EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms S Halton	v	1. Barnet Football Club Ltd 2. Mr A Kleanthous

Heard at: Watford
On: 29 – 31 August & 1-5 September 2023

Before: Employment Judge R Lewis
Members : Mr D Bean
Ms B von Maydell-Koch

Appearances:
For the Claimant: Ms L Iqbal Counsel
For the Respondent: Ms D Gilbert Counsel

RESERVED JUDGMENT

1. In the parties' agreed list of issues, issues 12.3 and 12.10.4 are dismissed on withdrawal.

2. The claim for holiday pay is dismissed on withdrawal.

3. The following claims are upheld:-

   3.1 that the first respondent victimised the claimant (s.27 Equality Act 2010) by informing her that it was investigating her performance and conduct (issues 12.14.1 and 22);

   3.2 that the first respondent subjected the claimant to detriment on grounds of public interest disclosure by informing her that it was investigating her performance and conduct (issues 12.14.1 and 34);

   3.3 that the first respondent discriminated against the claimant on grounds of sex by rejecting her grievance (issues 12.17, 27 and 28);

   3.4 that the first respondent discriminated against the claimant on grounds of pregnancy/maternity by refusing her requests to allow her partner to accompany her at the grievance appeal hearing (issues 12.18, 24A and 26);

3.5 that the first respondent discriminated against the claimant on grounds of sex by rejecting her grievance appeal (issues 12.19, 24A and 26);

3.6 that the first respondent constructively dismissed the claimant, and her claim of automatic unfair dismissal under s.103A Employment Rights Act 1996 (ERA) succeeds;

3.7 that the first respondent discriminated against the claimant on grounds of sex and pregnancy / maternity by constructively dismissing her;

3.8 that the first respondent victimised the claimant (s.27 Equality Act 2010) by constructively dismissing her; and

3.9 that the first respondent wrongfully dismissed the claimant by failing to pay her notice pay.

4. All other claims, including for avoidance of doubt all claims against the second respondent, fail and are dismissed.

REASONS

Case management

1. This was the hearing of a claim presented on 11 April 2021 on behalf of the claimant by Messrs Payne Hicks Beach ('PHB') solicitors, who continued to act for the claimant. Day A was 28 January and day B was 11 March 2021. There had been a case management hearing before Employment Judge Tynan on 31 March 2022, and although the Judge had indicated that at least one further case management hearing was required, none took place.

2. On 31 May 2022 the claimant's solicitors applied to the Tribunal to amend the claim (128). The application was stated to be in light of agreement of the list of issues. The proposed amendments were in part not disputed, and were dealt with in writing by Judge Tynan on 28 March 2023 (140A). The list of issues from which we worked included the amendments. No subsequent application to amend appears to have been made in light of disclosure, and in particular in light of two matters which were dealt with at this hearing and to which we refer separately: the information that Mr Fowler and Mr Rowe claimed to have been present at the loudspeaker telephone call; and the detail of what was said in the grievance investigation interviews.

3. The Tribunal had a bundle of about 700 pages to which a small number of documents were added during the hearing. The bundle appeared to include multiple duplicates of many documents, email trails in reverse chronology, and a number of items which could not assist the Tribunal. A core bundle, even if not directed by the Judge, would have greatly assisted.

4. Witness statements had been exchanged. The claimant was the only witness on her own behalf.

5. The respondent served six witness statements. In order of giving evidence, their witnesses were:

   - Mr R Bartlett, at the time Head of Football Operations;
   - Mr J Meir, at the time, Club Secretary;
   - Mr A Wigley, at the time, Safety and Safeguarding Officer;
   - Mr A Kleanthous, the second respondent and Chairman of the first;
   - Ms N Kleanthous, the first respondent's solicitor and legal advisor and daughter of the second respondent.

6. The first respondent's sixth witness, Mr M Patel, former Head of Finance, whose role was to have heard and rejected the claimant's grievance appeal, had passed away since completing his witness statement, which was accordingly read.

7. A number of case management matters arose during the hearing and we deal with them in order.

8. The hearing was fully in person and entirely public. The claimant expressed a concern about the medical confidentiality of players. The Tribunal did not in the event receive any information which in any respect appeared to engage any person's privacy rights. As this is a public document, we have followed the practice of referring to players about whom we heard by a single letter, respecting that their individual identity is not a material consideration, and that none of them has had the opportunity to address the tribunal on any privacy issue.

9. It was agreed that this hearing would deal with liability and any contribution issues, but that remedy issues, including any Polkey v A E Dayton Service Ltd [1987] IRLR 503 question, would be deferred. It was agreed that the claimant would be heard first.

10. On the first morning of the hearing the claimant applied to introduce in evidence two press reports from early 2022 regarding a pitch side incident involving Mr Bartlett. The claimant could give no evidence about the incident, and the reports were of the initial allegations, not of any subsequent investigation, fact find or outcome. The allegations were that Mr Bartlett had used a racial slur during a match. Ms Gilbert explained to us Mr Bartlett's account of the matter, and that the allegation had been the subject of three reports, within the club, to the police, and to the Football Association. We did not admit the material. The information had been in the public domain for about 18 months before the application was made. The material seemed to us more prejudicial than probative, particularly in the context that the present claim does not engage issues pitch side, or of race, and that the long delayed hearing of this matter would be further delayed if the respondents were to be called upon to give disclosure on the point, and answer it in evidence.

11. We were concerned to set a timetable which would ensure that the material before us was dealt with. In the event, the claimant's evidence lasted about a day and a half, and the evidence of the respondents' witnesses filled two days.

12. We took a number of short breaks, and additional breaks on occasion when the claimant became upset whilst giving evidence.

13. An issue arose on the third day as to potentially missing documents. It appeared that during the claimant's grievance investigation, statements had been available from two former colleagues, Mr Fowler and Mr Rowe (607). They had however not been disclosed, and the point had not been pursued. Ms Gilbert informed us that during the third day and overnight searches were undertaken, and neither document could be found, either electronically or by search of the relevant paper file.

14. On the first day, the claimant withdrew the claim for holiday pay. At the end of the evidence, and before the weekend adjournment pending closing submissions, the claimant withdrew two more claims.

15. On the morning of the fifth day the Tribunal heard closing submissions from both counsel, supplemented by written submissions, and judgement was reserved. A date was listed provisionally for a remedy hearing. That listing, with appropriate directions, is confirmed in a separate Case Management Order.

16. The bundle included an agreed list of issues. Although superficially elegant, it was prolix, convoluted, and difficult to follow. Plain, concise drafting would have assisted. We have used Arabic numerals consistently and solely, and we have avoided multiple sub categorisations so far as we can; so for example, where the list refers to issue 20.a.ii, we write 20.A.2. Where, in these reasons we use the overarching term 'prohibited' factors we mean all the legal heads of claim, including sex discrimination, discrimination on grounds of maternity or pregnancy or pregnancy related matters, victimisation on any ground, and detriment because of protected disclosure.

General approach

17. Before we turn to findings of fact, we address a number of matters of general approach.

18. In this case, as in many others, evidence touched on a wide range of factual points. Where we make no finding about a point about which we heard, or where we do so, but not to the depth to which the parties discussed the point, our approach is not a matter of oversight or omission. It represents the extent to which the specific point was truly of assistance towards us.

19. That observation is true in much of our work. It is particularly germane in a case where feelings run high on both sides; it was necessary to remind the claimant that the task of the Tribunal is limited to deciding the legal issues before it, and that the Tribunal is not an inquiry either into the matters about

which the claimant has strong feelings, or about the general running or management of the first respondent.

20. We have attempted to approach our task through a spectrum of workplace realism. That has a number of aspects.

21. We were considering events three to four years after they took place. When that happens, it is important to avoid the wisdom of hindsight, and equally to remember that nobody goes to work with the gift of prophecy. We must remember that events are to be considered as they presented at the time in question, and in the light of material and information available at that time. In particular, we note that an event which appeared mundane when it happened may, in the artificial setting of the tribunal, present with much greater importance than anyone attributed to it when it happened.

22. If we are called upon to consider a standard of conduct or behaviour, we should first ask whether it is necessary for us to make any decision in the context of our task in the case. If we do so, we must apply a realistic standard of the reasonable employer of the size and resources of the respondent. We should be careful not to apply a standard of perfection. Everyone who goes to work makes mistakes when they get there, a fact of which we should show understanding.

23. We were asked to consider a number of email trails. Email provides speed of response, but often at the expense of reflection. Workplace conversation and correspondence are rarely said or written to a standard of perfection, and we should not apply an artificial standard of interpretation or analysis to what appeared to be routine language at the time.

24. At this hearing witnesses denied having detailed recollection of an event or conversation. We accept that memories had faded. We should recall that not only were the events in question several years ago, they were not necessarily thought of at the time as particularly important, and nobody expected to be questioned about them in the artificial arena of a tribunal many years later.

25. We have avoided following the parties into the error of binarism. We mean by this we have avoided the approach, all too common in our work, in which one party claims to have been wholly in the right, and that the other was wholly in the wrong, without recognising mistake or short coming on their own side, or positives on the side of the other.

26. We were conscious that on occasion Ms Iqbal cross examined the respondents on the exercise of choices, in situations where she would have cross examined to the reverse effect if the other choice had been taken. This “damned if you do, damned if you don’t” approach, although not unusual in our work, is not fair, realistic nor helpful.

27. This was a case about a twin pregnancy. By the time it was heard the children in question were over three years old. Delay impacted on the effectiveness of this hearing. There had been significant turnover of staff at

the first respondent. A number of the relevant decision makers were no longer employed by it, and no application had been made to compel their attendance. Like the parties, we simply had to accept their absence and work round it.

28. The first respondent's HR model at the time appeared to be that there was a visiting HR consultant (Ms Wilde), but if there was an onsite permanent HR specialist, we heard nothing of them. We were told that late in 2020 the first respondent consulted Peninsula, who were of course also off site. Like all advisory models, they could only react to the information they were given and the questions they were asked. We heard about a large number of meetings and conversations. With the exception of the grievance interviews, the single conversation of which either side produced a contemporaneous note was that of 13 January 2020, the note being that of Mr Wigley (347). That showed us that the respondents (in the plural) did not, at the time, have an understanding of some of the basics of good and prudent employment practice, including the value of contemporaneous notes.

29. Where in these reasons we refer to "the respondent" we mean the first respondent only; we also refer to it as BFC. When we refer to the second respondent we do so by name or by calling him the Chairman.

30. We set out fact finds and conclusions together, where we think that that approach renders these reasons more intelligible. We depart from strict chronology on occasion for the same reason.

Legal framework

31. The claimant brought this claim under a number of different legal headings. Following the structure of the list of issues, the claims were the following:

- Automatic unfair constructive dismissal;
- Wrongful dismissal in failure to pay notice;
- Detriment on grounds of protected disclosures;
- Detriment for a prescribed reason (ERA s.47C), including related claims brought under MPLR 1999;
- Direct discrimination on grounds of pregnancy and maternity;
- Direct sex discrimination;
- Harassment related to the protected characteristic of sex;
- Victimisation contrary to s.27 Equality Act;

32. The claim of sex discrimination is brought under the familiar provisions of s.13 Equality Act. The question for the tribunal is whether, "Because of the protected characteristic A treats B less favourably than A treats or would treat others."

33. In considering this claim of sex discrimination we note three particular points. First, there is the importance in a claim of direct discrimination of identifying a comparator in the same or not materially different

circumstances (s.123) and secondly, the provisions as to burden of proof (s.136). Section 136(2) provides:

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

34. We note also that s.13(8), when read with s.17(2) and 18(7), in effect creates a boundary between claims which are truly analysed as sex discrimination and those which are truly analysed as pregnancy and maternity discrimination. Section 13 is read subject to 17(2) which provides:

> "A person discriminates against a woman if (A) treats her unfavourably because of a pregnancy of hers."

35. Section 18(2) provides:

> "A person 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."

36. The protected period is defined in s.18(6) and runs from the commencement of the pregnancy (about October 2019 in this case), and, having regard to s.18(6)(a), it continued throughout all the events with which we were concerned, up to the claimant's resignation.

37. It is important to note that s.18 does not speak of less favourable treatment, but uses the language quoted above in s.18(2), of unfavourable treatment. It therefore does not require identification of a comparator.

38. Claims were also brought under the provisions of s.47C ERA and Regulation 19 of the Maternity and Parental Leave Regulations 1999. Section 47C is a broad provision which starts,

> "(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
>
> (2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
>
> (a) pregnancy, childbirth or maternity…"

39. Regulation 19 states:

> "(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).
>
> (2) The reasons referred to in paragraph (1) are that the employee—
>
> (a) is pregnant,"

and sets out a number of incidents of maternity relevant to the Regulation.

40. Reference was made at this hearing to maternity suspension. Suspension on maternity grounds arises under ERA s.66(1), which provides that,

> 'an employee is suspended from work on maternity grounds if, in consequence of any relevant requirement or relevant recommendation, she is suspended from work by her employer on the grounds that she is pregnant ..'

41. The terms relevant requirement or recommendation are defined in s.66(2). We were not told of any event which met either definition in this case. There was discussion around the framework of s.67, which provides that,

> '(1) Where an employer has available suitable alternative work for an employee, the employee has the right to be offered to be provided with the alternative work before being suspended on maternity grounds ..
>
> (2)(a) the work must be of a kind which is both suitable in relation to her an appropriate for her to do ..'

42. The claim was also brought under provisions relating to protected disclosure. A qualifying disclosure is made in accordance with s.43B ERA and,

> "means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

43. We should bear in mind that the tribunal is not called upon to find out whether a disclosure in fact was in the public interest, or whether, as a matter of fact and law, a breach of legal obligation had occurred or was likely to occur. It is the task of the tribunal to find whether at the time of disclosing the information the claimant in fact believed that to be the case, and whether, in the tribunal's assessment, that belief was reasonable and reasonably held. It follows that a belief maybe reasonable, even if mistaken, and that includes a belief as to the existence of a legal obligation.

44. The statute sets out a number of the persons to whom disclosure may be made, and we note s.43D:

> "A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice."

45. Where a protected disclosure has been made, then s.47B provides:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

46. Section 48(2) provides.:

> "It is for the employer to show the ground on which any act, or deliberate failure to act, was done."

47. At each instance when the tribunal is called upon to decide whether there has been a detriment, it must apply objective tests, in accordance with the guidance in Shamoon v RUC, 2003 UKSC 11, and ask whether the event complained of was one which the reasonable worker would consider placed her at disadvantage in the workplace.

48. Claims were also brought under the victimisation provisions of the Equality Act. Section 27 provides broad protection and states:

> "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."

49. The definition of protected act at s.27(2) is broad, and must be approached purposively. We note in particular s.27(2)(c) which includes in the definition "doing any other thing for the purposes of or in connection with this Act;" and also we note s.27(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."

50. We understand "bad faith" to mean that it must be shown that the person making the allegation has done so without a genuine belief that it was true. An allegation which is factually wrong remains a protected act, if not made in bad faith.

51. The claimant brought a claim of automatically unfair constructive dismissal. She did not have two years completed service at the time of termination of her employment.

52. The general analysis is that the claim is brought under the provisions of s.95(1)(c) ERA, which provides that dismissal occurs if:

> "The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

53. The fundamental statement remains that of Lord Denning in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged…"

54. The development of authorities includes the situation identified in Malik v BCCI [1997] ICR 606, and the question of whether the employer,

> "Without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties."

55. It is important to note proper cause. Conduct may be repudiatory but nevertheless, depending on the evidence, not amount to constructive dismissal if it is conduct done for reasonable or proper cause. We must also note that the test of repudiatory conduct is an objective one. No matter how strongly a claimant may feel about their employer's behaviour, it is for the tribunal to decide whether the test has been met.

56. In this case, the claim of constructive dismissal was not of 'ordinary' unfair dismissal, but was brought under the automatic unfair dismissal provisions of ss.99(1), 99(3)(a) and 103A of the ERA, as well as under the discriminatory dismissal provisions of s.39(2) Equality Act..

57. Drawing all those provisions together, we ask whether the repudiatory conduct, which the tribunal has found led the claimant to resign, was either discriminatory in accordance with the Equality Act; or if the reason or principal reason for the conduct was a prescribed reason relating to pregnancy or maternity, or that the claimant had made a protected disclosures or disclosure.

Findings

58. We were concerned first with a series of events in January 2020, when the claimant made known her pregnancy, and considered that she suffered an immediate raft of adverse consequences. On 21 January, she went off sick, never to return to work. There were a number of relevant events in early February, but between then and 31 March, something of a lull in the dealings between the parties. On 1 April, the claimant through her solicitors presented a lengthy grievance. The grievance procedure, including appeal, continued until 29 October, and the claimant resigned on 17 December.

59. It was therefore a striking feature of the case that (1) in the period up to 21 January, the parties interacted as usual in the workplace; (2) in the period between 21 January and 31 March, they interacted almost exclusively in writing; and (3) in the period after 1st April, they interacted exclusively through representatives and in writing. That interaction also took place in 'without prejudice' correspondence, which we did not see.

Setting the scene

60. The respondent is a football club, based in North West London, which in May 2018 was relegated to the National League. It remains subject to the regulatory authority of the Football Association. It is part of a group of companies owned by Mr Kleanthous. We did not need to go into the corporate structure in any detail. It shares premises with other companies in the same group, which are health providers and work under the name TIC.

61. The claimant, who was born in 1988, took up employment on 5 August 2019 with TIC Physio Limited (278). The claimant is a chartered physiotherapist. She is therefore a qualified member of a regulated profession. As a matter of language we do not agree with, or follow, the parties' designation of her as 'medically' qualified (we would use that word only to mean a qualified doctor) but nothing turns on the point.

August to December 2019

62. From 5 August, the claimant worked in the TIC treatment area. Her contract of employment, issued after she had left TIC's employment, described her as Head Sports Physiotherapist (280) and provided for a probationary period of three months. Her reporting line was to the Practice Manager, Ms Ram, and to the COO, Mr Cerullo (287).

63. We have heard and decided this case on the understanding that the claimant was, and was regarded as, an entirely competent professional, and that there was no criticism of the treatment which she delivered, either to footballers, or to patients drawn from the general public.

64. In the course of her duties, the claimant, and other members of her team, might be required to refer a footballer to external medical help. An exchange of emails on 10 September 2019 (310-311) was, we find, relevant for two reasons. First it shows us that there were two procedures which had to be followed for that type of referral to take place. One was a referral by the physiotherapist, stating broadly what the medical issue was; and the other

procedure was an administrative procedure for a purchase order, authorising the expenditure which the referral would incur.

65. We find that it is quite clear from this exchange that both procedures had to be followed, and it is equally clear that the established practice by then, at the latest, was that the administrative managers, dealing with the purchase order side, were broadly told what the reason for the medical referral was. We find therefore, and it follows as a matter of common sense, that around the time the claimant started her employment, the established way of working was that the non-clinical management were given at least some medical information by the physiotherapy team about the footballers they were treating.

66. The Tribunal asked whether this procedure was covered by the players' terms and conditions of employment and we were given, late in the hearing, a copy of the standard contract for footballers. We find from section 8 as a whole, and from 8(b) in particular, (694) that while player consent is not expressly mentioned, it is implicit in the process of information exchange about health, and indeed (if the point were argued) could be said to be necessary to give that portion of the contract business efficacy.

67. We heard about two incidents in the autumn which we mention for the sake of completeness. There was a muddle about rota and cover on 28 August 2019 (313) and apparently some minor disagreement between the claimant and Mr Bartlett at a match at Potters Bar in October (347): as this was not mentioned for another three months (ie at the claimant's meeting with Mr Wigley on 13 January), it cannot have appeared very serious at the time. Mr Bartlett was Head of Football Operations, and during her employment with TIC, the claimant had relatively little contact with him.

68. The claimant's probationary period ended in early November. There was no meeting or discussion. Her appointment was not confirmed, nor was her probation extended. The claimant found in November 2019 that she was pregnant. Perhaps with an eye on the need to establish her working rights we note that on 27 November she emailed HR to say that she had not yet received her contract of employment (316). We noted that on 29 November Mr Cerullo sent the claimant, and other members of the physiotherapy team, a rota and schedule for the following month (319), which we take as an indication that everything was proceeding as normal up to the beginning of December 2019.

69. At some point in December the claimant told Mr Currie, then Head Coach of the respondent's team, that she was pregnant; she gave the information in confidence and Mr Currie respected the confidence, understanding that the claimant had not yet reached twelve weeks (591), and that she would in due course tell him that confidentiality no longer applied.

70. Early in December, the claimant had work concerns which she wished to discuss with Mr Cerullo among others (318). On 9 December, Mr Cerullo reported that the claimant had been absent from work without authority. It appears that the claimant met Mr Cerullo and Ms Ram first thing on 10

December (323), after which she had a separate meeting with Mr Kleanthous one to one. Mr Kleanthous understood that differences had arisen between the claimant and Mr Cerullo; and when, in June 2021, Mr Cerullo was interviewed as part of the claimant's grievance process (542) he confirmed that there were issues around the claimant's expectations of her role. The main point identified by Mr Cerullo was that the claimant wanted to do more work with BFC and its players than necessarily followed from the role in TIC to which she was appointed on 5 August.

71. The details of that point are less important than its resolution. The claimant met Mr Kleanthous on 10 December, and it was agreed that she would with immediate effect cease to be employed by TIC, and become an employee of the respondent. Mr Cerullo understood the next day that that had happened (326). The claimant had not, at that point, been issued with a contract by TIC. On 17 December she wrote to Ms Roberts-Pink to confirm that her employment had been moved from TIC to the respondent, and asked for a contract. In that context she wrote the following (330), which she said in evidence (discussed below) was at least partly untrue,

> "I desperately need it. We are in the process of moving house and I need a contract to show them. I didn't have one for TIC either and have been employed since August so I currently have nothing which is delaying the process and causing us a lot of stress.
>
> Please could you ensure this is sent across to me today?"

72. In the event, the claimant was issued with two documents. She was given a BFC contract dated 20 December, which gave a commencement date of 1 December, and which the claimant signed on 20 December. She was also given a TIC contract, giving a commencement date of 5 August, which was also dated 1 December. The bundle copy was unsigned (279, 291). Later in the month Mr Kleanthous wrote that the claimant had left TIC at the end of November and had started with the respondent the next day (331). He said in evidence that fixing those dates was an administrative convenience.

73. There has been an issue as to whether the claimant had continuous employment between TIC and BFC. It is agreed that they are associated employers. Mr Kleanthous' evidence was that it was the practice of the group that if an individual moved from one group company to another, their employment was broken by a period of unemployment of at least a week, with the consequence that they did not join the new employer with continuity from the previous one. While that may have been his practice, and his intention in this case, the entirety of the contemporaneous paperwork says the opposite. The claimant had never been issued with a TIC contract; and her BFC contract stated that her start date was 1 December; that was certainly what Mr Kleanthous thought at the time. Mr Kleanthous explained that he directed that the claimant should be paid for the whole of December by BFC, so that she would not lose a week's pay just before Christmas. That is consistent with the claimant's case on continuity. The start date of 1 December was confirmed later (on 7 January) by Ms Wilde (333). We find that the claimant's employment was continuous from 5 August 2019, and

was not broken in December, and that her employment with BFC, which began on 1 December, was deemed to have begun on 5 August. We also find that no one at the respondent gave this issue any real thought at the time, and that Mr Kleanthous thought that he had arranged for continuity to be broken, while at the same time ensuring that the break did not leave the claimant out of pocket.

74. We also find that there was a failure on the part of the respondent to clarify with the claimant the practical implications of her change of employer. We have referred above to the apparent absence of onsite HR support. With the change of company came possible changes of responsibility, job description, line management and possibly other implications. There was no evidence of any handover information being given to the claimant. Of particular interest is an email from Mr Kleanthous on 21 December to five recipients, including Mr Bartlett and Ms Wilde, but not including the claimant, stating that following the move the claimant (331), "should no longer be using or accessing any TIC facilities or products. She should organising *(sic)* her own department under Richard [Bartlett] as Barnet FC ops manager." We accept that that made good organisational sense to the respondents, for reasons understood by the six who saw the email; but there was no evidence that anyone explained it to the claimant.

75. We accept that Mr Kleanthous and Mr Bartlett understood that one logical consequence of her move was that the claimant came under Mr Bartlett's line management. Her BFC contract, unlike her TIC contract, did not annex a job description with a line management structure. This became an important issue very early in January, partly because of tensions between the claimant and Mr Bartlett, and partly because the claimant, who was proud of her professional qualification, quickly raised an objection to being line managed by a person without that or a similar qualification.

Events in January 2020

76. On 1 January 2020, Mr Bartlett was a spectator at BFC's game against Borehamwood. The claimant went on to the pitch to assist a player. Mr Bartlett saw that she was accompanied by Ms Buckland. He thought that that was strange (534, 546) but took no further action. Ms Buckland had a contract of employment showing that she had been appointed to the post of laundry assistant (690), but she was also a graduate qualified sports therapist, who had undertaken internship with BFC for her studies and clearly regarded her employed role as an opportunity for gaining experience of sports therapy, even if that were not her formal role. That has the sound of an informal workplace arrangement. When later questioned about coming on to the pitch, she said that she was entitled to do so in the role of supporting the chartered physiotherapist.

77. It will be recalled that the claimant had disclosed her pregnancy in confidence to Mr Currie in December. At some point in the first few days of January, she gave him permission to tell the BFC first team, and he did so. Certainly, they knew of the pregnancy by 10 January. On the morning of 10

January, the claimant contacted Mr Wigley, and asked to speak to him on Monday 13 January about a safeguarding issue.

78. Events critical to this case took place on Thursday and Friday 9 and 10 January 2020. The claimant's evidence was that earlier that week, and definitely before 9 January, she had told Mr Bartlett that she was pregnant. She could not be specific about when or where she did so, or about any wider context: her evidence was that she definitely did so on one of the first three days of the week. Mr Bartlett denied that she had. His firm evidence was that the first he knew of the pregnancy was that the claimant told him shortly before they both got on the team coach to travel to Farsley on Friday 10 January in advance of the match against Farsley Celtic the following day.

79. The claimant's evidence was that she needed to inform Mr Bartlett that she was pregnant before the coach journey on 10 January, so that he could make arrangements for the coach to make a stop or additional stops if need be. Mr Bartlett's evidence was that on the coach journey, in accordance with normal practice, he sat at the front of the coach behind the driver and did not mix with the team, and that it was a minor matter to ask the coach driver to make a stop. Certainly, it did not require any pre-planning.

80. It was perhaps in recognition that the evidence on this point for the claimant was not strong that in closing submission and, we think, for the first time, Ms Iqbal suggested that gossip about the claimant's pregnancy must somehow have reached Mr Bartlett before 10 January. That was speculation, of which there was no evidence, and which was not the case put to Mr Bartlett. We find that that suggestion has not been made out.

81. Our finding on this point is that we reject the claimant's evidence and we accept that of Mr Bartlett. We attach weight to the vagueness of the claimant's evidence about when she informed Mr Bartlett, in contrast with Mr Bartlett's specific recollection of when he was told. We accept that he did not know about the pregnancy until the morning of 10 January. It follows that we find that the events of 9 January, on which there was considerable focus at this hearing, took place at a time when he was ignorant of the claimant's pregnancy. It follows that we must find that pregnancy cannot have been any part of the reasons for his actions that day, and that all claims based on that proposition, and on any event on 9 January, fail. We now turn to the events of Thursday 9 January.

Thursday 9 January

82. A first team training session took place that morning. It was a usual duty of the claimant to attend. The claimant was treating players at hydrotherapy. She did not attend the training session and Mr Staggs of TIC covered it. Mr Currie was Head Coach. He later said (591) that the claimant would not have been absent without having told him, and obtained his permission, but he had no recollection of the specific event.

83. Mr Bartlett did not know that the claimant would not be at the training session. He regarded himself, correctly, as the claimant's line manager,

although there was no evidence that the claimant had been told this. We accept that as a matter of principle the Head Coach could not be line manager of the physiotherapist, because of the conflicts inherent in their roles (Mr Kleanthous reminded us in evidence of the incident at Chelsea FC, involving Mr Mourinho and Dr Carneiro).

84. At around 11am that day Mr Meir and Mr Bartlett were walking past the training area. They saw player A (in their words) "broken down" and helped off the pitch by another player and by Ms Buckland, but not by the person they thought appropriate to undertake the task, ie the claimant.

85. At 10:33am, coincidentally, the claimant emailed Mr Bartlett to say "I need to take [player B] to see [the consultant] asap. Would it be possible to book an appointment with him for early next week?" (336).

86. Mr Bartlett replied at 10:46 to ask the claimant, "Can you please tell me the results of the scan and I will action accordingly" (340). (It was explained to us that TIC, unusually, had facilities to undertake its own scanning.)

87. The claimant had a conversation with Mr Meir at around 11:45, and then had a telephone conversation with Mr Bartlett. Mr Bartlett put the phone on loud speaker, which was not unusual for him, and the conversation was therefore overheard in full by Mr Meir, who shared an office with Mr Bartlett. The conversation became heated to the point at which the claimant hung up in mid conversation. The point of the disagreement was that Mr Bartlett wanted information about why B needed to be seen, and also wanted to arrange for him to be seen that evening. The claimant's responses were two-fold. One was that the player was upset and that it would upset him more to be seen the same day; and secondly that as the information in question was medical, she was duty bound not to share it with Mr Bartlett, who was, in her words, 'not medical' and therefore not entitled to it.

88. On the first point, it seems to us a matter of common sense and experience that anyone, no matter how upset, should see a doctor sooner rather than later. That was Mr Bartlett's view, and we agree that it was a reasonable one. There was no evidence, beyond the claimant's impression, that the player had moved from being understandably upset by his injury to experiencing a clinical impact on mental health as she suggested. On the second point, we neither share nor understand the claimant's concern. There are many settings in which a person with a professional qualification reports to, and shares confidential information with, a person without such qualification. (As we pointed out, that point was referred to repeatedly in press reports of the trial of Nurse Letby, which took place at the same time as this hearing). It seemed to us that that proposition is inherent in the world of professional sport.

89. After the conversation had been ended, Mr Bartlett emailed the claimant at 12:07 (335). He again asked for a medical description of the player's injury and explained why he wanted it. Although he commented that he "did not appreciate" the claimant hanging up on him, he said no more about that aspect.

90. The claimant replied nearly two hours later (334) with an email, in which she partly conceded the point and provided the medical information, but also made clear that she did not accept, and resented, being managed by a non-medical person. She wrote, among others,

> " .. I requested an appt for early next week … The reason tonight is not essential is based on medical grounds; something I appreciate you do not fully understand yet tried to explain to you on the phone but to no avail. I will happily explain in simple medical terms the reasons for this if I will be listened to."

91. That was unusually robust language for an employee of less than six weeks actual service to use to a member of senior management; it was also, as the claimant did not appear to appreciate, even at this hearing years later, rude and patronising.

92. In the event, Mr Bartlett arranged for the player to be seen that evening, and gave evidence that the prognosis turned out to be less drastic than the claimant had feared. We make no finding on his assertion that the player's recovery was assisted by being seen that day (as Mr Bartlett had insisted) rather than the following week (as the clamant had suggested), beyond saying that that sounds like common sense.

93. A side issue arose as to who else overheard the speaker phone conversation. Mr Meir was in the room, because it was his shared office, and it was not unusual for Mr Bartlett or Mr Meir to work on speaker phone.

94. Two members of the press department, Mr Fowler and Mr Rowe, appear later to have told the claimant that they were in the room at the time and overheard the conversation. The grievance investigation report in the summer records that Mr Day, the investigator, had seen written statements from both to that effect. The statements were not disclosed, and seemingly not pursued before this hearing. The respondent's inability to produce them leaves us with little alternative but to find that there was no direct evidence before us to contradict the unanimous evidence of Mr Meir and Mr Bartlett that no other person was in the room with them during the speaker phone conversation. In the overall picture of this case, this seemed to us a much less important point than it was to the parties.

95. It was common ground that the team players who were on the coach on 10 January knew about the claimant's pregnancy before the journey. It was also common ground that Mr Meir and Mr Bartlett travelled on the coach, and were dropped off, and met club supporters at a pub on the way to the match.

Meeting on 13 January

96. On 12 January Mr Bartlett told Mr Wigley that the claimant was pregnant. We accept that he did so because he understood that he was the claimant's line manager. He could see the potential risks to the claimant of working for BFC as a physiotherapist whilst pregnant. He considered that Mr Wigley as safety officer had a duty to know, and that he was duty-bound to tell him.

We accept that the claimant had not asked Mr Bartlett to keep the pregnancy confidential; and that as the pregnancy was discussed freely and openly on the coach journey, Mr Bartlett had absolutely no reason to think that he had been given the information in confidence.

97. As stated, the claimant met Mr Wigley on 13 January. His handwritten notes are at pages 347-348. We accept that they are a broadly accurate summary, not a transcript.

98. The claimant told Mr Wigley about the Potters Bar incident the previous October. She reported that an injured player was waiting for an ambulance, and that rather than wait, possibly for hours, Mr Bartlett escorted the player through a public area where fans were present, in order to transport him for medical help. Her point was that this was contrary to procedure. Mr Wigley asked the claimant if she wanted to make a complaint and she did not. They agreed that an email would be sent about the importance of adhering to procedure unless there was a recorded reason for departure from it.

99. The claimant brought up the topics of player B and the speaker phone conversation. Mr Wigley's note is "SH unhappy their discussion which was heated overheard." The claimant again said that she did not want to make a complaint but wanted the conduct in question stopped. Mr Wigley agreed, and three days later Ms Wilde emailed all staff to advise that speaker phone should not be used for any call in which confidential business might be discussed (368). That was regarded, at the time, as a prompt and satisfactory resolution of that point.

100. We agree with Ms Gilbert that Mr Wigley's note of the meeting is slightly ambiguous, and suggests that the claimant's concern was that she had been overheard in a conversation which was embarrassing because it became heated and she hung up. We agree that that is a possible interpretation. The note does not in fact record any concern about being overheard in a confidential medical discussion.

101. The claimant told Mr Wigley about another issue, which related to the coach journey to Farsley the previous Friday. The issue was, as we understood it, an amalgamation of points all relating to Mr Bartlett: that he travelled on the coach so as to avoid driving, and be able to have a drink, that he had delayed the whole team on a previous occasion, and that he had been rude to her. Again the claimant is recorded as confirming that she did not wish to make a complaint. It was agreed that the person for the claimant to speak to about Mr Bartlett, if she wanted to, was Mr Kleanthous.

102. The note records that the claimant asked Mr Wigley if he knew that she was pregnant; that she was "unhappy" when he confirmed that he did, and that Mr Wigley, "explained must be a RA for any pregnant female". That referred to risk assessment. Mr Wigley then asked to spend a working day with the claimant so that he could tailor her risk assessment. She agreed in principle to make an arrangement. Mr Wigley's note records twice that the claimant would contact him to arrange her risk assessment day. His evidence was that she did not make contact, and that he unsuccessfully tried to contact

her by WhatsApp to make the arrangements. We accept that the arrangement was not made, for which we attach no fault to either party. It appears that there was a muddle or misunderstanding; and in any event the claimant went off sick the following 21 January, and never returned.

103. The final matter of substance reads: "General unhappiness at RB and his manner to her and staff. Discussed options again. No official complaint but said could be review in three weeks" (348).

104. It is obvious from Mr Wigley's note that the claimant was angry with Mr Bartlett for telling Mr Wigley that she was pregnant. We could not understand her anger, given that her news was widely discussed during the journey to Farsley; and that as line manager, Mr Bartlett was duty bound to inform the Safety Officer, and the Safety Officer had a duty to receive and act upon the information. The claimant's anger may reflect the stage which her hostility to Mr Bartlett had reached. It is also clear that she did not see either that it might be sensible to apologise for hanging up on him, or that what we have called her rude and patronising email reflected poorly on her professionalism.

Emails of 14 January

105. On 14 January Mr Cerullo wrote to Mr Kleanthous, Mr Bartlett and Ms Ram to point out that as Mr Staggs had covered the BFC training on 9 January (from which the claimant had been absent) and as Mr Staggs was employed as a sports therapist by TIC Physio, TIC would raise an internal invoice to BFC for his services. He asked if Mr Kleanthous knew that Mr Staggs had covered because Ms Halton was off site with players delivering hydrotherapy. That email had the effect of reviving the claimant's absence on 9 January as a live, financial issue.

106. By email a little later, Mr Bartlett raised process questions; had a purchase order been raised for Mr Staggs' services and if so by whom; why was the claimant not present at the training session; why was a player who had broken down been escorted from the pitch by Ms Buckland. Mr Cerullo replied immediately to state that there had been a breach of process, but not on his authority (350). The claimant replied shortly afterwards, stating her position, and her decision to deliver hydrotherapy. She went on to assert that Ms Buckland was a sports therapist and a key member of the medical team, to say that no player had 'broken down' and that "all management staff are aware if I go offsite." The answer suggested that Mr Staggs' work was not chargeable to BFC.

107. This was not a tactically wise response, and Mr Bartlett replied by querying Ms Buckland's qualifications and registration. He pointed out that he had personally seen player A at the time, and that his opinion was that he had broken down. The claimant replied later in the day (353) answering these points, and closing her email:

> "This again highlights which members of staff should and should not be involved in medical matters. I have already had meetings and brought this to the attention of the necessary people, and I hope this will be resolved in the upcoming weeks."

108. This referred back to the claimant's patronising email, and although expressed less confrontationally, repeated the challenge to Mr Bartlett's right to manage the claimant or her work. There was no evidence at any stage to support either of the points which she made in the first half of the second sentence.

109. Mr Kleanthous responded the same day (352) with an entirely sensible constructive email which stated, "We need to get a few ground rules in place here so that we are not all chasing our tails" and concluded, "This would have been a good exercise and helping to further define everyone's roles and responsibilities".

110. The next day, the claimant went to Mr Bartlett to ask for purchase orders for player A and player C to be seen by the club doctor (362). She gave no other information about either, despite the exchanges of the previous week. It, therefore, should not have come to a surprise to her that Mr Bartlett replied, "Can I have a descriptive reason for each player's visit to the doctor".

111. To this the claimant replied (361),

> "I'm not allowed to share reasons for players doctors visits outside of the medical dept as they are highly confidential. These appointments are both necessary and I would appreciate a PO being raised for them both. If this is an issue I am happy to discuss with the chairman."

112. Mr Bartlett replied (360), emphasis added,

> "By all means feel free to discuss this with the Chairman but I am confident he will inform you that <u>whether you like it or not</u> my role as Head of Football Operations means that I am part of the medical management team and must be fully aware of what players are seeing a Doctor for, unless it is for personal reasons only, of which these are not, and also its worth reminding you that I am your direct line manager and no one is seen outside of your physiotherapy services without it coming through me and being authorised through the proper channels.
>
> In simple terms, no player will be seen by any outside organisation including TIC Health without my prior authorisation."

113. The claimant replied, perhaps expediently, saying that player's A appointment was "for personal reasons", and Mr Bartlett confirmed the appointment.

114. The claimant complained that a number of Mr Bartlett's emails, including the "like it or not" email were aggressive in tone. We do not agree that in any email to the claimant Mr Bartlett crossed a boundary from firm and proper management into aggression or any other misuse of his authority. The claimant had been told the previous week what the referral procedure was,

and she had come back in disregard of the procedure. We find that Mr Bartlett's language, including the phrase, 'whether you like it or not,' was factually accurate, appropriately expressed, within the bounds of his authority, and within the scope of reasonable management.

Meetings on 28 January

115. On the morning of 21 January the claimant emailed Ms Wilde to ask for an urgent phone call. They spoke and the claimant told Ms Wilde that she was pregnant. The claimant said that she was having difficulties and wished to speak to or meet Mr Kleanthous. Ms Wilde said that she would call her back later that day, after she had spoken to Mr Kleanthous.

116. The same morning the claimant emailed Mr Kleanthous, asking for an urgent meeting. He replied in the small hours of the next morning to offer a meeting the same evening; to which the claimant asked if the meeting could be the following week, a delay of a further five days. Mr Kleanthous' promptness in answering speaks for itself.

117. On the same afternoon (21 January) the claimant went to see her GP, and was signed off sick for the first time. She never returned to work after that date.

118. The claimant followed up her conversation with Ms Wilde with an email at 8.14 the next morning (389). The claimant wanted Ms Wilde to know that there was no physiotherapist cover; she also repeated her request for a meeting to sort out how things would go forward over the coming weeks. Ms Wilde replied at 8.52 (388):

> 'My apologies for not getting back to you yesterday. I only managed to get a brief conversation with the Chairman due to meetings. I hope to see the Chairman tomorrow and will come back to you tomorrow.'

119. Ms Wilde followed up the next day, 23 January, to offer a meeting date with the Chairman the following 28 January, which the claimant accepted.

120. On 28 January the claimant was due to have a meeting jointly with both Mr Kleanthous and Ms Wilde. The meeting was on site; and it turned out to be the last occasion on which the claimant visited the site. Ms Wilde was late at the start of the meeting and therefore Mr Kleanthous asked the claimant to have a one to one conversation with him. After Ms Wilde's arrival there was a meeting of all three; after that, Mr Kleanthous and Ms Wilde had a separate meeting. The events at these meetings are the basis of issues 12.5, 12.6, 12.7, 12.11, 12.12 (in part) and 12.15.3. All of those claims fail for reasons which are set out below.

121. We find that the claimant attended the meetings on 28 January with a clear understanding of what she wanted. She had a prepared agenda, and had some understanding of maternity rights; Mr Kleanthous understood that there was to be some discussion about the practicalities of a pregnant physiotherapist working in a football setting, and he had no understanding of

any legal technicalities. When he described the claimant as 'well versed' in her rights, we find that he accurately contrasted her preparedness on the topics with his own unpreparedness.

122. The claimant told Mr Kleanthous that she wanted to continue working within the football setting, but not with Mr Bartlett. Mr Kleanthous understood that the layout of the premises was such that as the football physiotherapist, the claimant was based in a treatment room next to the players' changing room, a location which he considered inappropriate and potentially unsafe in light of her pregnancy. He explained that the area around the changing room could be wet and muddy, and that what he called the 'boisterous' atmosphere of the changing room might spill over into the next area.

123. Mr Kleanthous therefore suggested that the claimant should continue her treatment duties, but in the more clinical environment of the TIC premises, which were at the other end of the same building as the football changing room. She should for the time being not do pitch side duties. He also indicated that she would continue to do TIC work. The claimant expressed a concern that if that were the position, and if she were not doing pitch side duties, there would not be enough for her to do. She did not challenge the proposition that pitch side duties might not be feasible in light of any risk assessment which took place.

124. The claimant proposed rather that she should be placed on maternity suspension immediately, which would last until the start of her maternity leave, at which point there should be a severance agreement, which would include a settlement payment.

125. Mr Kleanthous did not know what to say or do with these proposals. He certainly could not answer them on the spot. He did not know the technicalities of maternity suspension and he did not like the sound of a settlement agreement. He said that he would want to take advice, including advice on whether a settlement in those circumstances was appropriate or proper.

126. Ms Gilbert pointed out a curiosity in this part of the claimant's case. It was that her evidence on who suggested settlement had done a complete U-turn (our word, not counsel's). In her written grievance of 1 April (444) the claimant had written that she had proposed settlement. That was also in the particulars of claim (35) and was confirmed in her witness statement. In an email to Mr Kleanthous of 6 February she had referred to (emphasis added) "your proposal" and Mr Kleanthous had replied immediately saying that he had made no settlement proposal, but that she had (412-414). After taking the oath at this hearing, the claimant had asked to remove the sentence in her witness statement which said that she had proposed settlement, and to replace it with evidence that it was Mr Kleanthous who had proposed settlement.

127. Our finding is that the claimant arrived well prepared at the meeting, with an outline understanding of her legal position, and a clear idea in her own mind of what she wanted as an outcome. She wanted to leave her employment

soon, on the best terms that she could get. Mr Kleanthous was, given the scale of his business interests, in our judgement surprisingly naive in his understanding of employment disputes. He had no reason or incentive to propose severance or settlement, and we find that he did not. We find that the proposal for severance and settlement which was made on 28 January was made by the claimant.

128. The claimant asserted that Mr Kleanthous had suggested that she should "fail probation" in order to go back to being employed by TIC. We accept his denials that he made either of those suggestions. As said above, we find that he proposed a relocation of the claimant's work, but not a change back to her previous employer. He had absolutely no reason to suggest a failure of probation because that would have nothing to do with the suggestion which he had made. He was also aware that as the claimant had only worked for BFC for about three weeks, the question of probation for BFC was premature.

129. Apart from that, there was a courteous conversation about the topics which are conventionally discussed in any setting where a family is expecting a baby: the practicalities of accommodation, the family setting, work and travel and such like. The claimant complained that Mr Kleanthous' questions were inappropriate, intrusive, and indicative of a stereotype about the working role of new mothers.

130. We disagree. We accept that the claimant's partner was mentioned in what we have called the conventional conversation, and that on being told that the partner worked for a private investment bank, Mr Kleanthous commented that the family would be financially secure.

131. There was a second curiosity about the claimant's evidence. Mr Kleanthous' evidence was that the claimant mentioned that she was moving house and that he understood that they were moving closer to her partner's work. In evidence the claimant said that there was no house move, and she had not discussed this with Mr Kleanthous. But as set out above, at #71, she had written, when pursuing her contract of employment, to state that it was essential because of a house move. When asked about this by the tribunal, her answer in evidence was that the letter was untrue, and that the real reason for wanting a contract of employment was to have proof of an address in the area of her local hospital. That answer did not make sense for a number of reasons. Proof of address can be found on many items which are accepted as giving current information (eg driving licence, utilities, Council tax); and if that were the reason for the request, the claimant could just as easily, on her version, have written a half-truth ('NHS treatment') rather than an untruth. Our finding is that we accept Mr Kleanthous' evidence on this point.

132. Overall, when we consider the meetings on 28 January, we accept Mr Kleanthous' evidence. We find that there was an amicable conversation in general terms before the arrival of Ms Wilde. After Ms Wilde arrived there was a more structured conversation about how matters were to proceed. Ms Wilde wrote to the claimant on 31 January (393) reiterating that there

would be risk assessments (in the plural), and that she would relocate to work in the TIC premises. Ms Wilde's email concluded,

> "Lastly you suggested that you would prefer to receive an ex gratia payment and leave employment altogether, and we are prepared to come to some arrangement with this, subject to confirmation that such payment would be legal and allowable under employment law."

133. The claimant's evidence was that she gave Ms Wilde her MATB1 form that day, and she said that she had a good recollection that she had done so in the workplace, and it must have been that day because that was her last day in the workplace. However, as Ms Gilbert pointed out to her, as her due date was 23 July, the claimant cannot have been in possession of a MATB1 form on 28 January. The claimant had no answer to that line of questions, and we find that she did not give the respondent a MATB1 that day.

Emails after 28 January

134. The claimant wrote to Ms Wilde on 3 February stating among others "I do not feel I am able to return to work alongside Mr Bartlett. " She also repeated her concerns about confidentiality, partly about her pregnancy but also wrote (397),

> "I am also concerned that players' medical information is not being kept confidential by him which is again a serious breach of professional conduct."

135. The claimant wrote to Ms Wilde on 4 February, saying, among others (395),

> "My priority is agreeing on a settlement in a quick and amicable way in order to prevent this matter for ongoing and causing further stress".

136. Mr Kleanthous wrote to the claimant on 4 February with his account of the first meeting, which we accept was broadly accurate. We note that again the claimant was asked whether she wanted to make a formal complaint about Mr Bartlett, but said that she did not, as it was just a matter of making Mr Kleanthous aware of her concerns.

137. In reply to the claimant's email of 4 February, Mr Kleanthous wrote (409):

> "I asked twice, once with Sharon [Wilde] present, whether you wanted to make a formal complaint about Richard Bartlett and you said you didn't, but your note suggests you feel this issue is still alive.
>
> As you are aware, Richard had previously raised a number of issues regarding your own conduct prior to your illness, so I think therefore it's best for all parties that these matters are properly investigated and documented.
>
> I will ask HR to begin the process but extend the timetable as necessary until your return to work. It's important we do everything properly and as the allegations are quite serious would like to expedite the matter as quickly as possible whilst always ensuring we are comprehensive and thorough."

138. This email presents as an attempt to express a sensible and practical way forward. The claimant in reply on 6 February at 5:29pm sent an email (414) which the claimant said was written before she had taken legal advice, but which we find was plainly not drafted by her, and plainly was drafted by someone who, if not a lawyer, was at least experienced in the style of lawyers' correspondence. It was relied upon as containing protected acts (issues 33.B and 33.C). Its style was legalistic, and its tone implied the likelihood of conflict.

139. The letter opens,

> "Having read through the emails and the suggested settlement proposal from the Chairman, I have been advised to request the following information ..
>
> I .. have obtained advice regarding my circumstances… [I am] a young pregnant female with no legal or employment knowledge and I want to ensure that I am not prejudicing my position or personal circumstances."

140. The claimant then asked for eight categories of company document, along with information about "Process to request a data request search" as well as "Contact details for the person who deals with PR for the club".

141. After the request for information, the claimant wrote:

> "In relation to the reason of a possible grievance (as asked by the Chairman) I will need to consider the breaches against the respondents and will do so once I have read the documentation relating to a grievance at/to the club – having raised the issue I am assuming Barnet FC are carrying out an investigation as required already under whistleblowing procedures. So on this point, I also reserve my decision pending the documentation requested.
>
> I am finding it very difficult to understand why my pregnancy has caused a change in attitude from the club."

142. Mr Kleanthous replied swiftly (412),

> "The first paragraph says you are considering my settlement offer but I have not made any such offer. You made clear from the outset you wanted a settlement rather than return to work and my position was, and still is, that I would need to understand the legality of making such a payment before taking this course."

143. The claimant's email was not well thought out, or clearly drafted. We accept that there was no settlement proposal from Mr Kleanthous and that that proposal came from the claimant. While the claimant had every right to request contractual documentation, she might have realised that asking about the subject access process, and asking about the PR contact, implied a threat of formal conflict. She had not been asked to raise a grievance, she had been asked if she wished to formalise the issues which she had brought up in discussion. That is a standard procedure in a workplace. It is entirely to the credit of those who managed the claimant, including Mr Wigley and Mr Kleanthous that they understood clearly (as the claimant did not) the difference between allowing an employee the opportunity to voice a concern, and formulating a written grievance to trigger a formal process.

144. The claimant was signed off for a month on 13 February. She continued in correspondence with Ms Wilde about the documents which she had requested. Ms Wilde emailed her on 19 February to tell her that players and staff had been told not to contact her during her sick leave, so that she could recover as best possible.

Events in March

145. The claimant remained signed off sick. On 9 March Mr Cerullo informed Ms Wilde that he had been told that the claimant had gone to Dubai for her 'babymoon'. The claimant had posted the information on social media. Mr Cerullo asked was it appropriate for her to do so whilst signed off sick, because he was covering her work. At about the same time Mr Cerullo mentioned to Mr Bartlett a conversation which had been reported to him. The essence was that at some point (which Mr Bartlett thought was around 9 January) in the physiotherapy room the claimant said to Ms Buckland, "We should go sick and claim stress." Mr Bartlett reported this to Ms Wilde on 10 March and asked her to investigate. His request and explanation started with the following, emphasis added (430),

> "Could I please ask that you investigate the following with the individuals named ASAP please, as I feel it is very important in relation to the behaviour and accusations that the claimant has brought against me and the Club."

146. As Ms Iqbal pointed out, this allegation was received by Ms Wilde at, at least, fifth hand. The allegation was that the remark had been made by the claimant to Ms Buckland, overheard by Mr Hutchings, reported to Mr Cerullo, reported to Mr Bartlett, and then reported to Ms Wilde for investigation.

147. Throughout March 2020 Covid-19 was spreading. On 19 March all professional football was postponed to the end of April and on 21 March the respondent's staff were placed on furlough. On 23 March the claimant notified Ms Wilde that she intended to start maternity leave and claim SMP on 3 May. The national lockdown was announced on the evening of 23 March. The respondent sent the claimant a standard letter asking for consent to go on furlough on 26 March. The claimant signed and returned it on 1 April (435) and was on furlough from that day, although she did not receive confirmation until a little later in April. She was paid furlough pay for the whole of April 2020.

148. On 1 April 2020 the course of this dispute changed significantly, when the claimant, through PHB, submitted a lengthy formal grievance. We therefore take that date, 1 April 2020, as an appropriate one on which to review and reflect on the position as it then stood. We do so, first by setting out our conclusions on the factual points in the list of issues which took place on or before 31 March; and secondly with an overview of the position.

Discussion of issues arising before 31 March 2020

149. We here set out our findings on the pleaded factual issues. Where necessary, we then go on to our conclusions on the cross-referenced legal issues.

150. Where we find that the factual event either did not happen at all, or did not happen as pleaded, we need not then go on to analyse under each head of claim. We add, as a general overview, that in our consideration of the pleaded allegations which we find did not happen, we could see no link whatsoever with prohibited matters. Where the claim was of detriment on grounds of protected disclosure, we understand that it is for the respondent to show the grounds on which the act was done or not done, and we have accepted the explanations for their actions, words and decisions which have been given by the respondents, including where they are based on mistake or misunderstanding.

151. Our task is made no easier by the list of issues. Its approach is scattergun. We take one typical example. Factual issue 12.4 is cross-referred to issues 14, 22.A, 24.A, 25, 26, 27, and 30. It will be recalled that the negative factual event was that Ms Wilde did not call back on 21 January (see #115-119 above). Instead she emailed the next morning. In a perfect world, she might be criticised for not having made a quick call on the afternoon of 21 January, to tell the claimant that she had nothing to report, and would be back in touch the next day; but we never apply a standard of perfection, and in any event, departure from the standard of perfection is not evidence of discrimination. The complaint that '*You didn't call me back'* was the most banal of everyday events of office life. It is pleaded as all of: a detriment on grounds of protected disclosure, and discrimination on grounds of pregnancy / maternity including pregnancy related illness and the exercise of leave rights, and sex, and also pleaded to be harassment related to sex. That is not just awkward pleading; it represents a lack of thoughtful analysis.

152. We preface our findings with two further over-arching findings. The claimant's approach to these events has two recurrent, fundamental flaws. We find first that there was a genuine coincidence of timing, which was that on 9 January Mr Bartlett challenged the claimant's working methods, and that the next day she told him that she was pregnant. We find that the claimant has mistaken chronology for causation, and we find that the disagreements which she had with Mr Bartlett and others after 9 January related to aspects of work, and in no respect whatsoever to her pregnancy.

153. The second flaw is that the claimant has approached the period on and from 9 January onwards with an indiscriminate lack of analysis; this has been the reason that the issues before us have included a number of banal, every day office interactions. She has fallen into the error of attributing everything at work that displeased her to prohibited factors, without considering the respondents' perspective, their reasons for saying or doing things which she disagreed with, or her probative difficulties. The claimant may have been disappointed that Ms Wilde did not phone her on the afternoon of 21 January; but she has failed to analyse Ms Wilde's emails of 22 and 23

January, whether they accord with the every day common sense experience of working life, and their impact on allegations of discrimination.

154. Issue 2.12.1 is based on the claimant's telephone conversation with Mr Bartlett on 9 January. We accept that Mr Bartlett disagreed with the claimant. He did so because that was his legitimate judgment of the questions being discussed, and he was entitled to do so. We do not agree that he was difficult or aggressive, or that his email sent at 12:07 was aggressive; we find on the contrary that it was remarkably calm in the circumstances.

155. We repeat that throughout that day Mr Bartlett had no knowledge of the claimant's pregnancy, and therefore any claim based on the proposition that Mr Bartlett was hostile to the claimant that day because of her pregnancy, and discriminated against her for that reason, must fail. We find that there has been no evidence whatsoever which drew any causal connection between the pleaded event and any of the other prohibited matters or factors which the claimant applied to it, and all claims based on this issue fail and are dismissed.

156. Issue 12.2 was that Mr Bartlett's emails of 14 January, in which he asked about Ms Buckland's qualifications, asserted that a player had broken down, and asked about the club doctor's availability, "were aggressive in nature and tone." The list of issues linked that factual assertion with a number of the prohibited factors. We do not agree that anything which we have seen in any email written that day by Mr Bartlett, (including the phrase, 'whether you like it or not' written the next day) was aggressive in nature and tone, or otherwise represented an exercise of authority which went beyond reasonable bounds. It is entirely to Mr Bartlett's credit that he did not rise to some of the language used by the claimant. The grounds upon which Mr Bartlett wrote what he wrote, in the manner in which he wrote it, was that he expressed his genuine and legitimate concerns and opinions to a direct report. We find that any claim based on the factual assertion at issue 12.2 fails.

157. Issue 12.3 has been dismissed on withdrawal.

158. Issue 12.4 is a factual allegation which complains of, "The failure of Ms Wilde to call the claimant when the claimant informed Ms Wilde about her pregnancy … "

159. It is correct that Ms Wilde told the claimant during their conversation on 21 January that she would call her back later that day after speaking to the Chairman; and it is agreed that she did not in fact call the claimant back on the afternoon of 21 January. She emailed at 8:52 the next morning to explain that "I only managed to get a brief conversation with the Chairman" and emailed again on the afternoon of the following day (23 January) to arrange a meeting with the Chairman. This is the everyday currency of a busy office.

160. The claimant asks the Tribunal to find that Ms Wilde's failure to call her on the afternoon of 21 January, at a point when she had nothing to say to her, was tainted by the prohibited factors in this case. There was no evidence whatsoever to that effect. On the contrary, it was obvious that Ms Wilde worked promptly to arrange a meeting with the claimant after she (the claimant) had turned down the Chairman's prompt offer to meet almost immediately (see #116 above). Ms Wilde's emails give a full explanation of the sequence and timing of these events, and of the grounds upon which she acted, and any claim based on issue 12.4 fails.

161. Issue 12.5 was that at the meeting 28 January Mr Kleanthous suggested that the claimant should fail her probationary period. Any claim based on that allegation fails, as we find that the pleaded event did not happen.

162. Issue 12.6 pleads that Mr Kleanthous accused the claimant of making an improper suggestion in her severance and settlement proposal (glossed by the claimant in her witness statement as implying 'that I would try to misrepresent my rights or suggest an inappropriate arrangement'). We were not addressed on whether or how the allegation survived the change in the claimant's case on who made the settlement proposal. Any claim based on that allegation fails because we find that the event did not happen as alleged. We find that Mr Kleanthous said nothing to the effect that the claimant's proposal was wrongful. He said that he wished to take advice on the legality of the claimant's proposal, a matter which he was legitimately entitled to say and do. He was also entitled to explain that he was unsure whether the proposal was correct or proper for the business. The grounds upon which he said what he said as he said it were that he expressed his genuine opinion to a subordinate. We find that this was another routine office interaction, and that the pleaded issue attaches a great deal more weight to Mr Kleanthous' language than was appropriate or proportionate.

163. Issue 12.7 referred to the conversation about the claimant's partner's work. We accept that in the course of the amicable conventional part of their conversation on 28 January the topic of the partner's employment arose, and that Mr Kleanthous made a comment about the likely level of earnings which he commanded in his sector of work. We agree that the topic arose out of the topic of the claimant's pregnancy.

164. This claim fails because we do not find that the remark was unfavourable treatment or a detriment; it was a routine comment based on a general assumption about the partner's work. We find that no prohibited factor played any part whatsoever in it. The grounds upon which Mr Kleanthous said what he said in the way he said it were that he expressed his genuine opinion in conversation. It was not clear whether the claimant relies further on a pleaded question of Mr Kleanthous saying 'whether she would still get SMP if unemployed'. Our finding is that he did not say that, or anything to that effect, because his state of knowledge about SMP was not of the level which would have led him to raise the question.

165. Issue12.8 references the claimant's right to be informed of the date on which additional maternity leave would end within 28 days of informing the

respondent of the start date of her maternity leave. We agree that that was not done (although we note that in the claimant's witness statement (#35) her complaint is that it was not done the same day). We agree that she should have been so notified. There was therefore a failure on the part of the respondent to carry out one of its statutory obligations to a pregnant employee. This was a very minor point, which took up one line of the claimant's evidence, and no cross examination. We find that we have seen no evidence whatsoever which might link this failure with any of the prohibited factors; we have however seen considerable evidence that at the time, both parties were distracted by a swathe of points and questions, and that there was error on both sides.

166. Issue 12.9 is a complaint that the respondents withdrew from any settlement discussions which were in place before 6 February 2020, and in response to the claimant's email of that day. Any claim based on that factual allegation fails, because we find that the factual event did not take place. There were no settlement discussions, and no withdrawal from discussions. Both sides had written that they wanted in principle to explore an amicable resolution. That avenue was closed off because of the disagreement about who had made a settlement proposal. If the sting of this allegation is that the claimant's 'advice' email of 6 February, with its extensive request for documents, ended active discussions, we repeat our rejection, and that that did not happen.

167. Issues 33.B and 33.C allege that the claimant's email to Ms Wilde of 6 February (414) contained protected acts. The respondents deny that either did so, relying on s.27 Equality Act 2010, which provides,

> 'Giving false .. information, or making a false allegation, is not a protected act if the .. information is given, or the allegation is made, in bad faith.'

We understand the words 'in bad faith' to mean that an allegation has been made without a genuine belief in its truth.

168. The grievance made repeated references to pregnancy, and stated clearly in terms,

> 'I am finding it very difficult to understand why my pregnancy has caused a change in attitude from the club.'

169. That is plainly an allegation which fits within the broad framework of s.27(2). While we have found that there was in fact no change of attitude towards the claimant, we have no evidence upon which to make a finding of bad faith. We find, as stated above, that she has confused chronology and causation, and that her analysis has fallen short. We find that she has convinced herself of a number of the factual bases of her claim. We find that the email did contain a protected act.

170. Issue 33.C was that the same email contained a separate protected act, which was that the second sentence said,

> 'I would like to state that I am reserving my response until after I have received the documentation and have obtained advice regarding my circumstances, as I hope you can appreciate I am a young, pregnant female with no legal or employment knowledge, and I want to ensure that I am not prejudicing my position or personal circumstances.'

The body of the email asks for policies on, among others, harassment, equal opportunity, maternity, before the final paragraph which contends (inaccurately, on our finding) that no issues about her work were raised 'until the club / individuals at the club were aware that I was pregnant.'

171. We have to read the email as a lay person's draft, without excessive legalism, and in light of s.27(1)(b). We are not assisted by the opaque wording of this portion of the list of issues. It seems to us that taken as a whole, the sense of the email is that the claimant intends to take further her allegations about a change in her treatment which she feels were the result of pregnancy. We therefore find that the email contains a second, separate, protected act.

172. Issue 33.C appears to contend that the same email includes a third protected act, that of informing Ms Wilde that, in context, she intended to take legal advice. Taking the email as a whole, we agree that the claimant told Ms Wilde that taking matters further included taking legal advice, which, in context, referred to advice on an allegation of discrimination. We agree that that would be an alternative iteration of the same protected act.

173. Issues 12.10.2 and 12.11 both complain of the respondent's failure to put the claimant on maternity suspension on or after 28 January, when she proposed suspension to the Chairman as part of her settlement package. We should bear in mind the underlying complaint here: as the claimant went off sick on 21 January, never to return, this is in reality a complaint that the respondent did not trigger a means for her to remain employed on full pay until she started her maternity leave.

174. We also accept that Mr Kleanthous did not, on 28 January, know what maternity suspension was. The claimant had no immediate right to suspension, as is perhaps implied by her claim. The respondents were entitled to take advice, reflect, and conduct risk assessment before responding. We have set out above the email exchanges which followed after 28 January. Nothing came of any part of the claimant's package proposal, for reasons set out earlier. We agree that nothing came of the claimant's proposal for maternity suspension.

175. Although no risk assessment ever took place, it was the immediate understanding of the Chairman, as well as Mr Bartlett and others, that pitchside work would not be appropriate during the claimant's pregnancy. The claimant agreed. She had no objection to working at the TIC premises as a location, her objection was that her experience between August and December showed her that 'there would not be enough work to do.' Mr Kleanthous' response was that she would have the opportunity to undertake work for members of the public, as she had done previously.

176. We must not lose sight of the fact that this discussion was hypothetical, as the claimant never in fact was at work after 28 January. It seems to us that the respondent's proposal was work which would have been suitable and appropriate. If the balancing exercise was, in reality, between (*As I cannot undertake work pitchside, I should be suspended from all work on full pay*) as opposed to (*As you can undertake off pitch work, you should continue to do that, and such further work as may arise, for the limited period available before the start of maternity leave)* the latter proposal seems to us both suitable and appropriate.

177. Maternity suspension implies two elements: being relieved of the obligation to work, and being paid in full. The former did not arise in practice, as the claimant was off sick from 21 January onwards. As to the latter: we were not shown full figures at this stage, but it appears clear that the claimant was paid in full for January, and was paid full furlough pay from 1st April. However, the claim fails because the requirements of ss.64 to 66 ERA, set out above, never arose. There was no relevant recommendation, and it has not been shown to us that there was a relevant requirement; alternative work was available, which was suitable in principle: the claimant's only concern was that it was insufficient in volume. The reason that the respondent did not progress the issue of maternity suspension was that the claimant's proposals of 28 January came apart in the events set out above, and was wholly unrelated to any prohibited factor.

178. We therefore find that the claims fail because it has not been shown that the conditions for maternity suspension had arisen. That is also the grounds for the claimant not being placed on suspension. If the claimant had returned to work, the respondent had a suitable alternative available, which was that, subject to risk assessments, she relocate her workplace to the TIC. She would therefore have been able to carry out the full range of professional work, on the same terms and conditions as before.

179. Issue 12.10.1 pleads the failure to recognise the claimant's continuity of employment. We agree that the respondents did not recognise the claimant's continuity of employment. We have found, for reasons set out above, that they were wrong to do so. We have found that the reason (and the grounds) was mistake: Mr Kleanthous did not understand that his decision to back date the claimant's employment to 1st December, and to ensure that she was paid in full for December, ran contrary to his intention to break continuity. As stated above, the respondent's employment paperwork was incomplete, and there was nothing evidential or in writing to support that there had been a break. We find that there has been no evidence whatsoever which drew any causal connection between the pleaded event and any of the prohibited matters or factors which the claimant applied to it, and all claims based on this issue fail.

180. Issues 12.10.3 and 12.15.3 were both predicated on the claimant having given Ms Wilde her MAT B1 on 28 January. As we find that she did not, we find that the factual basis of both claims did not happen, and therefore those claims both fail.

181. Issue 12.10.4 was dismissed on withdrawal.

182. Issue 12.12 complained first that Mr Kleanthous pressured the claimant into raising a formal grievance; the verb 'pressure' implies an improper use of his authority. Any claim based on that allegation fails because we find that the pleaded factual event did not happen. In accordance with good practice, including that endorsed by ACAS, Mr Kleanthous, like Mr Wigley before him, heard out what the claimant wanted to say about her concerns, and then offered the claimant the choice of submitting a formal grievance, (which she rejected). The second half of issue 12.12 is the same point as issues 12.14.2 and 12.15.2, and we deal with it below in that context.

183. At issue 12.13 the claimant complained of failure to furlough the claimant from 1 April as opposed to 11 April. We accept that the claimant was on furlough from 1 April, when she returned Ms Wilde's standard letter (435). We accept that she was fully paid for furlough for the month of April**.** The claim fails because we find that the pleaded event did not happen. We accept that there was delay in processing her furlough and in informing her. We recall that at that time, which was the second week of the national lockdown, uncertainty about the furlough process was commonplace. As workplaces were not functioning fully, the respondent may well, like many, many others, have experienced delay in its routine administration. We do not accept that the claimant, in those circumstances, experienced a detriment, when considered objectively. There was nothing whatsoever which linked this minor event with any of the prohibited factors or matters.

184. We deal separately, below, with issues 12.14 to 12.21, which post-dated 1 April 2020. We have found it more convenient to set out our deliberations and conclusions on them in the body of our chronological findings. Before we resume chronology, we turn to the protected disclosures relied on. They are set out at issues 20.A.1 and 20.A.2.

185. Issue 20.A.1 was that the claimant made two protected disclosures during the meeting with Mr Wigley on 13 January. They were in short, (120) 'that Mr Bartlett had improperly divulged and failed to keep confidential sensitive medical information about a player and about C's pregnancy, and that this was a breach of the respondent's legal obligations with respect to the confidentiality of medical records and data protection.'

186. We agree that that is a summary of part of what the claimant said to Mr Wigley on 13 January. We find that the claimant had a reasonable belief that Mr Bartlett had divulged information about a player's injury to, at least, Mr Meir, during the loud speaker telephone conversation. We agree that the claimant had a reasonable belief that the disclosure was made in the public interest, and showed a breach of a legal obligation to maintain medical confidentiality. We find that the claimant had a reasonable belief that the disclosure engaged the interests of all players in their dealings with a senior member of management, and a reasonable belief that disclosure of medical information to a person without medical qualification was a breach of a legal obligation. We find that the claimant made a qualifying disclosure to Mr Wigley about breach of players' medical confidentiality.

187. We distinguish however, as the claimant did not, between the information about her pregnancy, and players' medical information. We accept of course in principle that the claimant was entitled to choose whom she disclosed her pregnancy to, and when. Nevertheless, when we consider the reasonableness of her belief about this point, we must take account of the evidence that the claimant had before 13 January released Mr Currie from confidentiality, and that her pregnancy was a topic of chat on the journey to Farsley, and therefore public knowledge to a large number of colleagues. We have found that she was angry that Mr Bartlett told Mr Wigley about it, although we suspect that her anger was driven more by her animosity to Mr Bartlett than by anything else. We do not agree that the claimant could have a reasonable belief either that Mr Bartlett's further disclosure to Mr Wigley about her pregnancy was a matter of public interest, or a reasonable belief (irrespective of whether well founded) that it gave rise to breach of a legal obligation. We find that the claimant's response to being told that Mr Bartlett had disclosed her pregnancy to Mr Wigley did not include a protected disclosure.

188. Issue 20.A.2 was that the claimant claimed to have made a protected disclosure in her email to Ms Wilde of 3 February (397), in which she repeated her concerns about the disclosure of her pregnancy, and players' medical confidentiality. For the same reasons, we find that the email made a protected disclosure about the medical confidentiality of players, and not about the claimant's pregnancy.

Overview at 1 April

189. There had never, from her start in August 2019, been an issue with the claimant's professional performance in delivering treatment. There had been occasional friction with Mr Cerullo, but nothing out of the ordinary run of workplace events. She had changed her employer in December, and been issued with a first written contract. She had not been given any form of handover information or induction, and any practical changes arising out of the change of employer had not been spelled out to her. She had told Mr Currie, in confidence, that she was pregnant in December. She had come into disagreement with Mr Bartlett from 9 January 2020 onwards, the day on which he challenged a number of aspects of her work. The claimant considered that his challenges represented a change of attitude because of pregnancy. We disagree. We find that Mr Bartlett challenged aspects of the claimant's work before he knew that she was pregnant. We accept that he did so for legitimate managerial reasons. We find that the claimant resented being managed by Mr Bartlett, for reasons which included his lack of a professional qualification. We agree that she made protected disclosures about the issue of medical confidentiality.

190. We accept that at her meeting with Mr Kleanthous on 28 January the claimant arrived prepared with her proposals and an agenda in mind, but that Mr Kleanthous was wary of accepting her proposals. The claimant had on 6 February indicated that she was going to take advice but so far as the respondents saw, nothing had come from the advice. The claimant was off sick, and in her absence, two concerns came up: the journey to Dubai, and

the 'sick stress' conversation with Ms Buckland. Meanwhile, the covid-19 virus was taking hold, and had a particular impact on the leisure sector, including professional sport.

191. The Tribunal has rejected all claims based on events arising on and before 31 March. We have found, in short, that before that date the claimant was not in any respect discriminated against or subject to detriment because of protected disclosure. By late January the claimant had reached the view that she wanted to leave her employment, and by early February she saw that she might have some bargaining power with the respondent. By 1 April, the claimant had been signed off sick for over two months. She was approaching the final three months of a first pregnancy. She was pregnant with twins, at risk of pre-eclampsia, and was worried and stressed. She knew that there was no prospect of a return to work before the start of her maternity leave. By 1 April, the respondents had had little contact with the claimant for over two months, and she was not high on the priorities of either respondent: their priority was to manage the uncertainties of the first lockdown.

General approach after 1 April

192. A number of general points arise from our consideration of the events after 1 April.

193. The Tribunal is wary of disputes about lawyers' correspondence. We are not party to the dynamic between party and representative, and we do not know how much the representative's style is that of the party or that of the writer. Correspondence from the PHB side was prolix and legalistic. CCTC's two replies were brief to the point of curtness. Neither side showed in its open correspondence any sign of engagement with the human framework of a high-risk pregnancy, or appears to have considered the appropriateness of the timing of the correspondence, or indeed the desirability of conflict resolution without acrimony. (We accept that those points may have appeared in the without prejudice correspondence which we did not see).

194. We accept the general proposition that each side was bound by, and responsible for, what was written by its representative. Each representative wrote in their own professional style, which was not the language of workplace communication. Both representatives wrote confrontationally, and both were clearly accustomed to the style of writing which lays the ground for litigation; neither resisted the temptation to score points. The claimant and Mr Kleanthous gave notably similar evidence, which was to the effect that they had no knowledge or experience of this sort of correspondence or its legal framework, and they left things in the hands of their representatives. That seems to us especially likely given their respective focus on pregnancy and the lockdown. We doubt that either gave much scrutiny to any drafts which they were given: they trusted their representatives. In that setting, the claimant's decision to plead, as against the respondents, the contents of their representatives' letters, is particularly difficult. We have understood the claims and issues to be about the

substance of what was said by CCTC and Ms Kleanthous, and not to be about the style or manner of expression. We have found it more convenient in this section of these Reasons to set out discussion and conclusions as we progress chronologically through our findings of fact.

The lawyers' correspondence

195. On 1 April PHB on behalf of the claimant sent Ms Wilde a two paragraph letter submitting a grievance. The letter asked for the grievance to be dealt with in writing and in correspondence to PHB, which Ms Wilde rightly understood to mean that the claimant did not want to deal directly with either respondent. Attached to the one-page letter was an eight page grievance (438). Although set out in first person narrative, its style was unmistakably a lawyer's drafting; attached to the grievance were about 60 pages of enclosures. The grievance identified discrimination on grounds of pregnancy and sex, detriment as a result of protected disclosure, breach of confidential information and other points.

196. Issue 33.A was whether the grievance itself was a protected act, although in plain terms it set out the claimant's account of the above events, and made allegations of discrimination. The grievance was not agreed to be a protected act, and the respondents alleged that it was not put forward in good faith.

197. We had no evidence on which to make a finding of bad faith. It seems to us on the contrary that very early in these events, and certainly by 13 January, the claimant had convinced herself of a number of points on which we have factually found against her; and that having first convinced herself, she was confirmed in her belief by her perception of subsequent events. We find that the grievance was a protected act for the purposes of the Equality Act.

198. The grievance included:

> "I do not wish to enter into a protracted dispute with the club and hope that my grievance can be sensibly and swiftly resolved. I propose to instruct my solicitors to write further on a without prejudice basis to the club to set out my proposals for resolution of this issue. In the meantime, I look forward to hearing from you with details of how my former grievance is to be investigated."

199. On 16 April, the claimant was issued with a MATB1, which was described as a duplicate of one issued to her earlier. We had no evidence of when she had received one before then, or what became of it. On 23 April Ms Wilde reminded the claimant that the respondent had not received a MATB1. We accept that that was accurately written. The claimant began her maternity leave on 3 May.

200. In response to the grievance, the respondent instructed Chancery Court Tax Chambers, ('CCTC') who replied (514) on 14 May. PHB replied to that letter on 9 June (519) to which CCTC replied on 23 June (554). Ms Kleanthous took over the correspondence on behalf of the respondents on 27 July. Issues 12.14 and 12.15 each raise three factual allegations about the

content of CCTC's letters of 14 May and 23 June respectively; issue 12.16 raises a point about a phrase in Ms Kleanthous' letter of 27 July.

201. The correspondence speaks for itself, and we do not propose to repeat, paraphrase or analyse it beyond that which is necessary for our task. We deal only with the points of which complaint is made. We start with the first letter from CCTC of 14 May. The broad thrust of the letter was to acknowledge the grievance, and to state that it was being looked into, along with other matters which the respondent said had come to light.

202. The first point (issue 12.14.1) is the statement, "Our client is carrying out its own investigations around your client's performance and conduct whilst at work." That was not accurately said, as the investigation did not start until 14 May, and was the grievance investigation, which rolled up the grievance investigation with the Dubai point and the 'sick stress' point.

203. We interpret the list of issues as a complaint not about the content of CCTC's letter but about the substance of what was written. In short the claimant's point was that the decision to open an investigation into performance and conduct (ie the remark about going off sick set out at #145 above) was done on each of the prohibited grounds, including public interest disclosure, and in reply to the claimant having complained about discrimination.

204. We agree that Mr Bartlett's email to Ms Wilde of 10 March (430) states in terms that the claimant's alleged remark should be investigated because of her complaints against BFC. Mr Bartlett knew on 10 March that the event took place two months previously; he knew that the claimant was unlikely to return to work for a considerable period of time; and we find that the remark on its face was obviously mundane and trivial, and, if said, almost certainly a joke. We accept that Mr Bartlett knew, in general terms, what the claimant had said on 13 January to Mr Wigley. We find that he therefore knew that she had made a protected disclosure, even if he did not see it as such. There was no evidence that he knew about the claimant's email of 6 February to Ms Wilde, and we therefore find that he did not on 10 March know about that protected disclosure.

205. We find as follows on this point: the claimant had, well before 14 May, made at least one protected disclosure. It was alleged that in January she had made a remark about, in effect, fabricating a sickness absence. Management were made aware of this by 9 March, and on 10 March Mr Bartlett called for further action, in terms which expressly referred back to her protected steps. A decision to investigate was made over two months later, by 14 May. The respondent gave no explanation of how or why this minor issue, by then over four months old, and which referred to an employee who was likely not to be back at work for the rest of the year, was then deemed to require investigation. We find that the decision to conduct an investigation, and to notify the claimant that this was to be done, were, to a material degree, taken because the claimant had made a protected disclosure to Mr Wigley. We also find that it was taken in response to the claimant's grievance, and to a material degree, in response to the claim of

discrimination contained in it: we therefore uphold the claimant's claim of victimisation. The claim at issue 12.14.1 therefore succeeds on those two points, but fails on all other points, of which there was no evidence.

206. Issue 12.4.2 was that the letter stated, "I am disappointed that the company grievance procedure was not followed by your client." The claimant asked us to find that she had not deviated from the grievance procedure; that there was no basis for this to be written; that the statement constituted a detriment; which, she submitted, was in turn evidence that this phrase was written on one of the prohibited grounds.

207. In its second letter CCTC explained, in less than clear language, what the phrase meant. The broad thrust (554) was that the claimant had been offered many opportunities for informal discussion about her concerns; that she had been offered choices before proceeding to a formal grievance; but that she had indicated at an early stage that she would take advice, which appeared to suggest that she was predetermined on formality and confrontation.

208. We agree that the claimant had had informal conversations about her concerns. Managers, including the Chairman, had repeatedly offered her the opportunity of raising a formal grievance. We agree that it was good practice to make those offers. The claimant had turned them down, as was her right. She was entitled to take advice, a matter on which the grievance procedure is silent, and should not be a point of criticism. Workplace disputes are dynamic, and a decision made on a Friday to take advice is not evidence of the employee's state of mind the previous Monday.

209. We would agree with criticism of how CCTC wrote its letters, and we do not agree that there was evidence that the claimant had predetermined on confrontation; but we could see absolutely nothing in this issue (12.14.2) which engaged any prohibited factor. Whether or not the claimant had followed the grievance procedure was a workplace squabble, exacerbated by legal correspondence. Applying the proper objective test, we do not find that the comment, that the claimant failed to follow the procedure, was a detriment, or that it related to any prohibited factor. The claim does not succeed.

210. Issue 12.14.3 complained that the May letter from CCTC said that the claimant "should not have been in Dubai on 9 March 2020 when she was signed off work." We do not agree that that was what the letter says. It says:

> "Our client understands that on 9 March 2020 whilst signed off work due to sickness your client was in Dubai so was surprised that she could not attend a meeting to discuss matters due to ill health."

211. We do not agree that the CCTC sentence quoted is capable of sustaining the interpretation which is the basis of the issue. Our interpretation is that CCTC simply points out that if the claimant wanted to attend a meeting around that time, she was plainly well enough to do so. To say that if the claimant was well enough to go to Dubai, she was well enough to go to

Harrow seems to us uncontroversial. The issue fails because the factual basis for it has not been made out.

212. Issue 12.15.1 is that CCTC's letter of 23 June "made allegedly false allegations about the claimant's conduct."

213. In fact, the allegations in the 23 June letter came out in CCTC's reply to PHB's question of 9 June, which in turn challenged CCTC's assertion of 14 May, which had referred to "carrying out its own investigations around your client's performance and conduct." On 23 June CCTC, correctly in our view, back pedalled. CCTC confirmed that there was only one specific point under investigation, and it was a matter of conduct, not performance.

214. On 23 June CCTC wrote, "This has only recently been brought to our client's attention and is not a full-scale investigation into your client's general conduct as a result to the grievance claims that have been raised."

215. We do not agree that a timelapse between 9 March, when the allegation was made known to management, and 23 June, when the letter was written, can accurately be called "only recently". However, the point is that the issue of "an allegedly false allegation" appears to us to be based on a misunderstanding of the role of the representatives and advisors. CCTC were correct to give PHB the information about the allegation which they had asked for. There was nothing to link the clarification of the specific with any prohibited matter or factor. Any claim based on this allegation fails.

216. Issue 12.15.2 repeats the point clarified at #207 above. It was that the claimant, by stating that she was taking, or had taken, legal advice, acted in breach of the grievance procedure. In fact the claimant's letter of 6 February said "advice" and specifically said the claimant was without legal advice. It is a matter of argument as to whether or not the imperative in favour of informal resolution precludes taking legal advice. We think not, as everyone has in principle the right to take legal advice at any time -- but we also think that the two (informal resolution / legal advice) are separate issues. Our view is that while CCTC's letter of 23 June poorly expresses a bad point, we can see nothing in this issue which engages any prohibited factor.

217. Issue 12.15.3 is predicated on the claimant having handed her MAT B1 to Ms Wilde on 28 January. We find that she did not, and we accept Ms Gilbert's submission that she could not have done so. The allegation fails.

218. Ms Kleanthous' letter of 27 July 2019 (617) is the basis of issue 12.16. It was sent in reply to PHB's letter of 9 June which stated (522),

> "We await receipt of the outcome of our client's grievance. However, we repeat that it is our client's firm view that a return to work following maternity leave is not possible for her and this matter cannot be remedied through the grievance procedure. It is likely that our client will need to appeal the outcome of her grievance and dealing with the appeal will result in further delay and expense for both your client and for ours. Our client's view remains that the most sensible

> way of resolving this matter would be for your client to engage in sensible and constructive negotiations around her departure from her employment…"

219. Ms Kleanthous' point in reply was first to invite the claimant to a meeting to discuss the outcome of the grievance, and secondly to comment on the claimant's predictions that the process was futile and that she would have to appeal. In the course of that, she wrote that the claimant's approach was 'unreasonable and disingenuous.' Those words formed the complaint at issue 12.16. It seems to us that Ms Kleanthous' comment, however expressed, was in principle well founded. If the claimant wanted to pursue the grievance procedure, her reasons for not coming to a meeting were not convincing. They begged the questions of why she was pursuing a procedure which she saw as pointless, and why she was confident of a disappointing outcome. The reference to additional costs was likely to be perceived as a form of threat.

220. We find that Ms Kleanthous' words "unreasonable and disingenuous" were harsh but not beyond the bounds of fair comment on the correspondence trail. We do not accept that this phrase constitutes a detriment, and there is no evidence whatsoever that its usage related to any prohibited factor. We intend no disrespect to the claimant when we say that we attach no weight to Ms Iqbal's cross examination to the effect that the claimant had shortly before given birth, and that one of her babies was at that time in ICU. Ms Kleanthous (and for that matter PHB) would have done well to put their correspondence on hold, in the knowledge that they were writing at around the time of the claimant's due date, but we accept that Ms Kleanthous had no specific knowledge of the specific circumstances at that time.

The grievance process

221. We now go back, out of chronology, to the grievance. As said above, it was presented on 1 April, and it was lengthy. It was allocated to be dealt with by Mr Day, HR Assistant, with the support of Ms Wilde as note taker. We would at this hearing have been assisted by the evidence of Ms Wilde or Mr Day or both.

222. In his report, Mr Day indicated that the investigation process began on 14 May (599). We make allowance for the demands of the lockdown and note that that was over six weeks after receipt of the grievance. CCTC's first letter was sent to PHB on the same day, and its second paragraph wrote (514),

> "Our client is investigating the points in your letter of 1 April 2022 and will report on the findings as soon as possible. The current pandemic means that this process may take longer than usual."

223. It would have been more candid to have said that the investigation had just started, and that the delay had already happened.

224. Ms Iqbal conceded that the investigation was thorough. We had notes of the interviews, some of them signed by the interviewee. We summarise briefly. Mr Wigley was interviewed on 10 June (523). He was asked about a wider

range of issues than arise in this case. He said that he thought it was correct for Mr Bartlett to have told him that the claimant was pregnant, and he side-stepped the wider questions of management between the claimant and Mr Bartlett.

225. Mr Bartlett was interviewed on 10 June, accompanied by Mr Meir (528). He described himself as the claimant's line manager, and traced the change in their relationship to the point at which she was informed that he was the line manager. He said that it was clear that he had authority to override the claimant's assessment of players because he was "senior management and Head of Football" (531). When asked later about developments in his working relationship with the claimant he said, accurately in our view, (533)

> "I think the issue started when she started being managed by someone, and because I was starting to challenge some decisions she was making, it started going a bit sour."

226. When asked when he was made aware of the claimant's pregnancy, he gave the same answers as he gave to us in evidence: she told him on Friday 10 January, on the morning of the team journey to Farsley.

227. Mr Hutchings was interviewed on 12 June (538). He was Performance Analyst. He was asked about the "sick stress" remark allegation and denied having overheard the conversation. Mr Cerullo was interviewed on 16 June (542). He confirmed that he had been the claimant's line manager when she was employed by TIC. We note that he said that he would check and provide any notes he had retained of meetings with the claimant, but there was no evidence that anything came of this. He confirmed having been told by Mr Hutchings about the sick stress conversation. In closing answers he said, "I think she is being treated like every other therapist we have."

228. Ms Buckland was interviewed on 23 June (562). She said that she had no recollection of the sick stress conversation. She was asked about the Borehamwood match on 1 January. She said that she was allowed to go on to the pitch if assisting a physiotherapist, but was not allowed to go on to the pitch alone. She had gone on to the pitch that day not because the claimant was pregnant, but as part of her own work development.

229. Ms Buckland was asked about the relationship between the claimant and Mr Bartlett. It is not clear if her first answer, which was that, 'I personally feel he treats men his own age different to how he treat people that are younger than him or women' (567) was spoken entirely from personal knowledge, or repeated what the claimant had told her, or both.

230. There was then discussion which appeared to be focused on Mr Bartlett's age, in contrast with the younger staff whom he was managing; however Ms Buckland went further: "I don't think he likes being told by females, and if you use medical terms he doesn't understand, it will confuse him."

231. Ms Buckland was recalled for a second interview, this time with Ms Kleanthous as note taker, on 13 July (586). On that occasion she was asked more detailed questions about different treatment. In the context of Mr Bartlett's treatment of younger men, she was asked the question, "Would you consider the treatment to be discriminatory?" Her answer was (587): "Yes. I think he thinks that because I am a female that I don't know what I am talking about. He would have to get the last word in, and his decision was final." She said that she had made a complaint about Mr Bartlett to Mr Wigley, but that nothing came of it, as it was overtaken by the lockdown and then by Mr Wigley's ill health.

232. She was asked again about comments related to age and said that Mr Bartlett referred to her as "young" from time to time, and then said that Mr Bartlett and Mr Meir called the claimant and herself respectively Posh Spice and Baby Spice. Later she said that she accepted that the names were "probably intended as a joke but there's always a deeper meaning behind everything."

233. She was asked if she wanted to raise a grievance and said that she was leaving the respondent at the end of that month and did not want to do so. We note that that question was the same treatment of which the claimant complained as 'pressure.' We repeat that it was a correct, legitimate question to be put by a manager to an employee expressing a concern or complaint.

234. Mr Currie was interviewed on 13 July (590). He was asked about knowledge of the claimant's pregnancy. He said that she had told him in confidence during December, and early in January had asked him to tell the team. He was asked about the claimant's absence on 9 January, which he could not recall but said (592), "If you are saying that she was off site on 9 January, then she would have discussed it first. If she'd been off site then it would have been discussed… she would never have left the site without telling me or notifying me, it would have been discussed with us." He said that he had no recollection of the sick stress conversation.

235. Mr Hutchings was interviewed again on 13 July (595). He was asked again about the sick stress conversation. Mr Hutchings modified his original answer, and said that he had not actually overheard the conversation at all, and not been present when it took place, but that it had been reported to him by Ms Buckland some weeks later, and that he took it as a joke.

236. It appears that Mr Day, as investigator, produced a running document called the Investigation Plan, summarising the steps that he had taken and the evidence he had received. In his summary of evidence, Mr Day wrote that written statements had been obtained from Mr Fowler and Mr Rowe. He wrote, "Both stated that they had been in a meeting with Mr Bartlett when he had taken the call from the claimant on loud speaker. They had overheard the conversation in which medical information of players was discussed." (602). We have commented above that we did not find this point as helpful or important as the parties appeared to.

237. The Plan includes a short page of facts established, of facts which could not be established, and then a concluding recommendation which was (604):

> "No action required. Grievance claims not considered to be found and no disciplinary action required at this time."

238. Mr Day's report was completed on 23 July (616). It was sent to PHB on 4 September (620). In her letter of 27 July Ms Kleanthous offered PHB the opportunity for the claimant to be interviewed rather than have the investigation conclude without her contribution (619). Whatever the spirit of that offer, it was made at about or shortly after the claimant's due date and was unlikely to have been accepted.

239. Ms Kleanthous' letter of 4 September, in which the claimant was notified of the grievance outcome, was expressed in headlines, and gave little or no analysis. It did not explain the reasoning process or the assessment of evidence. It did not provide the claimant with any of the evidence which had been considered, including the notes of any interviews.

After the grievance outcome

240. On 11 September the claimant wrote a letter of appeal (649). There was correspondence about arrangements for the appeal, which formed a lengthy trail in reverse order in the bundle. Ms Kleanthous asked PHB whether the claimant would attend an appeal. On 28 September PHB asked if she could take part by telephone, and be accompanied by her partner, Mr Bell, as companion.

241. Ms Kleanthous replied the next day to offer a virtual meeting via Zoom, which she set on 8 October. She identified Mr Patel as the appeal hearer and declined to permit Mr Bell to be the companion. She pointed out the provisions of the employee handbook and the ACAS code, which, following the statutory scheme, both limited the right of accompaniment to a trade union official or a colleague (639).

242. PHB pursued the point and set out their arguments in a letter of 6 October (637). Their points were that the claimant was not a trade union member; and that as she had been away from the workplace since February she had had little contact and was not sure who might be an appropriate colleague; that the grievance touched on pregnancy and health, and therefore was of a personal nature; and that while Mr Bell was not legally qualified, he had been advised about the circumstances of the grievance meeting, including the limitations on his right to take part, and that his role would be to provide support.

243. On 6 October Ms Kleanthous confirmed her decision; in evidence she stated that at some point she was advised by Peninsula Business Services Ltd that it would be undesirable, and possibly create risk of other discrimination claims, if an exception were made from the respondent's usual procedures in this one case.

244. In the event, that remained the respondent's position. The claimant did not take part in the appeal hearing. The appeal was heard in the claimant's absence on papers only, and rejected by Mr Patel on 29 October (661).

245. Issue 12.17 pleads that the grievance was rejected. That much is agreed. Ms Iqbal agreed that although the investigation process was thorough, the outcome letter was short and uninformative. She accepted that Mr Patel's appeal outcome contained a fuller analysis of evidence than Mr Day had given, but gave the claimant very little material.

246. Were the rejection of the grievance, and the rejection of the grievance appeal (issue 12.19) tainted by any of the prohibited factors? We have found this a difficult and troubling point. Ms Buckland's interviews, and in particular the second interview, gave Mr Day clear information that she considered that she had been discriminated against as a woman by Mr Bartlett, and, using our phrase (not used in the material), that Mr Bartlett had deep seated attitudinal issues in managing women, particularly younger women. It cannot have escaped Mr Day's notice that of the six interviewees, Ms Buckland was the only woman. The only interviewee who shared a relevant protected characteristic with the aggrieved claimant supported the claimant, and claimed to have shared her experiences.

247. Mr Day was strictly correct to say that Ms Buckland did not actually corroborate any of the specific allegations made by the claimant. She gave her impressions, and she gave specifics of other alleged events: a shouting incident and the use of nicknames. The nicknames Posh Spice and Baby Spice differed from other nicknames about which we were told. They were not referable to the actual name or actual appearance of the person, so we did not think the analogy with Mr Meir and his nickname ('Meerkat') was helpful.

248. Ms Buckland's evidence was referenced in Mr Day's plan and summary, but there was no recorded analysis of what weight was attached to it, or if little or no weight was attached to it, why not, if that indeed was the position.

249. On this point, we find:-

    249.1 On both occasions when interviewed, Ms Buckland gave answers which were consistent with the claimant's complaints of discrimination on grounds of sex by Mr Bartlett;

    249.2 The respondent did not pursue or investigate Ms Buckland's answers any further;

    249.3 It must be inferred that Mr Day either rejected them as evidence or thought them to be of no evidential value;

    249.4 Rejecting the grievance, Mr Day wrote, "This outcome has been reached on the following basis: There are no clear or substantiated instances of unfair or discriminatory treatment or harassment based on any of the aforementioned grounds." That wording is so far from

complete as to be disingenuous. Ms Buckland had given clear instances; and as is often the situation, many of the instances were not supported by any other witness (if that is what is meant by substantiated);

249.5 There was no indication that the respondent considered Ms Buckland's statement in conjunction with the claimant's allegations as constituting evidence of a group wrong or of evidence of a "similar fact" approach to the management of women.

250. In our judgment, we find that the grievance outcome was not one which was reasonably open to the respondent in light of the material available to it; and that the outcome of the grievance was not clearly or fairly communicated to the claimant by Mr Day, as would have been swiftly apparent to her if the respondent had provided her with the evidence on which it relied.

251. Taking the above together we find that the claimant has proved facts about the investigation outcome which, in the absence of an adequate explanation from the respondent, permit us to draw an inference of discrimination.

252. In the absence of any evidence about the reasoning process, (which need not have been that of Mr Day personally) or from any other person involved in deciding the grievance, we have no such evidence from the respondent, and the claim succeeds. The claim therefore based on issue 12.17 and the protected characteristic of sex is upheld, but claims based on issue 12.17 in conjunction with any other prohibited factor fail as there is no evidence of them.

253. Mr Patel wrote that he had considered the material which arose during the grievance investigation, and he referred to it at length, although it appears not to have been disclosed to the claimant. The same points which apply above to Mr Day's analysis apply logically to that of Mr Patel. He must have had before him Ms Buckland's material and the considerations which applied to it. For the same reasons, and because Mr Patel adopted Mr Day's approach and outcome, issue 12.19, which complains about the outcome of the grievance appeal, succeeds as a claim of sex discrimination but not in relation to any other prohibited matter.

254. Issue 12.18 is more complicated. It was the refusal of permission for Mr Bell to accompany the claimant. The issue is not whether we think Ms Kleanthous' decision was reasonable, or whether we would have made the same decision, or whether we think that Peninsula's advice was sound. On the latter point, it seems to us that the advice was defensive, and that the line of advice which ran that an employer must always do in future what it has done before carried a risk of perpetuating discriminatory practice. In our consideration we took care to disregard our own view, which was that discretion could well have been exercised to permit Mr Bell to attend on terms on zoom.

255. On this point we were particularly assisted by the relevant portion of the particulars of claim (55-58). We asked first, was the claimant subjected to

unfavourable treatment; the answer to that question is that she was. Ms Kleanthous' refusal to exercise discretion to allow Mr Bell to act as the claimant's companion was unfavourable treatment, which took place in the protected period.

256. We accept that the claimant had at the time of Ms Kleanthous' decision been absent from work for over eight months because of pregnancy related sickness followed by maternity leave.

257. We accept that in consequence of her absence the claimant had been unable to form and maintain working relationships with a colleague or colleagues who she might have thought suitable to accompany her as companion at her grievance appeal. She was therefore unable to select a companion, and therefore unable to participate effectively in an appeal.

258. Could it be said that this treatment falls outside the protection of s.18(4) Equality Act 2010 because it was unfavourable treatment not because of the absence as such, but because of something arising from the absence (to take a phrase from another area of the Equality Act)? In the context of maternity leave, we do not consider that that is a distinction that can be sensibly made. The claimant was not refused a companion because she had been away from the workplace for eight months. Her absence from the workplace on grounds of pregnancy and maternity made it difficult to impossible for her to select a companion, and on that basis, the refusal of permission was unfavourable treatment.

259. We therefore uphold the complaint that the respondent's refusal to allow the claimant to be accompanied by Mr Bell was unfavourable treatment on grounds of maternity leave, contrary to s.18. This part of the claim succeeds.

260. The final factual points can be briefly stated. It was common ground, as alleged at issue 12.20, that after the outcome of the grievance the respondent made no attempt to contact the claimant. That does not seem to us a point which has anything to do with any of the prohibited factors. The claimant had made known that she did not want to be contacted. The grievance process had run its course. The claimant was not due to return from maternity leave for several more months. It would have been a thoughtful gesture if someone on behalf of BFC had contacted her and invited her to talk or meet once the air had cleared, but it was not discrimination to fail to do so. The claimant was entitled to be left alone, and we suspect that if Ms Kleanthous had contacted her, issue 12.20 would have been a complaint about unwanted contact.

261. Issues 12.10.1 and 12.21 both arise out of the respondent's denials, respectively in May and October, that the claimant had continuity of service. We accept that the respondent maintained its refusal to recognise correctly the claimant's continuity of employment. We find that the reason was that it made a mistake. The mistake was of its own making. We accept that Mr Kleanthous thought that he had broken continuity. Mr Kleanthous did not see the consequences of agreeing formally that the claimant's employment

with TIC ended on 30 November, and that with BFC began the next day. It is mere speculation that seeks to link this point with a prohibited factor. The claims based on that event fail. For avoidance of doubt, we add that if it is the claimant's case that the respondent challenged her continuity of employment deliberately so as to deprive her of her entitlement to SMP, we reject that complaint, as a matter of speculation, unsupported by evidence, which falls into the error of confusing consequence with treatment.

Resignation

262. The claimant resigned by email to the Chairman dated 17 December (670). The email also bears the mark of lawyers' drafting. The letter is relatively short and should be read in full: it sets out an overview of the claimant's perspective of events from November 2019. It refers to most if not all the events in the list of issues, including those parts of the claim which we have upheld.

263. We have found above that the respondent discriminated against the claimant on grounds of sex and pregnancy / maternity; and that it subjected her to detriment on grounds of a public interest disclosure, and that it victimised her. We accept, as a matter of principle, that each of those events constituted a breach of the duty of trust and confidence. We find that each of those matters alone was a material, effective cause of the claimant's resignation, and that she in fact resigned as a result of the accumulation of all of them (as well as of the other factual events to which she referred, but which we have found not to be related to any prohibited factor). We do not consider that the lapse of time between receipt of the outcome of the grievance appeal, and the resignation, is such as to indicate affirmation of the contract. We give some weight, on that point, to the absence of contact from the respondent in that period. Her claims succeed therefore as follows: of automatic unfair dismissal, s.103A Employment Rights Act; and of discrimination by constructive dismissal, s.39(2)(d) Equality Act.

Holiday pay

264. After acceptance of the claimant's resignation, on receipt of her P45, she raised a complaint that she had not been paid her annual leave. On 29 January Ms Kleanthous sent a general denial of claims in reply to a formal letter before action sent on 20 January by PHB. The respondent sent the claimant her final pay and P45. Following the commencement of early conciliation, Ms Kleanthous checked the position (685) and on 17 March the respondent issued payment of just over £3,100 in respect of accrued holiday pay. The claimant asserted that the delay in paying holiday pay was a further act of discrimination or victimisation. We agree that the final payment of holiday pay was delayed. It appears from Ms Kleanthous (685) that once the position was checked after being raised by ACAS, and in the light of accurate advice, the short fall was remedied. There was nothing to link this delay with any prohibited matter, and we find that the reason for delay was genuine mistake.

265. The claimant alleged that Mr Kleanthous had been personally involved in the decisions which led to delay in paying her holiday pay (issue 22.B and footnote). We find that there was no evidence whatsoever to link Mr Kleanthous with either the delay or its resolution. His evidence was that he was very busy, and that he had delegated looking after this matter first to CCTC and then to Ms Kleanthous. We accept that evidence. The mere fact that he was Chairman of the group does not change that: there was no evidence whatsoever of his personal involvement in the point. We add the observation that Mr Kleanthous was head of a leisure industry business, and that January 2021 was, we now know, the death rate peak of the pandemic. However important these issues were to the claimant, her holiday rights are unlikely to have been a priority for him at the time the relevant decisions were made.

Mr Kleanthous

266. The claims presented against Mr Kleanthous as a separate respondent were limited, and early conciliation against him did not start until 16 March 2021. The first respondent did not rely on the so-called statutory defence (s.109(4) Equality Act) and accepted full responsibility for the actions of the Chairman.

267. As Ms Gilbert pointed out, the complaint that Mr Kleanthous had personally interfered with the claimant's holiday pay would have the consequential effect, if upheld, of potentially bringing the earlier claims against him within time. As that claim fails, we then ask whether we had jurisdiction to determine the other claims against him personally. The most recent of them chronologically was, on the claimant's case, in about the first week of February 2020, and on their face all claims against him were out of time.

268. We have to counterbalance two considerations when we consider whether it is just and equitable to extend time. Throughout the time in question, the claimant was unwell and / or pregnant and / or on maternity leave. She had a period of serious health issues in July. On the other hand, the claimant had since late February and continuing to the date of this hearing had access to professional legal advice. Her solicitors had been assiduous in their correspondence.

269. In those circumstances, and in light in particular of the deep involvement of legal advisors, it does not seem to us just and equitable to extend time in relation to any claims against Mr Kleanthous individually, and the claims against him as an individual are dismissed on grounds that they were out of time.

First respondent: limitation

270. If and to the extent that any claim against the first respondent related to an event more than three months before day A, we find that it is just and equitable to extend time and/or there has been a continuing act since 10 January 2020, when the claimant notified Mr Bartlett of her pregnancy. It

does not seem to us fair, in a case relating to pregnancy, to break off relevant allegations from an earlier stage of the pregnancy.

Notice pay

271. The claimant was entitled under her BFC contract of employment to one month's notice on completion of probation (296). There was no evidence that she had failed probation, and we find that she did not. It is common ground that she was not paid in lieu of notice. In light of our findings above, we uphold her claim to notice pay.

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Employment Judge R Lewis

Date: …31 October 2023……..

Sent to the parties on:1 November 2023.

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For the Tribunal Office