EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs S Lumsdon	AND	Stagecoach Devon Ltd t/a Stagecoach South West

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 10 and 11 June 2019

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms S M Christison
Mr I Ley

Representation

For the Claimant: In person
For the Respondent: Ms S Hornblower of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Stacey Ann Lumsdon claims that she has been unfairly constructively dismissed, and that she has been discriminated against for maternity related reasons. The respondent contends that the claimant resigned, that there was no dismissal, that there was no discrimination, and in any event that the majority of the claimant's claims were presented out of time.
2. We have heard from the claimant. We have from Mr M Gibbon, Mr C Comer, Mr G Mellish and Mr P Clark on behalf of the respondent.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The respondent company provides public transport services in the South Devon region and employs approximately 1,200 employees. The claimant commenced employment with the respondent as a bus driver on 4 August 2014. The claimant worked at the respondent's Exeter Matford Depot, where there were about 500 employees. She resigned her employment with immediate effect by letter dated 5 October 2017 and her resignation was accepted by the respondent with effect from that date.
5. The respondent operates a sickness absence policy and procedure. Broadly speaking if an employee has three spells of absence in any six-month period this will trigger the procedure. The respondent is concerned to ensure reliable attendance from its employees, because absences give rise to the disruption of the efficient provision of services and potential difficulties with customers and the relevant Regulator.
6. The claimant had an erratic attendance record. Between 23 May 2015 and 19 May 2016 the claimant had just over 30 days' sickness absence. This triggered an attendance investigation meeting under the relevant procedure. 26 days within this total were for stress and family illness following the claimant's mother's illness and death. The respondent declined to take any further action for this reason. The claimant then took a further seven days' sickness absence from 13 June 2016 for lower back pain. This triggered a further attendance investigation meeting, but again no action was taken. From 13 July to 23 July 2016 the claimant had a further two and a half-days' sickness absence. This triggered a further investigation meeting and the claimant was told that she would be placed on a one-month review commencing on 16 August 2016. This was not a formal warning, but might have led to one depending upon the review. Given the amount of absences and the relevant procedure, it is fair to say that the respondent treated the claimant relatively leniently and compassionately during this period.
7. All of these sickness absences predate the claimant's pregnancy. From 11 September to 16 December 2016 the claimant had a further 44 days' sickness absence, but these were for pregnancy related reasons, and were effectively discounted for the purposes of the respondent's policy, and no action was taken. The claimant then commenced maternity leave on 8 January 2017.
8. The respondent has a four-page form headed "notification of intention to take maternity leave". The claimant completed this form in the presence of her line manager Ms Scant on 24 November 2016. She notified the respondent of her intention to return to work after her maternity leave. She gave notice that the last day of work would be 8 January 2017, and that she would start her maternity leave on the following day 9 January 2017. Her due date was 12 March 2017, but she gave birth to twin boys on 17 February 2017 following emergency Caesarian section. It was noted on the form that the claimant's Ordinary Maternity Leave would finish on 9 July 2017 but that she wished to commence Additional Maternity Leave on 10 July 2017, and that this would continue until 7 January 2018, with her expected return to work date being the following day 8 January 2018. The claimant confirmed that she wished to be kept informed of relevant announcements and recruitment opportunities during her maternity leave.
9. The claimant accepts that her manager Mr James Mooney kept in contact with her for a significant period of her maternity leave, and she has no complaint until after September 2017 when Mr Martin Gibbon (from whom we have heard) joined the respondent as Operations Manager and took over from Mr Mooney. The claimant complains that she entered the respondent's depot on at least 14 separate occasions between the end of August and 5 October 2017, but that the

respondent's managers effectively ignored her and failed to discuss her employment position with her. We have heard evidence from Mr Gibbon, and also from two Assistant Operations Managers, namely Mr Chris Comer and Mr Gary Mellish. They all confirmed that they have no recollection of the claimant's alleged visits at all, other than on an earlier occasion when she came in to introduce her children before Mr Gibbon had joined. The respondent effectively operates an "open door" policy and there was never any requirement for the claimant to book an appointment, and equally no difficulty in the claimant arriving at the Depot and finding a manager to speak to. There is no evidence of any appointments or entries in a visitors' book. On balance the weight of evidence is against the claimant on this point and we prefer the respondent's evidence for that reason. We find that the respondent did not fail to communicate with the claimant during her maternity leave period and we cannot find that the respondent's managers failed to engage with her when she attended the depot to speak to them.

10. The claimant also asserts that she sent two letters to the respondent on 9 September 2017 and 27 September 2017 and that these were effectively ignored by the respondent and that she received no reply. She confirmed at this hearing that she prepared these letters on a word processor. The respondent denies ever having received these letters. The claimant did not produce copies of these alleged letters, and no evidence such as proof of posting that they had been sent, and we are unaware of their supposed content. On balance we prefer the respondent's version of events and we accept that the respondent never received these letters, if indeed they were sent, and we therefore cannot find that the respondent failed to communicate with the claimant by way of the claimant's expected response to these letters.
11. Despite the agreed arrangements that the claimant would return to work following the expiry of her Additional Maternity Leave period on 8 January 2018, the claimant resigned her employment by letter dated 5 October 2017. That letter stated: "I'm writing to you as I am currently on maternity leave and have no option but to give notice to terminate my contract from the end of my maternity leave. My twin boys will be eight months old and in 12 days' time and having been given no other options to consider and child care for them is so overpriced I have no other option." She went on to request payment of accrued holiday pay and finished by confirming: "I thank you for the opportunities I have been given in my time with Stagecoach and may return in the future, kind regards." The claimant confirmed in her evidence at this hearing that the reason for her resignation related to the childcare costs for her baby sons.
12. Mr Gibbon confirmed that he had not received any request from the claimant to return to work before the agreed date of 8 January 2018, either for part-time or flexible working. Neither did the claimant ever request a meeting with him. The claimant had not raised any formal or informal grievance, or otherwise complained about how she had been treated during her maternity leave. His understanding on reading the resignation letter was that she wished to resign with immediate effect for personal reasons and in particular the cost of childcare. He decided to accept her resignation and made arrangements for it to be processed.
13. The claimant suggests that she took advice from ACAS in December 2017 about her position, but in any event did not raise any grievance or complaint following her resignation. On 15 March 2018 she emailed Mr Mellish to ask if the respondent would consider taking her on "as a casual driver". By way of a pleasant email by reply Mr Mellish confirmed that the respondent was no longer taking on any casual drivers. This followed a change of policy on the part of the respondent following a

previous fatal accident involving a casual driver. The change of policy was a result of difficulties in ensuring the casual drivers were not exceeding authorised hours with other driving duties over which the respondent had no control.

14. On 21 March 2018 the claimant sent an email to the respondent's managing director Mr Dennison. For the first time she raised a complaint to the effect that following the termination of her maternity leave in October 2017 she had received no contact from the operations department with regard to her employment and the potential for staying on in either a part-time or casual capacity. She complained that the respondent was only taking on full-time employees and that the Operations Department was not prepared to meet with her.
15. Mr Dennison passed the matter to Mr Paul Clark, the respondent's Operations Director, from whom we have heard. Mr Clark investigated the matter and sent an email to the claimant on 20 April 2018. He confirmed he had spoken with Mr Gibbon, and that "he does realise that he should have handled the situation in a better manner rather than to simply accept your resignation. At the time of your resignation, Martin was only in his first month as Operations Manager for Exeter, and was still getting to know the depot and its people but he does realise his error. Moving forward, is employment with Stagecoach something that you are seeking? If that is the case then please advise. Whilst we are actually reducing the number of casual employees with us, there may be an opportunity for a fixed part-time work. I have not looked at your personnel file but if your intention is to reapply for a driving position with us then I will arrange for this to be sent to me and I will make a decision on the matter…"
16. The claimant confirmed by email dated 22 April 2018 that she was seeking employment with the respondent and was looking for "something part-time as a full-time commitment isn't something I could offer. I'm looking for three days a week …" Mr Clark then reviewed the claimant's personnel file and responded by email dated 25 April 2018 to this effect: "After careful consideration following a review of your personnel file, we will not be progressing your application mainly due to the fact that there were a variety of attendance issues throughout your time while you worked at Exeter Depot." In a subsequent email that day Mr Clark confirmed: "You were put on an attendance review which is not something we do for one-off incidents and not a decision taken lightly. Reviewing your attendance, you had several absences over your three years with the company and for that reason, we will not be pursuing your application with the company."
17. The claimant subsequently requested a copy of her personnel file, and attended at the depot on 17 May 2018 to hand in a formal written request for the same. She met with Mr Gibbon, which is the first time that Mr Gibbon had spoken with the claimant. He agreed to take her letter and to process it. The claimant asserts that Mr Gibbon was rude and abrupt and told her to "get out". Mr Gibbon accepts that it was a short functional conversation, but denies that he was rude or abrupt or that he told the claimant to "get out". In addition, that conversation was witnessed and heard by Mr Comer, who cannot remember the exact words which were spoken, but confirmed that it was a short meeting and that Mr Gibbon was not rude or aggressive or abrupt. The weight of evidence is against the claimant on this point, and for this reason we favour the respondent's version of events. We find that there was a short meeting between Mr Gibbon and the claimant at which he might have been terse and businesslike, but cannot be said to have been rude or aggressive or unnecessarily abrupt.
18. The respondent then processed that request promptly, and the personnel file was sent to the claimant towards the end of May 2018. The claimant then sought advice

from ACAS and emailed Mr Clark on 24 May 2018 confirming that ACAS advised her to give the respondent seven days to reconsider its position. She set out her sickness absence record in detail and suggested that she had only taken a total of 14 days off due to sickness "not counting my pregnancy-related illness and the [absence] due to my mother's illness and death". Mr Clark checked the position and responded by email dated 30 May 2018 rebutting the claimant's suggestion that she had only had 14 days sickness absence, when in fact the real total was 79 days "for a variety of different reasons". This did include the pregnancy-related illness, but Mr Clark was making the point that the total was not 14 days. In fact the total of non-pregnancy related absences amounted to about 40 days in three years, leading to an attendance investigation meeting. We accept Mr Clark's evidence that his reason for refusing to process the claimant's application for further employment was because of this unreliable attendance record which had arisen before the claimant's pregnancy, and was in no way related to her pregnancy or maternity leave.

19. The claimant then presented her application to ACAS for an Early Conciliation Certificate on 30 May 2018, which was issued on 31 May 2018. The claimant then presented her claim form the same day, 31 May 2018.
20. The claimant has suggested that she was unable to consider and commence Tribunal proceedings within three months of her resignation on 5 October 2017 because of a number of personal difficulties in her family life. These include the effect of her mother's illness and death from March 2016; her moving house in June 2016; her father's illness and her having to look after him towards the end of 2016, and his eventual diagnosis of dementia in October 2018; her pregnancy and emergency delivery of twins in February 2017; her having to cope with twins as a new mother; her husband's road accident in December 2017; and being involved in Family Court proceedings in April and May 2018 with regard to contact for her stepchildren.
21. The claimant accepts that she started to prepare Tribunal proceedings in December 2017, but was distracted by her husband's road accident and the fact that his vehicle was written off, which involved difficulties with the insurance company, and which caused financial strain. As noted above the claimant did not make contact with ACAS with regard to the Early Conciliation provisions until the end of May 2018.
22. Having established the above facts, we now apply the law, and we deal with the alleged pregnancy and maternity discrimination, unfair constructive dismissal, and out of time issues in turn. These issues were identified and agreed at a case management preliminary hearing on 3 January 2019 and confirmed in an order of that date.
23. <u>Pregnancy and Maternity Discrimination</u>:
24. The relevant provisions are in section 18 of the Equality Act 2010 ("the EqA") which provide that:- s.18(2) a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably – (a) because of the pregnancy; or (b) because of illness suffered by her as a result of it … s.18(4) a person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave … s.18(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends – (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period, or (if earlier)

when she returns to work after the pregnancy; (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

25. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
26. The claimant raises four allegations, which are these: (1) that the respondent failed to communicate with her during her maternity leave; (2) that this led to her resignation in October 2017; (3) that the claimant was not offered any form of re-engagement in 2018; and (4) that Mr Martin Gibbon was abrupt and rude towards her on 17 May 2018. It is accepted by the parties that the Protected Period for the purposes of section 18 EqA came to an end when the claimant's notified period of Additional Maternity Leave expired on 8 January 2018. The third and fourth allegations took place outside the Protected Period, and the question therefore arises whether the decision was made within the Protected Period, but only implemented thereafter. Even if any one or more of the four allegations above are established, then under section 18(2) discrimination will only have occurred if the claimant was treated unfavourably (a) because of the pregnancy; or (b) because of illness suffered by her as a result of it; or under section 18(4) because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave.
27. Dealing with each of the four specific allegations, our findings and our decision are as follows. First, we have found that the respondent did not fail to communicate with the claimant during her maternity leave. This first allegation therefore fails.
28. The second allegation is that this led to the claimant's resignation in October 2017. We reject this allegation for two reasons: in the first place there was no failure to communicate with her, and in the second place the claimant has confirmed that the reason for her resignation was her concern about the costs of childcare.
29. The third allegation to the effect the claimant was not offered any form of re-engagement in 2018 is factually correct. It was also potentially unfavourable treatment. However, we have accepted Mr Clark's evidence that he took this decision because of the claimant's poor attendance record for the three years prior to her pregnancy. The unfavourable treatment cannot therefore be said to be under s18(2) EqA (a) because of the pregnancy; or (b) because of illness suffered by her as a result of it; or under section 18(4) because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave. In any event the unfavourable treatment complained of (namely Mr Clark's decision in April/May 2018) took place outside the Protected Period, and in our judgment cannot be said to be the implementation of any decision made within the Protected Period. We therefore reject the third allegation.
30. Finally, the fourth allegation is that Mr Gibbon was rude and abrupt to her on 17 May 2018. We have already rejected that allegation as being factually incorrect. In any event the unfavourable treatment complained of took place outside the Protected Period, and cannot be said to be the implementation of any decision made within the Protected Period. We therefore reject this fourth allegation
31. In these circumstances the claimant's claim of discrimination fails, and is hereby dismissed. In any event, we would also have dismissed the first and second allegations because these two claims were presented out of time for the reasons explained further below.

32. Unfair constructive dismissal:
33. The claimant alleges that the respondent's failure to communicate with her during her maternity leave amounts to a fundamental breach of the implied term in her contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
34. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
35. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
36. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Schultz v Esso Petroleum Company Ltd [1999] IRLR 488 CA.
37. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
38. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root 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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose

his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

39. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
40. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
41. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
42. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
43. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be

shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

44. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
45. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
46. The fundamental breach of contract relied upon by the claimant was identified in paragraph 21.5 of the case management order dated 3 January 2019. This was to the effect that the respondent failed to communicate with the claimant during her maternity leave, and that this amounted to a breach of the implied term of trust and confidence. However, we have found that the respondent did not fail to communicate with the claimant during her maternity leave. There was therefore no fundamental breach as relied upon by the claimant. In any event, even if there were such a breach, it is clear from the claimant's own admission that the reason for her resignation was her concern about the childcare costs for her young twins. That was the reason for her resignation, and it was not because of any alleged fundamental breach of contract.
47. In circumstances where there is no breach of contract, and/or the reason for the resignation was not in response to any breach, the claimant's resignation cannot be construed to be her constructive dismissal. We find that the claimant resigned her employment by letter dated 5 October 2017 and that there was no dismissal. Accordingly, we also dismiss the claimant's unfair dismissal claim.
48. In any event, we also dismiss the claimant's unfair dismissal claim because it was presented out of time for the following reasons.
49. Limitation and out of time issues:
50. The first relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
51. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination by reason of pregnancy or maternity contrary to section 18 of the EqA.
52. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other

period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

53. We have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
54. In this case the claimant's effective date of termination of employment was 5 October 2017. The three month time limit therefore expired at midnight on 4 January 2018. The claimant commenced Early Conciliation with ACAS on 30 May 2018 (Day A). The Early Conciliation Certificate was issued on 31 May 2018 (Day B). These proceedings were issued that same day 31 May 2018. Any complaint which predates 28 February 2018 is potentially out of time. The claimant accepts that claim was presented out of time, with the exception of the third and fourth allegations of maternity discrimination in April and May 2018.
55. Unfair Dismissal Limitation:
56. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are her numerous personal difficulties. These include the effect of her mother's illness and death from March 2016; her moving house in June 2016; her father's illness and her having to look after him towards the end of 2016, and his eventual diagnosis of dementia in October 2018; her pregnancy and emergency delivery of twins in February 2017; her having to cope with twins as a new mother; her husband's road accident in December 2017; and being involved in Family Court proceedings in April and May 2018 with regard to contact for her stepchildren.
57. Whereas we sympathise with the claimant who endured a number of distressing and difficult events, as well as being a new mother of twin sons, the claimant has not discharged the burden of proof to the effect that it was not reasonably practicable for her to have issued these proceedings in time in the three months before 4 January 2018. There is no suggestion that the claimant received defective advice, or was misled in any way by the respondent. The claimant has adduced no medical evidence to suggest that she was in any way medically incapacitated from issuing proceedings within time. We are not satisfied that the claimant's personal difficulties were in anyway sufficient impediment to restrict or debar her from issuing proceedings within time, particularly as the claimant was able to process and dispute an insurance claim, and take part in disputed Family Court proceedings, during the relevant period.
58. The question of whether or not it was reasonably practicable for the claimant to have presented the claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).

59. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
60. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
61. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
62. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

63. In the circumstances of this claim the claimant has not discharged the burden of proof upon her and we find that it was reasonably practicable for the claimant to have presented her unfair dismissal claim within the relevant limitation period. The claimant's unfair constructive dismissal claim was therefore presented out of time, and is also dismissed for this reason.
64. Pregnancy and Maternity Discrimination Limitation
65. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are the same personal difficulties set out above.
66. We have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. We deal with each of these in turn.
    a. The first is the length of and the reasons for the delay. This is some five months. The reasons given, as set out, in our judgment did not of themselves prevent the claimant or any advisers from issuing protective proceedings within time.
    b. Secondly, we have considered the extent to which the cogency of the evidence is likely to be affected by the delay, and given that we have already been able to hold a full hearing on the disputed evidence, this is no longer relevant.
    c. Thirdly, we have considered the extent to which the parties co-operated with any request for information. This was not relevant in this case.
    d. Fourthly, we have considered the promptness with which the claimant acted once she knew the facts giving rise to the cause of action. The claimant now asserts that she resigned her employment following less favourable treatment on the grounds of her maternity namely that the respondent did not make contact with her during her maternity leave. She did not act promptly to issue these proceedings, and only did so some eight months after her resignation.
    e. Finally, we have considered the steps taken by the claimant to obtain appropriate professional advice. We note that the claimant was able to seek advice from ACAS and prepare Tribunal proceedings in December 2017 (during the limitation period), but still did not issue these proceedings until well after it had expired.
67. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
68. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
69. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates

how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

70. In the circumstances of this case the claimant has not given a satisfactory explanation as to the delay in issuing proceedings following her resignation, which she now says was for discriminatory reasons, and neither has she given any satisfactory explanation as to the ongoing delay until the date of issue these proceedings. In the circumstances of this case we do not consider it just and equitable to extend the time period, and for this reason we would have dismissed the first and second allegations of maternity discrimination in any event as being out of time.
71. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 21; a concise identification of the relevant law is at paragraphs 24 and 25; 34 to 45; 50 to 53; 59 to 62 and 67 to 69; and how that law has been applied to those findings in order to decide the issues is at paragraphs 26 to 31; 46 to 48; 63 and 70.

Employment Judge N J Roper

Dated: 11 June 2019

Judgment sent to Parties: 25 June 2019

For the Tribunal Office