EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms A Emadi Allahyari		**Monitor**

Heard at: London South Employment Tribunal
On: 28, 29 & 30 June 2021
In Chambers on 1 July 2021

Before: Employment Judge Hyams-Parish
Members: Ms N Christofi and Ms C Upshall

Representation:
For the Claimant: Ms S Robertson (Counsel)
For the Respondent: Mr D Campion (Counsel)

RESERVED JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claim of unfair dismissal fails and is dismissed.

(b) The claim of direct disability discrimination fails and is dismissed.

(c) The claim of disability related harassment fails and is dismissed.

(d) The claim of breach of contract fails and is dismissed.

REASONS

CLAIMS AND ISSUES

1. By a claim form presented to the Employment Tribunal on 18 February 2019, the Claimant brings the following claims against the Respondent:

   (a) Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA"))

   (b) Breach of contract

   (c) Direct disability discrimination (s.13 Equality Act 2010 ("EQA"))

   (d) Disability related harassment (s.26 EQA)

2. A list of issues had been agreed at a previous case management hearing. On the first day of this hearing, Counsel for the parties confirmed that those issues were still applicable to this case. From these issues, the Tribunal drafted a set of questions which it considered needed to be answered to determine the claims against the Respondent. These questions were approved by Counsel. They are as follows:

   Termination

   (a) Was the Claimant dismissed or did she resign?

   (b) If she was dismissed, when was the effective date of termination?

   Time limits for unfair dismissal and breach of contract claims

   (c) Were the claims for breach of contract and unfair dismissal presented within the applicable time limit, which is three months, less one day, from the EDT?

   (d) If not, was it reasonably practicable for the Claimant to have brought the claims within the above time limit?

   (e) If it was not, did the Claimant bring her claim within such further period as was reasonable in the circumstances?

   Unfair dismissal

   (f) Has the Respondent proven a potentially fair reason to dismiss?

   (g) Did the Respondent act reasonably in treating the above reason as a reason for dismissal?

(h) If the dismissal was unfair, by what percentage, if any, should any compensation be reduced on account of *Polkey* or contributory fault?

Breach of contract?

(i) Did the Respondent breach the implied term of mutual trust and confidence?

(j) When did the Respondent breach the employment contract?

(k) Did the Claimant affirm the contract following the breach?

Disability related harassment

(l) Was the conduct complained of and set out at paragraph 3 below, related to the Claimant's son's disability?

(m) If it was, did it have the *purpose* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(n) If it did not have that purpose, did it have that *effect* and was it reasonable for it to have done so, bearing in mind the perception of the Claimant and the other circumstances of the case?

Direct disability discrimination

(o) Did the Respondent treat the Claimant less favourably than ZA or a hypothetical comparator? The Claimant relies on the treatment at paragraph 3 below.

(p) If so, was that treatment because of disability?

Time limits for discrimination claims

(q) Were the discrimination claims brought within the applicable time limits?

(r) If not, is it just and equitable to extend those time limits?

3. The allegations of harassment and direct discrimination were particularised by the Claimant in a document provided by order of the Tribunal. This set out the allegations as follows [sic]:

> ***(i) R refused to extend career break. This had followed C's request for an extension given her circumstances. The request was made to FM during a telephone discussion on 25.4.18 in which C had explained***

her son's disability was worse. FM was very reassuring that they could sort it out and give C another year. C emailed FM later on 25.4.18 thanking her for being so understanding. C emailed again on 15.5.18, asking FM for an update.

(ii) R disregarding C's inability to return to work. On 17.5.18, C had called FM expressing disappointment and asking if other avenues could be explored. FM passed C's details on to TF. C and TF had a number of calls during this period, including on 30.5.18 at 5:20 pm. On 11.6.18, C broke her ankle and TF was fully aware that C was unable to walk and so would not be able to return by 20.6.18 in any event. One call from TF was to C in the fracture clinic on 14.6.18 when C explained the severity of the fracture and her inability to walk.

(iii) The Respondent contacted the Claimant by telephone confirming that they were not going to extend the Claimant's career break; and told her that she would have to resign or return to work full time. C told TF that C's GP had agreed to sign her off work if going back full time was the only option. TF said she would call back on 21.6.18 as C was very upset.

(iv) TF not calling C. On 22.6.18 FS messaged C asking for an update. C replied the same day saying TF had said she would call on 21.6.18 but had not. FS replied saying she would get TF to call C. C called TF on 22.6.18 but did not get a response. TF did not call.

(v) R sent a letter to C, giving her 7 days to respond, asking for confirmation on whether C could return to her role, otherwise it would be assumed that C intended to resign.

(vi) The Respondent did not answer and ignored the Claimant's several attempts to call Tara Field on 09.07.18-10.09.18 following the Claimant's receipt of the letter of 4 July 2018. C is unable to be more precise as only calls she is charged for are shown on her bills.

(vii) R dismissed C. C received R's dismissal letter (dated 1.8.18) on 2.8.18. In the letter R purports to having already dismissed C ('we have made you a leaver') with an end date of 31.7.18. The letter also told C of a purported instruction to R's payroll to pay 3 months notice at the end of August. C's contract gave no provision for pay in lieu of her entitlement to 3 months' notice. R did not give C the right to appeal.

THE HEARING

4. The parties had agreed a timetable which the Tribunal was happy to adopt. The morning of the first day was spent reading witness statements and relevant documents in the hearing bundle consisting of 398 pages. There were no preliminary matters that needed to be dealt with prior to the start of the hearing.

5. The witness evidence started at 14.00 on the first day of the hearing and completed at 12.15 on the third day. Both Counsel had prepared written submissions which they supplemented with oral submissions between 13.30 and 15.45 on the third day. These submissions were considered

carefully by the Tribunal before reaching its decision. Where particular authorities referred to in submissions have not been mentioned in this judgment, the Tribunal has nonetheless taken them into account and given them due weight in reaching its conclusions.

6. After some discussion with the parties, the Tribunal decided to reserve its decision. The Tribunal met in Chambers on the fourth day of the listing.

7. During the hearing, the Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent:

   (a) Frances Shattock ("FS"), the Claimant's line manager

   (b) Sophie Ellis ("SE"), Employee Relations, Legal Director.

8. Tara Field ("TF") had provided a witness statement but could not attend the hearing to give evidence due to her sister's ill-health and for reasons relating to her child. This was discussed at the outset of the hearing. Counsel for the Claimant did not object to the Tribunal reading her witness statement or matters contained therein being put to the Claimant in cross examination. However, she said it would be a question of how much weight should be given to the evidence.

9. The Tribunal gave TF's evidence less weight than had she attended the Tribunal to be cross examined. Where her evidence was disputed, the Tribunal approached it with caution and looked to see what other supporting evidence was available. As it happens, the Tribunal did not find itself relying solely on the evidence of TF on any matter; its decisions were informed by all of the evidence, including oral testimony and documentary evidence.

BACKGROUND FINDINGS OF FACT AND CHRONOLOGY

10. The following findings of fact were reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

11. Prior to working for the Respondent, the Claimant had been working successfully for 10 years as a chartered accountant at PwC in their banking department. At some point she made the decision to look for a post in the public sector - preferably the health sector. She said she wanted a role where she could make a difference to people's lives.

12. The Respondent is an organization that sits within NHS Improvement. NHS Improvement is not an entity in itself but is the operational name for

a number of legal entities together, including the Respondent. Essentially, Monitor is responsible for the quality of services, operational and financial performance, of NHS trusts.

13. At the time of the Claimant's employment, the Respondent had in the region of 220 employees. It is supported by a team of HR professionals, based centrally within improvement, who are available to provide assistance and guidance to managers.

14. The Claimant came across the Respondent after some research and decided to apply for the position of Transaction Manager which was being advertised at the time and for which the Claimant had the relevant skills.

15. She joined Monitor on 1 September 2014 in the Transaction team. In August 2015, the Claimant became aware of the role to which she was later recruited, and which she performed when going on the career break referred to below. It was a managerial role in the regional team and the Claimant considered it was perfectly suited to her accountancy skills, as well as interpersonal and relationship skills.

16. At the time of taking up this role, the Claimant was pregnant and was due to give birth on 5 February 2016. The Claimant started her maternity leave on 30 January 2016 and her son, Sebastian, was born on 7 February 2016.

17. Very early on the Claimant and her husband could see that Sebastian was not feeding as he should and was therefore not gaining weight. There is no doubt that this must have been an extremely difficult time for the Claimant and her husband. Sebastian was eventually diagnosed on 29 April 2018 with an eating disorder called ARFID (Avoidant restrictive food intake disorder). It is not disputed for the purposes of this hearing that this condition falls within the definition of disability within the meaning of the EQA.

18. The Claimant added some accrued leave on to her maternity leave and was therefore due to return to work on 10 January 2017. However, she was signed off work by her GP with post-natal depression and anxiety. There were a series of sick certificates in the bundle, the last one signing the Claimant off for the period 5-31 May 2017.

19. During the period the Claimant was off sick, she discussed with FS the possibility of a career break to allow her to spend time with her son. That career break was agreed and began on 19 June 2017 and ended on 19 June 2018.

20. During the hearing, it was suggested by the Claimant that she was put under pressure to accept a career break. The Tribunal concluded that the evidence did not support that assertion. Indeed, in her email applying for a career break, she said the following [sic]:

> ***Dear Frances,***
>
> ***Many thanks for the call a couple of weeks ago to discuss my return to work, and for your on-going support, I can't tell you just how much I appreciate all of it.***
>
> ***As discussed, I would like to apply for a career break of 12 months, so please let me know what the next steps are.***
>
> ***Many thanks***
>
> ***Aida***

21. On 4 January 2018, the Claimant informed FS that she would ideally like to extend the career break for another year. During a call between FM and the Claimant on 25 April 2018, the Claimant requested that her career break be extended. However, the view of FS was that a further career break would not be possible. This was confirmed to the Claimant by a letter dated 16 May 2018 which said as follows [sic]:

> ***Dear Aida***
>
> ***I am writing in reference to your request to extend your career break by a further year to June 2019.***
>
> ***We have explored your request in depth but unfortunately we cannot agree to it.***
>
> ***Our difficulty is in recruiting to backfill your post and the effectiveness and practicality of having someone in the Delivery and Improvement Lead role on either a one-year fixed-term contract or secondment.***
>
> ***As we discovered during your current career break, a backfill arrangement does not work effectively for this role, the team, or for responding to the business needs. As you know, to be effective in this role the focus is on building positive relationships with key individuals within Trusts. By the time these relationships are productive, and the incumbent is getting up to speed with the role, the one year term is nearly complete, and they need to start focusing on finding their next job. We experienced this with our previous backfill who we recruited as your cover. We were unable to promise them a permanent role in the future, so they started to look for another role early in their time with us, were successful in finding a permanent role and left in February 2018. We have not been able to recruit someone temporarily between that time and 19 June 2018 (the date of your return), which has meant that more junior members of staff have been required to act up, and more senior members to act down, to backfill your post. This has put a strain on those members of staff, which cannot continue much longer.***
>
> ***Fundamentally, I'm afraid we cannot have another year of uncertainty—our area is one of the most challenged nationally and the pressure is increasing. We are a small team that has had to cover***

> ***a senior vacancy for over a year, and it is now untenable that we continue to hold this vacancy.***
>
> ***Therefore, we cannot agree to extend your career break. I appreciate that this is not the response you would have been hoping for, but I hope you understand the rationale for refusing your request.***
>
> ***Return to work***
>
> ***I have enclosed a copy of the letter confirming your original career break. As you will see from it, you are due to return from your career break on Tuesday, 19 June 2018, and recommence your role of Delivery and Improvement Lead. I will continue to make arrangements for your return, but I understand that this may no longer be what you want or can accommodate with your family life. I would appreciate confirmation that you wish to return to this role, or if not, what you are planning to do on 19 June 2018. Please confirm this to me via email at frances.shattock@nhs.net or to fionamurdock@nhs.net***
>
> ***Yours sincerely***
>
> ***Frances Shattock***

22. On 17 May 2018, the Claimant spoke to FS expressing her disappointment to the news that her career break could not be extended.

23. On 18 May 2018, the Claimant spoke to TF. During this conversation there was a discussion about what the Claimant's options were. The prospect of a part time arrangement was discussed but the Claimant said that the maximum she could work each day, taking into account travelling time into London, was 30 minutes per day.

24. On 14 June 2018 FS wrote to TF as follows [sic]:

> ***I'd like to move this on please if we can. You have had a number of conversations with Aida (per the email trail below) and I don't think we have a decision from her. We have a business need to fill the post and have had a resignation in the team which is compounding our resource issue.***
>
> ***We sent the letter to Aida on 16th May and her career break is due to finish on 19 June so could you please follow up with her and see if we can get her to make a decision please.***
>
> ***It may be appropriate for us to write formally to confirm our position.***
>
> ***Can you let me know how we should proceed?***
>
> ***Thanks***
>
> ***Frances***

25. In response to this, TF wrote to FS at 11.40am:

> ***Hello there,***
>
> ***I have a left a number of messages for Aida over the last few days and she has not responded.***
>
> ***As you say Frances the next step is to write again and ask the she make her decision by Monday and let us know.***
>
> ***Frances - we will draft the letter for your signature, you will have this today and it will be sent special delivery today or tomorrow. This means Aida will have the letter on Saturday at the latest.***
>
> ***Thanks, Tara***

26. Following the above email, TF telephoned the Claimant. She managed to speak to the Claimant but was told that she was in A&E because she had broken her ankle. It was therefore a brief call.

27. On 14 June 2018, FS wrote to the Claimant by letter which said as follows:

> ***Dear Aida,***
>
> ***Our HR department have tried to contact you on several occasions by telephone after your initial telephone conversation with Tara Field but have not been able to get hold of you and speak to you in person.***
>
> ***I am therefore now writing to you to ask you to confirm if after speaking to your consultant it would be at all possible for you to return to work, in your role of Delivery and Improvement Lead. We would be delighted to have you back in the team, but equally we would understand if this is not possible.***
>
> ***As you know your current career break ends on Tuesday 19 June 2018 and this cannot be extended.***
>
> ***I urgently need you to get in touch with HR by Monday 18 June 2018 at the latest to advise of your plans, so we can be clear what we are processing for you through July 2018's payroll.***
>
> ***If you would prefer, please get in touch with me directly on [telephone number provided].***
>
> ***Yours sincerely***
>
> ***Frances Shattock***

28. On 19 June 2018, FS contacted HR to enquire whether they had heard from the Claimant. HR confirmed they had not heard anything further.

29. On 20 June 2018, there was a conversation between the Claimant and TF. It appears from telephone records provided by the Claimant that the call was made to TF by the Claimant at 16:36 and lasted six minutes. The Claimant was distressed on the call. The Tribunal finds as fact that the

Claimant understood from the call that she was being given two options which were to either resign or to return to work. If TF did give the option of returning to work full time, that did not mean that part-time wasn't an option, just that a suitable part-time pattern had not been found. The accepts that the Respondent was open to a part-time working pattern. Until this point, all that the Claimant had offered to the Respondent, during her conversation with TF on 18 May 2018, was the option of her working for 30 minutes a day.

30. During this call, the Claimant alleges that she was told by TF that she could not be forced to resign. The Tribunal accepts that there was a conversation along these lines and that TF is likely to have said to the Claimant that what she chose to do was up to her and that the Respondent could not force her to resign.

31. TF telephoned the Claimant again on 21 June 2018 to follow up the call the previous day, but she did not get an answer from the Claimant.

32. On 22 June 2018, FS sent the Claimant a text asking her for an update. The Claimant replied to FS, referring to her conversation with TF on 20 June 2018.

33. Much was said during the hearing about the number of attempted and unsuccessful calls made by the Claimant to TF, and the number of attempted but unsuccessful calls to the Claimant by TF. The Tribunal accepted that there were times when the Claimant tried to call the Respondent albeit the phone records do not reflect the number of attempted calls the Claimant said she made. She justified this by saying that only if the call was connected would the call be put through. The Tribunal could see no evidence, apart from speculation by the Claimant, that TF was deliberately trying to avoid the Claimant, and indeed such a suggestion is not consistent with written correspondence. Equally the Tribunal accepted, as there was proof of it in the bundle, that the Respondent had attempted to contact the Claimant a number of times without success.

34. On 26 June 2018, FS was given the go ahead by FM to recruit for the Claimant's post.

35. On 26 June 2018, during a period when attempts were still being made to contact the Claimant, the Respondent extended the Claimant's career break until 31 July 2018.

36. By letter dated 4 July 2018, TF wrote to the Claimant as follows:

Dear Aida

> ***I'm writing following our recent telephone conversations. Since our last discussion on the phone, I've been trying to get in touch with you about you returning to work, but I haven't been able to get through to you.***
>
> ***In line with the letter confirming your original career break, you were due to return with us on 19 June 2018. However, unfortunately you haven't been able to return.***
>
> ***I'm very sorry to have to write to you in these circumstances, but we do need some certainty around your intentions as well as your post going forward. Given the time that's passed since your return date, we will have to assume that you intend to resign from your position.***
>
> ***Please let me know by Thursday 12 July 2018 if your intentions are any different, and we can discuss.***
>
> ***We will start to process your resignation after this date, and will make sure you're paid your full notice. In that event, I'd really like to emphasise that you are welcome back at NHS Improvement. To that end, I would encourage you to apply for any job with us in the future once you feel you're in a position to do so.***
>
> ***I reiterate that I would welcome a discussion with you about this, and remain open to speaking with you prior to the date above.***
>
> ***Kind regards.***
>
> ***Yours sincerely,***
>
> ***Frances Shattock***

37. The Claimant received the above letter on 5 July 2018.

38. On 30 July 2018, having not heard from the Claimant in response to their 4 July 2018 letter, the Respondent processed the Claimant as a leaver and treated her as though she had resigned without notice.

39. On 1 August 2018, FM wrote to the Claimant as follows [sic]:

> ***Dear Aida,***
>
> ***Further to previous correspondence I am writing to confirm that we have made you a leaver through our payroll with an end date of 31 July 2018.***
>
> ***We have instructed payroll to pay you your three (3) months' notice in lieu and you will receive this at the end of August when you will also receive your final pay slip and your P45.***
>
> ***We will also Inform MyCSP that you have now left Monitor/NHS Improvement and in due course they will write to you about your pension.***
>
> ***Kind regards.***

Yours sincerely,

Fiona Murdock

40. The Claimant received the above letter on 2 August 2018.

41. On 22 August 2018, the Claimant was sent her P45, which she accepted she received. She was paid three months' salary in lieu of notice at the end of August. This was paid in one lump sum of £17,772.69 and labelled "Lieu of Notice NP Ar" on her pay slip.

42. On 27 August 2018, the Claimant emailed TF as follows [sic]:

Hi Tara

As per our discussion I am writing to inform you of my decision to seek legal action with regards to the two options given to me with regards to my return to work. I have informed you that based on my son's medical condition, I cannot return to work full time until further notice. I do not wish to resign which is the second option you have given me.

I was very surprised to receive your letter stating I am on the leavers list and will receive my P45 soon when I have tried to call you to discuss my options without success. I have discussed this with my GP who is going to sign me off based on the letter from evelina stating I cannot return to work currently with Seb's condition, until I have received my legal advice.

Please let me know your thoughts and steps forward as you suggested on the call.

Many thanks

Aida

43. On 30 October 2018, the Claimant wrote to TF as follows [sic]:

Dear Tara,

as discussed just now please find below the emails between Fiona and I with regards to the dates of the career break document being wrong. I was signed off until May 31st by my GP, and had 31 days holiday which would take me to 18 July 2018. So my career break should have ended 18 July, therefore your previous email to me stating it ended 19 June 2018 was incorrect. Therefore, the letter you sent me 4th July, giving me 7 days to reply until the 11th July was in fact also incorrect as you were making me resign before my career break had ended. Again, i have been very understanding with the situation and when we spoke a few months ago on the telephone, I said my GP was going to sign me off work as he has a letter from Evelina stating my son will die if i return to work. I am very disappointed that later I receive a letter from you stating i either reign or come back full time totally disregarding my earlier comment about

i will be back to work but signed off by GP. and on top of that, you send me my resignation letter and P45 when I was still on a career break due to NHSI's mistakes with the dates. This behaviour is pretty appalling from any employer and is seen as unfair dismissal as you did not allow me sufficient time to reply to you after my career break. I did not have an answer by July 11th as I would need to see my GP to be signed off work when i was actually legally off my career break and started working.

at the very least i am still owed that one month of pay from June to July 2018, but as you are aware once my son's condition becomes less life threatening and allows me a bit more time to focus on other things I will be taking the legal advice I have been given further.

I will forward you another email shortly which was my response to the below email from Fiona.

Pleas let me know as discussed when I am likely to hear back from you with regards to this and your plans to move forward.

Many thanks,

Tara

LAW, ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

44. The Tribunal considered each of the questions set out at paragraphs 2(a)-(r) above.

(A) Dismissal and EDT

(a) Was the Claimant dismissed or did she resign?
(b) What was the effective date of termination?

45. The Respondent submits that the Claimant resigned, whereas the Claimant submits that she was dismissed.

46. In his submissions, Mr Campion relied on two cases to support the Respondent's position. The first case is ***Harrison v George Wimpey and Co Ltd [1972] ITR 188 (NIRC)***. In this case, Mr Harrison went away on holiday and was due to return to work on 28 December 1970. Whilst away the Claimant became sick and obtained a medical certificate which stated he was unfit for work for 14 days which he sent to his employer. Mr Harrison however remained unfit until April 1971 and although he obtained further medical certificates, he did not send the sick notes to the employer or inform them of the position. The NIRC upheld the Tribunal's finding of implied resignation by Mr Harrison. Sir John Donaldson said: "*Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated*". Sir John Donaldson highlighted that the Tribunal had

found as a fact that the employer was entitled to regard Mr Harrison's conduct and his lack of communication as an implied termination of Mr Harrison's contract of employment which it was viewed was a 'perfectly possible conclusion'. The NIRC also highlighted that an employee's duty when away sick is to keep his employer fully informed as to the progress he is making towards recovery and equally that an employer who is minded to treat the employment as coming to an end for any reason should communicate so far as he can with the employee, stating his intentions.

47. The second case relied on by Mr Campion was ***Oram v Initial Contract Services Ltd EAT/1279/98***. Mrs Oram failed to return to work after a disciplinary penalty had been reduced from dismissal to a final written warning because the company had not answered concerns she had raised. The employer's view was that the terms of her return were clear and that any matters of concern would be discussed once she had returned. The ET found that when Mrs Oram did not confirm that she would return to work as requested the employer had indicated that Mrs Oram would be deemed to have resigned and that is exactly what happened. The EAT upheld the ET's finding that Mrs Oram had resigned when she refused to confirm that she would return to work. The EAT reflected that the employer had not imposed any conditions on Mrs Oram's return, failure to perform which would be regarded as a resignation; rather, she had attempted to challenge its control of the disciplinary process by imposing conditions of her own. When Mrs Oram refused to confirm that she would return to work, the employer assumed that she had decided to resign.

48. Ms Robertson submitted that the Respondent cannot convert a repudiatory breach into a self-dismissal simply by saying in advance it will do so. Similarly, she said that there can be no self-dismissal where the Respondent says that in the absence of some communication from the employee within a fixed period s/he will be deemed to have resigned.

49. Ms Robertson relied on three cases in support of her submissions: (i) ***Rasool v Hepworth Pipe Co Ltd [1980] IRLR 88 EAT*** (ii) ***Hassan v Odeon Cinemas Ltd [1988] ICR 127 EAT***; and (iii) which ***Igbo v Johnson Matthey Chemicals Ltd [1986] IRLR 215, CA***. In the Tribunal's view, however, these cases had less relevance because the Claimant had not breached her contract at the point the Respondent deemed her to have resigned. The parties were in on-going discussions and the Respondent even extended the Claimant's career break until 31 July 2018.

50. The Claimant made it clear to the Respondent during her call with TF on 20 June 2018 that she did not want to resign. Bearing in mind she was unhappy (even angry) that her career break had not been extended, and that she was going through a very difficult time with her new baby, the Tribunal did not consider there was enough for the Respondent to have treated the Claimant as having resigned by her conduct. The Respondent might have been in a different position had it waited longer and written a

further letter. The same approach with an employee not in the same situation as the Claimant, might have been sufficient for the Respondent to have concluded that the employee had resigned by their conduct, but not in this particular case.

51. For the above reasons, the Tribunal concluded that the Claimant did not resign; her conduct was not such that the Respondent could conclude that she had resigned. The Tribunal therefore concluded that the Claimant was dismissed by the Respondent.

52. The effective date of termination ("EDT") is important for a number of reasons, but particularly as it enables a party to calculate the time limit by which they must submit a claim. In this case, the Respondent submits that the EDT is 2 August 2018, whereas the Claimant submits that it is 31 October 2018. As the claim form was presented to the Employment Tribunal on 18 February 2019, it is within the applicable time limits (taking into account the extension for ACAS early conciliation) for bringing unfair dismissal and breach of contract claims if the EDT is 31 October 2018, but out of time if the EDT is 2 August 2018.

53. Section 97 of the ERA defines the effective date of termination as follows:

> ***(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—***
>
> ***(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,***
>
> ***(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and***
>
> ***(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.***

54. It is common ground that the Claimant's contract of employment did not contain a clause permitting a payment in lieu of notice. The letter sent to the Claimant dated 1 August 2018, treating her as a leaver with effect from 31 July 2018, was received by the Claimant on 2 August 2018. The Respondent's case is that the dismissal was effective on 2 August 2018 applying ***Gisda Cyf v Barratt [2010] ICR 1475 (SC).*** The Respondent did not give the Claimant notice and therefore dismissed the Claimant in breach of notice, by paying her in lieu.

55. Ms Robertson appeared to suggest in her submissions that the Respondent should not benefit from their own breach of contract which

would have the effect of denying the Claimant her statutory rights. She quoted §38 of the ***Gisda*** case which said:

> ***Of course, where the protection of employees' statutory rights exactly coincides with common law principles, the latter may well provide an insight into how the former may be interpreted and applied but that is a far cry from saying that principles of contract law should dictate the scope of employees' statutory rights. These cases do no more, in our opinion, than recognise that where common law principles precisely reflect the statutorily protected rights of employees, they may be prayed in aid to reinforce the protection of those rights.***

56. In the Tribunal's view, however, the starting point had to be s.97 ERA. The relevant section applicable to this case was s.97(1)(b), as notice was not provided. The letter dated 1 August 2018 stated clearly that the Claimant's employment was treated as having ended on 31 July 2018. Applying the ***Gisda*** case, the dismissal became effective when the Claimant received the letter, which was 2 August 2018. That, the Tribunal concluded, was the EDT in this case.

(B) Time Limits – Unfair Dismissal

(c) Were the claims for breach of contract and unfair dismissal presented within the applicable time limit, which is three months, less one day, from the EDT?

(d) If not, was it reasonably practicable for the Claimant to have brought the claims within the above time limit?

(e) If it was not, did the Claimant bring her claim within such further period as was reasonable in the circumstances?

57. The time limits for bringing claims of unfair dismissal and breach of contract in the Employment Tribunal are set out in the ERA and Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 respectively.

58. Section 111 of the ERA provides as follows:

> ***(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.***
>
> ***(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—***
>
> ***(a) before the end of the period of three months beginning with the effective date of termination, or***

> ***(b) 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.***

59. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides for time limits in similar terms:

> ***Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-***
>
> ***(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or***
>
> ***(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or (ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).***
>
> ***(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.***

60. The legal burden is on the Claimant to satisfy the Tribunal that the presentation of her claim was within the applicable time limit, and if it was not, that it was not reasonably practicable to submit within the time limit. Even if it was not reasonably practicable, she must still satisfy the Tribunal that she submitted it within such further period as was reasonable.

61. If a Claimant claims to have been ignorant of the requirements, the Tribunal must look at whether that was reasonable and whether she ought to have known about them.

62. Having determined that the EDT was 2 August 2018, the Tribunal concluded that the unfair dismissal and breach of contract claims were out of time as they were submitted outside the three-month time limit. The latest date by which such claims ought to have been submitted was 1 November 2018. The ACAS EC did not commence until after then, on 6 December 2018, therefore no extension of the deadline is applicable. The claims were submitted over three months after the deadline and more than six months after dismissal.

63. The Tribunal therefore went on to consider whether it was reasonably practicable for the Claimant to have submitted the claim on time. When questioned about the reasons why the Claimant did not submit her claim on time, she referred back to her conversation on 20 June 2018 with TF

during which the Claimant said that TF told her that the Respondent could not make her resign. The Claimant suggested that she looked at correspondence from the Respondent very much with this in mind and assumed she had been given, and was working, her notice period.

64. Against that, the Tribunal concluded that whilst the communication from the Respondent could have been better, the Claimant must have known, and the Tribunal finds did in fact know (contrary to what she said in evidence) that her employment had ended on 2 August 2018 and that she did not remain in employment during what would have been her notice period. The Tribunal relied on the following in reaching the above conclusion:

    (a) The letter dated 1 August 2018 was clear that the Claimant's employment had ended and that she was being treated as a leaver. The Claimant is an intelligent professional who would have understood this letter to have said something quite different to what she said she had understood from her conversation with TF on 20 June 2018. Yet she did not respond to it or follow it up with the Respondent.

    (b) The Claimant said she did not know what a P45 was, despite having qualified as an accountant and having worked at PwC for a number of years. The Tribunal did not find this credible. It was self-evident, from looking at the P45, what it was and what it meant, even if the Claimant had never seen one before (which the Tribunal did not believe was true). What is more, the Claimant said that when her partner saw the P45, he said to her "I think you have been sacked". If she was in any doubt at that point what a P45 was, the Tribunal concluded that she would have found out, given what her partner had told her.

    (c) When asked whether she had received a lump sum payment in lieu of notice, the Claimant did not know, despite it being a large sum, some £17k. She later accepted she had been paid, when the pay slip was produced during the hearing. She said that she did not know what a payment in lieu of notice was. Again, the Tribunal did not find this credible, particularly taking into account the Claimant's accountancy background and the fact that the term "*lieu of notice*" was stated referred on her payslip. The Tribunal concluded that the Claimant knew what a payment in lieu was, and that she must have known that if she were still employed, as she claimed, she would have continued to be paid at the end of each month during the notice period, rather than a lump sum up front.

65. Having concluded that the Claimant in fact knew that her employment had ended when she received the letter dated 1 August 2018, and that any doubts as to whether she had been dismissed would have disappeared

when she received her P45 and pay in lieu of notice, the Tribunal went on to consider whether it was reasonably practicable for the Claimant to have presented her claim form in time. The Tribunal concluded that it was.

66. Whilst the Claimant would have been busy caring for her son during this time, she did not suggest in her evidence that this prevented her from presenting her claim form to the Employment Tribunal within the time limit.

67. The Claimant said in evidence that she had not heard of the Employment Tribunal and did not know about bringing a claim of unfair dismissal. Again, the Tribunal did not find this credible. The Claimant researched her son's condition on the internet, and the Tribunal is satisfied that the Claimant was capable of researching bringing claims of unfair dismissal and the time limits involved. In any event the Claimant wrote to TF on 30 October 2018 referring to a claim of unfair dismissal, suggesting that she knew she had a claim of unfair dismissal. Yet she still did not act to ensure that she submitted her claim in time. The Claimant also said that she visited her GP who also suggested that she had been unfairly dismissed.

68. The Tribunal was not persuaded that the Claimant was ignorant of the time limits for bringing claims, as she suggested. Even if she was, the Tribunal concluded that she was capable, and had time available, to look the time limits up.

69. For all of the above reasons, the Tribunal concluded that it was reasonably practicable for the Claimant to have brought her claim in time. That being the case, the Tribunal does not have jurisdiction to hear the Claimant's unfair dismissal or breach of contract claims.

(C) Unfair Dismissal

(f) Has the Respondent proven a potentially fair reason to dismiss?

(g) Did the Respondent act reasonably in treating the above reason as a reason for dismissal?

(h) If the dismissal was unfair, by what percentage, if any, should any compensation be reduced on account of Polkey or contributory fault?

70. The Tribunal went on to consider the unfair dismissal claim despite it not being obliged to do so in light of its above finding that it was reasonably practicable for the claim to have been presented within the applicable time limit.

71. The test for determining the fairness of a dismissal is set out in s.98 ERA which states the following: -

(1) In determining for the purposes of this Part whether the dismissal

> ***of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***…….***
>
> ***(b) relates to the conduct of the employee,***
> ……
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

72. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually justified the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233*** "*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness*".

73. In the case of ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT***, guidance was given that the function of the Employment Tribunal was to decide whether, in the particular circumstances, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

74. In the case of ***Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA***, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

75. In ***Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

76. The Tribunal concluded that the reason for dismissal was the Claimant's failure to return to work or notify the Respondent of her intentions regarding whether she wanted to return to work, and if she did, on what basis. The Tribunal concluded that this represented a potentially fair reason for dismissal, within the meaning of s.98 ERA, namely conduct.

77. Turning to the fairness of the dismissal, the Respondent argued that any process would have been futile. Here, the Tribunal disagreed that such a conclusion fell within a band of reasonable responses open for an employer to take. Had the Respondent written to the Claimant notifying her that they were considering whether she should be dismissed, and inviting her to a disciplinary hearing, the Tribunal finds that this may have triggered a different reaction by the Claimant. Had there been a disciplinary hearing, that would have provided an opportunity to discuss the Claimant's options further, including part-time working arrangements and other employment opportunities. The Tribunal concluded that the lack of a process rendered the dismissal unfair.

78. Notwithstanding the above finding, it is well established that compensation for unfair dismissal can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (***Polkey v A E Dayton Services Limited [1988] ICR 142***.

79. Section 123(6) ERA 1996 also enables the Tribunal to make a deduction to a Claimant's compensatory award:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.***

80. A claimant must be '*culpable or blameworthy*' for a reduction for contributory conduct to be made. This can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances', (***Nelson v BBC (No. 2) [1980] ICR 110 (CA).)***

81. The Tribunal concluded that there had to be a possibility that, had the Respondent followed a fair process, and had the Claimant attended a disciplinary hearing, there was still a significant possibility that a solution would not have been found and the Claimant would still have been dismissed, or she would have resigned. The Tribunal assessed this

chance as 50%. Due to the Claimant's circumstances, she had little availability for work due to the time required to care for her son at that time. There was no evidence before the Tribunal of other positions the Claimant might have taken up or that the Claimant could have taken up alternative positions at that time.

82. The Tribunal also found that the Claimant was culpable to some extent for the state of affairs that led to her dismissal. She failed to make contact or respond directly to correspondence sent to her. The Tribunal concluded that an appropriate reduction for contributory fault would have been 30% to both the basic and compensatory awards. When deciding on the percentage amount of the contribution, the Tribunal had regard to the overall reduction (including Polkey) to avoid any injustice of an excessive and disproportionate reduction.

(D) Breach Of Contract

(i) Did the Respondent breach the implied term of mutual trust and confidence?

(j) When did the Respondent breach the employment contract?

(k) Did the Claimant affirm the contract following the breach?

83. Once again, the Tribunal considered this claim despite it not being obliged to do so in light of its finding that the claim was brought out of time.

84. In the legal issues it had been agreed that this claim arose out of the Respondent's failure to extend the Claimant's career break. However, the Tribunal concluded that the actions of the Respondent went nowhere close to being a breach of contract. There was no contractual entitlement to an extension to the career break. There was nothing that the Tribunal could find, when considering the manner in which the Respondent considered the application to extend, and what they took into account in reaching their decision, that amounted to a breach of the implied term of mutual trust and confidence.

(E) Time Limits - Discrimination

85. Section 123 of EQA deals with time limits for bringing discrimination claims in the Employment Tribunal and says as follows:

> ***(1) [Subject to [sections 140A and 140B] on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 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.

……

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

86. The EAT in **British Coal Corporation v Keeble [1997] IRLR 336** held that the Tribunal's discretion in these circumstances is as wide as that of the civil courts under s.33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused. These include:

(a) The length of, and reasons for, the delay

(b) The extent to which the cogency of the evidence is likely to be affected by the delay

(c) The extent to which the party sued had co-operated with any requests for information

(d) The promptness with which the Claimant acted once they knew of the possibility of taking action

(e) The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action

87. The Tribunal concluded that the Claimant did not have a good reason for the delay in presenting her discrimination claims. In addition, for the reasons set out below, such claims were in any event weak. The Tribunal accepted that the Respondent had suffered prejudice by the delay because it prevented an earlier investigation into those matters relied on by the Claimant. They were now in a position where TF had left the Respondent and her own circumstances (which had only recently arisen) prevented her from giving evidence at this hearing. Weighing up the balance of prejudice as between the Respondent and the Claimant, the Tribunal concluded that there was greater prejudice to the Respondent if the Tribunal were to extend time limits to allow the Claimant to proceed with her claims. The Tribunal was therefore not persuaded that it was just and equitable in this case to extend the time limits. That being the case, the Tribunal does not have jurisdiction to hear the discrimination claims.

(F) Direct Discrimination and Harassment

In relation to each allegation at paragraph 3 above:-

(l) Was the conduct complained of related to the Claimant's son's disability?

(m) If it was, did it have the purpose of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(n) If it did not have that purpose, did it have that effect and was it reasonable to have done so bearing in mind the perception of the Claimant and the other circumstances of the case?

(o) Did the Respondent treat the Claimant less favourably than ZA or a hypothetical comparator?

(p) If so, was that treatment because of disability (the disability in this case being the Claimant's son's disability)?

88. Despite the Tribunal's decision that it was not just and equitable to extend the time limits for bringing the discrimination claims, it nonetheless went on to consider them.

89. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

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

90. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

91. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

92. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

93. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

94. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

95. Section 26 EQA defines harassment as follows: -

> ***(1) A person (A) harasses another (B) if—***

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

96. In ***Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT)*** Underhill J set out the necessary elements of harassment which Tribunals should address:

(a) The unwanted conduct

(b) The purpose or effect of that conduct

(c) The grounds for the conduct.

97. The Claimant relied on an actual comparator (ZA) for the purposes of her direct discrimination claim, and in the alternative, a hypothetical comparator.

98. The Tribunal was unable to conclude that ZA was an appropriate comparator as it appeared that his circumstances were very different to the Claimant's. Even on the Claimant's own evidence, she said ZA was absent for over a year for depression, but she could not be sure whether this was sick leave or a career break. The Tribunal heard insufficient evidence about the circumstances of ZA, such that it was safe to draw any comparisons with him.

99. The identity of a hypothetical comparator was discussed with the parties during the hearing. The Respondent identified the comparator as a person who wanted to extend a career break to care for a non-disabled child or dependant. The Claimant identified the comparator as someone who wanted to extend a career break. Whilst the Tribunal was of the view that an appropriate comparator was a person seeking a career break extension to care for a person who was not disabled, it did not feel it necessary to determine this point, because in the Tribunal's view there would have been no difference in treatment had the Respondent been dealing with either type of comparator.

100. The Tribunal considered each of the allegations at paragraph 3 above but, for the reasons set out below, concluded that they were neither acts of direct discrimination, nor harassment. The Tribunal concluded that there were reasons for what happened to the Claimant which had nothing to do with the her son's disability. The Claimant was treated no differently to how either hypothetical comparator at paragraph 99 above would have been treated.

101. Referring specifically to the allegations:

Allegation 3(i)

(a) The Claimant alleges that the refusal to extend her career break was an act of discrimination. The Tribunal accepted the evidence of FS who gave clear, cogent and compelling reasons why the career break should not be extended. These reasons were set out in a letter to the Claimant. The Tribunal further accepted the evidence of FS that this decision had nothing to do with the Claimant's son's disability. The Respondent had demonstrated patience and understanding regarding the very difficult and distressing circumstances of the Claimant. They had allowed the Claimant to take one career break but there were reasons why it was not viable for them to allow an extension. This was not an act of direct discrimination.

(b) The Tribunal further concluded that whilst the refusal may have been unwanted conduct, it was not related to the Claimant's son's disability. Even if it was, the Tribunal did not accept that the refusal violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded it was not reasonable for it to have had that effect in the circumstances.

Allegation 3(ii)

(c) The Claimant alleges that the Respondent disregarded her inability to return to work. The Tribunal did not agree this was factually correct. The Tribunal accepted the Respondent's evidence that there were discussions with the Claimant about her return to work, and the options open to her. These discussions were not concluded because the Claimant did not respond to the letters sent to her by the Respondent. The Respondent found it difficult to contact the Claimant. This is the reason why her employment eventually came to an end. There was no less favourable treatment, and such treatment that there was, was not because of her son's disability.

(d) None of the conduct alleged by the Claimant related to her son's disability; neither did it violate her dignity or create an intimidating,

hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded it was not reasonable for it to have had that effect in the circumstances.

Allegation 3(iii)

(e) The Claimant alleges that the Respondent contacted the Claimant by telephone confirming that they were not going to extend the Claimant's career break; and told her that she would have to resign or return to work full time. The Tribunal rejected the suggestion that the Claimant was given such an ultimatum. There was no evidence whatsoever from which the Tribunal could conclude that the Claimant was less favourably treated because of disability. Neither was it harassment for the reasons stated at paragraphs 101(b) and 101(d).

Allegation 3(iv)

(f) The Claimant alleges that TF's failure to call her was an act of direct discrimination and harassment. The Tribunal heard evidence that TF was a busy person who would have had other work pressures which explained why she might not have responded. In any event, whilst the Tribunal accepts that the Claimant did attempt to make contact with TF, there were also many occasions where TF had tried unsuccessfully to make contact with the Claimant. The Tribunal was not persuaded that the reasons for any failure to contact the Claimant was because of her son's disability. Neither was it an act of harassment for the same reasons stated at paragraphs 101(b) and 101(d) above.

Allegation 3(v)

(g) The Claimant alleges that the sending of the letter referred to at paragraph 36 above was an act of direct discrimination and/or harassment. The Tribunal did not agree. The Respondent was perfectly justified in sending the letter. The reasons the Respondent felt the need to send the letter are clear from its contents and had nothing to do with the Claimant's son's disability. Neither was the sending of the letter an act of harassment, for the same reasons as stated at paragraphs 101(b) and 101(d) above.

Allegation 3(vi)

(h) This allegation is essentially the same as that at paragraph 3(iv) above. Claims of direct discrimination and harassment are rejected by the Tribunal for the same reasons.

Allegation 3(vii)

(i) The Claimant alleges that her dismissal was an act of discrimination and an act of harassment. The Tribunal concluded it was neither. The only reason the Claimant was dismissed was because she did not respond to letters or engage with the Respondent about returning to work; neither did she return to work. A hypothetical comparator would have been treated in exactly the same way, in the Tribunal's view. The reason for the dismissal was not the Claimant's son's disability. The Tribunal concluded that the dismissal was not an act of harassment for the same reasons as stated at paragraphs 101(b) and 101(d).

102. For the above reasons, all of the claims fail and are dismissed.

……
Employment Judge Hyams-Parish
26 July 2021