate weekends?

170. The claimant was quite clear in her evidence that when she applied in April 2014 to reduce her hours from 37 to 22.5 hours per week, the days on which she would work those hours were also agreed. The agreement was with Ms Glen, the care home manager at the time. It was that the claimant would work Tuesdays and Wednesdays of each week, also working alternate weekends.

171. The Tribunal weighed all the evidence before it in considering whether there was such an agreement. It also considered whether, if it concluded that such an agreement did not exist, a term was in any event implied into the contract between the claimant and the respondents that the claimant's working hours would be those just mentioned.

172. The evidence before the Tribunal comprised various elements. There was, as mentioned, the evidence of the claimant. There was no competing or counter evidence from Ms Glen. The Tribunal appreciated that Ms Glen was no longer the care home manager. There was no evidence before the Tribunal however that it would have been impossible to bring her to the

Tribunal as a witness. What she might have said had she appeared is open to speculation. The fact of the matter is, however, that there was no contrary witness evidence as to the agreement reached between the claimant and Ms Glen.

173. It was borne in mind by the Tribunal that the letter confirming the flexible working arrangement, page 59 of the bundle, said that the reduced hours of the claimant were to be worked in accordance with a roster. It did not therefore specify the days which the claimant said had been agreed with Ms Glen. The letter could of course have specified those days. It was sent by the personnel department, it appeared. There was no evidence led as to what had been said to personnel as to the agreement reached between the claimant and the respondents.

174. The Tribunal was taken to notes of a senior staff development day held on 26 October 2016. Mrs Grant, then Ms Brown, was present at that meeting as was Ms Glen. The notes of the meeting appear at pages 60 to 62 of the bundle.

175. The following passage appears in the notes and was said by Mrs Grant to be an accurate reflection of her understanding of the position: -

*"There continues to be a number of staff vacancies which is having an impact on the rota and Seniors are continually working on filling gaps due to these vacant posts. Regarding this, Julie (*Ms Glen) *advised that the rota should be devised, firstly, using our full time members of staff and then our part time members. Where staff have made specific requests regarding shift patterns, we can try to accommodate where possible, however if we are unable to do so then they are to be placed on rota as required and the onus will be upon them to arrange for a swap."*

176. That was said by the respondents to support there being no agreement between the claimant and themselves through Ms Glen that the claimant would work set days.

177. The respondents also pointed to the sheets produced to the Tribunal as copies of the roster. The roster showed that the claimant did not invariably work Tuesdays and Wednesdays and did not invariably adhere to the pattern of each alternate weekend.

178. The instances to which the respondents pointed however of variation to the pattern worked by the claimant were very small in number. There were two occasions when the claimant had altered her working days during the week. Other variations were either at the festive period or to weekends.

179. The Tribunal was satisfied that the claimant was a credible witness. It believed and accepted her evidence both in respect of the conversation with Ms Glen and also with regard to later events involving Ms Allison.

180. Looking at the time when the claimant had the discussion with Ms Glen in April 2014, whilst it is true that the letter confirming the reduction in hours says that those hours are to be worked in accordance with a roster, the claimant put in place childcare arrangements for her first son so that he was with the childminder on Tuesdays and Wednesdays of each week. Her partner was able to look after him when the claimant was at work during weekends. There was no suggestion that there was any uncertainty as to Tuesdays and Wednesdays being working days of the claimant from the time of her return from maternity leave in April 2014. The roster had a *"standing arrangement"* showing her entered into it automatically as working Tuesdays and Wednesdays. The few times the claimant's working days differed from Tuesdays and Wednesdays required a handwritten alteration to the roster. The evidence was also that any such alteration was initiated by the claimant herself.

181. Mrs Grant referred to the claimant altering her working day one week as the claimant had a class to attend.

182. There was therefore no suggestion whatsoever that the claimant had to check the roster each time it was issued to see when it was that the respondents had scheduled her to work. There was no suggestion that whilst she had expressed a preference for Tuesdays and Wednesdays, the roster had to be checked to see whether those days could be accommodated each six week period when the roster was published. Mrs Grant's evidence was that it was her role to complete the roster. She would allocate staff appropriately to cover shifts. Staff would then approach her sometimes to seek different working days to those allocated to them in the roster. Her evidence was that if she stood firm, staff would then go to Ms Glen who was far more inclined to agree to staff working on the days when they wished to, thereby giving Mrs Grant an issue with the roster. There was no evidence however of any such process ever involving the claimant. Indeed, it was the reverse. Mrs Grant confirmed that the roster which she completed always had, prepopulated, the claimant as working Tuesdays and Wednesdays and alternate Saturdays.

183. A further important point in the view of the Tribunal was what happened when the claimant left for and returned from maternity leave around the birth of her second son and subsequently her third son. She was absent between December 2014 and September 2015. There was no evidence of any discussion with her when she left for maternity leave or upon her return as to the days on which she would work. Her evidence, which the Tribunal accepted, was that she simply returned to the working pattern which had applied prior to her departure on maternity leave i.e. Tuesdays and Wednesdays and alternate Saturdays. She arranged for the childminder to continue those duties on Tuesdays and Wednesdays, this time for both children. Once more, in the period of work prior to the claimant temporarily halting work for maternity leave associated with the birth of her third son, she worked Tuesdays and Wednesdays and alternate Saturdays.

184. Everything which happened was entirely consistent with there being agreement between the claimant and the respondents that her working days were Tuesdays and Wednesdays and alternate weekends. She said that she was approached on the basis of working additional time at the weekends on occasions. She was able to accommodate that. This was however on the basis of a request from the respondents. The claimant felt she should *"do her bit"* by assisting in this regard. There was no evidence whatsoever that the respondents were in a position to roster the claimant as they saw fit, allocating her 22.5 hours on whichever days might be necessary to ensure that there was adequate cover.

185. Further, the respondents themselves, through Ms Allison, recognised that there was an issue with set days which staff who were not working full time had in place. That is why Ms Allison sought to discuss and negotiate with staff. Unfortunately, as detailed above and as referred to below, those discussions and negotiations did not include the claimant. The reason for this, as conceded by Ms Allison, was that the claimant was not present at work. She was not present at work due to being on maternity leave.

186. Whilst the note from the senior staff development day referred to the respondents trying to accommodate specific requests regarding shift patterns when those were made by staff, that did not in the view of the Tribunal undermine there having been an agreement between the respondents and the claimant that she had set days to work. The development day had taken place on 26 October 2016. That was therefore some two and a half years after the claimant had agreed 22.5 hours and also had agreed her set days as being Tuesdays and Wednesdays and alternate weekends. She had worked on that basis since that time. There was no evidence of her making a specific request and as to there being any consideration being given by the respondents to that request or indeed of the respondents being unable to meet any such request. The working pattern of the claimant had been agreed and was then fulfilled by both the claimant and the respondent knowing that she was to work Tuesdays and Wednesdays and alternate weekends.

187. The Tribunal was therefore entirely satisfied on the evidence before it that there was a term in the contract of employment between the claimant and the respondents in terms of which the claimant's working hours from April 2014 were Tuesdays and Wednesdays of each week and alternate weekends. That was not a written term. It was nevertheless an express term confirmed in the verbal agreement between Ms Glen and the claimant and evidenced by all the elements mentioned, including in particular the fact that immediately and thereafter it became the working pattern of the claimant both in practice and in terms of the pre-populated roster sheet.

188. Had the Tribunal not been satisfied that there was an express term as to the claimant's working hours being Tuesdays and Wednesdays and alternate weekends, it would have been satisfied that such a term had been implied into the contract given the way the parties had operated the contract in practice and all the surrounding facts and circumstances. The case of ***Borrer*** was viewed by the Tribunal as being analogous to that of the claimant. The extent and frequency of the practice and in particular its presumed and automatic resumption on return of the claimant from maternity leave after the birth of her second son amply evidenced to the Tribunal that the practice was clear, settled and certain, notwithstanding there being no documented agreement upon the point.

Repudiatory breach of contract

189. Although not at the point of physically returning to work in the spring of 2017, the claimant engaged with the respondents seeking clarification and confirmation that she would be able to return to her set days. She did not obtain that from the respondents. Instead, she was told that she did not have set days of work in the view of the respondents. She was further told that she would require to make a flexible working application if she wished to work on Tuesdays, Wednesdays and alternate weekends. She made such an application, notwithstanding her view that she had agreement to work those days. The Tribunal did not accept on the evidence that the

claimant had been informed by Ms Allison that the flexible working application was granted for a period of six months. Even had it been, that was in the view of the Tribunal a variation to the contract of the claimant of a detrimental nature. What had been a permanent arrangement for set days was being *"downgraded"* to a trial arrangement for six months.

190. The Tribunal's view on the evidence was however that Ms Allison had referred to three months and to there being nothing being set in stone. The Tribunal preferred the claimant's evidence on this point to that of Ms Allison.

191. This view was arrived at for various reasons. Firstly, the claimant impressed the Tribunal as a credible and reliable witness. She was clear and straightforward in her evidence. Secondly, her evidence was backed up by contemporaneous notes which reflected the conversation with Ms Allison as having been as narrated by the claimant to the Tribunal. Thirdly, her evidence was consistent from the time of the conversation with Ms Allison onwards. The evidence from Ms Allison that the respondents had agreed that the claimant would work on a trial basis for six months on Tuesdays and Wednesdays each week and alternate weekends was not accepted by the Tribunal as being accurate. There was no evidence that the respondents had agreed this. In terms of their policy, a meeting would generally take place within 28 days of receipt of the request. No such meeting took place. No written notice of the decision was issued. The policy refers to written notice being given to an employee within 28 days of receipt of the request or within 14 days of any meeting. Both of those elements of the policy appear in the passage at page 124 of the bundle. There was nothing therefore to support Ms Allison's evidence that there was agreement by the respondents to the flexible working application for a period of six months or that she had communicated that to the claimant. In fact, the evidence contradicted there being any such agreement. The email from Ms Allison of 2 June 2014 which appeared at page 73 of the bundle saw Ms Allison state that the flexible working request would be

considered. That directly contradicted the evidence that in fact the decision had been reached and the outcome had been communicated to the claimant on 1 June.

5 192. Even however had the claimant been informed that for a period of six months or on a trial basis she could work Tuesdays, Wednesdays and alternate weekends, that was a material variation in her contract given that she had agreement to work those days as set days, unlimited in duration.

10 193. There was therefore in the view of the Tribunal a breach of the contract in place between the claimant and the respondent in terms of which the claimant was to work Tuesdays and Wednesdays and alternate weekends. Given that this related to the days of work of the claimant and that working those days was critical to the claimant due to childcare arrangements and 15 was known by the respondents to be critical, this was breach of a fundamental term of the contract. It was repudiatory conduct by the respondents. The claimant was therefore entitled to resign in response to it and to advance a claim of constructive unfair dismissal.

20 **Breach of the implied term of trust and confidence**

194. The Tribunal was also satisfied that the actings of the respondents constituted a breach of the implied term of trust and confidence. The assessment by the Tribunal in that regard involves not simply the setting aside by the respondents of the days on which the claimant was contracted 25 to work with them, but also their conduct around this time.

195. The respondents had not made any contact with the claimant to discuss varying her set hours. The claimant was absent from work due to maternity leave. She had found out from colleagues that the respondents were in 30 discussion as to departing from set days of work with employees. There was no evidence from Ms Allison that she intended to contact the claimant and would have done that had the claimant not contacted her. The

claimant initiated the contact. She was very concerned that her days of work might not be honoured. This would have raised real difficulties for her with the childminder. Her health suffered as a result of this.

196. The claimant sought to meet with Ms Allison. The Tribunal appreciated that, from what was said in evidence, Ms Allison had many things to address when she took over as care home manager. Although the claimant sought to meet with Ms Allison, she did this by arriving at the office without an appointment. Nevertheless, Ms Allison did not then attempt to contact the claimant to arrange a meeting about something which was clearly causing the claimant real concern and worry. The claimant attended her doctor during this time due to the upset this caused her. She sought to contact Ms Allison by telephone but was in the main unable to speak to her. When she did speak to her there was absence of reassurance to the claimant. The Tribunal accepted that Ms Allison reacted to the claimant on the basis of her own checks on the claimant's file as to what had been agreed in writing and upon the view passed to her by personnel, again after personnel had perused the records which they held.

197. The respondents' position however was predicated on there being a need for a written record of the claimant's hours being agreed as Tuesdays, Wednesdays and alternate weekends. Contractual terms do not however require to be agreed in writing as a matter of law. It appears the respondents did not appreciate or understand that. It was said to the claimant that her previous flexible working application was *"out of date".* It is entirely unclear why that was said to the claimant. Ms Allison said to the claimant that the claimant appeared to be *"over anxious".* This was when the claimant managed to speak with Ms Allison regarding the "set days" point. Whilst both Ms Allison and Mrs Grant said that the claimant was anxious and indeed the claimant herself accepted that she wished answers and was very concerned about the way things were taking shape, the Tribunal accepted that what had been said by Ms Allison to the claimant was that the claimant was *"overly anxious"*. That in the view of the Tribunal

was not a supportive or understanding comment or one which might be seen as reassuring in the context in which it was said. Rather, the Tribunal regarded the evidence as supporting the view that it was said in more of a dismissive way. It illustrated, as the Tribunal saw it, the lack of understanding and sympathy which the respondents had for the position of the claimant.

198. Throughout this period the claimant wished to continue working for the respondents if her set days were confirmed as being adhered to by them. She informed the respondents that she was looking for a job. She told them that she had spoken with Acas. They were also aware that she was speaking with her union representative and obtaining advice from him. None of these factors caused the respondents to vary their approach with the claimant.

199. In the view of the Tribunal from the evidence, there were two key contributing factors to the approach of the respondents. Firstly, the claimant did not have any set days specified in writing. Secondly the claimant was not present in the office. The fact that she was not present in the office was due to her being on maternity leave.

200. Had there been no breach of an express term of contract, the Tribunal would have been entirely satisfied on the basis of the actings and omissions of the respondents as set out in this Judgment, that the implied term of mutual trust and confidence had been breached by the respondents. A breach of that implied term is always a repudiatory breach. The claimant would therefore, on that basis, have been entitled to resign and to claim constructive unfair dismissal.

<u>Did the claimant resign, at least in part, in response to the breach?</u>

201. There was no doubt in the mind of the Tribunal that the claimant had indeed resigned, at least in part, in response to the repudiatory breach of contract

by the respondents. The time for her return had not been reached in that her maternity leave was still current at the point when she resigned. Nevertheless, the respondents had been clear that Tuesdays and Wednesdays and alternate weekends were not accepted as her set days of working. It was not, in fairness to the respondents, argued in submission that the claim ought not to be successful due to the claimant having resigned as she had another job. By the time she resigned she did indeed have an alternative post. As mentioned, she had been keen to remain in employment with the respondents. What caused her to seek an alternative post was the fundamental breach of contract by the respondents. There was a clear connection between the fundamental breach of contract and the resignation of the claimant.

Did the claimant affirm the contract either positively or by delaying in resigning?

202. This again was not a matter of submission by the respondents. Nevertheless, it is appropriate that the Tribunal records that it was content that the claimant had acted reasonably promptly and certainly in time such that she had not affirmed the breach of contract by the respondents.

Automatically unfair dismissal

203. Although the claim of constructive unfair dismissal was successful as detailed above, it is also appropriate that the Tribunal records that it was satisfied that the respondents had acted in breach of section 73 of ERA and Regulation 18 (2) of MAPL. They had not permitted the claimant the right to return to her job. Whilst there may have been a role as a care assistant available, her hours of work were critical to that role.

204. Whilst there was some evidence from the respondents that they had issues with set days and distribution of staff hours, there was no evidence

supporting the view that it was not reasonably practicable for her to return to her role in those set hours. Such evidence as there was upon the difficulty of accommodating the set hours related to the "justification" argument in respect of the claim of indirect discrimination.

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Was there a breach of section 18 of the 2010 Act, due to the claimant being discriminated against during the protected period by being treated unfavorably due to her pregnancy?

205. In the view of the Tribunal, this question was appropriately answered in the
10 affirmative. The following occurred in the protected period. The claimant was not contacted to discuss her days of work. She was not invited to meetings to discuss her days of work. Had she been at work, she would have been able to speak with Ms Allison regarding her days of work. She was however unable to meet with Ms Allison or to speak to her, other than
15 infrequently on the telephone, regarding her days of work. Further, the valid and legitimate concerns of the claimant regarding the potential removal of her entitlement to set hours were treated somewhat dismissively by the respondents. Her flexible working request was not dealt with appropriately in terms of the respondents' own policy.

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206. As this Judgment sets out, upset was caused to the claimant through the acts and omissions of the respondents. She attended her doctor. The first period of her maternity leave was impacted to a significant extent by the worry caused by the acts and omissions of the respondents.

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Remedy

207. In respect of the constructive unfair dismissal, the claimant is entitled to a basic award together with an award in respect of past and ongoing loss of earnings. There was no significant challenge to the sums which she
30 sought in respect of the compensatory award under those heads of claim.

208. The basic award to which she is entitled is £2,185. That is calculated by having regard to her age, wage and length of service at effective date of termination. She was 32 at that point. Her weekly wage was £198.68 gross, £193.44 net. She had been employed for 12 years.

209. The claimant's weekly wage in her new role is 70p per week less than that which she was paid by the respondents. She commenced work in her new role on 27 July 2017, her employment with the respondents having finished on 22 June 2017 when she tendered her resignation.

210. Her loss as of 2 June 2018 is £819. A further loss to date of Tribunal has accrued amounting to £252. Her new employment may see an increase in her wage. It is reasonable however to award her what amounts to the shortfall in wage as paid to her by her new employer and that which would have been paid to her by the respondents for a period of six months in round terms. That amounts to £400. The claimant is awarded those sums which are in accordance with her schedule of loss. These amounts total £1,471.

211. In addition, the respondents have reclaimed from the claimant the sum of £703.54. That was an element of maternity pay paid to the claimant which was conditional upon the claimant returning to work after maternity leave for a period exceeding three months. Whilst she did not return to work after her third period of maternity leave, the Tribunal was satisfied that, had there not been a material breach of contract by the respondents which resulted in her resignation, she would have returned to work and would have worked for a period in excess of three months. She was happy in her role and gave the respondents every opportunity to adhere to the agreement with her that she work the set days of Tuesdays, Wednesdays and alternate weekends. This loss was therefore as a result of the (constructive) dismissal of the claimant by the respondents. The claimant is therefore entitled to reimbursement of £703.54.

212. The claimant is also awarded payment in respect of loss of statutory rights and employment protection, quantified in the sum of £500.

213. The respondents are therefore ordered to pay the following amounts to the claimant:-

(1) An amount in respect of the basic award, £2,185.

(2) An amount in respect of the compensatory award, £2,174.54. That is comprised of £819, £252, £400 and £703.54

(3) An amount in respect of loss of statutory rights, £500.

Injury to feelings

214. The Tribunal took cognisance of the upset caused to the claimant by the respondents' acts and omissions. The claimant lost a job which she enjoyed. A period of her maternity leave was adversely affected. She was caused anxiety and worry. That necessitated her visiting her doctor.

215. Whilst it was maintained on behalf of the claimant that an award in the middle band of the ***Vento*** scale was appropriate, the Tribunal considered that the extent of the discriminatory treatment, its nature and the length of time over which had occurred warranted an award at the upper end of the lower band. In view of the Tribunal, the sum of £8,000 is appropriately awarded to the claimant, by way of injury to feelings. The respondents are ordered to pay that amount with interest. Whilst it is difficult to be definitive as to when the acts of discrimination commenced, the Tribunal is of the view that such an act had occurred as at 5 March 2017. By that time there had been communication stating that the claimant's entitlement to fixed or set days (as the Tribunal has found existed) was not being accepted by the respondents. The resultant sum by way of interest applying 8% on the sum of £8,000 for the period 5 March 2017 to 12 December 2018 (a period of

92 weeks) is £1,132.31. The respondents are ordered to pay to the claimant an amount in compensation for injury to feelings of £8,000 with interest thereupon of £1,132.31

Employment Judge: Robert Gall
Date of Judgment: 12 December 2018
Entered in register: 13 December 2018
and copied to parties

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