THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mrs S Maher	**AND**	Taylor Engineering & Plastics Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester (by CVP) **ON:** 30 November 2021 and 1 and 2 December 2021

EMPLOYMENT JUDGE A M Buchanan **MEMBERS:** Ms A Jackson
Mr A Wells

Appearances

For the Claimant: Ms Isobel Bayliss of Counsel

For the Respondent: Mr Zain Malik - Solicitor

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The complaint of breach of section 80F of the Employment Rights Act 1996 ("the 1996 Act") advanced pursuant to section 80H of the 1996 Act is not well-founded and is dismissed.

2. The complaint of pregnancy/maternity discrimination contrary to Section 18 of the Equality Act 2010 ("the 2010 Act") is well-founded.

3. The alternative complaint of direct sex discrimination contrary to section 13 of the 2010 Act falls away.

4. The complaint of detriment arising from maternity contrary to section 47C of the 1996 Act and Regulation 19 of the Maternity and Parental Leave etc Regulations 1999 ("the 1999 Regulations") is well founded.

5. The complaint of indirect sex discrimination contrary to section 19 of the 2010 Act is well-founded.

6. The claimant was constructively dismissed by the respondent. The dismissal was an act of unlawful pregnancy/maternity discrimination. The complaint of unfair dismissal contrary to Section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999 is well-founded.

7. A Remedy Hearing will take place on Friday 8 April 2022 by CVP beginning at 10am.

REASONS

Preliminary Matters

1. By an ET1 filed on 28 February 2020 the claimant brought various claims to the Tribunal detailed below. The claimant relied on an early conciliation certificate on which Day A was shown as 16 December 2019 and Day B as 30 January 2020. The respondent filed a response dated 30 March 2020.

2. A private preliminary hearing took place on 16 June 2020 and case management orders were made. Various amendments to the claim were permitted. It was later clarified that the claim was amended to include reliance on a second PCP in relation to the indirect sex discrimination claim namely that there was a PCP applied by the respondent that the role of receptionist which was advertised and appointed to in October 2019 had to be carried out on a full-time basis. The respondent raised no objection to that amendment which accordingly features in the issues identified below.

Witnesses and Documents

3. During the course of the Hearing the Tribunal heard from:-

Witnesses for the claimant

3.1 The claimant.

Witnesses for the respondent

3.2 Ian Bolton ("IB") – Head of Finance.

3.3 John Scott Taylor ("JST") – Managing Director.

4. The Tribunal had before it an agreed bundle of documents running to some 383 pages. Any reference in this Judgment to a page number is a reference to the relevant page within the agreed bundle. Five pages were added at the outset of the hearing and numbered appropriately.

The Issues

5. At the outset of the hearing the parties produced an agreed list of issues. The relevant issues for the Tribunal to consider in respect of liability are as follows:

Pregnancy / Maternity Discrimination

5.1 Has the respondent subjected the claimant to discrimination contrary to Section 18 of the 2010 Act, in that the claimant has been subject to unfavourable treatment because of exercising her right to maternity leave/ giving birth to a child as follows:

5.1.1 Failing to adequately engage with the claimant to facilitate a return to work;

5.1.2 The repeated rejection of each and every suggestion made by the claimant to return to work;

5.1.3 Failing to offer the claimant the role of Receptionist/ Administrator on a part-time basis;

5.1.4 Constructively dismissing her in accordance with section 39(2)(c) and (7)(b) of the 2010 Act.

5.2 Did the acts/ omissions of unfavourable treatment occur during the protected period, pursuant to section 18(5) of the 2010 Act?

5.3 If not, was the decision to commit such acts made during the protected period and, therefore, regarded as occurring during the protected period pursuant to section 18(5) of the 2010 Act?

Direct Sex Discrimination

5.4 If not, do those acts/omissions set out in paragraphs 5.1.1 - 5.1.4 amount to direct sex discrimination pursuant to section 13 and 18(7) of the 2010 Act? Specifically, do they amount to less favourable treatment because of sex, in comparison to:

a. Kris Kain;
b. Mariusz Zeiba;
c. Matthew Hayden;
d. John Wiseman and
e. Steve Maddison.

5.5 Are the comparators named by the claimant appropriate?

5.6 If not, what are the characteristics of a hypothetical comparator?

Detriment

5.7 Has the respondent subjected the claimant to detriments relating to her maternity leave or that she has given birth contrary to Section 47C of the 1996 Act and Regulation 19 of the 1999 Regulations? The detrimental treatment relied on is as set out at paragraphs 5.1.1 – 5.1.4 above.

Indirect Sex Discrimination

5.8 The respondent having accepted that its requirement for the role of Sales Manager and role of Receptionist / Administrator to be worked on a full-time basis from its premises amount to provisions, criteria or practices (PCPs), did either or both of the PCPs put women at a greater disadvantage when compared to men?

5.9 The respondent accepts that women are more likely to have caring or childcare responsibilities than men.

5.10 Did it put the claimant at that disadvantage?

5.11 Can the respondent show it to be a proportionate means of achieving a legitimate aim? The respondent says that the PCP is reasonably necessary to facilitate the department's operations and meet customer demand.

Flexible Working

5.12 Did the claimant make a request for flexible working under section 80F of the 1996 Act in her letters of 17 September 2019 and/or 03 October 2019 and/or 25 November 2019?

5.13 Were each of the above separate requests by the claimant or did the latter requests remedy any defect of the earlier requests? Did the letters combined have the effect of satisfying the requirements of section 80F of the 1996 Act? If not, did the respondent have an obligation under the 1996 Act to deal with those requests in a prescribed manner?

5.14 If obligated to do so, did the respondent consider the flexible working application in a 'reasonable manner' in accordance with section 80G(1)(a) of the 1996 Act?

5.15 Further, or in the alternative, was the respondent's decision based on incorrect facts – Section 80H(1)(b) of the 1996 Act?

5.16 Accordingly, is the claimant entitled to bring a claim under Section 80H(1)(a) of the 1996 Act?

Constructive Unfair Dismissal

5.17 Was the claimant unfairly dismissed by the respondent contrary to Sections 98 and 99 of the 1996 Act and Regulation 20 of the 1999 Regulations, in that she was dismissed in accordance with section 95(1)(c) of the1996 Act as per her resignation on 19 December 2019?

5.18 In particular, did the respondent act in a way calculated or likely to destroy the mutual duty of trust and confidence without just cause by:

5.18.1 the separate and cumulative effect of failing to deal with her flexible working application in a reasonable manner;

5.18.2 failing to give her requests reasonable consideration;

5.18.3 failing to adequately engage with the claimant on her requests to return to work;

5.18.4 failing to offer her any of the proposed variations to her contract or any other alternative work (including the advertised post of Receptionist/ Administrator) to accommodate the fact that she was returning from maternity leave and had childcare responsibilities.

5.18.5 discriminating against the claimant as set out above.

5.19 If the conduct set out at paragraph 5.18 occurred was it sufficiently serious as to constitute a repudiatory breach of contract?

5.20 Did the claimant resign in response to the breach/ breaches?

5.21 If the claimant was constructively dismissed, has the respondent established a potentially fair reason for dismissal in accordance with sections 98(1) or (2) of the1996 Act? The respondent relies on some other substantial reason.

5.22 If so, was the dismissal fair in all of the circumstances in accordance with section 98(4) of the 1996 Act?

5.23 If the respondent has not established a potentially fair reason for dismissal, was the reason or principal reason for dismissal related to the claimant's maternity leave, or that she had recently given birth, amounting to prescribed circumstances in accordance with Regulation 20 of the1999 Regulations?

Findings of Fact

6. Having considered the evidence and the witnesses called before us and in particular the way in which that evidence was given and having considered the contents of the documents to which it was referred, the Tribunal makes the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 23 November 1981 and was employed by the respondent from 24 January 2005 originally as a sales administrator but then from May 2014 as Internal Sales Supervisor and from January (otherwise May) 2015 as Internal Sales Manager. In her last role, the claimant worked with a sales administrator and a reception sales administrator to manage sales for existing customers. There were few visitors to the premises where the claimant worked. It was the duty of the reception sales administrator to greet and deal with the visitors but, if that person was not available, other members of that small office would take on that responsibility. The claimant worked mainly online but, on a few occasions – approximately once per month- would meet customers for in person meetings by arrangement. The claimant did work from home when working overtime and had no difficulty doing so.

6.2 The claimant's duties are summarised in her curriculum vitae at page 259 and follow the job description at pages 216-217. We accept the evidence of the claimant as to the extent of her duties requiring personal attendance. Her

evidence was clear and conformed with what she had written in her curriculum vitae. The claimant worked online using a package known as Syspro and other packages to manage, forecast and highlight trends and changes within the market, to process customer orders and update schedules and forecasts and to deal with customer queries and complaints. Occasionally, and by arrangement, the claimant would visit a customer's premises and host customers in the office. We do not accept that customers called unannounced or that such pre-arranged visits were frequent. The claimant would attend conference calls for industry updates. She would update and issue the weekly order book to directors and senior managers of the respondent and attend a daily meeting for approximately 30 minutes to discuss supply and other issues in respect of the order book. We accept that some attendees at those meetings attended by telephone and we cannot identify any reason why the claimant could not have done the same. The claimant also chaired daily production meetings with production supervisors to ensure targets were being reached: these meetings also lasted around 30 minutes. In addition to other administrative duties, the claimant managed the day to day running of the small sales office team including recruitment and was also responsible for quality systems and health and safety systems. The claimant carried out some duties as personal assistant to the managing director John Newbold ("JN") and worked closely with him at all times. It was JN who made some of the decisions in respect of the claimant's requests to change her hours/place of work towards the end of her maternity leave. We did not hear from JN who had apparently retired when the hearing took place. No other reason for his absence was given to us. At the time the claimant began her maternity leave, she was earning an annual salary of £29,218.00p. We accept the claimant's evidence that the amount of her time spent dealing with matters using IT systems was approximately 80% of her working time.

6.3 The respondent company was founded in 1949 and specialises in the manufacture of technical plastic mouldings for a wide range of industries. It operates over six sites, four of them being manufacturing sites. It employs around 170 people and has around 30 agency workers.

6.4 The claimant became pregnant in 2018 and advised the respondent of her pregnancy. She wrote to the respondent on 17 September 2018 (page 89) and confirmed she would begin her maternity leave on 3 December 2018 immediately after annual leave of one week beginning on 23 November 2018. The claimant's expected date of confinement was 29 November 2018. The respondent advised the claimant that her maternity leave would end on 29 November 2019 (page 91). Whilst she was on leave, the claimant's duties were covered by Rebecca Walton ("RW"). RW was engaged by the claimant on behalf of the respondent to cover the claimant's maternity leave. RW was a former employee of the respondent and, in the event, remains employed by the respondent. RW began work on 19 November 2018.

6.5 On 17 September 2019 and whilst still on maternity leave, the claimant wrote to the respondent (page 95) making a request for shorter working hours preferably working Wednesday, Thursday and Friday in the office. The reason for the request was the daily travel time and finding suitable childcare for her daughter. The letter was received by the respondent on 21 September 2019.

6.6 On 25 September 2019 the respondent replied to the claimant (page 96) through Carol Richardson ("CR") of the human resources department to the effect that it could not grant the request to move to part time hours and the letter continued: "*I hope you understand that this is a business decision, as your role requires a full-time manager".* The claimant's maternity leave was stated as coming to an end on 26 November 2019. In breach of its flexible working policy, the respondent did not hold a meeting with the claimant to discuss the proposal.

6.7 The claimant wrote direct to the managing director JN on 3 October 2019 (page 97) indicating that she had taken on board the comments in the letter of 25 September 2019 and requested that she be allowed to return to full time duties but with two days working from home. The letter continued: *"I believe this would meet any requirements needed to cover the full-time position and ensure the day to day running of the office and workload via laptop/mobile etc. This is something which I have previously carried out and understand that other members of staff have done so also".* Alternatively, the claimant noted that the respondent was advertising for a sales administrator within the sales department and she would be willing to step down from her sales office manager role if the respondent could then offer her the sales administrator role on part time hours. The claimant asked if there were any other more suitable roles for part time working or working from home and, if so, she would be happy to discuss those options with the respondent. The letter from the claimant is date stamped by the respondent as having been received on 8 October 2019.

6.8 On 7 October 2019, RW asked recruiters to look for a full-time person to fill a role described as *"receptionist/ office support (administrator) @ nat min wage".* This was a role in the office which the claimant managed. Details of potential candidates were sent over to the respondent on 8 October 2019, interviews took place during the following week and the person appointed began work on 17 October 2019. The claimant was not made aware of this vacancy by the respondent, and it was not discussed with her at any time. At no point was any consideration given as to whether this was a role which the claimant could carry out either part time or on a job share basis with another person.

6.9 On 22 October 2019 (page 101) the respondent wrote to the claimant, in response to her letter of 3 October 2019, saying that the Sales Manager role was a full-time office-based position requiring "*full contact with external clients and internal production departments within the business".* The respondent stated the role required extensive contact and attendance at daily production meetings. The respondent did not consider working from home would be appropriate and would likely have a detrimental impact on performance and quality and on the responsibility to meet customer demand as the claimant's position was a stand-alone position and her duties could not be reorganised amongst existing staff. The respondent confirmed that there was no sales administrative position available but there had been a receptionist position advertised which had been filled. The respondent noted that the flexible working legislation only allowed for one request in a 12-month period but that nonetheless JN had considered the separate request to change hours and location. The claimant was told if she wished to discuss the matter with JN he would be happy to meet her to do so. We conclude that the offer to meet was window dressing. The respondent had

made up its mind on the claimant's request and communicated its refusal of the request and then offered to meet the claimant to discuss the refusal. That was an unreasonable way in which to consider a flexible working request which is what the respondent accepted it was. We conclude the request was not considered seriously and that stereotypical attitudes and assumptions were in play. Why else ignore the requirement in the respondent's own policy to meet with the claimant and discuss the proposal before communicating the refusal of the proposals?

6.10 On 1 November 2019 (page 102) the claimant wrote to JN raising a formal grievance in respect of the decision regarding her request for part time hours. The claimant stated that she felt the two decisions of the respondent showed a clear discriminatory attitude against her as a new mother with primary childcare responsibilities. The claimant referred to flexibility having been granted to various other male employees across the company and similar discriminatory treatment afforded to two other new mothers within a short period of time both of which had resulted in them leaving the respondent company. The claimant stated that she felt let down after 15 years of service for the respondent company.

6.11 On 13 November 2019 (page 103) the claimant was offered a grievance hearing to be taken by the company secretary IB on 20 November 2019. In the letter inviting her to a meeting, the respondent erroneously categorised the claimant's grievance as being one "*against the decision regarding your return to work on part-time hours, following maternity leave".* The claimant was told of her right to be accompanied. That meeting duly took place and the claimant attended together with her trade union representative. IB attended for the respondent accompanied by CR who took the notes. The meeting began at 10:50am and lasted approximately one hour. The minutes of the meeting were not sent to the claimant at any time for her approval or for her information. The claimant first saw the notes in the trial bundle.

6.12 At the meeting, IB confirmed that the claimant's role was a full-time role which was determined by the needs and requirements of the respondent's business. In making that statement, IB was repeating what JN had told him in a brief discussion he had had with JN before the hearing. IB had made no attempt of his own to assess whether that was so. It was noted that former employee RW had been asked to return to the respondent's business to cover the claimant's role while she was on maternity leave. The minutes erroneously record that the claimant stated that she did not feel that she was being pushed out of the respondent's business. We prefer the claimant's evidence that she stated that she felt she was being pushed out of the respondent's business. We reach that finding because it patently summarises the spirit of the grievance which the claimant was pursuing, namely that she was being pushed out of the respondent's employ after 15 years' service. IB and CR had only joined the business during the claimant's maternity leave and asked for details of the people the claimant had referred to as having been refused part time work after maternity leave and the names were provided. The examples in the minutes of two named female employees being granted flexible working were not provided by the claimant but by her union representative: we accept the claimant's evidence that she had no knowledge of those two employees before the meeting. The claimant confirmed that her difficulty in returning to work full time in the office were the

costs of travel since she had moved to Astley and also additional childcare costs. The claimant stated that she was aggrieved that no one had discussed her requests with her or had discussed the period of time for which she expected any revised arrangements to apply. It was noted that if the respondent agreed to the claimant's request to work part time that she would not automatically have the right to return to a full-time role in the future. The claimant was asked to put further proposals to the respondent in writing for the respondent to consider. The claimant stated that she would put a further request in writing and in the meantime, it was agreed that the grievance would be looked into.

6.13 Before the grievance was responded to, the claimant wrote to the respondent on 25 November 2019 (page 107) and effectively set out four further proposals for a return to work. The first proposal was that the claimant would work three days in the office between 8:00am and 4:00pm and two days from home. The second proposal was that she would work in the office five mornings each week from 8:00am until 1:00pm and the rest of her working hours from home during the course of the afternoon. The claimant proposed that her salary would remain the same if either the first or second proposal was adopted. The third proposal was to work five mornings each week between 8:00am and 1:00pm in the office but step down from her managerial role and for this reduced role she would expect a salary in the region of £20,000 per annum. The claimant anticipated that the managerial duties could be assumed by RW. The fourth alternative was to step down from her managerial role and work four days each week between 8:00am and 2:00pm on Tuesdays to Friday inclusive again for a salary in the region of £20,000. The claimant stated she would be happy to review any revised position after 12 months.

6.14 On 26 November 2019 (page 108) IB responded to the claimant's grievance and concluded the grievance was not upheld in any particular. It was stated the two female employees who had been mentioned by the claimant had left the employ of the respondent after maternity leave but, in both cases, they were the only personnel fulfilling the roles in question and IB was content that there was clear justification for the roles needing to be filled on a full-time basis. In relation to two other female employees mentioned by CR, their requests for part time hours had been accommodated as they were production workers and not the only people fulfilling their roles and thus the business could accommodate the request. IB concluded that the response of JN dated 22 October 2019 was both adequate and fair and provided justification given that the claimant's role was a stand-alone role which would directly impact on the responsibility to meet customer's demands as JN had stated. It was noted that it had been agreed that the claimant could make a further request for flexible working which would be considered. The outcome letter did not deal with the allegations advanced that requests from male employees for flexible working were taken seriously and that sex discrimination was in play. The outcome letter gives no detail on how the claimant's concerns about the manner in which her flexible working requests had been investigated. The reason for that was plain to the Tribunal – there had been no such investigation. IB had limited himself to speaking to JN and simply accepting his justification for his decision without seeking to challenge that justification in any way.

6.15 On 9 December 2019, CR responded to the claimant's request of 25 November 2019 and stated that, after further careful consideration, none of the options advanced by the claimant were acceptable. The claimant's role was said to require full contact with external clients and internal production departments and extensive contact and attendance at daily production meetings. Two days home working and an early finish on all five days would not allow the claimant to meet the needs of the respondent's business. Furthermore, the claimant was not currently set up to work from home and there was a lack of equipment and software to facilitate this working effectively. Face to face meetings could be arranged at short notice and often run over and it would have a negative impact on client relationships if these could only be arranged on three days each week between the hours of 8:00am and 4:00pm. In relation to the claimant's other proposals, it was noted that there was no sales administrator vacancy, and that the claimant's request could not be accommodated without the need to look to terminate or vary the terms and conditions of other existing staff which was not considered to be appropriate. The claimant was encouraged to return to her duties on 2 January 2020.

6.16 On 19 December 2019 (page 116) the claimant wrote to the respondent giving notice of her resignation effective from 10 January 2020. The claimant stated: *"I feel that I have been pushed towards this decision by the company itself and have been left with no other alternatives. I have worked for TEP for 15 years and have prided myself in being loyal, hardworking and above all flexible when the company has needed it. However, over the last three months the company has not shown me the same attributes or respect I would have hoped I have earned".*

6.17 On 19 December 2019 (page 117) CR for the respondent accepted the resignation and stated: "*we are sorry that you are not returning to your original role which we held for you but completely accept your reasons as your priorities naturally change when you become a mother. I sincerely hope in time you come to understand ours, as we must prioritise the needs of the business as a whole".*

6.18 The Claimant contacted ACAS on 16 December 2019 and instituted these proceedings before the Tribunal on 28 February 2020.

Flexible Working Policy

6.19 The respondent had a brief flexible working policy (page 215) which reads:

"You are entitled to request flexible working in line with current statutory provisions detailed below. If you are a parent with a child under the age of 6…. you have the right to request a change to your normal working hours and the company has a duty to seriously consider it. To be eligible you must have six months service and apply for the change in writing. Only one request per year can be made. The onus is on the parent to set out the working pattern they wish to adopt and how it might be accommodated. On receiving a request, the company will investigate the business case for accepting or rejecting a request and hold a meeting with you within four weeks. The decision will be confirmed in

writing within two weeks of the meeting, and you will have the right to appeal against it. Accepted requests will be subject to a one-year trial period".

Pleaded Comparators

6.20 We make findings in respect of the named comparators named by the claimant:

Krzysztof Kaim

6.20.1 We have noted the documents at pages 218-223. On 25 September 2017 he made a further flexible working request to vary his hours of work. Some discussion took place, and a further variation was agreed from September until October 2017. An earlier request from June until September 2017 had been agreed previously. We infer from this correspondence that meetings took place to discuss these requests. This male employee was promoted to the role of senior site manager in September 2019 (page 221). In January 2020 he returned to his former role as site manager.

Mariusz Zieba

6.20.2 We have noted the documents at pages 224 – 227. This male employee made a flexible working request on 27 March 2014 requesting a variation in working hours but not working days. A meeting was arranged to discuss the matter and the request was granted (page 227) for 8 weeks. Page 226 indicates that a further request was made and a meeting to discuss occurred on 12 October 2017 which was resulted in the further request being declined.

John Wiseman

6.20.3 This male employee sustained an accident on his motor bike in 2018 and was absent from work. When he returned to work, he was allowed a phased return to full duties (page 242).

Stephen Maddison

6.20.4 We have noted the documents at pages 243-248.This employee was absent from work from May 2016 until April 2017 and a phased return to full duties was agreed.

Matthew Hayden

6.20.5 This male employee was absent from work with an acute head injury in 2018 and was absent from work until he resigned in March 2020.He declined to raise a grievance in respect of his statement that there had been a failure to make reasonable adjustments for his disability.

6.21 We accept that the respondent did grant flexible working requests from time to time for both male and female employees if it felt able to accommodate such requests.

Submissions

7. The Tribunal received submissions from the parties at the end of the evidence and they are briefly summarised.

8. On behalf of the respondent Mr Malik submitted:-

8.1 The claimant gave inconsistent evidence in particular in relation to the childcare arrangements she had in place. The claimant's evidence as to what she did or did not say at the grievance hearing about being pushed out of the business should be treated with great caution.

8.2 The daily production meeting attended by the claimant had always taken place in person. The claimant only worked very occasionally from home and always out of hours.

8.3 The respondent did adequately engage with the claimant in respect of trying to facilitate a return to work. The claimant has not shown that the other alleged instances of unfavourable treatment were because of pregnancy/maternity. The claimant did not apply for the receptionist/administrator role. The protected period in respect of maternity/pregnancy discrimination ended on 29 November 2019 and any allegation after that date cannot amount to pregnancy/maternity discrimination

8.4 The claimant has not referred to any actual comparator who was in the same material circumstances as she was. It is not appropriate for the Tribunal to consider a hypothetical comparator in the circumstances of this case. The Tribunal should not take account of what the respondent did or did not do during the pandemic. That event occurred after the claimant had resigned and the Tribunal should not judge this matter retrospectively. The respondent has shown that it did allow flexible working requests from both men and women but the distinguishing feature here is that the claimant was office based and did not work on the shop floor where such requests were easier to accommodate and were granted.

8.5 In terms of indirect discrimination, it is not accepted that the claimant was herself placed at any disadvantage by either of the PCPs relied on. In considering whether the respondent acted proportionately to a legitimate aim, the Tribunal should judge the matter through the pre-pandemic lens. The proposals made by the claimant would have required all other departments and customers to operate with the claimant based on her accessibility and her availability. The claimant was the lead customer liaison in a standalone role and her proposals were not sufficient to allow the respondent to achieve its legitimate aims. The same considerations apply to a job share situation. It was not appropriate even to explore the possibility of a job share in respect of the claimant's role. The claimant's suggestions as to working part time and the level of salary requested did not make financial sense for the respondent.

8.6 None of the requests made by the claimant for flexible working complied with the detailed statutory provisions and in particular did not say that any request was an application pursuant to section 80F of the 1996 Act. In any event, the respondent considered each and every request reasonably.

8.7 The respondent did not act in a manner calculated or likely to destroy the employment relationship. The respondent reasonably and actively engaged with the claimant's requests. The claimant was not entitled to treat herself as discharged from further performance of her contract of employment. The claim of constructive dismissal should be dismissed. The claims all relate to an unjustified sense of grievance by the claimant who was unable to reach an agreement with the respondent which was mutually convenient.

9. On behalf of the claimant Ms Bayliss submitted:-

9.1 The claimant had requested full time work albeit in a flexible location. The respondent approached the case on the basis that the claimant had not made such a request but then both of its witnesses accepted in cross examination that she had. The respondent has called neither decision maker to give evidence. Of the two witnesses, one dealt with the claimant's grievance and the other had no involvement in the matter at all.

9.2 The respondent committed breaches of its own Flexible Working Policy. The response to the claimant's first request contained no explanation for the response and the respondent had made no effort to investigate the claimant's request. The actions of the respondent in failing to ask its recruiter to interview candidates who wanted part time work for the role advertised in October 2019 was not merely disinterested or unreasonable but mean. A candidate willing to work part time could have shared the post with the claimant, but no consideration was given to that possibility. The respondent only offered to meet the claimant to discuss her second flexible working request dated 3 October 2019 after it had reached its decision. None of the reasons given for rejecting the claimant's offers made sense. The grievance hearing organised to discuss the claimant's grievance was not adequate. The outcome letter from the grievance contains severe faults. The response to the claimant's third and final flexible working request is the worst response of all. As a result, the claimant resigned her contract of employment. The response sent by the respondent to the claimant was tone deaf and patronising.

9.3 This is a clear-cut case of constructive dismissal. The claimant wanted to return to work and the respondent unreasonably breached its policy as regards flexible working by failing to meet with the claimant or carry out an adequate investigation. There was a position open which the claimant could have filled but it was filled without inviting her and her grievance was mishandled. The claimant's requests were not taken seriously or listened to due to the requests being mischaracterised. The final straw was the rejection of the final flexible working request. The dismissal was unfair both on ordinary principles but also for reasons related to breach of the 1999 Regulations.

9.4 In looking for the reason for any unfavourable treatment found, the Tribunal should have regard to the failure on the part of the respondent to adequately engage with the claimant to facilitate a return to work. The respondent saw everything the claimant proposed or complained about through the lens of a new mother who wanted to spend time with her child rather than to work. If the Tribunal does not accept that there was maternity/pregnancy discrimination then in terms of less favourable treatment because of sex, there are multiple references to men

having discussions and meetings before decisions on flexible working requests were made in stark contrast to the claimant's treatment. The repeated rejection of suggestions made by the claimant to return to work can be seen as either maternity or sex discrimination. The failure to offer the role of receptionist on a part time basis was maternity discrimination. The respondent failed in the grievance investigation to check if there was disparity of treatment between men and women in terms of flexible working requests and the language used by the respondent in respect of requests made by the claimant would not have been used towards men.

9.5 The respondent accepts the PCPs contended for by the claimant in the indirect discrimination claim were applied and that there was group disadvantage. The disadvantage to the claimant herself is clear. Many of the tasks undertaken by the claimant could have been done by telephone/ email and would in most businesses have been done in that way. Whilst some of the claimant's duties were better undertaken in person, they could have been easily accommodated on the days she would have been in the office. The receptionist/ administrator role could have been carried out on a part time basis or partially remotely. The respondent did not act proportionately.

9.6 In terms of the flexible working request, it is accepted there was no statement in it that it was a statutory request although it was clearly such a request and so treated by the respondent. The respondent did not act reasonably in dealing with the request.

10. The Law

Direct Discrimination

10.1 We have reminded ourselves of the provisions of sections 13 and 18 of the 2010 Act which read:

13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others….

18(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-

(a) because of her pregnancy, or

(b) because of illness suffered by her because of it.

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 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….".

10.2 We have reminded ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of 'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases, discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant has received less favourable treatment. This is a crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision would have to be deduced, or inferred, from the surrounding circumstances".

10.3 The Tribunal has reminded itself of the guidance in **Igen -v- Wong & Others 2005 IRLR 258** which it has considered in full although does not trouble to set it out here. In particular we have reminded ourselves of the two-stage test.

10.4 We have noted the decision in **Madarassy v Nomura International Plc**, where in the Court of Appeal, Lord Justice Mummery said at paragraphs 71 and 72:

"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in ***Liang*** *(at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

10.5 In respect of the claim of pregnancy/maternity discrimination, we remind ourselves that protection is temporally confined to the “protected period”. If the unfavourable treatment in issue implements a decision taken in the protected period. that treatment is to be treated as occurring in the protected period even though the period has ended. No comparator is required given that the protection recognises that pregnancy is a condition unique to women. If a claim relating to pregnancy /maternity occurs outside the protected period and is advanced as a sex discrimination claim, the decision in **Webb -v- EMO Air Cargo (UK) Limited 1993 IRLR 27** continues to apply such that no comparator is needed in a pregnancy or maternity case. For a claim to succeed, there must be a causal connection between the treatment complained of and the pregnancy. The key point is that the reason for the unfavourable treatment has to correspond to pregnancy or maternity: it is not sufficient for pregnancy or maternity to simply be part of the background. The claimant’s maternity leave or pregnancy has to be the conscious or unconscious reason for any treatment if a claim is to succeed: the mere fact a woman happens to be on maternity leave when the unfavourable treatment occurs is not enough to establish direct discrimination. Put another way, was the pregnancy/maternity an effective cause of the treatment complained of. The emphasis in such cases is to seek to establish the reason why the claimant was treated as she was: in carrying out that exercise it is permissible for the Tribunal to draw inferences from its primary findings of fact.

Indirect Discrimination

10.6 The provisions of section 19 of the 2010 Act provided:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) the relevant protected characteristics are …disability

10.7 We have reminded ourselves that in considering a claim of indirect discrimination it is necessary to consider the matter in stages. First has the respondent applied the PCP contended for by the claimant to the workforce or a part of it. Secondly, if so, to consider if there is particular disadvantage to those with the relevant protected characteristic under consideration. To undertake this exercise, we must identify the pool of people to be considered and in considering the pool we must not overlook the provisions of section 23 of the 2010 Act set out below. Thirdly, if group disadvantage can be established, we must consider whether the claimant has shown that he suffers particular disadvantage by reason of that PCP. If all those matters are satisfied, then we must consider whether the

respondent has shown that the application of the PCP is a proportionate means of achieving a legitimate aim.

10.8 We have reminded ourselves of the decision in **Rutherford –v- Secretary of State for Trade and Industry (No 2) 2006 ICR 785** and **Somerset County Council –v- Pike 2009 IRLR 870** to the effect that in considering the pool the Tribunal should not bring in any who have no interest in the advantage or disadvantage in question. We note that that position particularly holds good in so called "access to benefit" cases.

10.9 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination and was referred to again in the decision in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

"Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances".

Burden of Proof and other relevant provisions of the 2010 Act.

10.10 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

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

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

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……….."

10.11 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

10.12 We have reminded ourselves of the provisions of section 23(1) of the 2010 Act which read:
"On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case".

Detriment and automatic unfair dismissal

10.13 We have reminded ourselves of the relevant provisions of **section 47C of the 1996 Act**:

47(1) An employee has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to

(a) pregnancy childbirth or maternity…

(b) ordinary compulsory or additional maternity leave

10.14 The Tribunal has reminded itself of the relevant provisions of **section 99 of the 1996 Act** which read:

"(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if-

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

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of state.

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

(a) pregnancy, childbirth or maternity….."

(b) ordinary, compulsory or additional maternity leave…

10.15 The Tribunal has reminded itself of the provisions of the **Maternity and Parental Leave etc Regulations 1999 and Regulations 19(1) – (3) and 20(1) - 20(3) ("the 1999 Regulations")** the relevant parts of which reads:

"19(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act or any deliberate failure to act by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee:

(a) is pregnant

(b) has given birth to a child..

(d) took, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave..

"20(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if-

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3) …

20(3)The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with-

(a) the pregnancy of the employee

(b) the fact that an employee has given birth to a child…

(d) the fact that she took, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave..

10.16 The wording of the above-mentioned regulations makes it clear that employees have the right not to be subjected to any detriment for having exercised or sought to exercise one of the rights to family leave. Thus, the mere fact that a detriment arises is insufficient — there must be a link between the employer's act (or deliberate failure to act) and the exercise of the right. However, an employee does not have to show that the detriment was deliberately inflicted or that the employer acted with any malice.

Constructive Dismissal

10.17 The Tribunal has reminded itself of the provisions of section 95(1) of the 1996 Act which read:-
"(1) For the purpose of this part an employee is dismissed by his employer if (and, subject to subsection (2)… only if) - …(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in

which he is entitled to terminate it without notice by reason of the employer's conduct."

10.18 The Tribunal has reminded itself of the test for constructive dismissal as set out by **Denning MR in Western Excavating (ECC) Limited -v- Sharpe [1978] ICR 1221** where it was stated:-
"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 the employer's conduct. He is constructively dismissed."

10.19 The Tribunal has reminded itself of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides 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 the employer and employee".* The Tribunal notes that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

10.20 The Tribunal has reminded itself of the decision in **Lewis -v- Motorworld Garages Limited [1985] IRLR 465** where Glidewell LJ stated:-
"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract: the question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the 'last straw' situation."

10.21 The Tribunal has reminded itself of the decision in **London Borough of Waltham Forest -v- Omilaju** where Dyson LJ states:-
"Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things… is of general application……The question specifically raised at this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. … Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct… The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred…

If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

10.22 The Tribunal has reminded itself of the decision in **Hamill –v- J V Strong & Co EAT/1179/**99 where Judge Altman stated on the question of affirmation of breach:
"It seems to us that a Tribunal confronted with this sort of situation must look and see if the final incident is sufficient of a trigger to revive the earlier ones. This will, it seems to us, involve looking at the quality of the incidents themselves, the length of time both overall and between the incidents, and it will also involve looking at any balancing factors which may have, at any point, been taken to constitute a waiver of earlier breaches.
Finally, when considering the issue of waiver, the very nature of the waiver will need to be considered. It is not only a question of seeing whether the facts give rise to either an express or implied waiver but considering the terms of the waiver itself. Is it a once and for all waiver, or do the circumstances give rise to the implication of a conditional waiver, for instance a waiver subject to the condition that there would be no repeat of similar conduct or, as in this case, that the Appellants would not continue the lack of support. Finally, of course, any finding of waiver has to be identified and based on clear facts or inferences from established facts".

The complaint under Section 80F of the 1996 Act

10.23 We have reminded ourselves of the provisions of sections 80F, 80G and 80H of the 1996 Act. We have also reminded ourselves of the provisions of the **Flexible Working Regulations 2014.** These are lengthy and detailed provisions and we do not set them out in full but have considered them in detail and refer to the in the appropriate part of our Judgment.

Conclusions

The Flexible Working Application

11.1 The complaint under section 80H of the 1996 Act requires us to give detailed consideration of sections 80F-80I of the 1996 Act. We have also considered the Flexible Working Regulations 2014 and the provisions of the ACAS Code of Practice 5 – Handling in a reasonable manner requests to work flexibly 2014 ("the Code").

11.2 The right to make a flexible working request under the 1996 Act is subject to various mandatory requirements set out in section 80F(2). There are three requirements. The first requirement is that any request must state that it is an application under section 80F of the 1996 Act. None of the iterations of the

request made by the claimant in this matter complied with that mandatory requirement. The 2014 Regulations do not make any reference to the mandatory requirements set out in section 80F(2) but notwithstanding that, we consider the provisions of section 80F(2) to be applicable to any flexible working request if complaint is to be made under section 80H of the 1996 Act for compensation.

11.3 That being so, we conclude that the complaint under section 80H must fail as the mandatory requirements for the application were not complied with and therefore the claimant's right to complain about the respondent's failure to comply with its duties under section 80G of the 1996 Act and thus to seek compensation under section 80I of the 1996 Act does not arise.

11.4 Accordingly, the complaint under section 80H of the 1996 Act fails and is dismissed.

11.5 Notwithstanding the failure of this complaint, we conclude that the manner of the respondent's treatment of the various applications made by the claimant, which the respondent treated as flexible working requests pursuant to its own policy, and the provisions of the Code are of considerable relevance in our consideration of this matter.

The Pregnancy/Maternity Direct Discrimination Claim, the Direct Sex Discrimination Claim and the Pregnancy/Maternity Detriment Claim

General matters

11.6 Before moving to consider the specific issues in relation to these particular complaints, we consider it right to set out various conclusions which are of central importance to these complaints, and which are relevant to our drawing of inferences in relation to these complaints.

11.7. The decisions taken both by JN and CR are at the heart of this matter. However, we did not hear from either of those individuals. The claims for direct discrimination involve us seeking for the reason why the respondent, through those decision makers, acted as it did in relation to the acts of unfavourable treatment asserted by the claimant. We were not told whether either decision maker had had any, let alone any recent, training on discrimination matters. The witnesses from who we did hear had either had no such training at all or none from or on behalf of the respondent. We infer the same was true of the two decision makers.

11.8 It is clear from the approach of the respondent in this matter that it considered the claimant was only seeking part time hours and that no consideration had been given to the proposals advanced by the claimant for working full time hours – albeit with a degree of flexibility in terms of location. The first request made by the claimant was for part time hours but, having received the respondent's refusal, the claimant countered with a proposal for full time hours and later made other full time working proposals. We conclude that stereotypical assumptions were in play on the part of the decision makers that a woman returning from maternity leave would only be interested in part time working hours. That assumption pervades the history of the way the respondent

dealt with the claimant's requests – or, more accurately, failed to deal with those requests in any meaningful way.

11.9 It is clear that the witness IB, in dealing with the claimant's grievance, referred to and took account of the views of JN. It is clear that IB effectively adopted JN's views, as to the necessity for the claimant's post to be worked full time in the office, without question or challenge and without investigation as to whether those views were justified.

11.10 That there were stereotypical attitudes in play finds no more clear expression than the letter sent by CR in response to the claimant's letter of resignation. The response was characterised by counsel for the claimant as "*patronising"* and "*tone deaf".* We find ourselves in full agreement with those descriptions.

11.11 The Code recommends an employer should arrange to talk with an employee about any request for flexible working as it will help an employer gain a better understanding of what is proposed and enable an employer to better understand how any proposal might benefit the business. Any request should be considered carefully. Any request which is refused should carry a right of appeal. The witnesses for the respondent demonstrated no knowledge of the Code: we infer the same applied to the decision makers. The respondent treated the requests made by the claimant as flexible working requests and by implication agreed that its own flexible working policy was engaged throughout the various requests made by the claimant. That policy required the respondent to meet with the claimant to discuss the requests made and it required any proposal to be seriously considered. The manner in which the respondent dealt with the various requests from the claimant demonstrates no such consideration.

11.12 We conclude that the manner in which the respondent dealt with the claimant's first flexible working request was unreasonable. The proposal was rejected without holding any meeting with the claimant or engaging with her in any way. The request was rejected shortly after it was received and with the justification for the refusal of the request being expressed in summary terms as being *"a business decision, as your role requires a full-time manager".* The request clearly indicated that the claimant was open to negotiation, but that offer was not taken up. We infer that CR rejected the first request dated 17 September 2019 without any thought and without considering the proposals seriously or at all. The decision to refuse the request was a knee jerk reaction tainted with stereotypical assumptions. We reach the same conclusion in respect of the second request dated 3 October 2019 and the third request dated 25 November 2019. Neither such request resulted in any meeting with the claimant to discuss the detailed proposals advanced. In particular the third request dated 25 November 2019 contained a variety of full time and part time working suggestions but that third request was responded to without any meeting with the claimant and it was treated as being a further request for part time hours whereas, if considered properly, it contained proposals both to work part time or full time. The full-time proposals were not considered as the respondent erroneously saw the third request as being only a request to work part-time as, we infer, that is what the respondent presumed the claimant wanted given that she had become a mother for the first time.

11.13 We conclude that the respondent did not give consideration at any time to the possibility of the claimant undertaking the administrator/receptionist role based in the office in which the claimant herself worked, which was advertised by the respondent on 7 October 2019, either on a part time basis or on a job share basis. There was no joined up thinking by anyone within the respondent company about that matter. This was so in spite of the fact that the respondent was aware either on the day of, or the day following, the advertisement of that full time role that an employee of the respondent (senior in terms both of length of service and of the substantive role carried out by her) was seeking to return from maternity leave and had raised the possibility of returning on a part time basis.

11.14 We conclude that the grievance procedure caried out by the respondent was severely flawed. The grievance outcome confuses part time working with flexible full time working, it fails to recognise or address the failures of the respondent to observe its own flexible working policy, there was little, if any, investigation (let alone rigorous investigation) by IB into the grievance. IB did not seek to challenge the decisions made by CR and by JN but blindly went along with their conclusions without any meaningful challenge to those conclusions. Furthermore, the grievance did not investigate the serious allegations of discrimination because of sex raised by the claimant.

11.15 We accept the submissions of Ms Bayliss that acts of discrimination are necessarily acts of prejudgement. Such acts are likely to be accompanied by not listening to an alleged victim of discrimination or not taking them seriously. The perpetrators of discrimination often project their own views onto the victim of discrimination. It is probable that in any situation where a person is being patronised and disbelieved that some bias is occurring. Understanding what that bias is and whether it is unlawful discrimination can often be revealed through the sort of language used by the alleged perpetrators of unlawful discrimination. We conclude that those factors are patently at play in the circumstances of this case.

11.16 In the course of his cross examination, IB accepted that since the pandemic began the respondent has used various IT applications to conduct its business remotely which he described as possible but not desirable. IB confirmed he saw the claimant’s grievance and flexible working requests as being related to part time working only. IB accepted that no notes of any investigation carried out by him into the grievance were available. He accepted that he did not speak to anyone else in the small office in which the claimant worked to check on the viability of remote working and that he did not consider it appropriate for him to do so because he spoke to JN and obtained his views. He was not sure why he had concentrated on the part time options put forward by the claimant. IB accepted flexible remote working might be possible now with the experience gained in the pandemic, but it was not possible when the decisions were taken. IB accepted that no one had investigated the possible use of IT to accommodate the requests made by the claimant for working from home.

<u>Failure to adequately engage with the claimant to facilitate a return to work</u>

11.17 We conclude that the facts of this case reveal a startling lack of meaningful communication with the claimant. There was a failure to adequately engage with the claimant. That was unfavourable treatment of the claimant.

11.18 We seek the reason why there was unfavourable treatment. By reference to the factors set out at 11.6 -11.16 above, we infer one of the reasons was the claimant's absence from the office on maternity leave. We have evidence that other employees who made flexible working requests did have discussions with the respondent about those requests. The claimant was not afforded that opportunity because she was away from the office. She was away because she was on maternity leave. This situation applied to all three requests made by the claimant on 17 September, 3 October and 25 November 2019.

11.19 The requests made by the respondent were mischaracterised. The respondent saw the requests from the claimant as being exclusively related to a request for part time working whereas that was not the case. The claimant made suggestions for both part-time and full-time hours albeit at flexible locations. By reference to the factors in 11.6 – 1.16 above, we infer that the decision makers (from whom we did not hear) made stereotypical assumptions that women away on maternity leave would not wish to return to full time work because their priorities would have changed on giving birth. That assumption found direct expression by the decision maker CR in the letter acknowledging the claimant's resignation. IB characterised the grievance raised by the claimant as being a grievance against the decision "*regarding your return to work on part time hours following maternity leave".* That was only a partial description of what the claimant had requested but the grievance was seen through a prism clouded by stereotypical assumptions of what women returning from maternity leave were bound to request. The minutes of the grievance hearing record that the respondent will accept "*a second written request for pat (sic) time working on this occasion".* Whilst that statement was not carried through to the outcome letter itself, we conclude that the minutes further evidence the distorted and discriminatory way in which the claimant's requests for flexible working were perceived and treated. The third request made by the claimant on 25 November 2019 was again treated as though it contained requests for part time working alone. In fact, on careful analysis, that request contains a variety of requests including two requests for flexible full time working. The clear assumption of the respondent and its witnesses was that the claimant was seeking part time work and that they considered to be understandable. We infer that assumption was based on stereotypical assumptions that a woman returning from maternity leave was bound to want to work part time.

11.20 We conclude that in failing to adequately engage with the claimant to seek a return to work the claimant was treated unfavourably by the respondent. We conclude that the reason why the claimant was so treated was because she was on maternity leave and because she had given birth to a child and that the decision makers assumed that her priorities were bound to have changed. Those are discriminatory reasons why the decision makers acted as they did in this regard. This allegation of maternity discrimination is well-founded.

11.21 All the decisions made in relation to the requests for flexible working were made within the protected period (which ended on 26 November 2019) with the exception of the final refusal which was communicated by letter dated 9 December 2019.We have considered the chronology and the history of dealing with the various requests. We conclude that a decision had been taken by the

respondent to refuse any request made by the claimant other than a request to return to her full-time duties in the workplace. Nothing other than that would suffice for the respondent. We therefore conclude that by rejecting the claimant's four proposals made on 25 November 2019 the respondent was in effect implementing a decision which had been taken during the protected period and thus the provisions of section 18(5) of the 2010 Act apply to render that last refusal an act of maternity discrimination. If this conclusion should be wrong, then we consider that the refusal, communicated on 3 December 2019, would be an act of sex discrimination but one for which no comparator would be required given that it related to less favourable treatment for pregnancy/maternity reasons as we set out in paragraph 10.5 above.

The repeated rejection of each and every suggestion made by the claimant to return to work

11.22 The respondent did reject each and every suggestion made by the claimant to effect a return to work from maternity leave. We conclude that that was unfavourable treatment of the claimant.

11.23 We did not hear from the decision makers. For the reasons set out above at paragraphs11.6-11.16, we infer that the claimant's absence on maternity leave materially influenced those decision makers. The claimant's absence had not impacted on the respondent as efficient maternity cover was in place. That maternity cover is still in place, and we infer the respondent, through its decision makers, knew that RW was prepared to remain in post. Accordingly, when the claimant indicated that she was ready to return from maternity leave, the respondent had no incentive to give serious and meaningful consideration to the proposals the claimant was advancing for a return and we infer, as counsel for the claimant suggested, that the respondent simply could not be bothered to even to consider making any accommodation with the claimant. Again, we conclude that stereotypical assumptions were in play in the minds of the decision makers. Those assumptions were that a woman returning from maternity leave was bound to want only to work part time and was not going to be able to be as effective an employee as before her maternity leave because her priorities were bound to have changed.

11.24 We conclude, for the same reasons as before, that all rejections occurred in the extended protected period or, in so far as they did not do so, would be an act of sex discrimination.

11.25 We conclude that this allegation of maternity discrimination is well-founded.

Failing to offer the claimant the role of receptionist/administrator on a part time basis

11.26 The respondent gave no consideration whatsoever to how this vacant role in the claimant's office in October 2019 might have been used as a means of accommodating the claimant's proposals to return to work. The respondent advertised this vacancy at a time it knew the claimant was seeking to return from maternity leave to an office where three people were usually employed. We conclude that no thought whatever was given by the respondent to using that

vacancy in a return-to-work accommodation for the claimant. There was an absence of any thought about the claimant. The claimant was treated unfavourably by the respondent in this regard.

11.27 We infer the reason for this unfavourable treatment was that the claimant was away from the office: this was a classic example of “out of sight, out of mind”. The reason the claimant was out of sight was her pregnancy and her resulting maternity leave. We conclude that the failure to think of the claimant and to consider how this role might be used to facilitate her return was an act of pregnancy/maternity discrimination.

11.28 Accordingly, this allegation of maternity discrimination is well-founded. It occurred during the protected period in relation to the claimant’s pregnancy.

11.29 No time issues were raised in respect of any of the allegations of pregnancy/maternity discrimination. We have no hesitation in concluding that the respondent was right so to do. Given the date the claimant approached ACAS for early conciliation, any allegation after 17 September 2019 is in time and the first request from the claimant was after that date.

11.30 Therefore, all the allegations of pregnancy/maternity discrimination are well-founded, and the claimant is entitled to a remedy.

11.31 In those circumstances it is not necessary for us to consider the alternative allegations of direct sex discrimination which fall away.

11.32 Given that the required test for the presence of maternity detriment is in essence the same as the test for pregnancy discrimination, we conclude that the three allegations of unfavourable treatment also amount to maternity detriment and that the complaint under section 47C of the 1996 Act and Regulation 19 of the 1999 Regulations is well-founded. It seems to us that that finding adds little or nothing in respect of any remedy to which the claimant is entitled.

11.33 We deal with the allegation of discriminatory constructive dismissal in our conclusions on the question of constructive dismissal generally which follow.

The indirect sex discrimination claim

11.34 The respondent accepted that the two PCPs contended for by the claimant were applied by the respondent and that the group disadvantage to women was made out given that women are more likely to have primary childcare responsibilities and are more likely to need more flexible working. The PCPs were that the role of sales manager and the role of receptionist/administrator had to be carried out full time and from the office premises of the respondent.

11.35 We have considered whether each PCP put the claimant individually at a disadvantage and we conclude that both PCPs did so. We find ourselves in agreement with the submission on this matter made by counsel for the claimant. The respondent did apply both PCPs to the claimant. As a result, the claimant embarked on a series of flexible working requests. Those requests were unreasonably dealt with and led ultimately to the claimant’s resignation from her

employment with the respondent after 15 years' service. The claimant was personally disadvantaged by the application of both PCPs.

11.36 We have considered the needs of the business of the respondent and the discriminatory effect on the claimant. We note that the more serious the impact on the claimant, the more cogent must be the justification for it.

11.37 The respondent advanced two aims in this matter namely that the PCPs were reasonably necessary first to facilitate the operation of the department in which the claimant worked and secondly to meet customer demand. We conclude that both are legitimate aims.

11.38 In the context of this claim, the claimant was proposing a return to full time working albeit with two days spent at home working remotely. No consideration was given to this proposal let alone serious consideration.

11.39 Many of the matters referred to by the respondent as requiring the application of the first PCP was the need to liaise with the finance team and other teams on a daily basis and in person. We received evidence, which we accept, that some attendees at the daily team meetings attended by the claimant did so by telephone. In the course of cross examination, IB accepted that remote working had taken place during the pandemic lock-down which began in 2020 and, although not ideal, had worked. The respondent gave no consideration whatsoever to the possibility of the claimant also being able to attend those meetings remotely on the days she proposed not to be working in the office. No investigation was carried out as to whether the claimant could effectively work from home of the two days each week she proposed not to be in the office. Dialling into meetings by telephone or by video is now commonplace and, whilst not so common in 2019 when the respondent was invited to consider these matters, it was far from unknown and indeed some participants at those meetings did so. We note that the claimant proposed to be working in the office as before on three days each week and that any revised arrangements would only apply for two days each week.

11.40 We conclude that the number of times the claimant was required to meet customers of the respondent were few and far between. We conclude that the overwhelming majority of such meetings took place by arrangement and there seems no reason, on the face of it, why any such meeting could not have been arranged on days when the claimant would have been physically present in the office. There were clearly some aspects of the role carried out by the claimant that needed face to face contact – not least the management of the small staff in the office in which she worked. However, no consideration was given to those duties being able to be carried out on the days when the claimant would have been present in the office or indeed the claimant being able to do so remotely on the days that she would not. Equally no consideration was given as to whether it would have been possible for the claimant to meet with customers remotely on the rare occasions when any such meeting would have been required on a day she was not in the office.

11.41 It was accepted that in respect of the reception/administration role, only 10% was a traditional reception role. No investigation took place as to whether

that role could have been carried out on a job share basis by the claimant and another part time employee or partially remotely. The truth of the matter is that the respondent did not try to accommodate the claimant in this role because it would have involved altering the status quo of its operations. That is what the avoidance of unlawful discrimination sometimes involves.

11.42 The discriminatory effect on the claimant of the operation of the two PCPs was very great: she lost a senior position which she enjoyed and which, by all accounts, she was good at. That required reasoned and cogent justification from the respondent. However, in this case, the respondent did not apply its mind at all to whether the discriminatory effect of the PCPs could be avoided. A decision was taken by a decision maker, from whom we did not hear, that the role needed full time attendance in the office. That decision was accepted without challenge. That decision was tainted with maternity discrimination. The respondent was just not interested in any proposal advanced by the claimant. We conclude that in acting as it did, the respondent did not act proportionately to achieving either legitimate aim on which it relied by the application of either or both of the PCPs relied on in this matter.

11.43 The claim of indirect sex discrimination is well-founded.

<u>The constructive unfair dismissal claim - automatic and ordinary</u>

11.44 We consider first whether the claimant was constructively dismissed. There are then two further questions. First, was any constructive dismissal an act of unlawful discrimination and secondly, was any constructive dismissal automatically or ordinarily unfair.

11.45 We conclude that the claimant resigned in the face of a fundamental breach of contract by the respondent.

11.46 The respondent unreasonably breached its own flexible working policy by failing to meet with the claimant under the terms of the policy or carrying out any, or at least any reasonably adequate, investigation into how her requests could have been accommodated. The respondent simply was not interested in anything the claimant proposed – and she proposed several cogent solutions.

11.47 When the claimant raised a grievance it was mis-handled. Stereotypical assumptions continued to be applied as the grievance was investigated and it was understood to be a grievance only about a flexible working request for part time working. The respondent failed to understand, or chose not to understand, the true effect of the proposals being advanced.

11.48 The claimant was entitled to conclude that none of her requests were taken seriously.

11.49 The final straw was the way the request dated 25 November 2019 was handled. That request contained four suggestions. No meeting took place to discuss the proposals and the requests were not seriously considered. The claimant resigned in the face of a breach of the implied term of trust and

confidence. We are satisfied judged objectively that the claimant was entitled so to do.

11.50 The claimant did not delay in effecting her resignation. As it happened, she found vindication in the attitudes she considered to be in play in the workplace by the language used in the letter sent by the respondent accepting her resignation.

11.51 The claimant was constructively dismissed by the respondent.

11.52 We have considered whether the act of dismissal was also an act of unlawful discrimination. We conclude that it was. The reason the claimant resigned was materially influenced by three acts of unfavourable treatment which amounted to pregnancy/maternity discrimination. The dismissal was therefore materially affected by pregnancy discrimination. The fact that the dismissal occurred after the end of the protected period is not material. It is clear that given the respondent's discriminatory conduct which gives rise to the dismissal occurred in the protected period. The respondent decided on the conduct which led the claimant to resign during the protected period and thus the provisions of section 18(5) of the 2010 Act again apply and render the dismissal an implementation of a decision taken by the respondent during the protected period. The claimant's constructive dismissal was an act of pregnancy/maternity discrimination. The claimant is entitled to a remedy for a discriminatory dismissal.

11.53 In terms of whether the constructive dismissal is fair or unfair for the purposes of the 1996 Act, we have considered whether the respondent has made out its claimed reason for acting as it did namely some other substantial reason falling within section 98(1) of the 1996 Act.

11.54 The claimant asserts that the reason for the dismissal – namely the reason the respondent acted as it did - was related to her pregnancy/maternity within section 99 of the 1996 Act and Regulation 20 of the 1999 Regulations. By reason of our findings set out above, we conclude that the claimant has established a prima facie case that that is so. We have considered therefore whether the respondent has disproved that prima facie case and established that it decided on the matters which led the claimant to resign because of some substantial reason. We conclude that it has not. We therefore conclude that the claimant was automatically unfairly dismissed.

11.55 If that conclusion is wrong and the respondent has established a substantial reason for dismissal, we have considered whether it acted reasonably in moving to dismiss the claimant for that reason. We conclude that it did not. No meeting was held with the claimant to discuss the dismissal. The claimant was not afforded the opportunity to advance her case save in the context of a grievance hearing which she herself requested and which was mishandled. No reasonable employer would act in that way. The dismissal of the claimant was unfair on ordinary principles.

11.56 The complaint of unfair dismissal is well-founded, and the claimant is entitled to a remedy.

Remedy Hearing

12.1 The remedy hearing will take place on 8 April 2022 as provisionally arranged at the end of the liability hearing and agreed with the parties.

12.2 The Tribunal will issue directions to prepare for that hearing.

12.3 The remedy hearing will consider all matters in respect of remedy including any argument which the respondent may raise as to the effect of the unlawful acts of discrimination.

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EMPLOYMENT JUDGE BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 26 February 2022

JUDGMENT SENT TO THE PARTIES ON 1 March 2022

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS

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