EMPLOYMENT TRIBUNALS

Claimant:	**Mrs K. Amin**
Respondent:	**Calvary Pre-School Limited**
Heard at:	**East London Hearing Centre**
On:	**14-16 August 2019**
Before:	**Employment Judge Massarella** **Mrs A. Berry** **Mr P. Quinn**
Representation	
Claimant:	**In person**
Respondent:	**Ms T. Bailey (Respondent manager)**

JUDGMENT

The judgment of the Tribunal is that:-

1. by consent the name of the Respondent to these proceedings is amended to Calvary Pre-School Ltd;

2. the Claimant's claim of pregnancy and maternity discrimination succeeds;

3. the Claimant's claim of unfair (constructive) dismissal succeeds;

4. the Claimant's claim for unauthorised deduction from wages in respect of salary and holiday pay succeeds.

REASONS

Procedural background

1. By a claim form presented on 30 August 2018, the Claimant complained of direct pregnancy and maternity discrimination and unauthorised deduction from wages. The case was reviewed at a preliminary hearing, which took place before EJ Russell on 26 November 2018, by which time the Claimant had resigned. The Judge gave the Claimant permission to amend her claim to include a claim of unfair and/or discriminatory constructive dismissal.

The hearing

2. The Tribunal had an agreed bundle of documents, running to some 180 pages. We heard evidence from the Claimant and her husband, Mr Afzaal Asghar. For the Respondent we heard evidence from Ms Tanique Bailey (manager of the Leyton pre-school), Ms Celine Mensah (deputy manager) and Ms Cheryl Spooner (senior nursery practitioner).

3. We also had a statement from Ms Natasha Curzi-Micallef (manager at one of the other nurseries), who did not attend to give evidence. The Respondent's only explanation for this was that she had moved to Portsmouth; she knew about the hearing; no application had been made for a witness order. The Tribunal regarded the Respondent's explanation as unsatisfactory and her absence affected the weight which the Tribunal gave to her evidence.

4. The Claimant represented herself; the Respondent was represented by Ms Bailey. At the beginning of the hearing Ms Bailey clarified that the correct name of the Respondent is Calvary Pre-School Ltd. With the consent of the Claimant, the Respondent's name in these proceedings is amended accordingly.

5. Further, Ms Bailey conceded on behalf of the Respondent that the Claimant had continuous employment from 23 February 2015 and therefore the Tribunal has jurisdiction to hear the claim of unfair constructive dismissal under the Employment Rights Act 1996, the Claimant having more than two years' continuous service.

6. At the conclusion of the evidence Ms Amin relied on brief written submissions, which she supplemented orally. For the Respondent Ms Bailey made brief oral representations. We have had regard to both sets of submissions.

The issues

7. The issues for determination were identified by EJ Russell at the preliminary hearing. She summarised them as follows [original numbering retained].

   EqA, section 18: pregnancy & maternity discrimination

   Did the Respondent treat the Claimant unfavourably because of her pregnancy and/or maternity leave?

3.1 Late June 2017: refusing the Claimant's request for a pay rise. The Respondent says that refusal was due to business reasons.

3.2 4 September 2017: refusing the Claimant's repeated request for a pay rise. The Respondent says that no request was made and/or no pay rise was justified due to lack of certification and low child numbers.

3.3 4 September 2017: Ms Bailey refused to change the Claimant's contract/status from apprentice to employee. The Respondent says that the Claimant's assessor asked it to extend the period of apprenticeship.

3.4 Between June and 10 November 2017: Ms Bailey failed to provide the Claimant with support to resolve the dispute about pay and employment status. The Respondent denies a lack of support.

3.5 On several occasions before commencing maternity leave and on 25 June 2018: Ms Bailey made comments about the Claimant's brain not functioning properly because she was pregnant, her always arguing and raising problems. The Respondent denies the comments.

3.6 15 September 2017: Ms Bailey did not invite a director to a meeting with the Claimant in order to avoid Head Office becoming aware of the Claimant's concerns. The Respondent denies trying to exclude Head Office from the meeting.

3.7 15 September 2017: Ms Bailey said that she was helping the Claimant by keeping her as an apprentice and that she could dismiss her if she wanted. The Respondent denies the comments and avers that the apprenticeship was extended at the request of the assessor.

3.8 Late September 2017: the Respondent offered the Claimant full-time employment on her return to work from maternity leave but not before. The Respondent says that it refused immediate employment as the number of children did not warrant it and the Claimant would still be entitled to SMP.

3.9 28 February 2018: Ms Bailey refused to renew the Claimant's DBS check until after her return from maternity leave. The Respondent says that the DBS had not expired and that an up-to-date check is required upon return to work.

3.10 From 25 June 2018: failed to pay the Claimant under the new contract of employment. The Respondent says that the Claimant refused to sign the contract until July 2018.

3.11 August 2018: did not pay the Claimant in full for her holiday under the terms of the employment contract. The Respondent will say that the Claimant did not return to work until 25 August 2018 and so was only entitled to SMP.

Unfair constructive dismissal

3.12 Did the Respondent conduct itself without reasonable and proper cause in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence? The Claimant will rely upon the cumulative effect of the conduct set out at paragraphs 3.1 to 3.11 above and the 'last straw' of persistent refusal to pay under the new contract.

3.13 If the Claimant was entitled to treat herself as dismissed on 28 September 2018, did she resign because of the conduct? The Respondent will say that the Claimant only worked one day in September 2018 and resigned because she fell down stairs at home when moving.

3.14 If dismissed, was dismissal an act of discrimination and/or was it fair in all of the circumstances of the case?

Unauthorised deductions

3.15 From 25 June 2018, was the Claimant entitled to be paid under the offered contract of employment in respect of pay and holiday pay?

8. The Claimant contacted ACAS on 19 July 2018. The EC certificate was issued on 3 August 2018. The Claimant presented her ET1 on 5 August 2018. The starting-point, therefore, is that any act before Issue 3.10 above is *prima facie* out of time, subject to whether it amounts to conduct extending over a period or the Tribunal considers it just and equitable to extend time.

Findings of fact

9. The Tribunal makes the following unanimous findings of fact.

The Respondent organisation

10. Calvary Charismatic Baptist Church is a charity and a company limited by guarantee. It has three separate branches, each of which is a limited company in its own right: Calvary Poplar Limited; Calvary Great Field Day Nursery Limited; and Calvary Pre-School Limited. The Claimant was employed by Calvary Pre-School Limited, which is the Respondent to these proceedings. It is located in Leyton, East London.

11. There was some lack of clarity as to who the directors of the Respondent company were. The Claimant took us to her contracts of employment, which are detailed below. The 2015 contract was signed by Mr Mensan who described himself on it as 'director'. The 2016 contract also identifies him as director, although it has been completed and signed by someone else on his behalf. He is also named as such, along with Mrs Elizabeth Sarpong, in a letter to the Claimant in late September 2018. In that letter the Respondent acknowledged the Claimant's resignation and invited her to her raise a grievance and reconsider her decision 'in a meeting to be held with the directors'. The letter is then signed by Mrs Sarpong and Mr Mensan, who are identified as 'The Directors'.

12. This may not in fact have been the case. From the information given to us, it appears that he was the secretary of the parent company, Calvary Charismatic

Baptist Church. However, the Tribunal formed the strong impression that Mr Mensan was an influential figure in relation to some of the decisions taken about the Claimant's employment. It is clear from Ms Bailey's evidence that she would refer difficult questions up to him, especially if they related to finances, for example employees' salary.

The Claimant

13. The Claimant was a nursery nurse. She started working for the Respondent on 23 February 2015 as an apprentice. While she worked for the Respondent she was also pursuing a course of study with an organisation called Skills for Growth. The Claimant spent one day a week on these studies and four days a week at the nursery. At all times, however, she worked under a contract of employment, irrespective of her status as an apprentice.

The contracts of employment

14. We had three contracts before us.

15. The first is a contract of employment which gives the date of commencement of employment as 23 February 2015 and was signed by the Claimant on 12 March 2015 ('the 2015 contract'). In that contract the Claimant is described as a student/apprentice.

16. The second is a contract of employment signed and dated on 22 February 2016, which wrongly gives the date of continuous employment as the same date. As we have already recorded, the Respondent concedes that the Claimant had continuous employment throughout the material period. There were no breaks in her employment. In that contract the Claimant is described as a student/apprentice.

17. We find that the 2016 contract remained in force throughout the currency of the Claimant's maternity leave in 2017/2018 and up to the point where she accepted new contractual terms on 13 July 2018. The contract gives an annual salary of £7,123.20 to be paid monthly. Paragraph 40 of the contract provided that all annual leave is to be taken during school holidays; there was no entitlement to take it during term time; but term-time working did include an entitlement to proportional bank holiday leave. Although these provisions are not particularly clear, it is evident that there was no additional contractual entitlement to holiday leave or pay, the entitlement was statutory only.

18. The third contract is a contract of employment which gives a start date of 25 June 2018. In that contract the Claimant is described as a nursery nurse. The date of continuous employment is left blank. The Claimant initially objected to the terms of the 2018 contract because she did not consider that the proposed salary of £10,600 was sufficient. She asked for at least £15,000. She subsequently changed her mind and signalled her acceptance by signing it on 13 July 2018, at which point the Tribunal finds it superseded the 2016 contract.

The nursery in Leyton

19. The team at the nursery in Leyton was small. At the material time six or seven people worked within the nursery and all worked closely with the children, whatever their role or level of seniority. Ms Bailey was the manager, Ms

Mensah her deputy. According to Ms Bailey the Claimant was an excellent worker and a highly valued member of the team. Insofar as there was a ratio between staff and children, the Claimant was factored into that ratio. If she was absent for any reason, it put the ratio out of kilter. By way of example, Ms Bailey referred in her statement (paragraph 11) to an occasion in October 2017 when the Claimant's brother came to collect her from work before the end of her shift. Ms Mensah refused the request because 'if she allows her to leave early, the room will be out of ratio and that we would be down a staff member'. Already at that stage the Claimant was an integral part of the nursery team.

20. There were some relationship difficulties along the way. For example, in November 2015 there was an altercation between the Claimant and another member of staff, as a result of which the Claimant tendered her resignation. However, she quickly asked to return and the Respondent accepted her change of heart. Although considerable emphasis was put on this and other minor incidents in the Respondent's evidence, we find that none of it was material to the issues which we had to decide.

The Claimant's apprenticeship

21. We find that in early 2017 Ms Bailey told the Claimant that, on completion of her apprenticeship, she would be given a new, permanent contract and her pay would rise.

22. The Claimant told the Respondent that she was pregnant around the end of May/beginning of June 2017. By that point she was having regular medical appointments related to her pregnancy, including an antenatal appointment on Wednesday 24 May 2017 and a midwife appointment on 8 June 2017. Both appointments were within her normal working hours and the likelihood is that she would have required time off to attend them and Ms Bailey's permission to do so.

23. The Claimant completed her apprenticeship course on 28 June 2017. Her course had been extended because there had been an issue over some of the work that she had produced.

24. The Claimant immediately informed Ms Bailey that she had completed her apprenticeship and asked to be given the new contract and a higher rate of pay. Ms Bailey told the Claimant that, before she would agree to this, she required documentary proof that she had completed her apprenticeship.

25. The Claimant's course assessor, Sarah O'Dwyer, emailed the Claimant (copying in Ms Bailey) the next day. She confirmed that the Claimant had successfully completed her Early Years Education Level 3 qualification the previous day. She told her that her certificate was now in progress and that it would be provided in due course. She added [original format retained]: 'if you require any further information, please do not hesitate to contact me and also you can indeed be able to contact Stephanie Dent, she is the point of call for any questions as well'.

26. Despite this Ms Bailey insisted that no changes could be made to the Claimant's contract until she had been provided with a copy of the certificate. The Tribunal asked Ms Bailey whether, if she genuinely had concerns that the Claimant might not have completed her course, she made efforts to contact the

assessor to verify the information. Ms Bailey said that she had tried to phone Ms O'Dwyer but was unable to get through to her. She accepted that she had not then followed this up by email. Ms Bailey then asserted that it was an OFSTED requirement that she have the physical certificate in her possession. We heard no evidence to support that contention and we reject it.

27. The Tribunal finds that Ms Bailey used the absence of a hard copy certificate as a pretext for not issuing the Claimant with a permanent contract and increasing her pay.

The refusal to increase the Claimant's pay on completion of her apprenticeship

28. As a result of this decision, the Claimant worked from 29 June to 9 November 2017, when she went on maternity leave, under her apprenticeship contract, even though her apprenticeship had finished on 28 June 2017.

29. The Claimant received the certificate on 4 September 2017 and emailed it to Ms Bailey. At the same time, she also gave formal notice of her intention to take maternity leave from 10 November 2017 to 22 June 2018. Her first day back at work was to be 25 June 2018.

30. At the top of the copy of the 2016 contract which was included in the bundle, Ms Bailey had written in manuscript 'contract end on 9 November 2017'. The Tribunal finds that this reflected a mistaken view on her part (at least when she wrote it) that the Respondent was not required to maintain the 2016 contract once the Claimant started maternity leave on 10 November 2017. In fact, Ms Bailey agreed that she never terminated the 2016 contract.

31. Around this time the Claimant informed Ms Bailey that she would be away for part of her maternity leave, visiting relatives in Pakistan to introduce them to her new-born child.

The alleged financial difficulties in June to November 2017

32. At around the same time the Claimant again asked for a pay rise and to be put onto the new contract. Ms Bailey again refused. The reason she now gave was that numbers were down and the Respondent could not afford to employ the Claimant on a permanent, non-apprentice contract until she returned from maternity leave.

33. The Respondent suggested that low child numbers in September 2017 led to financial difficulties. We find that there was a natural cycle every year and across the year: some children would leave at the beginning of each academic year to go to reception class at school; numbers would gradually grow again as they were replaced by other children. No documentary material of any sort (accounts, for example) was adduced to support the contention that this created financial difficulties for the Respondent around this time. None of the Respondent's witnesses were able to give us concrete examples of hours, or numbers of employees, being reduced at times of low child numbers.

34. The Respondent suggested that the existence of financial difficulties was evidenced by the fact that a shift pattern was introduced in September 2017. Such evidence as there was of this was vague and unpersuasive and we reject it.

35. We are reinforced in our view that there were no financial difficulties during this period by the fact that Ms Mensah decided to leave the company, temporarily as it turned out, in January 2018 and a replacement was immediately recruited, at a time when we were told that numbers would still be low.

36. On the balance of probabilities, we find that there were no financial difficulties at the material time and that this was merely a pretext for not raising the Claimant's pay and putting her on a permanent contract. We consider it more likely than not that the Respondent's business model was such that it could accommodate the fluctuation of numbers across the year, given that it was an entirely predictable, annual pattern.

<u>The meetings in September 2017</u>

37. The Claimant was dissatisfied with Ms Bailey's decision not to increase her pay and a meeting was arranged to discuss it, which was scheduled for 13 September 2017. The Claimant's husband was due to attend but in an email of 12 September 2017 he told Ms Bailey that he was no longer able to attend and the meeting did not take place. In his email Mr Asghar made similar points to those which had already been made by the Claimant about her contractual entitlement.

38. On 14 September 2017 Ms Bailey wrote to the Claimant offering her full-time employment from 25 June 2018, which was the date of the Claimant's intended return from maternity leave. The letter gives no information as to the proposed terms of the contract and contains no explanation as to why the Respondent would not be offering her a permanent, full-time contract for the remainder of the period before the beginning of her maternity leave (which was still some two months away).

39. Ms Mensah (in her statement at para 10.1) stated that [original format retained]:

> '[Ms Bailey] decides she will employ [the Claimant] when our child enrolment increases, meaning that this would be when she resumes work after her maternity leave. Unfortunately for the meantime she cannot afford to pay her level 3 salary. Therefore she will keep her on her apprenticeship contract and pay her age-related salary.'

40. Asked why the Respondent had continued to pay the Claimant as if she were an apprentice after she had qualified, Ms Bailey replied: 'she was pregnant and she is a good worker. I wanted to re-employ her. She was putting pressure on us for a contract.' Later, in her evidence, asked whether the Respondent wished to keep the Claimant in its employment (albeit on unfavourable terms) because she was a good employee, Ms Bailey replied: 'that would have been selfish…' She did not deny that it was the case.

41. The Tribunal finds that the position adopted by the Respondent with regard to child numbers was quite at odds with the fact that the following year it required the Claimant to delay her start under the new contract until September, i.e. at the very point in the year when, according to it, there would be a downturn in work.

42. Moreover, the evidence the Tribunal heard was that child enrolment increased from around April of each year. If that was the reason for the delay in the start

date of the contract, no explanation was given as to why the Claimant's new contract was not scheduled to start in April 2018, rather than in June.

43. The Tribunal finds that the Respondent took advantage of the fact that the Claimant was going on maternity leave to save money by delaying the start of her permanent contract until she returned.

44. In an email of 14 September 2017 in response to Ms Bailey's letter of the same day the Claimant renewed her request for a change to her contract, writing [original format retained]:

> 'I would like to know more information as it is unclear to me how much salary will I receive when I get a new full-time employment contract. And secondly, why I am not receiving my new full-time employment contract this year as I am Level 3 qualified. Prior [in] our conversations, you used to mention that my pay will be increased once I'm qualified. Therefore, I completed my Level 3 qualification in June 2017 and I requested you please can you raise my pay and you responded that we cannot raise your pay until we get your certificates. During this month, I provided a copy of certificates my tutor also emailed regarding I'm qualified in June 2017. Therefore, I am still confused and unclear in regards to why the company is not providing my new contract this year.'

<u>The meeting of 15 September 2017</u>

45. The postponed meeting took place on 15 September 2017. It was in two parts. In the first part the Claimant alleges that, in response to her attempts to make her points about her contract and her pay, Ms Bailey said words to the effect of:

> 'your brain does not function properly because you are pregnant! You're always arguing! Here comes Khadijah with her problems!'

46. Ms Bailey denies making such remarks. The Tribunal finds on the balance of probabilities that she did. It is consistent with the frustration which she acknowledges she felt that the Claimant would not simply accept her decisions.

47. The Claimant's husband attended the second part of the meeting, at which a deputy manager from another nursery attended, Ms Curzi-Micallef. Although Mr Mensan, who the Claimant regarded as a director of the company, did not attend the meeting, there is no evidence that Ms Bailey did not invite him to attend the meeting because she did not wish Head Office to become aware of the Claimant's concerns (as the Claimant alleges). On the contrary, the Tribunal considers it more likely that Mr Mensan was already aware of the Claimant's concerns and was influential in encouraging Ms Bailey to make the decisions that she did. Equally, we think it more likely than not that Mr Mensan did not wish to become directly involved in the dispute. That is consistent with the fact that he was not called as a witness in these proceedings, although there were a number of issues on which he could have provided relevant evidence.

48. According to the notes of that meeting Ms Curzi-Micallef told the Claimant (amongst other things) that Ms Bailey was [original format retained]:

> 'doing you a favour, they are keeping you for these two months so you can still get the mat pay … If she was not pregnant, she would have had

> the apprentice extended 'til June. So she would not have a job now … My understanding is she has a get out of jail free card. She still has a job'.

49. The position did not change as a result of this meeting. The Claimant remained on her apprentice contract, even though she had completed her apprenticeship. She knew that she had been offered a contract to commence on 25 June 2018, but had not seen it and did not know its terms.

The renewal of the DBS

50. Before the Claimant went on maternity leave she drew Ms Bailey's attention to the fact that her DBS authorisation would expire in February 2018 during her maternity leave. The Claimant's evidence was that Ms Bailey refused to apply for it to be renewed before she went away. MsCurzi-Micallef gave evidence in her statement that Ms Bailey asked the Claimant on a number of occasions to come in and fill the forms out but the Claimant failed to do this. We reject that evidence.

51. Ms Bailey gave a different explanation altogether as to why she did not complete the process before the Claimant went on maternity leave. It was her evidence that it was a regulatory requirement that, if someone was spending a significant period outside the country, their DBS would have to be renewed on their return. The Claimant had told her she was going to Pakistan. We asked Ms Bailey to provide us with the material on which she based this belief, which she did on the last day of the hearing. We find that this material does not support it. One of the documents provided was an internal policy of the Respondent's, which contains a section 'Safer Recruitment Policy'. In that section there is a passage which reads:

> 'We at Calvary Pre-School Leyton believe when you are not working within a childcare environment for a significant amount of time (while not registered on the updated service) the company would require a new DBS for all its staff and any potential future employees, as stated in government document Keeping Children Safe an Education "if the person has lived or worked outside the UK, make any further checked the school or college consider appropriate" actions [*sic*]'

52. An extract from the government guidance referred to was provided to the Tribunal which conforms with the quotation given in the Respondents own policy.

53. From this a number of points arise: firstly, this is an internal, rather than a statutory, policy; secondly, insofar as it refers to government guidance, that guidance simply gives the employer a discretion to make further checks if it considers it appropriate; and thirdly, insofar as the Claimant was out of the country for any period of time, it was to visit relatives; she was not 'living or working outside the UK'.

54. On 29 May 2018 the Claimant emailed Ms Bailey, asking for a copy of her new contract, which she still had not had sight of.

The Claimant's return from maternity leave

55. The Claimant returned from Pakistan on 23 June and returned to work on 28 June 2018. Ms Bailey immediately applied for her DBS but the authorisation was not received until 26 July 2018.

56. Ms Bailey also gave the Claimant her new permanent employment contract. It provided for a salary of £10,600 per annum in respect of a 32-hour week. The Claimant initially said that she was unhappy with the salary and asked for at least £15,000. She later changed her mind and accepted the original offer, signing the contract on 13 July 2018.

57. Ms Bailey then explained to the Claimant that in fact her new contract would begin in September because, without a DBS in place, the Claimant could not return to work for the last few days of June and into July and the summer holiday would then intervene.

58. The absence of a DBS was entirely the fault of the Respondent, who had not taken steps to ensure that a DBS was in place in time for the Claimant's return from maternity leave.

59. The Respondent paid the Claimant £528.29 for the month of July, which we understand was the rate of SMP which she had been receiving during her maternity leave. It was certainly less than the salary provided for in the 2016 and 2018 contracts.

60. Ms Bailey initially told the Claimant that she would not be paid at all for the month of August because the Claimant had not worked since returning from maternity leave. In the event, the Claimant accepted that she was paid for the month of August, albeit at the SMP rate.

61. Ms Bailey's explanation for this was that the Claimant was entitled to take 12 months' maternity leave. Ms Bailey referred the Tribunal to an SMP table in the bundle which showed the figures for SMP calculated up until August 2018. The Tribunal pointed out to Ms Bailey that, although the Claimant could have elected to take maternity leave up to that point, as a matter of fact she had elected to return to work on 28 June 2018. Asked what justification there was for paying her at the SMP rate after that date, Ms Bailey was unable to provide an answer.

62. Ms Bailey then insisted that it was right to pay her at that rate 'because she had not actually worked since her return from maternity leave'. She was asked why, if that was the Respondent's justification, she was paid anything at all. Ms Bailey was unable to provide an answer.

63. We find that the Respondent took advantage of the fact that the Claimant had recently been on maternity leave to treat her as if her maternity leave was continuing through until the beginning of September, despite the fact that she had returned from maternity leave in June. We find that they did this so that they could continue to pay her at lower SMP rate of pay, which would be a saving to the business. They were not entitled to do so. There was no suggestion by the Respondent that either the contract of employment was suspended or frustrated in the absence of a DBS. We find that from 28 June 2018 the Claimant was entitled to be paid in full according to the terms of the 2016 contract; and that from 13 July 2018 she was entitled to be paid according to the terms of the 2018 contract.

64. On 10 July 2018 there is an exchange of emails in which the Respondent was asked to provide a UCAS reference for the Claimant to support her application for a university course. The Claimant was evasive in providing disclosure to the Respondent in relation to the start date of that course. In her evidence before us she initially sought to give the impression that she would be commencing her university course in September 2019. She later accepted that in fact her course began at the start of the academic year in 2018. We will hear further evidence at the remedy hearing before forming a view as to whether the Claimant sought to mislead the Tribunal in respect of this matter and whether it is relevant to the losses which she claims.

65. On 20 July 2018 the Claimant emailed Ms Bailey asking why she was not being paid in accordance with the newly signed contract. On 24 July 2018 the Claimant texted Ms Bailey, querying her July wages. On 26 July 2018 the DBS clearance was issued to the Claimant. She forwarded it to Ms Bailey on 31 July 2018.

<u>The beginning of the Autumn term 2018</u>

66. On 4 September 2018 the Claimant returned to work for an inset day. On 5 September she phoned to say that she had been moving house the previous night and had fallen down the stairs. She was signed off work from 5 to 14 September 2018.

67. On 7 September 2018 Ms Bailey wrote to the Claimant telling her that she was 'still within your probation period… During your holiday your probation is frozen'. On 25 September 2018 Ms Bailey emailed the Claimant asking how she was as they had not had not heard from her for some time.

68. On 28 September 2018 the Claimant resigned. She wrote [original format retained]:

> 'I'm writing to inform that I've been very disappointed over the past year, the way the company has treated me unfairly since I had been pregnant and went on maternity leave. As a result, I have been suffering from detriment, I have also felt that the company has been ignoring my esquires [enquiries?] and previously refused to clarify issues further in regards to pay rise and change of contract once I'd finished my apprenticeship back in June 2017 and are not replying to my emails regarding on which contracting conditions and getting paid for July, August and September 2018.
>
> I have sent many emails to request further information regarding the issues but I've not had any response. Therefore unfortunately, I do not have any choice but to resign from working at Calvary Pre-School because I also felt that I have been discriminated because if I had not been on maternity leave, all the issues regarding pay, change of contract would have been much smoother and result quicker. I feel I have not been treated fairly and neither being paid fairly since I was pregnant and went maternity leave. As a result, I have taken a decision to take this issue further to the Employment Tribunal services.'

The law

Time limits

69. S.123(1)(a) EqA provides that a claim for pregnancy/maternity discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

70. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

71. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.

72. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

73. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at para 16). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at para 17).

Direct discrimination because of pregnancy/maternity

74. The EqA prohibits employers from treating an employee unfavourably (as opposed to less favourably) because of her pregnancy (s.18(2) EA 2010) or because she is exercising, is seeking to exercise or has exercised the right to maternity leave (s.18(4) EA 2010).

75. S.18 EqA provides:

> 18. Pregnancy and maternity discrimination: work cases
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (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.

> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (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.
>
> …

76. Those provisions enact the decisions in *Webb v Emo Air Cargo Ltd. (No.2)* [1995] IRLR 645 HL). The House of Lords had referred the question of the proper comparator to the ECJ which held ([1994] IRLR 482 ECJ) that unfavourable treatment of a woman because she is pregnant is automatic sex discrimination without the need to compare the position of a woman with a man.

77. The issue of maternity (as opposed to pregnancy) was not specifically addressed in *Webb*. It was considered in *Thibault v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS)* [1999] ICR 160, ECJ. The ECJ held that depriving a woman of her right to an assessment of her performance, and therefore of the possibility of qualifying for promotion, on the ground that she was absent on maternity leave for some of the assessment period, was contrary to EU law.

78. Even in cases where the employee will be unavailable for the majority of a fixed-term contract, it will nevertheless be an act of discrimination not to appoint her because of her pregnancy (*Tele Danmark A/S v Handels- og Kontorfunktionaerernes Forbund I Danmark* [2001] All ER (EC) 941).

79. In order for a discrimination claim to succeed under s.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave. The meaning of this expression was considered in this context in *Indigo Design Build and Management Ltd. V Martinez* (UKEAT/0020/14/DM). HHJ Richardson referred to *Onu v Akwiwu* [2014] ICR 571, in which Lord Justice Underhill said:

> 'What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not

> involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind… so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice.'

80. Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. The Tribunal should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see X v Y [2013] UKEAT/0322/12. It must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

The burden of proof

81. In a discrimination case the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between his race and discriminatory acts of which he complains. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 (at paras 2, 9 and 11) held that the Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the Tribunal is twofold: first, to establish what the facts were on the various incidents alleged by the Claimant; and, secondly, to decide whether the Tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, the Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

82. The burden of proof provisions are set out in s.136(1)-(3) EqA.

> **(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.**

83. In *Igen v Wong* [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

‘(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less

> **favourably on the ground of sex, then the burden of proof moves to the employer.**
>
> **(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'**

84. In *Madarassy v Nomura International plc* [2007] IRLR 246 Mummery LJ held at [57] that 'could conclude' [The EqA uses the words 'could decide', but the meaning is the same] meant:

> **'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'**

85. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy* per Mummery LJ at para 56:

> **'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'**

86. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at para 19,

> **'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'**

87. In *Hewage v Grampian Health Board* [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Constructive unfair dismissal

88. The Claimant relies on a breach of the implied term of trust and confidence. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental: *Morrow v Safeway Stores plc* [2002] IRLR 9.

89. The law of constructive dismissal in a case where the employee relies on a cumulative breach was comprehensively reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 at para 14 onwards:

> **14. The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:**
>
> > **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The**

> **particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.

90. Those principles were further considered by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 at para 55:

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**

> **(5) Did the employee resign in response (or partly in response) to that breach?'**

91. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 at para 29.

92. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 at 828-829.

Unauthorised deduction from wages

93. S.13 Employment Rights Act 1996 provides:

> **Right not to suffer unauthorised deductions.**
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless—**
>
> > **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
> > **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—**
>
> > **(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
> >
> > **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**

Conclusion: the burden of proof

94. In relation to some of the Claimant's allegations, the Tribunal is in a position to make positive findings of fact as to the reason for the Respondent's treatment of the Claimant. Where that is not the case, the Tribunal has considered the application of the burden of proof provisions.

95. Looking at the events during the material period as a whole, the Tribunal identifies the following facts from which it could conclude, in the absence of an adequate explanation, that the Claimant's pregnancy and/or her taking of maternity leave were material factors in Ms Bailey's treatment of her.

    95.1. She changed her position as to whether the Respondent would award the Claimant a pay rise and a permanent contract after she learnt that the Claimant was pregnant and planned to take maternity leave.

    95.2. She behaved evasively and inconsistently when the Claimant challenged her reasons for not issuing her with a permanent contract, relying first on the absence of a hard copy certificate, then on financial difficulties caused by low child numbers.

    95.3. The manuscript comment on the 2016 contract indicated that Ms Bailey believed (at least when she wrote it) that she could terminate the Claimant's contract when she commenced maternity leave.

    95.4. The start date of the permanent contract (28 June 2018, the first working day after the end of the Claimant's maternity leave) was inextricably bound up with the Claimant's maternity leave.

    95.5. At the meeting of 15 September 2017 Ms Bailey made derogatory remarks about the Claimant's brain not functioning because she was pregnant.

96. The Tribunal considers that the matters set out above are sufficient to shift the burden to the Respondent to show that Ms Bailey's actions were in no sense whatsoever influenced by the Claimant's pregnancy and/or maternity.

Conclusions: direct pregnancy/maternity discrimination

[Issue 3.1] - Late June 2017: refusing the Claimant's request for a pay rise. The Respondent says that refusal was due to business reasons.

97. We have already found (para 36) that there were no financial difficulties at the material time. In any event that was not the explanation given to the Claimant at the time as to why her pay would not be raised. She was told it was because she had not provided a hard copy of her certificate. The Tribunal has already found that the absence of a hard copy of the certificate was not the true reason for the decision and that both explanations were mere pretexts for the decisions.

98. The Respondent has provided no adequate explanation as to why it did not introduce the terms of the 2018 contract on 29 June 2017. We conclude that it did not do so because it discovered that the Claimant was pregnant and planned to take maternity leave, during which time she would not be carrying out work for the Respondent. That was an act of unfavourable treatment because of pregnancy and maternity discrimination.

99. We further conclude that, had the Claimant not been pregnant, the enhanced terms would have been offered to her on completion of her apprenticeship on 28 June 2017 and the terms would have been those which were offered to her at the end of her maternity leave, i.e. the terms of the 2018 contract.

[Issue 3.2] - 4 September 2017: refusing the Claimant's repeated request for a pay rise. The Respondent says that no request was made and/or no pay rise was justified due to lack of certification and low child numbers.

[Issue 3.3] - 4 September 2017: Ms Bailey refused to change the Claimant's contract/status from apprentice to employee. The Respondent says that the Claimant's assessor asked it to extend the period of apprenticeship.

[Issue 3.8] - Late September 2017: the Respondent offered the Claimant full time employment on her return to work from maternity leave but not before. The Respondent says that it refused immediate employment as the number of children did not warrant it and the Claimant would still be entitled to SMP.

100. The Tribunal has already found (para 32) that the Claimant did make a request for a pay rise in early September 2017, which the Respondent refused. By 4 September 2017 the Claimant had provided a physical certificate confirming completion of her apprenticeship and so that cannot have been the reason for the refusal.

101. Nor can the extension of the Claimant's period of apprenticeship be the reason for not changing the Claimant's status from apprentice to permanent employee in September 2017 as that took place between April and June 2017. Nor was it the reason given at the time, as will be apparent from our earlier findings of fact.

102. The Claimant's apprenticeship finished at the end of June 2017. The Tribunal finds that the Respondent has advanced no rational explanation for maintaining her on an apprentice contract thereafter.

103. The Tribunal infers, in particular from the evidence of Ms Mensan and Ms Bailey and referred to above (paras 39-40), that the Respondent wanted the best of both worlds: to retain the services of a good employee in the long-term, but not to give her a contract which reflected her newly-qualified status or pay her at the relevant rate because she was about to go on maternity leave, during which time they would not have the benefit of her services.

104. The Tribunal concludes that the reason why the Claimant was not offered a new contract, at a higher rate of pay, in September 2017 (or indeed at any point after 28 June 2017) was because she was pregnant and was exercising her right to take maternity leave. That was an act of unfavourable treatment because of pregnancy and maternity discrimination.

[Issue 3.5] - On several occasions before commencing maternity leave and on 25 June 2018: Ms Bailey made comments about the Claimant's brain not functioning properly because she was pregnant, her always arguing and raising problems. The Respondent denies the comments.

105. The Tribunal has found above (para 46) that Ms Bailey did make these remarks at the meeting of 15 September 2019. In doing so, we find that Ms Bailey acted thoughtlessly but not maliciously. However, there is an explicit connection between the remarks and the Claimant's pregnancy. We accept that the Claimant was very upset by the remarks, not unreasonably so. Ms Bailey was in effect telling her that she was wrong about something about which she knew

she was right and linking that to her pregnancy. In making the remarks Ms Bailey treated the Claimant unfavourably because of her pregnancy.

[Issue 3.4] - Between June and 10 November 2017: Ms Bailey failed to provide the Claimant with support to resolve the dispute about pay and employment status. The Respondent denies a lack of support.

106. We also uphold this allegation in the light of the findings and conclusions we have already made about Ms Bailey's approach. Ms Bailey consistently failed to provide the Claimant with support to resolve these disputes and consistently identified impediments for not implementing the new contract and increasing the Claimant's pay. We have already found (paras 27 and 36) that the explanations she gave were mere pretexts. The Respondent has failed to discharge the burden on it to show that pregnancy/maternity were not material factors in Ms Bailey's conduct and accordingly claim of unfavourable treatment because of pregnancy and maternity discrimination in this respect succeeds.

[Issue 3.6] - 15 September 2017: Ms Bailey did not invite a director to a meeting with the Claimant in order to avoid Head Office becoming aware of the Claimant's concerns. The Respondent denies trying to exclude Head Office from the meeting.

107. We have already found (para 47) that this did not occur and this claim fails.

[Issue 3.7] - 15 September 2017: Ms Bailey said that she was helping the Claimant by keeping her as an apprentice and that she could dismiss her if she wanted. The Respondent denies the comments and avers that the apprenticeship was extended at the request of the assessor.

108. This allegation is not upheld because, although the remarks were made, they were not made by Ms Bailey but rather by Ms Curzi-Micallef (para 48), against whom the allegation was not made.

[Issue 3.9] - 28 February 2018: Ms Bailey refused to renew the Claimant's DBS check until after her return from maternity leave. The Respondent says that the DBS had not expired and that an up to date check is required upon return to work.

109. Although the Claimant asserted in her ET1 that she asked Ms Bailey on 28 February 2018 to renew her DBS, there was no evidence before us that she did so.

110. The Tribunal finds that it was the Claimant's absence in Pakistan, rather than the fact that she was on maternity leave which caused Ms Bailey to believe (genuinely but mistakenly) that she should wait until the Claimant returned from Pakistan before seeking to renew her DBS. That is consistent with the fact that she tried to secure the Claimant's attendance for a KIT day during her maternity leave on 11 June 2018, when they would make the application together. We accept that Ms Bailey believed that an application made then could result in a DBS being in place for the Claimant's return on 28 June 2018.

111. Accordingly, we dismiss this claim.

[Issue 3.10] - From 25 June 2018: failed to pay the Claimant under the new contract of employment. The Respondent says that the Claimant refused to sign the contract until July 2018.

[Issue 3.11] - August 2018: did not pay the Claimant in full for her holiday under the terms of the employment contract. The Respondent will say that the Claimant did not return to work until 25 August 2018 and so was only entitled to SMP.

112. The Tribunal has already found (para 63) that the Claimant was entitled to be paid in full under the 2016 and 2018 contracts from her return on 28 June 2018. We have also found (para 63) that the Respondent used the fact that, had she chosen to do so, the Claimant might have remained on maternity leave until August as a pretext to continue to pay her SMP rather than the salary due to her under the 2016 and 2018 contracts. We conclude that the fact that the Claimant had taken maternity leave was a material factor in that approach and that the decision was unfavourable treatment because of maternity leave.

Conclusions: time limits in respect of the discrimination claims

113. The Tribunal has found that the Respondent consistently placed obstacles in the way of providing the Claimant with a permanent contract and increased pay, to which we have found she was entitled from the point at which she completed her apprenticeship. We have concluded that it did so because of pregnancy/maternity. We find that that was an ongoing state of affairs, in the *Hendricks* sense, from June 2017 to the Claimant's resignation. We conclude that it was 'conduct extending over a period' and accordingly we accept that all the Claimant's claims are in time by reason of s.123(3)(a) EqA.

114. If we are wrong about that, we consider that in all the circumstances it would be just and equitable to extend time in respect of those complaints which are *prima facie* out of time. We accept the Claimant's explanation as to why she did not issue proceedings earlier: she was consistently seeking to resolve matters internally in the hope that she could avoid issuing proceedings. The Respondent contributed to the delay in that, at each stage, the Claimant was led to believe that the situation would indeed be resolved in her favour, only to discover that a further impediment was then put in her way. The balance of prejudice favours the Claimant: the prejudice to her if time were not extended of not being able to pursue meritorious claims outweighs any prejudice to the Respondent. Indeed, the Respondent did not identify any prejudice and at no stage did it indicate that the passage of time made it difficult for it to lead evidence or advance its defence.

Conclusions: Unauthorised deductions from wages

[Issue 3.15] - From 25 June 2018, was the Claimant entitled to be paid under the offered contract of employment in respect of pay and holiday pay?

115. In the light of our findings above we uphold the Claimant's claim for unauthorised deduction from wages from the point at which the 2018 contract superseded the 2016 contract. She was underpaid from 13 July 2018 onwards when the Respondent did not pay her the sums due to her under the 2018 contract.

116. For the avoidance of doubt, because we have found that the failure to put the Claimant on the new terms from 28 June 2017 was an act of discrimination, she will also be entitled to losses flowing from that as part of the compensatory

award, including any impact it had on the level of statutory maternity pay which she received.

117. The method by which the Respondent dealt with holiday entitlement / holiday pay in respect of its employees is at present unclear to the Tribunal. Ms Bailey was unable to explain to us how it was dealt with in the Claimant's case. However, it follows from our findings that, because the Claimant was underpaid under the 2018 contract, that this must also have had an impact on her holiday pay because the monthly salary was too low. Accordingly, we uphold that claim.

Conclusions: constructive unfair/discriminatory dismissal

[Issue 3.12] - Did the Respondent conduct itself without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence? The Claimant will rely upon the cumulative effect of the conduct set out at paragraphs 3.1 to 2.11 above and the 'last straw' of persistent refusal to pay under the new contract.

118. The Tribunal finds that the persistent failure to pay the sums due under the 2018 contract from 13 July 2018 up to her resignation on 25 September 2018 was, in itself, a repudiatory breach of contract. The failure to pay wages due to the Claimant went to the very root of the contract.

119. Further, we conclude that, viewed objectively, the serious discriminatory course of conduct to which we have found the Respondent subjected the Claimant over a period of some eighteen months (including the discriminatory failure to implement a permanent contract in 2017 and the failure subsequently to pay her in accordance with that contract in 2018) was likely seriously to damage the relationship of trust and confidence between the Claimant and the Respondent. It follows from our conclusion that the Respondent's conduct was discriminatory that there was no reasonable or proper cause for it.

120. Although not identified as an issue by the Respondent, we find for the avoidance of doubt that because the (discriminatory) failure to pay the Claimant the sums due under the 2018 contract continued up to the beginning of September 2018, there can be no question of the Claimant's having affirmed the contract/waived her right to claim constructive dismissal. Moreover, the Claimant repeatedly and consistently objected to the treatment.

[Issue 3.13] - If the Claimant was entitled to treat herself as dismissed on 28 September 2018, did she resign because of the conduct? The Respondent will say that the Claimant only worked one day in September 2018 and resigned because she fell down stairs at home when moving.

121. The Tribunal concludes that the Respondent's unauthorised deduction from her wages and the discriminatory course of conduct to which it subjected her were both material factors in her decision to resign. We consider that this is plain both from the letter of resignation, which clearly identifies many of the acts in respect of which she complained to the Tribunal which we have upheld, and from the Claimant's evidence before us. We reject the Respondent's contention that she resigned because of the injury she sustained.

[Issue 3.14] - If dismissed, was dismissal an act of discrimination and/or was it fair in all of the circumstances of the case?

122. Having found that the conduct in response to which the Claimant resigned was a course of discriminatory conduct, we find that the (constructive) dismissal was outside the band of reasonable responses and unfair. It further follows that it was itself an act of discrimination.

Remedy

123. There will be a remedy hearing to determine what compensation the Claimant is entitled to receive. That hearing is listed for 10 a.m. on 5 November 2019 (with a time estimate of one day).

124. At that hearing we will hear further evidence as to the impact on compensation, if any, of the fact that the Claimant has now started a full-time university course. Mr Asghar told the Tribunal that the University option was a fallback position which the Claimant explored because she did not know what the final result of the Respondent's treatment of her would be. We make no finding at this stage as to what the likelihood was that the Claimant would have left her employment with the Respondent to go to university, had there been no discrimination. We expect to hear further evidence on that issue at the remedy hearing.

125. In preparation for that hearing, the Tribunal makes the following orders. The parties must co-operate fully with each other in complying with these orders and preparing for the remedy hearing.

125.1. The Claimant shall send to the Respondent a 'schedule of loss', i.e. a written statement of what is claimed, including a breakdown of the sums concerned, showing how they are calculated by **15 October 2019**.

125.2. On or before **15 October 2019** the Respondent shall send to the Claimant a list of the documents in their possession or control relevant to issues of compensation, together with copies of those documents. These must include all documents relevant to questions of pay, such as payslips.

125.3. If the Claimant has additional documents she should provide copies of these to the Respondent by **18 October 2019**. These should include any documents relevant to the schedule of loss.

125.4. The Claimant shall disclose documents showing the date she applied for her university course, the date she was offered it, the date she accepted it and the date she started it.

125.5. On or before **22 October 2019** the Respondent shall send to the Claimant a 'counter-schedule', setting out its response to the sums claimed by the Claimant, showing how that response is calculated.

125.6. For the remedy hearing, the parties shall prepare an agreed bundle of all these documents. The Respondent shall create the bundle. On or before **25 October 2019** the Respondent will provide the Claimant with a hard copy of the bundle, containing all the relevant documents which either party wishes to include. Unless there is good reason to do so, only one copy of each document (including documents in email streams) is to be included in the bundle. The documents should be single sided. They must follow a logical sequence which should normally be simple

chronological order (although related documents such as payslips may be grouped together). The documents in the bundle should be numbered in a single sequence.

125.7. The Respondent shall bring **five copies** to the Hearing (three for the Tribunal, one for any witness and one other).

125.8. By **1 November 2019** the parties shall exchange written witness statements (including one from the Claimant). The witness statement should set out, in numbered paragraphs, all the evidence of the relevant facts which that witness intends to put before the Tribunal relevant to questions of compensation. If the statement refers to any document, the statement must refer to its page number in the agreed bundle.

125.9. Each party shall bring **five copies** of any such witness statement to the Hearing and **five copies** of their schedule/counter-schedule.

126. The Claimant should lead evidence as to the impact the discrimination which the Tribunal has found had on her (injury to feelings).

127. The Tribunal invites both parties to address in their statements the following questions (although they may also lead evidence on other issues relating to compensation which they consider relevant).

127.1. What would the Claimant's SMP have been had she been paid at the rate of pay set out in the 2018 contract from 29 June 2017 onwards?

127.2. How does the Respondent calculate holiday pay? How was the Claimant paid holiday pay? What was she paid in respect of holiday pay?

127.3. Would the Claimant have taken up her place at university, had there been no discrimination?

Employment Judge Massarella

Date: 8 October 2019