Case Number: 3202214/2016

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Z McNeish**
Respondent:	**Network Rail Infrastructure Limited**
Heard at:	**East London Hearing Centre**
On:	**22 – 25 August 2017** **In chambers 25 September & 2 October 2017**
Before:	**Employment Judge Foxwell**
Members:	**Ms L Conwell-Tillotson** **Mr ML Wood**

Representation:

Claimant:	In person
Respondent:	Ms J Shepherd (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant was constructively dismissed.**

2. **The principal reason for the Claimant's dismissal was pregnancy and the dismissal was automatically unfair under section 99 of the Employment Rights Act 1996.**

3. **The Respondent subjected the Claimant to harassment related to sex contrary to section 26 of the Equality Act 2010 by:**

    a. **Philip Lewis referring to "cost implications" when asking the Claimant about likely return to work and due dates on 13 April 2016.**

b. Philip Lewis telling the Claimant in a meeting on 23 May 2016 that Maxime Boy had had to cover her workload when she had been absent due to pregnancy-related sickness.

4. The Respondent treated the Claimant unfavourably because of pregnancy contrary to section 18 of the Equality Act 2010 by:

a. failing to provide the Claimant with an outcome to her grievance within 8 days of the hearing in breach of its policy and, more generally, within a reasonable time;

b. failing to undertake a workplace risk assessment to ensure the safety of the Claimant's workplace contrary to its policy "Employee Guide to Maternity".

5. The Respondent victimised the Claimant contrary to section 27 of the Equality Act 2010 by Peter Ojumu ignoring the Claimant's request made on 18 August 2016for the names of his line-manager and the HR Business Partner handling her case.

6. The Tribunal finds it just and equitable to extend time for the bringing of the successful claims.

7. The Claimant's other allegations of harassment, pregnancy related discrimination and/or victimisation are not well-founded and are dismissed.

8. The Claimant's allegations of direct and indirect sex discrimination are not well-founded and are dismissed.

9. The Remedy to which the Claimant is entitled will be decided at a Remedy hearing on 11 December 2017 (time estimate 1 day)

REASONS

1 The Claimant, Mrs Zainab McNeish, began working for the Respondent, Network Rail Infrastructure Limited, on 25 January 2016. Her employment ended on 6 March 2017 when she resigned.

2 On 14 December 2016 she presented claims of sex and pregnancy related discrimination and victimisation to the Tribunal. She became pregnant in February 2016 and her son, Malakai was born on 24 October 2016. He is her second child; her older son, Jamil is 8 years old.

3 The claims came before the Tribunal for case management on two occasions, on 20 March 2017 before Employment Jones and on 17 July 2017 before Employment Judge Brown. The issues in the claims (which are set out below) were identified as a result of these hearings and it is clear that an amendment to add a claim of constructive unfair dismissal was considered although no formal order permitting this was recorded.

Accordingly, and for the avoidance of doubt, we have granted the Claimant permission to amend her claim to assert constructive unfair dismissal. Ms Shepherd did not object to this on behalf of the Respondent.

The Issues

4 The issues in the claim have been agreed by the parties to be as follows:

Direct discrimination – s.18 Equality Act 2010

1. *Did R act as alleged at numbers 1 to 40 of the attached 'chronology of discriminatory events'?*
2. *If so, was that unfavourable treatment?*
3. *If so, was it done because of any of the matters set out at s18(2)-(4) EqA 2010?*
4. *Is the claim out of time? If so, should time be extended?*

Harassment – s.26 Equality Act 2010

1. *Did R act as alleged at numbers 1 to 40 of the attached 'chronology of discriminatory events'?*
2. *If so, was it unwanted conduct?*
3. *Was it related to the Claimant's sex?*
4. *Did it have the relevant purpose or effect (s26(1)(b) EqA 2010)?*
5. *Is the claim out of time? If so, should time be extended?*

Victimisation – s.27 Equality Act 2010

C relies on the alleged protected act of raising complaints of discrimination and harassment on the grounds of pregnancy in a grievance dated 22/6/16, sent by email on 7/7/16.

1. *Did C do a protected act as alleged?*
2. *Did R subject C to a detriment because C did a protected act or R believes that C has done or may do a protected act? C relies on the alleged acts set out at numbers 18 to 40 of the attached 'chronology of discriminatory events'.*
3. *Has the Claimant given the evidence or information in good faith?*
4. *Is the claim out of time? If so, should time be extended?*

Indirect discrimination – s.19 Equality Act 2010

C relies on the alleged PCP of being required to attend the Stratford office

1. *Did R apply to C a PCP as alleged?*

2. *Did R, or would R, apply that PCP to men?*

3. *Did the PCP put, or would it put, women at a particular disadvantage when compared with men?*

4. *Did it put, or would it put, C to that disadvantage?*

5. *Is the PCP a proportionate means of achieving a legitimate aim?*

Automatic Constructive Unfair Dismissal

1. *Did R act in all or any of the ways alleged at numbers 1 to 40 of the attached 'chronology of discriminatory events'? If so, was the Respondent's conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?*

2. *Were the alleged breaches of the Claimant's contract, whether taken individually or cumulatively, sufficiently fundamental so as to entitle the Claimant to resign in response and regard herself as constructively dismissed? And were the breaches related to any of the reasons set out in s.99 ERA 1996, thereby entitling the Claimant to resign and claim automatic unfair dismissal in the absence of her having the relevant qualifying period of service to claim ordinary constructive unfair dismissal?*

3. *Did the Claimant resign in response to such breach or breaches?*

4. *Did the Claimant waive any alleged breach(es) and/ or delay her resignation, thereby affirming the contract?*

5. *In the event that the tribunal finds that the Claimant was unfairly dismissed, did the Claimant contribute to her dismissal and, if so, is it just or equitable to award any compensation?*

CHRONOLOGY OF DISCRIMINATORY EVENTS

Date	***No.***	***Incident summary***
10.03.16	*1*	*Maxime Boy emails the Claimant and insists that she book her time off as sick and reneges upon the previous agreement made on 3rd March 2016 that the Claimant could work from home.*
13.04.16	*2*	*Phil Lewis contacts the Claimant by email, phone and text messages*

		to ask when she would return to work.
13.04.16	*3*	*Phil Lewis questions the Claimant about her due date because of the "cost implications" of finding cover.*
03.05.16	*4*	*Maxime Boy requires the Claimant to attend the Stratford offices for: the first week following her return to work; and Monday morning meetings during May and June 2016 .*
03.05.16	*5*	*The Claimant informs Maxime Boy that sitting in her chair is causing back and hip pains; in response, Mr Boy replaces the chair without any risk assessment of the workstation.*
05.05.16	*6*	*Maxime Boy declines to investigate the Claimant's pay query.*
05.05.16	*7*	*Phil Lewis declines to investigate the Claimant's pay query.*
16.05.16	*8*	*Maxime Boy informs the Claimant that the only time she can take off from work is to attend pregnancy related appointments, or else she will have to work extra hours the following week.*
16.05.16	*9*	*Maxime Boy required the Claimant to provide a sick note for her attendance at an antenatal appointment.*
19.05.16	*10*	*Sajid Mahmood is required by Maxime Boy and Phil Lewis to inform them of the Claimant's arrival and departure times from the office.*
20.05.16	*11*	*Maxime invites the Claimant to a meeting defined as a 'one-to-one' when in fact he also intends Phil Lewis to attend.*
23.05.16	*12*	*During a meeting between Maxime Boy, the Claimant and Phil Lewis, Mr Lewis compared the Claimant to male colleagues.*
23.05.16	*13*	*During a meeting between Maxime Boy, the Claimant and Phil Lewis, Mr Lewis stated to the Claimant that she is a band 4 and will be expected to speak to other managers to get information, work late during the reporting period week and attend functional meetings in Stratford.*
23.05.16	*14*	*During a meeting between Maxime Boy, the Claimant and Phil Lewis, Mr Lewis told the Claimant that when she went on sick leave Maxime Boy had to cover her workload.*
07.06.16	*15*	*Maxime Boy verbally requested form MATB1 from the Claimant and openly declared in the office in front of work colleagues that the Claimant was 20 weeks pregnant.*
17.06.16	*16*	*Claimant excluded from the PER Periodic meeting.*

07.07.16	*17*	*The Claimant is refused an occupational health referral.*
10.07.16	*18*	*The Respondent fails to acknowledge the Claimant's grievance within 3 days of submission in breach of its policy.*
12.07.16	*19*	*During a telephone conversation, Peter Ojumu tells the Claimant that the Respondent will only consider her as pregnant once form MATB1 has been received.*
12.07.16	*20*	*In an email, Peter Ojumu implies that the Claimant cannot expect to have a pregnancy risk assessment until form MATB1 is received by the Respondent.*
12.07.16	*21*	*The Claimant's request to take annual leave is ignored.*
14.07.16	*22*	*The Respondent fails to arranged a grievance hearing within 7 days of submission in breach of its policy.*
21.07.16	*23*	*The Respondent fails to inform the Claimant that the grievance hearing has been adjourned.*
July 2016	*24*	*Maxime Boy allocates the Claimant's desk to a new planner, despite there being other available desks (because of staff annual leave).*
26.07.16	*25*	*Peter Ojumu continues to fail to refer the Claimant to occupational health.*
29.07.16	*26*	*The Respondent fails to provide the Claimant with a written record of the grievance hearing within 8 days of the hearing in breach of its policy.*
29.07.16	*27*	*The Respondent fails to provide the Claimant with an outcome to her grievance within 8 days of the hearing in breach of its policy.*
17.08.16	*28*	*During a telephone conversation, Peter Ojumu requests a sick note from the Claimant and denies that she sent him numerous emails in relation to her time off work.*
17.08.16	*29*	*Peter Ojumu emails the Claimant requesting her to advise if she is fit to work and if she cannot provide a Fit Note, she is to promptly return to work.*
18.08.16	*30*	*Peter Ojumu asks the Claimant to complete her timesheet in the Oracle timekeeping system and states that Human Resources will have to decide what the Claimant's time off is to be classified as.*
18.08.16	*31*	*Peter Ojumu does not provide the Claimant with the names of the relevant HR Business Partner and their line manager but instead,*

		asks her why she needs the information.
August 2016	*32*	*Emails sent by the Claimant to Peter Ojumu and Human Resources chasing the outcome to her grievance are ignored.*
06.09.16	*33*	*The Respondent continues to fail to conduct a revised workplace risk assessment taking into account the Claimant's pregnancy.*
07.10.16	*34*	*The Respondent emails the Claimant to inform her that she will be required to attend a reconvened grievance hearing.*
28.10.16	*35*	*Jessica Stewart emails the Claimant to request her form MATB1 to process her maternity entitlement, despite the fact that this had previously been provided to Peter Ojumu.*
07.11.16	*36*	*The Respondent denies that Peter Ojumu received the Claimant's form MATB1 and Jessica Stewart insists that she will visit the Claimant's home to collect the original MATB1 form.*
11.11.16	*37*	*The Claimant's queries in relation to her annual leave remained outstanding.*
06.12.16	*38*	*The Respondent continues to request that the Claimant obtain a further MATB1 form despite the Claimant informing them that this is a document that is only produced once.*
Circa 18th December 2016 to 10th February 2017	*39*	*The Respondent refuses to assign an individual from a different service to hear the Claimant's appeal.*
10th February 2017 to 2nd March 2017	*40*	*The Respondent unreasonably disregarded evidence that might otherwise have resulted in aspects of her appeal being upheld.*

The Hearing

5 The Tribunal heard evidence and submissions on liability over five days between 22 and 29 August 2017. The Claimant gave evidence in support of her claim and called no other witnesses. This is quite usual and we draw no inference from the number of witnesses a party calls.

6 The Respondent called the following witnesses:

Maxime Boy - Mr Boy was engaged by the Respondent as a Programme Controls Manager on the Crossrail Anglia East project in February 2016. He is a contractor and not an employee; he was nevertheless the Claimant's line-manager.

Rachael Evans - Mrs Evans is the Respondent's Senior HR Business Partner for the Crossrail programme.

Philip Lewis - Mr Lewis is the Principal Programme Controls Manager for Crossrail Anglia East. He is an employee of the Respondent.

Ben Wheeldon - Mr Wheeldon is the Crossrail Programme Director and is also employed by the Respondent. He heard the Claimant's appeal against a grievance decision.

7 The Respondent also relied on a witness statement from ***Peter Ojumu*** who was a Senior Programme Manager at times relevant to this claim. Mr Ojumu has since left the Respondent and is living in Australia. He dealt with a grievance raised by the Claimant. We explained to the parties that the weight we could attach to Mr Ojumu's evidence was diminished by the fact that he had not been cross-examined.

8 In addition to the evidence of these witnesses the Tribunal considered the documents to which it was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

9 Finally, the Tribunal received written submissions from both parties and they had the opportunity to amplify these orally. We are grateful to them for the care which they took in presenting their cases. It was notable how the Claimant conducted herself with dignity during the hearing.

10 The Tribunal considered its decision in Chambers on 2 and 9 October 2017.

The Legal Framework

11 The Claimant claims that she was subjected to pregnancy and maternity discrimination, harassment related to sex, direct sex discrimination, indirect sex discrimination and victimisation because of a protected act. Pregnancy and maternity are protected characteristics under section 4 of the Equality Act 2010 and sex is a protected characteristic under section 11. It is unlawful to discriminate against employees under section 39 of the Act.

12 The Claimant also complains of constructive, automatic unfair dismissal related to pregnancy.

Pregnancy and maternity discrimination & direct sex discrimination

13 Pregnancy and maternity discrimination arises under section 18 of the Equality Act which provides as follows:

> *"(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 the pregnancy, or*
> *(b) because of illness suffered by her as a result of it.*
> *….*
>
> *(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
…."

14 This section makes it unlawful to treat a woman unfavourably because of pregnancy during her pregnancy and any period or ordinary or additional maternity leave. An employer will only be in breach, however, once it knows of the woman's pregnancy.

15 Guidance has been issued on the interpretation of section 18 by the EHRC in its Code of Practice on Employment (2011) at Part 8 and we have had regard to this.

16 The determination of whether treatment is because of a protected characteristic requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan v London Regional Transport* [1999] ICR 877). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator in order to determine the reason for the conduct (see *Amnesty International v Ahmed* [2009] IRLR 884).

17 What amounts to unfavourable treatment is not defined in 2010 Act. The Code of Practice suggests in the context of disability that treatment which puts an employee at a disadvantage is unfavourable and that this will often, but not always, be obvious (see paragraph 5.7). We consider that this guidance is equally valid to a claim under section 18.

18 The fact that an employer thinks that it is acting in its employee's best interest does not prevent treatment from being unfavourable. Furthermore, the consequences to the employer of pregnancy related absence or of maternity leave are irrelevant.

19 Unlawful treatment under this section cannot also be unlawful direct sex discrimination under section 13 (see section 18(7)). As the unlawful acts alleged in this case are said to be because of pregnancy or illness related to pregnancy and because they fall within the protected period section 18(7) applies and they cannot be acts of direct discrimination under section 13. We have, therefore, looked at the allegations of direct discrimination in this context.

Harassment related to sex

20 Section 26(1) of the 2010 Act provides as follows:

"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."

21 Pregnancy and maternity are not identified expressly as protected characteristics for this type of claim but sex is and, as pregnancy happens to women only, it is necessarily related to gender (see *Webb v EMO Air Cargo UK) Ltd [1994] ICR 770*).

22 A party alleging harassment must provide evidence consistent with unwanted conduct related to sex which has the *'purpose or effect'* of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

23 A claim based on *purpose* requires an analysis of the alleged harasser's motive or intention. This can require a Tribunal to draw inferences about the true motive or intent of a person against whom such an accusation is made as they may be reluctant to admit to an unlawful purpose.

24 Where a claim relies simply on the *effect* of the conduct in question, the perpetrator's motive or intention, which could be entirely innocent, is irrelevant. The test in this regard has both subjective and objective elements. The Tribunal must consider the effect of the conduct from the complainant's point of view, the subjective element, but it must also ask whether it was reasonable for the complainant to consider that the conduct had the requisite effect, the objective element. Holland J put if this way in *Driskel v Peninsula Business Services Ltd [2000] IRLR 151 (at paragraph 12(d)(3))*:

> *"The ultimate judgment, sexual discrimination or no, reflects an objective assessment by the Tribunal of all the facts. That said, amongst the factors to be considered are the applicant's subjective perception of that which is the subject of complaint and the understanding, motive and intention of the alleged discriminator. "*

25 Treatment must be related to sex for the claim to succeed: simple offensive treatment is not enough. This requires an objective assessment by the Tribunal of the evidence adduced to determine whether there is a connection between the unwanted conduct and sex. There is no requirement for a comparator.

26 A finding of harassment cannot also be a detriment for the purpose of other forms of sex discrimination or victimisation (see section 212 of the 2010 Act).

Indirect sex discrimination

27 Section 19 of the Equality Act 2010 provides as follows:

> *"(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."

28 This provision requires a Tribunal to decide the following: -

28.1 Has the employer applied a provision, criterion or practice ('PCP') to the employee?

28.2 Has or would the employer apply the PCP to persons who do not share the employee's protected characteristic?

28.3 Does the PCP put persons who share the employee's protected characteristic at a particular disadvantage compared with persons who do not?

28.4 Does the PCP put the employee at that disadvantage?

28.5 If the answer to the foregoing questions is yes, can the employer nevertheless show that the PCP is a proportionate means of achieving a legitimate aim? This is the defence of justification.

29 Lady Hale in *R (On the application of E) v Governing Body of JFS and others [2010] IRLR 136*, a race discrimination case, described indirect discrimination as follows (see paragraphs 56 to 57):

''The basic difference between direct and indirect discrimination is plain: see Mummery LJ in R (Elias) v Secretary of State for Defence [2006] EWCA 1293*,* [2006] 1 WLR 3213, para 119*. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.*

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The

> *main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."*

30 Similarly, in *Homer v Chief Constable of West Yorkshire* Police *[2012] IRLR 601*, Lady Hale said at paragraph 17:

> *"The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified …"*

31 We have reminded ourselves that indirect discrimination can be intentional or unintentional (*Enderby v Frenchay Health Authority [1993] IRLR 591 ECJ*) and that a 'PCP' is no more than a way of doing things: it may or may not be a written process or policy (see *British Airways plc v Starmer [2005] IRLR 862*). It is for a claimant to identify the PCP that she relies on and the question whether it is, in fact, a PCP is one of fact for the Tribunal (see *Allonby v Accrington and Rossendale College [2001] EWCA Civ 529*, *[2001] IRLR 364, CA* and *Jones v University of Manchester [1993] IRLR 218*). There is no need for a claimant to show that a person who shares her protected characteristic cannot comply with the PCP. The PCP being complained of must be one which the alleged discriminator applies or would apply equally to persons who do not have the protected characteristic in question: it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its effect would have been if it had been applied.

32 There is no requirement for a Claimant to prove *why* a PCP puts a group at a disadvantage (see *Essop v Home Office [2017] UKSC 27*) but It is generally necessary for a claimant to adduce evidence tending to show that persons who share her protected characteristic (though not necessarily all of them) are placed at a particular disadvantage by the PCP and that she is also at that disadvantage. This may involve consideration of pools of employees, statistical evidence or such like but the notion of *'particular disadvantage'* is not confined to this. What constitutes a *'disadvantage'* depends on the facts of the case and is not defined in the Equality Act but we draw assistance from those cases which shed light on the meaning of the word *'detriment'* in the Act (see, for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285*).

33 In some instances a Tribunal will take judicial notice of well-known matters, for example that the responsibility for child care falls disproportionately on women, but care must be taken in this regard. It is often asserted that a Tribunal can take judicial notice of the fact, for example, that a refusal to grant flexible working will affect women disproportionately because they are more likely to have caring responsibilities but Lady Smith questioned this in *Hacking & Paterson v Wilson [2009] UKEATS 0054*, pointing out that men and women may have many and varied reasons for seeking part-time or flexible working patterns in the modern age and stating that it would be wrong therefore to make assumptions about this without evidence.

The defence of justification

34 Harassment, pregnancy and maternity discrimination and victimisation cannot be

justified but claims of indirect discrimination are subject to this defence. It is for a Respondent to establish justification: it will only do so if it can show that the discriminatory PCP is a proportionate means of achieving a legitimate aim. The test to be applied by a Tribunal in considering this is an objective one and not a band of reasonable responses approach (*Hardy & Hansons plc v Lax [2005] IRLR 726*, *CA*). Furthermore, a Tribunal must not conflate the issues of the existence of a legitimate aim and proportionality: they are separate and require separate consideration.

35 What amounts to a legitimate aim is not defined in the Equality Act 2010 and is a question of fact for the Tribunal. The measure in question must pursue the aim contended for but it is not necessary for this to have been specified in those terms at the time, an *ex post facto* rationalisation is possible (see *Seldon v Clarkson Wright and Jakes [2012] IRLR 590*). An aim which is itself discriminatory cannot be legitimate; an example might be a trendy fashion store having a policy of employing young people only. Reducing cost can be a legitimate aim in certain contexts, for example the allocation of resources between competing demands, but it may not be a justification for an otherwise discriminatory provision *per se*.

36 The principle of proportionality requires a Tribunal to strike an objective balance between the discriminatory effect of a measure and the reasonable needs of the employer's business. Once again, the Equality Act provides no guidance on what is proportionate and, therefore, this is something the Tribunal must assess. In general terms however the greater the disadvantage caused by a PCP, the more cogent the justification for it must be. That said, an employer can rely on a justification defence not thought of at the time of the discrimination (see *Cadman v Health and Safety Executive [2004] IRLR 971*). Furthermore, the question under consideration is whether the PCP is justified and not whether its application to an individual Claimant was unreasonable or caused some disproportionate effect on her (*Seldon v Clarkson Wright and Jakes [2012] ICR 716*).

37 Some evidence is required to establish the defence of justification but Elias P explained the function of Tribunals in this context in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT* as follows (paragraph 73):

> *''We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment.''*

Victimisation

38 Section 27 of the 2010 Act provides as follows:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

39 This provision is designed to prevent the unfavourable treatment of people who have asserted rights under or in connection with the Equality Act in good faith (it does not protect those who raise allegations in bad faith). The Respondent has asserted bad faith in this case.

40 The determination of whether treatment was because of a protected act requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged perpetrator. This element will be established if the Tribunal finds that the protected act formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan supra* and *O'Donoghue v Redcar Council* [2001] IRLR 615).

The burden of proof under the Equality Act

41 Section 136 of the 2010 Act provides as follows:

"(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 subsection (2) does not apply if A shows that A did not contravene the provision".

42 These provisions require a Claimant to provide evidence of facts consistent with her claim: that is facts which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof falls on the Respondent to prove that it did not commit the unlawful act in question (see *Igen v Wong [2005] IRLR 258* and *Efobi v Royal Mail Group [2017] UKEAT 203*). The Respondent's explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the

protected characteristic or act.

43 We have borne this two-stage test in mind when deciding the Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. Save where the contrary appears from the context, however, we have not separated out our findings under the two stages in the reasons which appear below. In any event, detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

44 As noted above, the burden of establishing the defence of justification lies squarely on the Respondent.

Constructive dismissal

45 An employee who Claims to have been constructively dismissed must show that her employer acted in repudiatory breach of contract. Furthermore, she must show that she resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for her resignation). It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

46 In this case the Claimant relies on an alleged breach of the implied term of trust and confidence. A breach of this term occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see *Mahmud v BCCI [1997] IRLR 462*). A breach of this implied term is likely to be repudiatory.

47 The Claimant's claim that her employer acted in breach of contract is also based on the 'last straw doctrine'; this provides that a series of acts by the employer can amount cumulatively to a breach of the implied term of trust and confidence even though each act when looked at individually would not be serious enough to constitute a repudiatory breach of contract. Inherent in a last straw case is the fact that there was one final act which led to the dismissal ('the last straw') and the nature of this was considered in *London Borough of Waltham Forest v Omilaju [2005] IRLR 35* where the Court of Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed to a repudiatory breach.

48 The question whether a repudiatory breach of contract has occurred must be judged objectively (*Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908*); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so.

49 The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of *Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420. Maurice Kay LJ, who delivered the leading judgment held as follows at paragraphs 19 and 20:

> *"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:*
>
> > *"The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):*
>
> > *"… the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

50 We have taken this guidance into account when determining the Claimant's claim of constructive dismissal. We have reminded ourselves too that a breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when she has acted in a way which affirms the contract despite the breach (for example by delay). We have also noted the guidance on this topic in the decision in *Assamoi v Spirit Pub Company (Services) Ltd [2011] UKEAT 50*, which provides that there is a distinction between steps taken to prevent a matter escalating to a breach of the implied term of mutual trust and confidence and attempting to cure a breach which has already occurred

51 The Claimant's claim in this respect turns, therefore, on the following basic questions:

51.1 When judged objectively, did the Respondent act in repudiatory breach of contract?

51.2 Did the Claimant resign because of this breach (the breach need only be a reason for her resignation)?

51.3 At the time of her resignation had the Claimant lost the right to resign for this breach because of her earlier affirmation of the contract?

Automatically unfair dismissal

52 Consideration of unfair dismissal arises only if the Claimant establishes that she was *"dismissed"* within the definition in section 95 of the Employment Rights Act 1996. *"Dismissal*" includes constructive dismissal.

53 Employees ordinarily only acquire the statutory right not to be unfairly dismissed after they have completed 2 full years' service but there are exceptions to this service requirement in cases where the reason for dismissal is deemed to be automatically unfair. One of these exceptions is where the reason for dismissal (or the principal reason if more than one) is pregnancy or childbirth (sections 99 and 108(3)(b) of the Employment Rights Act 1996). The relevant parts of section 99 provide as follows:

> *"(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) ……"*

54 In a case where an employee asserts an automatically unfair reason for dismissal but has sufficient qualifying service to bring a claim of "ordinary" unfair dismissal, she must adduce some evidence consistent with her claim to, as it were, get it off the ground but the burden of proving the reason for dismissal lies on the employer. If, however, the employee has insufficient service to claim ordinary unfair dismissal, as in this case, she must establish the Tribunal's jurisdiction and, therefore, the burden of proving the automatically unfair reason falls on her.

55 In cases of automatically unfair dismissal the focus of the Tribunal's enquiry is on the reason for dismissal. The reasonableness of the decision to dismiss is irrelevant but so too is the unfairness of any investigation or procedure adopted in dismissing the employee if the principal reason for the dismissal is not the proscribed one (although such factors may lead a Tribunal to draw inferences as to the reason for dismissal).

The drawing of inferences

56 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We have borne in mind that discrimination may be unconscious and people rarely admit even to themselves that considerations of sex or pregnancy have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if sex or pregnancy played a part (see *Anya v University of Oxford* [2001] IRLR 377). We have considered the guidance given by Elias J on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer this from unexplained

unreasonable behaviour (see *Madarassy v Nomura International plc* [2007] IRLR 246).

The scope of our findings

57 The Tribunal heard a substantial amount of evidence over 4 days. Issues were tested and explored by the parties through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings unanimously and on the balance of probabilities.

Findings of Fact

58 The Respondent is responsible for the rail infrastructure in the United Kingdom. It is a large organisation with approximately 32,000 employees. The Claimant's employment began on 25 January 2016. She had worked for the Respondent as a contractor previously she was employed as a Performance and Reporting Analyst in the Respondent's Crossrail Anglia East Division. Crossrail is a major rail infrastructure project in London. The Claimant's role required her to generate investment plans and to monitor and report on existing programmes to identify risks and corrective actions (page 85A). She had specialist expertise in using the Oracle computer system which was useful to the project.

59 On first joining the Claimant was line-managed by Mr Lewis but this lasted only a week or two until the responsibility was taken over by Mr Ojumu who had himself just joined the Respondent. In turn, he only line-managed the Claimant directly for a short period as this responsibility then passed to his report, Maxime Boy, when he joined the Respondent on 23 February 2016.

60 The Claimant was absent from work between 29 February and 2 March 2016 because of sickness. Although she did not know it at the outset of this absence she was in the early stages of pregnancy. The Claimant learned that she was pregnant at a hospital visit on 1 March 2016.

61 The Claimant attempted to return to work on 3 March 2016 but felt unwell and went home. She asked Mr Boy whether she could work from home for the next few days and he agreed. The arrangement was a fluid one initially with no specific date agreed for her to return to the office. On 7 March 2016, a Monday, Mr Boy emailed to see whether she was coming in to one of the Respondent's offices (page 168). The Claimant's evidence is that she informed Mr Boy of her pregnancy at or about this time whereas he says she did not tell him until 14 March 2016. We prefer Mr Boy's recollection on this point as it is more consistent with the documents. There is no reference to pregnancy in any of the emails exchanged about her absence prior to 14 March 2016.

62 The Claimant continued to report to Mr Boy that she felt too unwell to work at the office. On 10 March 2016, having discussed the matter with Mr Lewis, Mr Boy emailed the Claimant telling her that he had been advised that she could not work at home if she was off sick. He asked her to fill in a sickness absence form (page 180). The Claimant replied saying that she would do so for those days when she had not been working at

home and Mr Boy responded that the certificate needed to cover the full two weeks absence, that is from 29 February to 10 March 2016, which included the days when the Claimant worked from home. Mr Boy acknowledges that this was a mistake. We note that Mr Boy, who is French, was very new to the Respondent.

63 The Claimant took sick leave from 11 March 2016. She informed Mr Boy that she was pregnant on 14 March 2016 and on 15 March 2016 she submitted a medical certificate giving a diagnosis of hyperemesis (a pregnancy related condition).

64 The Claimant had significant symptoms during her pregnancy and at this early stage required admission to hospital for a week at the end of March 2016.

65 Mr Boy was in contact with the Claimant in March 2016 and asked when she was likely to return to work. Similarly, Mr Lewis attempted to contact her in April 2016 and spoke to her on or about 13 April 2016; he also asked when she was likely to return to work and when her baby was due. The Claimant told us that she had no problem with Mr Boy and Mr Lewis contacting her while she was off work but that she felt under pressure to return when Mr Lewis referred in his call to the strain on Mr Boy and the rest of the team because of their lack of Oracle expertise. She also said that he had asked her to complete time sheets on-line during her absence (although she did not in fact do this). We find on the balance of probabilities the Mr Lewis expressed concern about the impact of the Claimant's absence on the project in his phone calls with her in April 2016. We do not find that he intended to pressurise the Claimant to return to work rather he was attempting to plan for her absence by gauging when she was likely to return and when her maternity leave might begin, but we accept that she felt pressured by this.

66 We note that Mr Lewis, like other of the Respondent's managers, had had no training in dealing with pregnant workers and despite years in the rail industry had never dealt with a pregnant worker before (we were told that the industry workforce is largely male). We think that he simply equated pregnancy with sickness.

67 The Claimant was off work until Tuesday 3 May 2016 (the Monday was a bank holiday). As she was about to leave for or was on her way to Romford, her usual place of work, that Tuesday Mr Boy contacted her and asked her to come to Stratford instead for a return to work meeting. The Claimant had attended the Stratford office from time to time before her pregnancy. The change of location was inconvenient for her as she usually drove to Romford but took the train to Stratford. Travelling by train involved carrying her lap top in her bag. Nevertheless, she travelled to Stratford that day and says that she found it uncomfortable carrying her laptop.

68 Once at Stratford the Claimant had a meeting with Mr Boy and Mr Lewis. They told us, and we accept, that they were working at Stratford that day for a regular beginning-of-the-week management meeting known as "the PER". The Claimant does not complain about Mr Lewis being present at this meeting and she accepted that it is normal for employers to hold a return-to-work meeting with an employee after a lengthy absence. She agreed that she was asked how she was at the meeting and whether she was fit for work. She said that she was. There is a dispute however about whether the Claimant was offered a phased return to work which she declined. Her case is that a phased return was agreed when she said that her GP had suggested it. Mr Lewis and Mr Boy say that it was offered but the Claimant declined. There is no evidence that the Claimant was

rostered to work part-time hours in the weeks after this meeting and her evidence of her hours being monitored (see below) is inconsistent with this. We find, therefore, that the evidence is more consistent with Mr Lewis's and Mr Boy's account. We also find that Mr Lewis and Mr Boy offered the Claimant a reduced workload and asked her to tell them if she could not cope. The Claimant accepted that these steps were supportive.

69 A further factual issue is whether the Claimant was referred for an Occupational Health assessment. Her account is that Mr Lewis instructed Mr Boy to refer her to Occupational Health. Their account is that they simply told the Claimant that, given the length of her absence, Occupational Health might contact her. We prefer the Respondent's account of this part of the meeting as it is agreed that the Claimant had told Mr Boy and Mr Lewis that she was fit to return to work and was no longer on medication. We think it probable that the Claimant misunderstood what Mr Lewis was saying in this regard.

70 It is common ground that neither Mr Lewis nor Mr Boy mentioned carrying out any risk assessment or ergonomic assessment of the Claimant's work station. The Respondent's maternity policy provides for a risk assessment to be undertaken by a manager as soon as they are notified that an employee is pregnant (page 107). It is also agreed that the Claimant did not mention back or girdle pain in this meeting as she told us these symptoms had not yet occurred. The Claimant also did not mention that travelling to Stratford was a problem.

71 The Claimant says that Mr Lewis told her in the meeting that he did not want her to go off sick again. She characterises this as pressurising her to remain at work. We find on the balance of probabilities that Mr Lewis used these words or similar but in the context of a supportive and informal meeting, one in which he and Mr Boy had explored ways of reducing the Claimant's workload. We find that the Claimant has misconstrued words of concern for a veiled threat.

72 The Claimant alleges as an issue that Mr Boy swapped a chair for her on 3 May 2016 without carrying out a risk assessment when she complained of back and hip pain. It is clear from the evidence that this event did not occur in the way alleged in the list of issues. It is said to have taken place in Romford but the Claimant's evidence is that she was at Stratford on 3 May and on the days following. Furthermore, she did not have hip and back pain at that time. We find on the balance of probabilities that Mr Boy swapped a chair for the Claimant either at Romford or in Stratford because hers had a sticking wheel but that there was no more than this to the incident. There was a later incident concerning a chair involving Mr Ojumu to which we shall come.

73 On 5 May 2016 the Claimant received a pay slip showing that she had been absent from work for eight weeks between 29 February and 22 April. The slip did not show as working days the days when she was working from home. She immediately queried this with Mr Boy and he told her to email Mr Lewis about it which she did (page 212). Mr Lewis replied that she should take the issue up with Mr Boy or Mr Ojumu as he was not "*personally involved in [her] work/sick pattern"*. Mr Lewis took the opportunity to ask for a doctor's certificate to confirm her due date. On 10 May 2016 the Claimant forwarded Mr Lewis's email to Mr Boy and Mr Ojumu asking them to look into her payroll query (page 212). The following day Mr Ojumu forwarded the email to the Respondent's HR provider, HR Direct, asking for advice (page 219B). On 13 May 2016 Jessica Stewart

replied that he would need to clarify the Claimant's dates of absence (page 219A) and Mr Ojumu then asked Mr Boy to do this. On 23 May 2016 Mr Boy emailed the Claimant setting out his understanding of the days she had worked and those she had been off sick (page 227). The Claimant replied confirming this. Following this, on 1 June 2016 payroll was able to confirm that the Claimant had been paid correctly and that her records had been corrected (page 247).

74 The Claimant was required to attend the Stratford office for the first three days after her return to work in May 2016 and then from time to time thereafter. She complained that travelling by train to Stratford was uncomfortable and painful because she had to carry her laptop and charger. Mr Boy arranged for a second laptop to be made available at Stratford for her so she no longer had to carry one. When she said that she was still finding travelling difficult he no longer required her to attend the Stratford office. We do not know when these changes took place exactly but find on the balance of probabilities that they occurred in May.

75 First thing on the morning of 16 May 2016 the Claimant attended an antenatal appointment and was told that she needed an urgent blood test at the hospital. As she was expected at work later that day she contacted Mr Boy to say that she would not be in because of this. Mr Boy asked her to provide a sick note to cover her absence. He describes this request as a mistake in his witness statement. In any event, the Claimant provided him with some evidence that day, an appointment card and pregnancy confirmation letter (page 351). He replied correcting his earlier mistake, saying (page 351):

> *"I confirm you do **not** need to provide a self-certificate for today's absence as it is related to pregnancy.*
>
> *See you tomorrow*
>
> *Maxime."*

76 The Claimant's evidence was that Mr Boy's manner was curt and his responses sharp when she spoke to him on 16 May, saying words to the effect of *"it's only a sick note"*. We accept that his manner was matter-of-fact as, from his perspective, he was simply asking for evidence to support the reason for absence. We find that the Claimant was distressed by this as she knew that she did not need a sick note for an antenatal appointment and was concerned that there was a hidden implication. That said, Mr Boy corrected his mistake within the day.

77 An allegation in the list of issues is that Mr Boy told the Claimant on 16 May 2016 that she could only take time off for pregnancy related appointments and would have to make up time taken off for other absences (issue 8). It is clear from the evidence, however, that such a conversation did not take place then but on 25 May 2016 and in the context of a childcare issue for the Claimant's older son. The Claimant had requested to start work late and leave early on 26 and 27 May 2016 because her childminder would be away attending a funeral. She proposed working from home while caring for her son but Mr Boy offered time off on the basis that she make up the hours missed later. The Claimant compared this treatment with that given to other employees, male and female, but it is notable that it is said not to be related to pregnancy but to childcare.

78 One of the Claimant's complaints is that Mr Boy asked her colleague, Sajid Mahmood to monitor her movements. The facts of this allegation are agreed to a large extent. Mr Boy became concerned that the Claimant was leaving work early regularly while claiming seven hours work each day on time sheets. The Claimant confirmed in evidence that she often worked five to six hours rather than seven, making up time over breaks to *"cover her hours"*. She says she learned that Mr Mahmood had been asked about her hours when he said that he would tell Mr Boy that she was leaving early. She said that she found this distressing as Mr Boy had not spoken to her directly about this. Mr Boy's explanation is that he had only asked Mr Mahmood about the Claimant's hours on one or two occasions because he was not always at the Romford office himself to check and because he had been asked to sign off the Claimant's timesheets. When asked why he did not ask the Claimant directly about her hours Mr Boy said that he did not want to distress her.

79 On 20 May 2016 Mr Boy scheduled a meeting with the Claimant using Outlook. The Claimant says that he described this as a *"one-to-one"* meeting and we accept that this is correct as Mr Boy used this description in a later email. Mr Boy told us that he wanted to discuss how the Claimant's return to work was progressing, to review her workload and to discuss whether further support was necessary. Mr Boy did not tell the Claimant that Mr Lewis was also going to attend the meeting. The Claimant's evidence was that she thought this was simply a performance review meeting of a type usually held twice a year between an employee and his or her line manager. Mr Boy accepted in evidence that she may have been surprised by Mr Lewis' presence and that it would have been better practice to have informed her beforehand.

80 When the Claimant attended the meeting on 23 May 2016 she saw that Mr Lewis was there with Mr Boy. As the more senior and experienced of the two, Mr Lewis led the meeting. The Claimant did not object at the time but her evidence is that she was so shocked and concerned by this development that she was lost for words. In contrast Mr Lewis's and Mr Boy's perception of the meeting was that it was amicable and constructive and that the Claimant appeared confident and articulate. We accept that the Claimant was surprised to see Mr Lewis at the meeting and may have felt that her performance was being scrutinised but we do not find that this came across from her manner in the meeting. We have had the opportunity to observe the Claimant over a number of days and she presents as a confident, capable and articulate person but we know that outside the Tribunal she has had moments of serious anxiety and distress. We find on the balance of probabilities that the Claimant appeared confident and at ease in the meeting of 23 May 2016 but, in fact, was troubled by and suspicious of her employer's motives.

81 The evidence shows that the meeting focused on the Claimant's programme of work. Mr Boy summarised what was expected in the coming weeks in an email also dated 23 May 2016 (page 233). It is agreed that Mr Lewis said that Mr Boy had had to cover the Claimant's workload during her absence. He said that there were difficulties in the project because she was the only person trained in her field. The Claimant says that she was unfairly compared to male colleagues, in particular Matt Tindal and Diki Gaskin. Mr Lewis confirmed that he referred to Messrs Tindal and Gaskin as examples of good practice as he wanted their approaches to be copied across the region. Mr Lewis said that this was not a not a criticism of the Claimant's work. The Claimant alleges that the facts show that Mr Lewis only became involved in issues related to her when it suited him or the business not when she needed help and support, for example by obtaining an occupational health

report, carrying out a risk assessment or dealing with payroll issues.

82 We find that the parties' differing accounts of the meeting reflect their perception of events. The Respondent's witnesses regarded the meeting as business-like and forward-looking, the Claimant as one loaded with implied criticism of her absence and the quality of her work. Nevertheless, we do not find that Mr Lewis and Mr Boy had the hidden agenda the Claimant suspected; in our judgment they thought that they were working constructively and cooperatively with her.

83 On 1 June 2016 the Claimant raised a further payroll issue concerning her entitlement to annual leave which Mr Boy responded to that day.

84 In early June 2016 Mrs Evans advised Mr Lewis that he needed to request a MATB1 form from the Claimant. Mr Lewis asked Mr Boy to do this on 7 June 2016 (page 258) and Mr Boy did so on 8 June 2016. The Claimant replied on 9 June 2016 saying that she had been in touch with her midwife and would provide the form when she had it. We note that HR Direct also advised obtaining a MATB1 on 9 June 2016 (page 741C). The Claimant is critical of the timing of this request because she had provided a copy of her pregnancy appointment card to Mr Boy previously and this stated that a MATB1 would be issued by the midwife on 11 July 2016 (page 441). She did not make this point at the time.

85 The Claimant complains that Mr Boy asked her for the MATB1 in an open plan office in front of others. Mr Boy agreed that he asked the Claimant for the form when they were in the Romford office but said that, as they sat next to each other and were barely a metre apart, the request was discreet. He also said that the Claimant had made no secret of her pregnancy. We accept Mr Boy's evidence.

86 The Claimant alleged in cross-examination that she raised a number of issues with Mr Boy when he asked for the MATB1. She said that she told him that it was too hot in the office, that her chair was uncomfortable, that she needed a fan and a footstool and that there had been no risk assessment or work station assessment. Mr Boy denied that the Claimant raised these issues with him on 8 June 2016 although he accepted that she had sometimes asked him to open the window because she was feeling hot. We find that the Claimant is mistaken about the exact sequence of events. The issues referred to as being raised on 8 June 2016 did arise later but not on this occasion in our judgment as she made no reference to them in contemporary documents, including her grievance, nor were they referred to in her claim form, the list of issues and her witness statement.

87 The Claimant has asserted that she was excluded from a PER meeting on 17 June 2016. This took place on a Monday in Stratford. The Respondent's evidence, which we accept, is that attendance had been restricted to managers only from April 2016 at Mr Ojumu's direction, so while the Claimant was not invited she was in the same position as all the other analysts who were not managers. To her credit the Claimant accepted in evidence that this treatment was not discriminatory given the explanation.

88 The Claimant complains about the requirement to attend the Stratford office which she says she found increasingly difficult due to palpitations, headaches, dizziness, high blood pressure, swollen feet and hip and back pain. She says that this travel had a detrimental impact on her health. While we accept that travelling on public transport

exacerbated the symptoms the Claimant was suffering in pregnancy, there is no medical evidence to show that this was damaging her health. More generally, there is no evidence that women as a whole or in a particular group, are or were at a disadvantage compared to men in travelling by train to Stratford. As noted above, Mr Boy made two adjustments for the Claimant in any event, firstly by providing a second laptop for her to use at Stratford so she did not need to carry one, and, secondly, when she said she still found travelling by train difficult, saying that she no longer needed to go to Stratford.

89 Mr Ojumu was at the Romford office on 22 June 2016 and asked the Claimant how she was. She told him that she was in pain because of the chair she was sitting on. She also told him that she had seen her GP that day and that he had since phoned saying that she should be signed off work for two weeks. She told Mr Ojumu how dissatisfied she was with her treatment and how she was planning to lodge a formal grievance. Mr Ojumu asked for an opportunity to deal with things informally. He asked the Claimant what she was looking for and she replied that she wanted adjustments and a risk assessment. The adjustments she asked for were to be provided with a fan and a footstool. She also complained that someone had been allocated her desk in her absence.

90 Mr Ojumu immediately gave the Claimant a more adjustable chair which had been obtained for another pregnant employee and was in the office. He agreed to order the fan and footstool and to carry out a risk assessment. The Claimant says that when she told Mr Ojumu about Mr Lewis and Mr Boy's detrimental treatment of her, he replied that it was *"just her pregnant brain talking"*. She says that he told her that the management team would do everything it could to protect Mr Boy as he was a good worker.

91 Later on 22 June 2016 the Claimant was contacted by her GP and was signed off work for two weeks with a diagnosis of palpitations (page 274). She notified Mr Ojumu and Mr Boy of this on the morning of 23 June 2017 (page 301). Coincidentally on 23 June 2016 Mr Boy emailed Ms Lewis and Mr Ojumu setting out adjustments he said he had made for the Claimant during her pregnancy: he said that she had refused the *"working arrangement"* he had offered her and that he had provided her with a second laptop in Stratford and then said later that she did not need to travel there at all. He also said that she had been working shorter hours but he had not commented on this to avoid causing her stress. He added that he had deliberately not spoken to the Claimant about her performance and had given her tasks without specific deadlines to avoid causing her stress. He also said that the Claimant knew when she should hand in her form MATB1. Mr Lewis agreed with Mr Boy that they had made these adjustments (page 275).

92 The Claimant returned to work on 7 July 2017. She found that someone was using the desk where she normally sat. She had expected Mr Ojumu to undertake a risk assessment but he was not at work that day; in fact he was on a plane to Australia for family reasons but he had asked Mr Lewis or Mr Boy to carry out the assessment in his absence on the morning of 7 July 2016 (page 305). Mr Boy replied that he would do so on 8 July when he was next in the Romford office. Mr Lewis replied later that day to say that the footstool and fan had just been ordered for the Claimant and that he would help with her return to work meeting and risk assessment on 8 July 2016 (page 308). The Claimant was not copied in to this correspondence (page 305) so from her perspective when she returned to work nothing had been done about the fan and footstool she had requested and there was no indication that her risk assessment was about to be done.

93 On the afternoon of 7 July 2016 the Claimant submitted a grievance dated 22 June 2016; this was the document she had agreed to hold off submitting in her conversation with Mr Ojumu on 22 June. The Claimant alleged in her grievance that she had been subjected to detriments, harassed and victimised because of her pregnancy and that there had been a lack of care and consideration. She complained about incorrect information being given to payroll about the times when she had worked from home; the failure to carry out a risk assessment; not being provided with appropriate equipment; not being permitted to work from home despite her symptoms; being required to provide a sick note for maternity related appointments; and Mr Lewis's presence and involvement in her one-to-one meeting on 23 May 2016 (page 311).

94 The Claimant did not come in to work on 8 July 2016; in fact she did not return to work prior to submitting her resignation.

95 On 11 July 2016, the Claimant was issued with a MATB1 giving an expected week of confinement in the week including 25 October 2016.

96 The Claimant's grievance was acknowledged on 14 July 2016 and she was invited to a grievance meeting on 21 July 2016 (page 322). This meeting took place and was chaired by Mr Ojumu. Minutes are at pages 336 to 341.

97 The Claimant wrote to Mr Ojumu regarding her absence from work in July 2016. On 26 July 2016 he replied saying the he could not give her guidance about whether to take annual leave or sickness absence. Nevertheless, he advised the latter if the absence was sickness-related. He did not refer her to Occupational Health.

98 We pause to note that the Claimant received full pay from 8 July 2016 notwithstanding that it was unclear whether she was taking leave or was sick.

99 On 17 August 2016 Mr Ojumu phoned the Claimant asking when she was likely to return to work and requesting a sick note. He followed this up by sending a summary of the call by email and the Claimant replied alleging that he had been aggressive and she had felt humiliated (page 424). There was a further exchange that day about the fact that there had been no Occupational Health referral (pages 426 to 427).

100 On 18 August 2016 Mr Ojumu emailed the Claimant saying that he would arrange for her hours to be uploaded onto the computer (the Oracle system) but the Claimant would have to confirm the time taken off and type (page 431). The Claimant responded asking for the contact details of the person in HR who would be considering her case. She claimed that she was finding her treatment stressful. Mr Ojumu replied that his emails were not intended to do that but to simply obtain accurate information (page 433).

101 On 22 and 23 August 2016 the Claimant emailed Mr Ojumu asking for her grievance outcome and an explanation for the delay. She referred to the Respondent's procedure which provides for an outcome within 8 calendar days (pages 445 – 446). Mr Ojumu replied apologising but adding that the meeting notes of 21 July 2016 had been sent to her for approval on 28 July 2016 and had since been revised to take account of her changes.

102 At the beginning of September 2016 Mr Ojumu interviewed Mr Mahmood as part of his investigation of the Claimant's grievance.

103 The Claimant was assessed by Occupational Health in September 2016 and the report of Ms Sally Phillips is dated 29 September 2016. She said that the Claimant was currently unfit for work and would be until her baby was born (pages 494 – 495).

104 On 6 October 2016 Mr Ojumu wrote to the Claimant inviting her to a reconvened grievance meeting to tell her of the outcome. This was scheduled for 14 October 2016 (page 511). The Claimant replied saying that she had been unaware that the grievance hearing had been postponed (page 512). She asked for a written outcome and referred to the stress she was suffering in this late stage in her pregnancy.

105 The Claimant's son, Malakai, was born on 24 October 2016 and that is when her Ordinary Maternity Leave began.

106 On 25 October 2016 the Claimant made a further request for a grievance decision in writing (page 554).

107 On 28 October 2016 Jessica Stewart, an HR Business Partner, emailed the Claimant asking her for a copy of her MATB1. Ms Stewart explained that she had just picked up the case in the absence of a colleague (page 553). The Claimant had provided this document to Mr Ojumu on 11 July 2016 (page 741r).

108 Mr Ojumu provided a written grievance decision on 1 November 2016 (page 556). He upheld the Claimant's complaint that there had been a failure to carry out a timely risk assessment but dismissed her complaints of harassment, detriment and victimisation due to pregnancy (pages 556 – 557). He notified the Claimant of her right of appeal.

109 There was further correspondence between the Claimant and Ms Stewart in early November 2016 concerning the MATB1 form. Ms Stewart said that Mr Ojumu had only received one page of the form (page 566). The Claimant replied on 5 November 2016 saying that she had given Mr Ojumu a hard copy of the form at the grievance meeting on 21 July 2016. Ms Steward emailed the Claimant again about the MATB1 on 6 December 2016 and the Claimant replied complaining about having to obtain a further copy. She nevertheless provided this on 12 December 2016 (page 631).

110 On 25 November 2016 Mr Ojumu completed a grievance report setting out the basis of his earlier decision (pages 559 – 557). The Claimant appealed against the grievance decision on 28 November 2016 and the Respondent permitted this despite it being lodged outside the time limit under its procedure (page 585). Mr Wheeldon was assigned to hear the grievance appeal. In an email dated 19 January 2017 the Claimant requested a chair from another service to *"retain full objectivity"* (pages 655 – 656). Ms Shifaly, the HR Business Partner overseeing the case, replied that Mr Wheeldon was fully independent and had not been involved before. The Claimant replied accepting this (page 660).

111 The grievance appeal hearing took place on 10 February 2017 and Mr Wheeldon interviewed Mr Boy and Mr Lewis as part of his consideration of it on 20 February 2017.

He provided an outcome in writing on 2 March 2017 (pages 687 – 690). He reached the same conclusions as Mr Ojumu.

112 On 6 March 2017 the Claimant resigned with immediate effect. She gave her reasons as follows:

> *"The reasons why I am resigning are as follows:*
>
> *I do not believe I have been treated with respect or dignity since the time I declared my pregnancy to the management team, nor do I believe there has been a fair and objective process during my grievance and the appeal hearing."*

113 That concluded the internal process.

Conclusions

114 In this section of our Reasons we deal with our conclusions on the agreed issues in light of the legal principles and findings of fact set out above.

115 We start with the claim of indirect sex discrimination. There is no evidence to show that women, or a particular group of women are at a disadvantage compared to men because of the requirement to attend the Stratford office. The furthest the evidence goes is that the Claimant found it difficult to travel to Stratford by train when pregnant. In the absence of evidence of group disadvantage this claim fails at the first hurdle.

116 As far as the claim of victimisation is concerned we are satisfied that the Claimant's grievance of 7 July 2016 is a protected act. The allegations predating the submission of this grievance cannot be matters of victimisation under the Equality Act 2010.

117 We turn then to our findings on the issues.

Issue 1: *10 March 2016 – Maxime Boy emails the Claimant and insists that she book her time off as sick and reneges upon the previous agreement made on 3rd March 2016 that the Claimant could work from home.*

118 While we understand why the Claimant was frustrated and confused by Mr Boy's action on 10 March 2016, we do not find that his request was conduct which had the purpose or effect of affecting her dignity in the workplace or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her (we shall refer to these concepts compositely as "dignity in the workplace" below). Mr Boy was, as the Claimant knew, a new-comer to the Respondent who had tried to help her by permitting her to work from home but then had to backtrack on this because of the advice he had been given by Mr Lewis. Furthermore, there is no evidence that this treatment was related to sex or pregnancy as Mr Boy was unaware that the Claimant was pregnant at the time. This claim fails on the facts.

Issue 2: *13 April 2016 - Phil Lewis contacts the Claimant by email, phone and text*

messages to ask when she would return to work.

119 We find that the Claimant felt pressured by Mr Lewis's contact by telephone, email and text but that this had not been his intention. We have had regard to the fact that the Claimant was near the beginning of a difficult pregnancy and was relatively new to the Respondent. We find that she felt vulnerable but that is some distance from concluding that Mr Lewis's contact at the time had the purpose or effect of violating her dignity nor do we find that being asked about likely return dates from the current absence or birth dates is unfavourable treatment related to pregnancy. These are obvious and reasonable questions for an employer to ask in this context. This claim fails on the facts.

Issue 3: *13 April 2016 – Phil Lewis questions the Claimant about her due date because of the "cost implications" of finding cover.*

120 It is common ground that Mr Lewis referred to the *"costs implications"* of finding cover for the Claimant when asking about her likely return to work and birth dates. We find that the Claimant was sensitive to these questions because of her sense of vulnerability. We do not find that Mr Lewis intended to violate her dignity in the workplace by this but that his comment about costs reasonably had this effect. We are satisfied therefore that this was an act of harassment related to sex as it concerned not only immediate absence but also likely maternity leave. This claim succeeds as an allegation of harassment subject to the issue of time. While this conduct might also arguably be classified as unfavourable treatment because of pregnancy, this adds nothing so we make no separate finding in this regard.

121 We deal with time limits in a separate section of these reasons and any further successful elements of the Claimant's allegations should also be read as being subject to the issue of time.

Issue 4: *3 May 2016 – Maxime Boy requires the Claimant to attend the Stratford offices for: the first week following her return to work; and Monday morning meetings during May and June 2016.*

122 We reject the Claimant's case that it was an act of harassment or pregnancy related discrimination to ask her to work at Stratford in the week commencing 3 May 2016 or to attend Monday morning meetings there. This latter complaint is inconsistent with her claim that she was unlawfully excluded from these meetings. This claim fails as one of harassment or pregnancy related discrimination.

Issue 5: *3 May 2016 – The Claimant informs Maxime Boy that sitting in her chair is causing back and hip pains; in response, Mr Boy replaces the chair without any risk assessment of the workstation.*

123 This claim fails on the facts for the reasons given at paragraph 72.

Issues 6 & 7: *5 May 2016 – Maxime Boy declines to investigate the Claimant's pay query.*

Phil Lewis declines to investigate the Claimant's pay query

124 It is wrong to suggest that Mr Boy and Mr Lewis declined to investigate the Claimant's pay query; there was initial confusion about who was responsible for doing this but the issue was resolved. While the Claimant may have been frustrated that the matter was not dealt with sooner this is not treatment which amounted to harassment related to sex or unfavourable treatment because of pregnancy in our judgment.

Issue 8: *16 May 2017 – Maxime Boy informs the Claimant that the only time she can take off from work is to attend pregnancy related appointments, or else she will have to work extra hours the following week.*

125 This claim fails on the facts for the reasons given at paragraph 77.

Issue 9: *16 May 2016 – Maxime Boy required the Claimant to provide a sick note for her attendance at an antenatal appointment.*

126 Mr Boy's inexperience in dealing with pregnancy is at the heart of this allegation. We are sure that the Claimant felt surprised and upset to be asked for a sick note for an antenatal appointment but Mr Boy corrected his mistake within the day. This conduct did not have the purpose nor reasonably could have had the effect of violating the Claimant's dignity in the work place in our judgment. Furthermore, when looked at as a whole it was not unfavourable treatment in the sense that it placed the Claimant at some disadvantage because of pregnancy. She attended her antenatal appointment and did not have to provide a sick note. This claim fails on the facts.

Issue 10: *19 May 2016 – Sajid Mahmood is required by Maxime Boy and Phil Lewis to inform them of the Claimant's arrival and departure times from the office.*

127 We find that the Claimant was annoyed to learn that her colleague, Mr Mahmood, had been asked about her timekeeping. We do not find that this was treatment because of pregnancy or related to sex. It arose because of the concern that the Claimant was not working her contracted hours. We note in this context that Mr Boy was required to sign off her timesheets and was often not present in the Romford office to verify her hours himself. This claim fails on the facts.

Issue 11: *20 May 2016 – Maxime invites the Claimant to a meeting defined as a 'one-to-one' when in fact he also intends Phil Lewis to attend.*

128 We find that the Claimant was surprised that Mr Lewis was present at a meeting she had thought was to be with Mr Boy alone. They acknowledge that it would have been better to have informed her of this beforehand. We do not accept the Claimant's evidence that she was shocked into silence because of this. She presented to us as a confident person however she may have been feeling inside. We find that she conducted herself in a normal and business-like manner. We do not find that Mr Lewis and Mr Boy holding a return to work meeting of this nature with the Claimant and discussing work issues and future plans amounts to conduct with the purpose or effect of violating her dignity in the workplace nor was it unfavourable treatment because of pregnancy, it was a normal management action. This claim fails on the facts.

Issue 12: *23 May 2016 – During a meeting between Maxime Boy, the Claimant and Phil*

Lewis, Mr Lewis compared the Claimant to male colleagues.

129 We do not find that Mr Lewis or Mr Boy compared the Claimant's work with that of male colleagues in the sense alleged by her rather the work of Matt Tindal and Dikki Gaskin set a standard to which all analysts were encouraged to work. The fact that they were put forward as examples of good practice does not lead us to infer that Mr Lewis and Mr Boy were making an unfavourable comparison with the Claimant's work whether because of sex, pregnancy or at all. This claim fails on the facts.

Issue 13: *23 May 2016 – During a meeting between Maxime Boy, the Claimant and Phil Lewis, Mr Lewis stated to the Claimant that she is a band 4 and will be expected to speak to other managers to get information, work late during the reporting period week and attend functional meetings in Stratford.*

130 We do not find that Mr Lewis's manner in the meeting on 23 May 2016 was abrupt as the Claimant alleges rather he was business-like and referred to what was expected of the Claimant. There is nothing to suggest that this was different from what is expected of other analysts. We do not find that this was intended to or could reasonably be perceived to have the effect of violating the Claimant's dignity at work nor was it unfavourable treatment because of pregnancy.

Issue 14: *23 May 2016 – During a meeting between Maxime Boy, the Claimant and Phil Lewis, Mr Lewis told the Claimant that when she went on sick leave Maxime Boy had to cover her workload.*

131 It is common ground that Mr Lewis said this about Mr Boy in the meeting on 23 May 2016. We have asked ourselves why Mr Lewis would state the obvious. We think it was simply insensitivity on his part but the effect of his comment was such that it made the Claimant feel guilty about her absence. We find that this comment had the effect of violating her dignity in the workplace for a reason related to pregnancy absence and therefore related to sex. This treatment amounts to unlawful harassment subject to the issue of time. As with issue 3, while this conduct could arguably be unfavourable treatment because of pregnancy, this adds nothing so we make no separate finding to that effect.

Issue 15: *Maxime Boy verbally requested form MATB1 from the Claimant and openly declared in the office in front of work colleagues that the Claimant was 20 weeks pregnant.*

132 We are not satisfied that this treatment either had the purpose or effect of violating the Claimant's dignity in the workplace nor was it unfavourable treatment because of pregnancy. Mr Boy worked closely with the Claimant and she had made no secret of her pregnancy.

Issue 16: *17 June 2016 – Claimant excluded from the PER Periodic meeting.*

133 The Claimant accepted under cross-examination that all analysts had been excluded from the PER meetings. This claim fails on the facts.

Issue 17: *7 July 2016 – The Claimant is refused an occupational health referral.*

134 There is no evidence to show that the Claimant was refused an Occupational Health referral on 7 July 2016.

135 Mr Lewis told the Claimant at the return to work meeting on 3 May 2016 that Occupational Health might be in touch with her, not that they would. This was in the context of the Claimant saying that she was fit to return to work full-time with immediate effect. This claim fails on the facts.

Issue 18: *10 July 2016 – The Respondent fails to acknowledge the Claimant's grievance within 3 days of submission in breach of its policy.*

136 Mr Ojumu acknowledged the Claimant's grievance by email on the day it was received (page 310). The formal acknowledgement may have come later but this claim nevertheless fails on the facts.

Issue 19: *12 July 2017 – During a telephone conversation, Peter Ojumu tells the Claimant that the Respondent will only consider her as pregnant once form MATB1 has been received.*

137 We reject this allegation on the facts. The Claimant raised it by email at the time and Mr Ojumu replied the next day disputing it. We find this contemporaneous evidence to be probable.

Issue 20: *12 July 2017 – In an email, Peter Ojumu implies that the Claimant cannot expect to have a pregnancy risk assessment until form MATB1 is received by the Respondent.*

138 We reject this allegation on the facts. The Claimant was told on 23 June 2016 that a risk assessment would be done on her return to work. For reasons that could not have been foreseen then this could not take place on 7 July 2016. Mr Ojumu informed her by text that it would be done on 8 July 2016 (page 316). This was not contingent upon receipt of the MATB1.

Issue 21: *12 July 2016 – The Claimant's request to take annual leave is ignored.*

139 The Claimant requested leave commencing on 13 July 2016 in an email to Mr Ojumu dated 12 July 2016 (page 366). He was in Melbourne, Australia at the time. The Claimant was aware that he was abroad. It is unsurprising therefore that the request was not dealt with immediately. Mr Ojumu approved her leave on 14 July 2016 (page 360). This claim fails as an allegation of harassment, pregnancy related discrimination or victimisation in our judgment. The request was dealt with promptly in the circumstances.

Issue 22: *14 July 2016 – The Respondent fails to arrange a grievance hearing within 7 days of submission in breach of its policy.*

140 This claim fails on the facts. The Claimant was given a date for a grievance

hearing within 7 days of submitting it in accordance with clause 4.1.2 of the Grievance Procedure (page 97). The requirement is only to give a date by this deadline not to have heard the grievance itself. The obligation under the policy is to hold a hearing as soon as possible.

Issues 23 & 27: *21 July 2016 – The Respondent fails to inform the Claimant that the grievance hearing has been adjourned.*

29 July 2017 – The Respondent fails to provide the Claimant with an outcome to her grievance within 8 days of the hearing in breach of its policy.

141 We are not clear what the Claimant means by the word "adjourned" in allegation 23. She was not given a grievance outcome soon after her meeting with Mr Ojumu on 21 July 2016. The evidence shows that he undertook further investigations after this meeting by interviewing others, namely Mr Boy and Mr Mahmood. There was also a delay in the process we are told due to pressure of work. Despite all of that the Claimant was not asked to attend a further investigatory meeting but a meeting to receive the grievance outcome face-to-face which she declined because she wanted a written decision. This passage of events is consistent with delay not an adjournment.

142 It is evident that the Claimant was not kept abreast of the progress of her grievance and that there was significant delay in dealing with it. Paragraph 4.1.7 of the Respondent's grievance procedure stipulates that the grievance response should be given in writing within 8 days or an explanation given of the reasons for delay. We find that the Respondent failed without explanation to comply with this aspect of its policy and that this is the nub of these allegations. We do not find that the Respondent intended to violate the Claimant's dignity in the workplace because of this treatment rather it arose from a combination of overwork, lack of training and thoughtlessness but we find it reasonably had the effect of violating the Claimant's sense of dignity in her workplace and therefore constituted an act of unlawful harassment.

143 We are satisfied on the evidence that this treatment was related to sex as the Claimant had stated explicitly that her grievance complaints concerned unlawful treatment due to pregnancy.

144 As far as the claim of pregnancy related discrimination is concerned we find that the delay in dealing with the Claimant's grievance was unfavourable treatment but it was not treatment because of pregnancy rather pregnancy was the context of the Respondent's thoughtlessness. We do not find that this treatment was because of the nature of the Claimant's complaints either and therefore the claim of victimisation also fails.

Issue 24: *July 2016 – Maxime Boy allocates the Claimant's desk to a new planner, despite there being other available desks (because of staff annual leave).*

145 Once again there is a semantic problem with this allegation: what does "allocated" mean? We think the Claimant's allegation is that someone else was given her desk thereby permanently excluding her from it. We reject this formulation on the facts. On the other hand, we find that someone had been sitting at the desk the Claimant generally

used when she was in the Romford office. We accept the Respondent's evidence that it had a hot-desking policy and find that the Claimant was simply oversensitive about the fact that someone else had used and left his belongings at the desk she normally sat at. This claim fails as an allegation of harassment, unfavourable treatment or victimisation.

Issue 25: *26 July 2016 – Peter Ojumu continues to fail to refer the Claimant to occupational health.*

146 This allegation was not addressed in the evidence or submissions. The significance of referring the Claimant to Occupational Health on 26 July 2016 is unclear. It is not the case that the Claimant had no referral as an Occupational Health report was produced in September 2016. The claim fails on the facts.

Issue 26: *29 July 2017 – The Respondent fails to provide the Claimant with a written record of the grievance hearing within 8 days of the hearing in breach of its policy.*

147 The Claimant was provided with a written record of the grievance meeting of 21 July 2016 within 8 days under cover of an email dated 28 July 2016 (page 399). This claim fails on the facts.

Issue 28: *18 August 2016 – During a telephone conversation, Peter Ojumu requests a sick note from the Claimant and denies that she sent him numerous emails in relation to her time off work.*

148 We find that Mr Ojumu asked the Claimant to provide him with a medical certificate (sick note) to confirm the reason for her absence on 17 August 2016 (page 424). He did this because the Claimant was absent from work without leave or explanation at that time. Although the Claimant describes feeling humiliated and disbelieved by Mr Ojumu's request, we do not find that it was reasonable for her to do so in the circumstances. Any manager with an absent employee would reasonably be expected to establish their position and status. This treatment was not unfavourable. Accordingly, this claim fails on the facts.

Issue 29: *17 August 2017 – Peter Ojumu emails the Claimant requesting her to advise if she is fit to work and if she cannot provide a Fit Note, she is to promptly return to work.*

149 See out findings in respect of issue 28. This claim fails on the facts.

Issue 30: *18 August 2017 – Peter Ojumu asks the Claimant to complete her timesheet in the Oracle timekeeping system and states that Human Resources will have to decide what the Claimant's time off is to be classified as.*

150 This allegation is a further aspect of those under issues 28 and 29. We find that it was reasonable and appropriate for Mr Ojumu to seek to establish the reason for the Claimant's absence and to ask her to explain this on the Respondent's computerised time recording system, Oracle. We note too that the Respondent offered to assist the Claimant with the recording of her absence. This claim fails as an allegation of harassment, pregnancy related discrimination or victimisation.

Issue 31: *18 August 2016 – Peter Ojumu does not provide the Claimant with the names of the relevant HR Business Partner and their line manager but instead, asks her why she needs the information.*

151 We find that the Claimant asked Mr Ojumu to provide her with his line manager's details and that of the HR Business Partner dealing with the case. The context was delay in dealing with her grievance. Mr Ojumu took advice from HR and was told to query why the Claimant needed this information (page 769). He did so by email on 22 August 2016 (page 435). The Claimant replied by return saying that she wished to escalate matters as she had not had a response to her *"numerous emails"*. We have been shown no evidence which demonstrates that Mr Ojumu responded to this and we find, therefore, that this request was simply ignored. It would be overstating this passage of events to describe it as an act of harassment in our judgment; it was not an act violating the Claimant's dignity in the workplace rather it was a point raised and ignored in private correspondence. On the other hand, we find that being ignored in this way was a detriment given that the Claimant was seeking to escalate her complaint because of the delay in dealing with it. We find that Mr Ojumu ignored the request because of the Claimant's complaint in the sense that neither he nor HR wished for it to be escalated. Accordingly, we find that this was an act of victimisation. We do not find that it was treatment because of pregnancy because, once again, pregnancy and pregnancy related complaints were simply the context of this issue rather than the cause of it.

Issue 32: *August 2016 – Emails sent by the Claimant to Peter Ojumu and Human Resources chasing the outcome to her grievance are ignored.*

152 This is another allegation with a semantic difficulty; what is meant by "ignored"? Mr Ojumu replied to the Claimant's emails in our judgment and on occasions assured her that he was working on her grievance. One aspect of the delay in providing an outcome was difficulty in agreeing the minutes of 21 July 2016 meeting. If by *"ignored"* the Claimant means that Mr Ojumu took too long in providing a written outcome we agree but the allegation that he failed to respond to emails is not established on the facts.

Issue 33: *6 September 2016 – The Respondent continues to fail to conduct a revised workplace risk assessment taking into account the Claimant's pregnancy.*

153 In the emails dated 28 July, 22 August and 6 September 2016 the Claimant requested a workplace assessment. She referred to the Management of Health and Safety at Work Regulations 1999 and the Work Place (Health Safety and Welfare) Regulations 1992 as well as the Respondent's Family Friendly Policy and Procedures.

154 We accept the Respondent's argument that the legal obligation to carry out a risk assessment for a pregnant worker did not arise on the facts of this case. The obligation is only engaged where working conditions involve a risk of harm of danger to a pregnant worker (see *Madarasy v Nomura International Plc [2007] IRLR 246 CA* and *O'Neill v Buckinghamshire County Council [2010] IRLR 384*). There was no such risk on the evidence in this case. The Claimant referred to feeling too hot in the office; the evacuation procedures in the event of an emergency; the desirability of an ergonomic assessment of her work station and the requirement to travel by train to Stratford (this was removed). None of this is consistent with a risk of danger or harm in our judgment.

155 On the other hand, the Respondent's Employee Guide to Maternity provides as follows at step 2 (page 116):

> *"Your line manager will undertake a number of risk assessments to ensure your workplace is safe for you throughout your pregnancy".*

156 This policy creates a legitimate expectation that risk assessments will be undertaken and we consider that such assessments are likely to be reassuring to a pregnant worker. So, while there may have been no statutory obligation to undertake a risk assessment, we find the Respondent's failure to do so in breach of its own policy was unfavourable treatment because of pregnancy.

157 We do not find that this treatment was harassment because the Respondent had offered to conduct a workplace assessment by June 2016, it just failed to do so when first informed of the Claimant's pregnancy or for some months after that. Similarly, we do not find that this was unfavourable treatment because of the Claimant's grievance. This claim succeeds therefore as a complaint of pregnancy related discrimination.

Issue 34: *7 October 2016 – The Respondent emails the Claimant to inform her that she will be required to attend a reconvened grievance hearing.*

158 The Claimant was invited to a meeting to receive the grievance decision face-to-face by letter dated 6 October 2016. The Claimant replied immediately asking for a decision in writing. She referred to the anxiety she had experienced in the months since lodging her grievance and the effect on her pregnancy (page 516). Mr Ojumu replied to say that it was the Respondent's policy to hold a face-to-face meeting but that he would send a written decision if she wanted (page 515). It appears, therefore, that when the Claimant questioned the holding of a further meeting she was told that she could have a written decision instead. We do not find that referring to such a further meeting to inform her of the grievance outcome in these circumstances was an act of harassment, pregnancy related discrimination or victimisation. It was simply a step in the process the Respondent had adopted. This issue is, of course, separate from the wider question of delay in dealing with the Claimant's complaint about which we are critical.

Issue 35: *28 October 2016 – Jessica Stewart emails the Claimant to request her form MATB1 to process her maternity entitlement, despite the fact that this had previously been provided to Peter Ojumu.*

159 We are satisfied on the evidence that there was a genuine misunderstanding about whether the Claimant had supplied a complete copy of her MATB1 form. Although it may have been frustrating for the Claimant to have been asked for this by Ms Stewart in October 2016 we do not find that this was harassment, a detriment or unfavourable treatment. Accordingly, this claim fails on the facts.

Issue 36: *7 November 2016 – The Respondent denies that Peter Ojumu received the Claimant's form MATB1 and Jessica Stewart insists that she will visit the Claimant's home to collect the original MATB1 form.*

160 We dismiss this claim for the same reasons as issue 35. Furthermore, we find

that Ms Stewart offered to collect the MATB1 form from the Claimant's home as an act of genuine assistance and that this could not reasonably be construed as harassment, a detriment or unfavourable treatment.

Issue 37: *11 November 2016 – The Claimant's queries in relation to her annual leave remained outstanding.*

161 We reject this claim on the facts. It is clear from Ms Stewart's email of 6 December 2016 (page 588) that the Respondent addressed the issue of the Claimant's leave.

Issue 38: *6 December 2016 – The Respondent continues to request that the Claimant obtain a further MATB1 form despite the Claimant informing them that this is a document that is only produced once.*

162 We reject this claim for the reasons given in respect of issues 35 and 36.

Issue 39: *Circa 18 December 2016 to February 2017 – The Respondent refuses to assign an individual from a different service to hear the Claimant's appeal.*

163 We reject the Claimant's case that it was an act of harassment, pregnancy related discrimination or victimisation to appoint Mr Wheeldon as the appeal officer. Mr Wheeldon was a more senior manager than Mr Ojumu. We note that the Claimant had asked him to look into matters in October 2016 and that when the Claimant raised her objection to him on 19 January 2017 (page 655) she was subsequently reassured and did not raise the matter again.

Issue 40: *10 February 2017 to 2 March 2017 – The Respondent unreasonably disregarded evidence that might otherwise have resulted in aspects of her appeal being upheld.*

164 In our judgment Mr Wheeldon attempted to address the Claimant's grievance appeal in good faith and thoroughly. He upheld the finding that the Respondent had failed in its duty of care to the Claimant but concluded that there had been no deliberate harassment of the Claimant. This is broadly consistent with out judgment. This claim fails on the facts.

Time Limits

165 The Claimant presented her claim to the Tribunal on 14 December 2016 having been engaged in early conciliation over nine days between 7 and 16 November 2016 and therefore the Equality Act claims relating to events before 6 September 2016 are arguably out of time having regard to the provisions of Section 123 of the Act. We are satisfied, however, that events should be looked at as a whole – that is through the entirety of the Claimant's pregnancy and after the birth of her son - and that it is just and equitable to extend time for the successful claims which on a strict construction might have been out of time. In the circumstances we have not analysed whether the successful claims constitute conduct extending over a period. Accordingly, we find that we have jurisdiction in respect of the successful claims.

Constructive Dismissal

166 When judged objectively we find that the Claimant resigned because of how she perceived she was treated during her pregnancy. While we have not found many aspects of her allegations to be established as unlawful conduct under the Equality Act some elements have been proved. We find that these successful aspects cumulatively constitute a repudiatory breach of contract and that the principal reasons underlying them was the Claimant's pregnancy or pregnancy related symptoms.

167 We find too that the Claimant did not affirm the contract by any act prior to resigning in March 2017. While the span of events was long much of this was because of delay on the Respondent's part and it is noteworthy that the Claimant resigned promptly after the appeal outcome. We have noted also that the Claimant referred to Tribunal proceedings and the possibility of reaching a settlement agreement in the course of events and none of this suggests that the Claimant affirmed her contract despite earlier breaches.

168 Judged objectively therefore we find that the established breaches of the Equality Act 2010 amounted to a breach of the implied term of trust and confidence entitling the Claimant to resign and treat herself as dismissed. That dismissal was automatically unfair under Section 99 of the Employment Rights Act 1996 as the principal reason was pregnancy.

Remedy hearing

169 As the Claimant's claim has been successful in part remedy to which she is entitled shall be decided at a remedy hearing on 11 December 2017.

Employment Judge Foxwell

13 October 2017