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EMPLOYMENT TRIBUNALS

Claimant:	**Mrs R Folan**
Respondents:	**(1) Mrs Sue Ali aka Sultan Ali** **(2) Mr Neville Ali aka Nevzat Mehmet Ali**
Heard at:	**East London Hearing Centre**
On:	**19-22, 26 and 27 September 2017**
Before:	**Employment Judge Brown**
Members:	**Mr D Kendall** **Mrs S A Taylor**
Representation	
Claimant:	In person
Respondents:	Mr I Ahmed (Counsel)

JUDGMENT

The majority (EJ Brown and Mr D Kendall) judgment of the Employment Tribunal is that:

1. The First Respondent subjected the Claimant to pregnancy discrimination by asking the Claimant on 11 May 2016 to change her days off to match her antenatal appointment, by pressurising the Claimant to return to work on 14 May 2016, by making the Claimant work late on 1 June 2016, by asking a client to make a complaint about the Claimant, by being rude and abusive to the Claimant on 29 August 2016, by saying to the Claimant, "If you're stressed, why are you still here?" on 31 August 2016, by dismissing the Claimant and by refusing, initially, to pay her Statutory Maternity Pay.

2. The Claimant contributed to her dismissal, the amount of contribution to be decided at a Remedy Hearing.

3. The Second Respondent was liable as agent of the First Respondent, as principal, for dismissing the Claimant.

It is the unanimous judgment of the Employment Tribunal that:-

4. The First Respondent did not automatically unfairly dismiss the Claimant.

5. The First Respondent did not make unlawful deductions from the Claimant's wages.

6. The First Respondent did not fail to pay the Claimant holiday pay to which she was entitled.

7. The First Respondent failed to provide the Claimant with a written statement of her terms and conditions within two months of her starting employment.

The minority (Mrs SA Taylor) Judgment of the Employment Tribunal is that:

8. The First and Second Respondents did not subject the Claimant to pregnancy discrimination.

REASONS

Preliminary

1. The Claimant brought complaints of automatically unfair dismissal because of pregnancy or other prescribed reason under *s99 Employment Rights Act 1996 ("ERA");* and/or automatically unfair dismissal because of assertion of a statutory right to maternity pay and/or holiday pay under *s104 ERA 1996*; pregnancy discrimination; unlawful deductions from wages; and a failure to pay holiday pay, against the First Respondent, her employer. The Claimant also brought a complaint of pregnancy discrimination against the Second Respondent, the First Respondent's husband.

2. The parties had agreed a list of issues for determination by the Employment Tribunal.

The Issues

Automatically Unfair Dismissal – Pregnancy

2.1. Was the reason or principal reason for the Claimant's dismissal her pregnancy or other prescribed reason under *s99(3) ERA 1996*?

Automatically Unfair Dismissal – Enforcement of a Statutory Right (Statutory Maternity Pay and Holiday Pay)

2.2. Did the Claimant bring proceedings to enforce a relevant statutory right of hers or allege that the Respondent had infringed a relevant statutory right

of hers?

2.3. If so, what was such relevant statutory right or rights?

2.4. If the Claimant made such allegation, how was such allegation made?

2.5. If the Claimant did bring such proceedings or make such allegation, was such conduct the reason or principal reason for the Claimant's dismissal?

Pregnancy Discrimination (s 18 Equality Act 2010)

2.6. Are the Claimant's alleged acts of discrimination out of time for the purposes of *s123(1) Equality Act 2010 ("EQA")?*

2.7. Do the alleged acts form part of a series of acts, the last of which is in time?

2.8. If not, is it just and equitable to extend the time limit for presenting the claims?

2.9. Did the Respondent perform the following acts:

2.9.1. Mrs Ali told the Claimant on 11 May 2016 to change her days off to match her antenatal appointments.

2.9.2. Mrs Ali demanded that the Claimant return to work on Saturday 14 May 2016.

2.9.3. Mrs Ali told the Claimant on 21 May 2016 to leave and return to work after giving birth to her child.

2.9.4. Mrs Ali made the Claimant work late on 1 June 2016.

2.9.5. Mrs Ali from June to August 2016 put pressure on the Claimant to decide when she wanted to commence her maternity leave and stated that repayment of SMP by HMRC would take three years.

2.9.6. Mrs Ali, in June 2016, asked a client to make a complaint about the Claimant. Further details concerning this client are required.

2.9.7. Mrs Ali, on 29 August 2016, was abusive to the Claimant and intimidated and bullied her.

2.9.8. Mrs Ali, on 31 August 2016, verbally abused the Claimant by asking her *"if you're stressed then why are you still here?"*.

2.9.9. Mrs Ali, on 9 September 2016, emailed the Claimant refusing to pay her SMP.

2.10. If so, did all or any of such acts constitute unfavourable treatment?

2.11. If so, was such treatment because of the Claimant's pregnancy and/or proposed maternity within the definition of *s18 EqA 2010*?

Unlawful Deduction from Wages

2.12. Did the Respondent make any unauthorised deduction from the Claimant's wages in terms of *s13(1) ERA*?

2.13. If so, what was the extent of such unauthorised deduction?

Holiday Pay

2.14. Was the Claimant entitled to accrued holiday pay during maternity leave?

2.15. If so, what was the extent of such accrued holiday pay?

2.16. Was there a failure by the Respondent to pay such accrued holiday pay?

Failure to Supply Written Particulars of Employment

2.17. If any of the other claims are successful, did the Respondent provide the Claimant with a written statement of her terms and conditions of employment within two months of starting her employment?

2.18. If not, what is the appropriate remedy?

Remedy

2.19. If the Claimant's claims are upheld:

2.19.1. What remedy does the Claimant seek?

2.19.2. What financial compensation is appropriate in all of the circumstances?

2.19.3. Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?

2.19.4. Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

2.19.5. Has the Claimant mitigated her loss?

3. The Claimant asserted, in her ET1 Claim Form, that her dismissal was an act of pregnancy discrimination: that claim was also to be determined the Employment Tribunal.

4. The Tribunal heard evidence from the Claimant, from Cathy O'Rourke and Dr Nisha Malhotra, for the Claimant. It heard evidence from the two Respondents - Mrs

and Mr Ali – and from Alex Sullivan and Pam Shoker, for the Respondents. The Respondents had served a witness statement of Maisie Bull, which was unsigned. Ms Bull did not attend the Tribunal to give evidence.

5. There was a Bundle of documents. Both parties made closing submissions.

6. The Tribunal had intended to give its decision orally but, in the event, the decision was reserved and sent in writing to the parties.

7. A date for a Remedy Hearing will be fixed. The parties should write to the Employment Tribunal by 15 November 2017, giving their dates to avoid for a 1 day remedy hearing.

Findings of Fact

8. The First Respondent, Sue Ali, employed the Claimant from 16 February 2015 until 31 August 2016 when Mrs Ali's husband, Mr Neville Ali, the Second Respondent, dismissed the Claimant, giving the reason as gross misconduct. The Claimant is a trained beauty therapist.

9. The First Respondent opened a spa in 2015, specialising in a body treatment called, "Endermologie" and other face and body therapies. The Claimant undertook a number of weeks' unpaid training before she started employment. The Claimant and the First Respondent had a good relationship when the Claimant started work.

10. On 14 February 2015, the First Respondent gave the Claimant a letter offering her employment, p29. The letter said that the Claimant would be given a contract of employment in the first month of her employment. The letter said that key terms of the contract would include the Claimant working 37.5 hours per week, earning a salary of £18,000 per annum, with 20 days per annum holiday plus bank holidays, and commission on sales. The letter further stated that the Claimant would have, in total, a one hour unpaid break, each day. It said that the Claimant would be paid overtime at the rate of £9.23 per hour, that her probationary period would be 8 months long and that that her contractual notice period, during her probationary period, would be one day.

11. The First Respondent did not give the Claimant a written contract after this. She did not give the Claimant any written confirmation of the rate at which commission on sales of products would be paid, nor did the First Respondent ever state to the Claimant the contractual notice period to which she would be entitled after the completion of her probationary period.

12. After she commenced employment, the Claimant recommended to the First Respondent that she also employ an ex-colleague of the Claimant, Emma Callis. The First Respondent did so from May 2015.

13. The Claimant went on annual leave from 14 – 28 September 2015. Unfortunately she suffered a miscarriage while on holiday. She told the First Respondent of this.

14. The First Respondent's spa was not generating enough income in autumn 2015 to retain two therapists in addition to the First Respondent. The First Respondent

decided to dismiss Emma Callis, rather than the Claimant (page 39P).

15. In October 2015, a new client at the spa, Mr Malik Arif, had a consultation with the Claimant about his skin. The Claimant recommended at treatment for him, but after she had done so, the First Respondent recommended a different treatment. The Claimant did not agree with what the First Respondent had recommended and told her so. Also in 2015, another client of the spa, Pam Shoker, felt that the Claimant was not carrying out treatments correctly and questioned the Claimant about this. Ms Shoker felt that the Claimant was abrupt in her response and Ms Shoker believed that this was inappropriate.

16. In February 2016, the Claimant became pregnant again. She told the First Respondent on about 10 February 2016. The First Respondent was very pleased for the Claimant and her husband and sent the Claimant a number of supportive and enthusiastic messages (pages 39Q-39R). Unfortunately the Claimant miscarried again in early March 2016. She went home from work because of this on 2 March 2016. The First Respondent was very sympathetic to the Claimant. The Claimant was absent from work for 3 days and the First Respondent paid her full pay during the absence.

17. The Claimant became pregnant again in April 2016 and told the First Respondent on 7 April. At this stage, the relationship between the Claimant and the First Respondent was very good, as evidenced by very friendly Whatsapp messages passing between them (pages 55-62). These friendly Whatsapp messages continued up to and including 11 May 2016. The Claimant and First Respondent also exchanged friendly messages at various times after 11 May 2016.

18. The First Respondent paid for half the cost of an early scan of the Claimant's pregnancy, which the Claimant underwent on 2 May 2016 (page 63).

19. The Claimant saw her midwife in the first week of May 2016. The midwife told the Claimant that the Claimant had the right to paid time off to attend antenatal appointments. On 11 May 2016 the Claimant told the First Respondent that the Claimant had an antenatal appointment booked on 1 June 2016. In evidence to the Tribunal, the First Respondent agreed that the First Respondent asked the Claimant to rearrange that antenatal appointment for her day off, which was a Tuesday. The Claimant already had beauty therapy clients booked in the work diary for 1 June 2016. The Claimant told the First Respondent that she had the right to paid time off to attend antenatal appointments. The First Respondent told the Tribunal that the Claimant was aggressive when she said this.

20. The Tribunal finds that the First Respondent perceived the Claimant to be aggressive when the Claimant said that she had the right to time off, but the Tribunal finds that the Claimant was simply asserting her right to time off.

21. The majority of the Tribunal also finds that the First Respondent was being unreasonable in considering that the Claimant was aggressive: the Claimant was merely asserting her right but the First Respondent did not welcome this formality. The minority finds that the First Respondent was entitled to perceive the Claimant's response as aggressive because the First Respondent believed that the Claimant spoke differently to how she had previously spoken to the First Respondent.

22. The First Respondent then allowed the Claimant to take time off to attend the antenatal appointment. She rearranged the Claimant's appointments which had been booked for 1 June.

23. The Claimant started to feel ill on 11 May 2016. On 12 May she woke up with symptoms of nausea, vertigo and headache. She told the First Respondent that she was unable to attend work. The First Respondent was able to cover the Claimant's appointments that day, because it was the First Respondent's usual day off (a Thursday). The Claimant and First Respondent spoke on the telephone between 12 and 14 May 2016. The Claimant's GP had advised her to take a full week off work. The Tribunal accepted the Claimant's evidence about that advice – weeks are standard blocks of time in which GPs tend to give sick certificates. The Claimant told the Tribunal that the First Respondent instructed the Claimant to come back to work because *"she had a business to run"*. Mrs Ali denied that she had said this and told the Tribunal that the Claimant had come back to work willingly. She pointed to evidence of Whatsapp messages at the time.

24. The Tribunal notes that the First Respondent wrote a letter on 23 May 2016. The Tribunal accepted that the letter was written at the time, although it was not sent to the Claimant at the time. The letter has the appearance of contemporaneity. In the second paragraph of the letter, the First Respondent recorded the contents of a recent conversation between the Claimant and Mrs Ali, the First Respondent. The First Respondent recorded that the Claimant had said that she felt mistreated and could have taken more time off sick due to being unwell, but that she had put her job first. Mrs Ali also recorded, in the letter, that the Claimant had said that she had tolerated Mrs Ali's persistent stressed state and felt that she could not tell Mrs Ali that she was feeling ill. The First Respondent recorded that the Claimant had said that Mrs Ali had called her, to see when she was coming to work, and that Mrs Ali had not been nice to the Claimant because she was ill. In the letter, Mrs Ali said that she had called the Claimant at home to see how she was, had offered to collect prescriptions for the Claimant and had told the Claimant to lie down when she was ill.

25. The Tribunal finds, on the balance of probabilities, that Mrs Ali, the First Respondent, did not tell the Claimant to come back to work and did not say *"I have a business to run".* Mrs Ali's letter, written at the time, did not record that Mrs Ali had said or felt those things. However, the Tribunal does find that Mrs Ali telephoned the Claimant while she was off sick and communicated her stress about the Claimant being off work, so that the Claimant felt compelled to come back to work, even though the Claimant herself would have taken more time off, due to her genuine illness. The Tribunal finds this because the First Respondent referred to the Claimant's description of her persistent stressed state and the First Respondent set out justifications for her state in the letter, effectively admitting that she had been stressed and had communicated this to the Claimant.

26. The Claimant sent a message to Mrs Ali on the morning of 14 May saying that she would be in at 10am. Mrs Ali responded gratefully and said that, if the Claimant still felt rough, Mrs Ali understood (page 63). On 15 May the Claimant bought Mrs Ali flowers and chocolates and a TK Maxx voucher for her birthday.

27. The Claimant was still feeling ill, but continued to work, in the week beginning Monday 16 May 2016. The First Respondent asked the Claimant how she was feeling

on Wednesday 18 May and the Claimant responded, briefly, by saying that she was fine. The Claimant then went into a treatment room to treat a client. The First Respondent then was silent with the Claimant for the rest of the week. In the First Respondent's draft letter to the Claimant on 23 May, the First Respondent described the Claimant as having displayed contempt to the First Respondent when she had asked her how she was. The Tribunal considers that the description of displaying "contempt" was an unreasonably pejorative description of the Claimant's reaction on 18 May.

28. At the end of that week, on Saturday 21 May 2016, the Claimant and the First Respondent had an argument after the Claimant had finished work. It appears that, during the previous week, the Claimant had said that she did not want to treat a particular client. Both parties agreed, in evidence to the Tribunal, that there had also been tension between the Claimant and the First Respondent during the week of 16 May. The Claimant told the Tribunal that she had said to the First Respondent, during the 21 May argument, that the First Respondent was being angry with her because she had been ill during her pregnancy. The Tribunal finds that the Claimant did say this. It notes that, in the First Respondent's letter of 23 May, written two days later, the First Respondent said *"I have always been sympathetic to your condition…"*. The Tribunal considers that that is a reference to the Claimant's condition of being pregnant. In the letter, the First Respondent appears to be reacting to the Claimant's assertion that the First Respondent was not sympathetic to her illness and her pregnancy.

29. In the Tribunal, both parties agreed that the First Respondent had said to the Claimant, during their argument, *"Where do we go from here?"* The Claimant assumed that the First Respondent was questioning whether the Claimant would leave her employment.

30. The Claimant also told the Tribunal that the First Respondent had said, during this argument, that the Claimant should leave and come back after the Claimant had had her baby. In evidence to the Tribunal, the First Respondent denied that she had said this. The Tribunal notes that nowhere in the letter of 23 May 2016 does the First Respondent suggest that the Claimant should leave work. It also notes that, in her grievance submitted later, the Claimant did not mention being asked to leave and come back after she had her baby, during the argument on 21 May. The Tribunal finds that the First Respondent did not say, at this point, that the Claimant should leave and come back after she had had the baby, but she did question how the future employment relationship would be when she said *"Where do we go from here?"*. The Tribunal finds that after this argument, the Claimant and First Respondent hugged and made up; the Claimant recorded this in her grievance and confirmed it in evidence to the Tribunal.

31. The First Respondent drafted a letter to send to the Claimant on 23 May 2016. It referred to the events of the previous couple of weeks; the Claimant feeling that she had been mistreated and the First Respondent's view that she had always been sympathetic to the Claimant's condition. At the conclusion of the letter, the First Respondent set out things she expected of the Claimant. These included:

> *"• To keep the spa open during opening hours. (you closed the spa early without permission on Wednesday and that is not acceptable).*

- *To be courteous to me.*
- *To be courteous to **ALL** clients.*
- *To respect client confidentiality. (this is a legal requirement and the penalty for breaking this rule is instant dismissal).*
- *To carry out treatments according to the protocols, or as prescribed by me….*
- *To keep the spa clean at all times.*

You have expressed a preference not to treat certain clients purely on the basis that you do not feel a connection with them. This is a failing in your professionalism and must be corrected…" (Page 84-85)

32. The First Respondent told the Tribunal that the Claimant had committed various acts of misconduct during the week leading up to 21 May, for example not cleaning the First Respondent's treatment room, saying that she did not want to treat a particular client and the Claimant not respecting client confidentiality. The majority of the Tribunal found that the Claimant was cross-examined about each of these matters and that the Claimant's explanation for each of these was detailed, honest, logical and reasonable. Her explanations were corroborated by her detailed grievance, for example at paragraph 1.10 (page 93). The majority of the Tribunal found that the First Respondent's criticisms of the Claimant in this regard were not reasonable. The minority found that the First Respondent genuinely felt that the Claimant had failed to carry out her tasks properly; the minority found that the First Respondent's criticisms of the Claimant regarding tidiness and behaviour towards clients was reasonable.

33. On 24 May 2016 Maisie Bull commenced unpaid training with the First Respondent as a therapist. Ms Bull was given meals during her training. The First Respondent, not the Claimant, trained Maisie Bull.

34. On Saturday 28 May 2016, the Claimant was responsible for locking up the spa and pulling down the shutters. The Claimant did lock the door, but the Tribunal finds that the Claimant did not pull down the shutters on the shop. On Monday morning, 30 May 2016, the First Respondent arrived at the spa and discovered that the shutters were not pulled down. She sent a message to the Claimant about this, saying that she would not have had insurance as a result. The First Respondent asked the Claimant why the shutters were not down. She then spoke to the Claimant on the telephone and the Claimant agreed that she may inadvertently have left the shutters up. The Claimant apologised to the First Respondent and bought her flowers on 1 June.

35. The Claimant attended her antenatal appointment on the morning of 1 June and returned to work that afternoon. When she looked at the work diary that day, the Claimant noticed that she was booked to carry out a treatment on a client at 6pm that evening. 6pm was after normal working hours, although the Claimant did work after 6pm, on occasion, but took time off in lieu to compensate. The Claimant raised the appointment with the First Respondent, because the Claimant was intending to go out to dinner with her family to announce her pregnancy. The First Respondent said that

the Claimant should carry out the treatment for the client at 6pm. Later, however, the client cancelled the appointment. The Tribunal finds that the First Respondent booked an appointment for the Claimant for 6pm on 1 June, which was later than the Claimant normally worked. Mrs Ali did this without warning the Claimant about the late appointment. When the Claimant questioned Mrs Ali about it, Mrs Ali said that the Claimant should do the appointment. From the work diary, the Tribunal observes that, following the Claimant's antenatal appointment, the Claimant was booked to work for a very full afternoon. She was booked to carry out almost as many treatments as she was normally booked to carry out in a full working day.

36. The Claimant told the Tribunal that Mrs Ali repeatedly asked her when she was going on maternity leave and stated that repayment of statutory maternity pay ("SMP") by HMRC could take 3 years. The First Respondent denied doing either. On 25 June 2016, the Claimant asked to take holiday from 3 – 24 September 2016, inclusive, with the intention of starting her maternity leave on 26 September. The First Respondent accepted the Claimant's holiday request, but asked the Claimant to return to work for two weeks after her holiday, so that Mrs Ali herself could go on holiday. They agreed that the Claimant's maternity leave would start, therefore, on 10 October. The Tribunal finds, on the basis that the two women agreed this, that Mrs Ali could not have been asking the Claimant, in July or August 2016, when the Claimant was going to go on maternity leave. The Tribunal also finds that Mrs Ali did not say that SMP would take three years to be repaid. There was a conflict of evidence in this point. Both witnesses were equally credible regarding it. The Tribunal finds that the Claimant has not discharged the burden of proof to show that Mrs Ali said that repayment of SMP could take three years.

37. In June 2016, Cathy O'Rourke, a client of the Claimant, arrived for a treatment at 10am in the morning. The Claimant had been held up on the Central Line and arrived a couple of minutes late. Maisie Bull had also arrived for 10am and she waited with Mrs O'Rourke outside the spa. Later, Ms Bull reported to the First Respondent that Mrs O'Rourke had been unhappy about the Claimant's lateness. The First Respondent telephoned Mrs O'Rourke about this. Mrs O'Rourke told the Tribunal that Mrs Ali had said, *"It has been brought to my attention that a member of my staff was late…"*. Mrs Ali went on to say that this was not what she expected of her staff. Mrs Ali then asked Mrs O'Rourke whether there was anything Ms O'Rourke wanted to do about it. Mrs O'Rourke told the Tribunal that she had assured Mrs Ali that it was not a problem and could happen to anyone. She said that Mrs Ali, however, repeated that this was the standard she expected of her staff and asked whether Mrs O'Rourke wanted to do anything about it. Mrs O'Rourke repeated that she did not. The Tribunal accepted Mrs O'Rourke's evidence. She was a credible witness on this matter and had a good, detailed recall of the conversation. Mrs O'Rourke told the Tribunal that she understood that Mrs Ali was implying that Mrs O'Rourke should complain. The Tribunal found that Mrs O'Rourke's understanding of Mrs Ali's intention was accurate. The natural implication of Mrs Ali's repeated enquiry about whether Ms O'Rourke wanted to do anything was that Mrs Ali was inviting Mrs O'Rourke to complain about the Claimant.

38. Mrs Ali told the Tribunal that Maisie Bull had told her that she had heard the Claimant discussing, with a client, the Claimant's legal rights about maternity leave, in about June 2016. Maisie Bull did not attend the Tribunal to give evidence about what she heard. In the absence of Ms Bull giving evidence, the Tribunal finds that the First Respondent was told by Ms Bull that the Claimant had had a conversation with a client

about her maternity rights. As a result, the First Respondent believed that the Claimant had discussed her maternity rights with a client. The Tribunal, however, was unable to make findings about what Ms Bull overheard. It did not hear evidence from Ms Bull, who did not attend the Tribunal, despite having been listed as a witness. The Claimant denied that she had said anything inappropriate.

39. The First Respondent told the Tribunal that, on 15 June 2016, the Claimant took time off in the middle of the day to go to the hairdressers and locked the spa door because she was not in the reception area. The First Respondent said that the Claimant did this without telling the First Respondent. The Claimant told the Tribunal that she had no beauty appointments in the diary for that afternoon and had taken her one hour unpaid lunch break and had written this in the diary, along with another hour, in lieu, to go to the hairdresser. The Claimant said that she had frequently spent her unpaid lunch break in the spa reception, making sure the spa stayed open. The Tribunal notes that the diary entry for the day does record the Claimant taking an hour's break. The Tribunal finds that the Claimant took an hour, which she was entitled to take, and wrote this in the diary. She locked the door because she was not in reception. She did not tell the First Respondent that she was doing this. Mrs Ali sent the Claimant a message on 15 June saying that clients had complained that the spa was closed. She said that the spa should be kept open. The Claimant replied, agreeing with Mrs Ali that the spa should be open (page 67-68).

40. The Claimant went to a wedding on 8 and 9 July 2016. The Claimant told the Tribunal that she had asked the First Respondent, a number of months previously, for time off to go to the wedding and had put this in the diary. Mrs Ali told the Tribunal that the Claimant simply had booked time off, without asking. The Tribunal observed that, in a Whatsapp message sent by the First Respondent at the time (page 74), the First Respondent said *"Hi Roxana, have a lovely few days off and enjoy your wedding…"*. The Tribunal finds that the Whatsapp message demonstrated that the First Respondent knew that the Claimant was going away to the wedding and that that First Respondent was not unhappy about this, at the time.

41. Maisie Bull did not ultimately start working at the spa and the First Respondent employed another therapist, Alex Sullivan, from July 2016. The First Respondent told the Tribunal that Maisie Bull left the spa because of the Claimant's behaviour, that the Claimant was controlling and tried to interfere with her work and that Maisie Bull felt that the Claimant was disrespectful towards the First Respondent. Maisie Bull's mother was an acquaintance of the First Respondent. Ms Bull did not herself give evidence to the Tribunal about these matters. In absence of oral evidence, cross-examined, and in the circumstances that Ms Bull's witness statement was unsigned, the Tribunal considered that it was not able to make findings about the reason that Ms Bull left the First Respondent's workplace.

42. On 16 July 2016, the First Respondent gave the Claimant £100 to buy a present for her baby. The First Respondent and the Claimant both went on a training course on 19 July 2016, in order to learn how to use a new beauty machine called, "Venus Freeze". The Claimant and First Respondent were exchanging friendly messages at this time, exchanging tips on dealing with summer mosquitoes, amongst other matters. The First Respondent also enthusiastically commented on the Claimant's Facebook post of the 20 week scan of her baby (pages 76-77).

43. The parties agreed that the Claimant's client, Mrs O'Rourke's, endermologie treatment on her arms was not successful after several sessions. The Claimant raised this with the First Respondent and the First Respondent told the Claimant only to use the rollers on the machine in one direction. She also said that reversing the rollers could cause skin to stretch. It was agreed between the parties that rollers could be reversed on other areas of the body, for example on the buttocks.

44. The First Respondent asked the Claimant to train Alex Sullivan. The Claimant did so in the first week of August 2016. During that week, Ms Sullivan told Mrs Ali that the Claimant had shown Ms Sullivan to use the endermologie rollers in reverse. Ms Sullivan said that the Claimant had said *"Sue doesn't like this but I use the rollers this way"*. Mrs Ali was cross and considered that the Claimant had not followed her management instructions. Mrs Ali retrained Ms Sullivan.

45. The First Respondent produced an endermologie instruction photograph which appeared to show arrows on an arm for the directions of travel of rollers on the arm, down towards the elbow and also laterally in both directions on the arms. The First Respondent did not produce literature which gave instructions, for example that rollers should never be used in reverse on the arms. The Claimant told the Tribunal that her training had included using rollers in reverse. The First Respondent said that she had orally been told by the manufacturer that this must not occur on the arms. The Tribunal finds that the First Respondent, as the Claimant's manager, had given the Claimant an instruction not to use rollers in reverse on the arms and that the Claimant should have followed this instruction with regard to the arms, even if she disagreed with it.

46. In about July 2016, the First Respondent also noticed the Claimant hanging the facial head on the endermologie machine from its hose, rather than resting it in a secure holder. The First Respondent asked the Claimant to stop doing this, but felt that the Claimant continued to do it. The Claimant told the Tribunal that she was training Alex Sullivan, when an error occurred on the facial head, and when she told the First Respondent about the error, the First Respondent said that she had experienced the same problem a few weeks earlier. The Claimant said that the facial head stopped working again on 25 August 2016. The First Respondent was not happy that the facial head had stopped working and blamed the Claimant.

47. The Claimant gave the First Respondent her MAT B1 certificate on 13 August 2016.

48. On 22 August 2016, the Claimant had sold some skin products to a client, Emma, for dry skin and uneven pigmentation. The client had paid for the products and the Claimant had ordered them. The First Respondent disagreed with the Claimant and told her that another product for dry skin would have been better for the client. On 27 August the client, Emma, came into the spa. The Claimant saw that the products which she had ordered for the client were in a bag in the reception area. She gave them to the client, assuming that they were for the client. She did not check with the First Respondent about this. In fact, the products were for a different client. On 29 August 2017, the First Respondent sent a message to the Claimant saying that the creams were for a different client and asking the Claimant to call as soon as possible. The message was not friendly in tone. When the Claimant telephoned the First Respondent about this; the discussion became heated. The First Respondent told the Tribunal that the Claimant was not listening to her. The Claimant told the Tribunal that

the First Respondent was not listening to her and had put the phone down on her. The Tribunal notes that in the diary, on 29 August 2016, Mrs Ali wrote in large letters and underlined that the product was not for Emma. The Tribunal considers that the nature of the entry shows that Mrs Ali was angry. The Claimant told the Tribunal that Mrs Ali abused the Claimant on the telephone. The Tribunal finds, on the balance of probabilities, that the First Respondent did display anger towards the Claimant on the phone, and did not listen to her explanation, and put the telephone down on the Claimant.

49. On 31 August 2016, the First Respondent spoke again to the Claimant about the disputed products. The First Respondent told the Tribunal that the First Respondent was calm and professional and that the Claimant shouted at the First Respondent and was aggressive and accused the First Respondent of placing her and her baby under stress. The Claimant told the Tribunal that the First Respondent had said to the Claimant *"If you are stressed, why are you still here?"*. The Tribunal finds that the First Respondent was not calm and professional during this conversation, she was angry and, indeed, she was still angry at the time of the Tribunal. The Tribunal finds that the Claimant did say that the First Respondent was putting stress on the Claimant and the Claimant's baby. The Tribunal accepted the Claimant's evidence that the First Respondent said *"If you are stressed, why are you still here?"*.

50. The First Respondent left the spa and sat outside on a bench for some time. She telephoned her husband, the Second Respondent, and told him that she felt very stressed. The First Respondent and her husband agreed to obtain legal advice. Her husband telephoned ACAS. An ACAS adviser warned him about the possibility of a pregnancy discrimination claim if the Claimant was dismissed, but also gave advice about dismissing the Claimant.

51. The Second Respondent drafted a letter of dismissal to the Claimant, based on information from the First Respondent. He felt that the relationship had broken down and that "someone had to go" and, logically, it was the Claimant who would go. The Second Respondent wrote the letter as from the First Respondent. The letter said:

> *"On 21st May 2016, I attempted to verbally and informally address these issues so that our work relationship, as well as my business would not deteriorate further, however the situation has now deteriorated beyond repair and I no longer have any trust of confidence in you as an employee."*

52. The reasons for dismissal were given as:

> *"**18th May 2016:** You remained bad tempered and morose throughout the day, for no apparent reason…*
>
> ***19th May 2016:** You were condescending and rude to me in the presence of clients Sam and Gwen.*
>
> ***20th May 2016:** You did not prepare the treatment room as you are required to do.*
>
> ***15th June 2016:** You booked a hairdressers appointment during work*

time and without permission…

Without permission, struck out your diary leave as 'holiday leave' on 8th and 9th July.

…you have repeatedly ignored and defied explicit instruction on the way treatments are carried out, to the detriment of the health and safety of clients…you have chosen to ignore me and continue to carry out treatments the way you want to, rather than by the protocols which have been designed…

This behaviour can only be taken as a direct attack against the integrity of my business and I am no longer willing to stand by and watch you destroy it.

Despite several warnings about your use of the Endermolab machine, and of the damage you may cause due to mistreatment of the facial head, you have continued to mistreat it, causing the head to be damaged to the tune of £1000.

You refused to treat Amrita for the unacceptable reason that you just don't like her, and then went on to breach client confidentiality...

You recently sold client products, which I explicitly told you not to as they were unsuitable for her skin condition…

I have a list of clients who have stated that they do not wish to be treated by you…

I have felt bullied, undermined and mistreated in my own business...

I attempted to talk to you this morning, however you remain indignant and unwilling to listen, leaving me no option but to dismiss you without notice…"

53. The Second Respondent attended the spa and dismissed the Claimant on the First Respondent's behalf.

54. The Claimant submitted a detailed grievance on 2 September 2016, responding, point by point, to the Respondent's dismissal letter and disagreeing with the First Respondent's version of events (page 92). The Claimant said that she had never received a verbal or written warning regarding her conduct during her employment and that she had been dismissed for pregnancy related reasons.

55. On 3 September 2016, the First Respondent replied, setting out her detailed response to the Claimant's grievance (page 96-102).

56. On 8 September 2016 (page 109), the Claimant wrote to the First Respondent, setting out her entitlement to statutory maternity pay, and giving the First Respondent the web address of the relevant government website. The Claimant said that she was on the First Respondent's payroll in the qualifying week, the 15th week, before the

expected date of child birth, that she had given the First Respondent the correct notice for her maternity leave, her MAT B1, the proof that she was pregnant, had worked continuously for at least 26 weeks up to the qualifying week and had earned at least £112 per week gross. The Claimant said that she was, therefore, entitled to statutory maternity pay from the First Respondent; 90% of her average weekly earnings for six weeks and, thereafter, 33 weeks at £139.58 per week.

57. On 8 September 2016, the First Respondent replied (page 111). She said:

> *"You did not start your maternity leave as of 31st August, therefore SMP rules cannot apply to you.*
>
> *You have chosen to ignore my reasons for your dismissal and are attempting to exercise your maternity rights, which have diminished at the point you were dismissed due to your gross insubordination, negligence and intolerable attitude."*

58. The First Respondent was wrong about the Claimant's entitlement to SMP. Eventually, some time later, the First Respondent did pay the Claimant's statutory maternity pay.

59. The Claimant told the Tribunal that the First Respondent had made deductions made from her pay. The Tribunal did not hear any evidence about unlawful deductions. With regard to her holiday pay claim, the Claimant said that she would have accrued holiday during her maternity leave and lost that holiday because she had been dismissed. The Claimant did not say that she accrued holiday before her dismissal but that, rather, the First Respondent failed to pay her for the holiday which would have accrued during her maternity leave.

Relevant Law

Pregnancy Discrimination

60. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing her or by subjecting her to a detriment.

61. By *s18 EqA 2010*,

"….. (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

……

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise.. the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins……"

62. There are three elements to discrimination because of pregnancy:

62.1. The employer has subjected the Claimant to unfavourable treatment;

62.2. The unfavourable treatment is a prohibited act such as a detriment or dismissal;

62.3. The unfavourable treatment was done because of pregnancy

63. The *Equality Act 2010* does not define what is meant by "unfavourable treatment" for the purposes of *s18*. The EHRC Code of Practice on Employment 2010 states, in relation to *s15*, which makes it unlawful for an employer to treat a disabled person "unfavourably" because of something arising in consequence of disability, that the disabled person "must have been put at a disadvantage," see Code paragraph 5.7.

64. The shifting burden of proof applies to claims under the Equality Act 2010, *s136 EqA 2010*:

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

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

Detriment

65. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Causation

66. Regarding causation, the question is whether the complainant was treated unfavourably because of her pregnancy or maternity, *Johal v Commission for Equality and Human Rights* UKEAT/0541/09, [2010] All ER (D) 23 (Sep)): was her pregnancy an 'effective cause' of the treatment complained of (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1996] IRLR 372, [1997] ICR 33, EAT)?

67. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

Burden of Proof and Inferences

68. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and the Annex to the judgment. The Guidance refers to race discrimination but applies equally to other forms of discrimination:

> (1) Pursuant to s136 EqA 2010 it is for the claimant who complains of race discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by the Act or which is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of race discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word 'could' in s136. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s138 of the EqA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s138 EqA.
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.s15(4) of the EqA 2006. This means that inferences may also be drawn from

any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

Unreasonable Treatment

69. The EAT has commented *In London Borough Of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council* [1997] IRLR 229:

'… it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

70. In the circumstances of a particular case, unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ indicated, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

Contributory Conduct

71. The EAT has confirmed, in *Way v Crouch* [2005] ICR 1362, that the *Law Reform (Contributory Negligence) Act 1945* applies to discrimination law, so that Employment Tribunals can make a reduction from compensation to reflect contributory conduct.

Liability of Agents

72. By *s110 EqA 2010* Liability of employees and agents, "A person (A) contravenes this section if… A does something which, by virtue of *s109(1) or(2*), is treated as having been done by A's employer or principal (as the case ay be) and the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Automatic Unfair Dismissal

73. *S 99 ERA 1996* provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a kind prescribed in the *Maternity and Parental Leave etc Regulations 1999*, or the dismissal takes place is prescribed circumstances, *s99(1) & (2).*

74. *Reg 20 MPL Regs 1999* provides that an employee is unfairly dismissed where the reason or principal reason for her dismissal is a reason connected with the pregnancy of the employee, the fact that the employee has given birth to a child or the fact that she took, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave *(Reg 20(3)(a),(d), (e) MPL Regs 1999*).

75. By *s104 ERA 1996* it is automatically unfair to dismiss an employee if the reason or principal reason for dismissal is that the employee, ".. alleged that the employee had infringed a right of his which is a relevant statutory right."

76. Relevant statutory rights include any right conferred by the *ERA 1996*, the remedy for infringement of which is by way of complaint to an Employment Tribunal.

Time Limits - Discrimination

77. By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of

77.1. the period of three months starting with the date of the act to which the complaint relates or
77.2. such other period as the Employment Tribunal thinks just and equitable.

78. By *s123(3),* conduct extending over a period is treated to be done at the end of the period.

79. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act

extending over a period'. The question is whether there is “an act extending over a period,” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.' Paragraph [52] of the judgment.

Discussion and Decision

Automatic Unfair Dismissal – Unanimous Decision

80. The Claimant contended that she had been dismissed automatically unfairly and that the reason or principal reason for her dismissal was the fact that she was pregnant and/or seeking to exercise the right to maternity leave, or that she had been dismissed for asserting the right to statutory maternity pay and/or holiday pay.

81. The unanimous judgment of the Employment Tribunal was the Claimant’s pregnancy and/or her seeking to exercise the right to maternity leave and/or maternity pay was not the sole or principal reason for dismissal. The Tribunal found unanimously that the First Respondent did have, in her mind when she dismissed the Claimant, numerous matters of what she considered to be the Claimant’s misconduct. For example, the Claimant selling products with the First Respondent had said were not the most suitable products to a client, the Claimant training Alex Sullivan to use rollers in reverse and the First Respondent’s belief that the Claimant had damaged part of an endermologie machine by not storing it correctly.

82. The Second Respondent drafted the letter of dismissal relying on information from the First Respondent. The letter of dismissal enumerated many items of misconduct on the Claimant’s part. The ET accepted that the First Respondent did have all these things in her mind when she dismissed and that these were foremost in her mind. Because these matters of misconduct were foremost in the First Respondent’s mind, the Tribunal concludes that the sole or principal reason for dismissal was not any of the automatic grounds for dismissal.

Pregnancy Discrimination – Detriments and Dismissal – Majority Judgment

83. The Employment Tribunal looked at its findings of fact, regarding the alleged acts of unfavourable treatment, separately and as a whole.

84. The majority of the Employment Tribunal found that the First Respondent asked the Claimant to rearrange her antenatal appointment for her day off. It also found the First Respondent unreasonably viewed the Claimant’s response, that she was entitled to time off for antenatal appointments, as aggressive. The majority found that there was, as a result, unresolved tension between the two women. The majority of the Employment Tribunal concluded that the First Respondent treated the Claimant unfavourably and subjected her to a detriment by asking her to take her antenatal appointment on a day off and considering that the Claimant had been aggressive when she had merely asserted her right to have paid time off for the antenatal appointment; a reasonable employee would feel disadvantaged in the workplace thereafter, as a result of the unpleasant interaction and consequent unresolved tension.

85. Given that antenatal appointments are a natural consequence of being pregnant, the majority of the Employment Tribunal considered that the burden of proof shifted to

the First Respondent to show that pregnancy was not part of the reason for this detrimental treatment.

86. The majority of the Employment Tribunal also found that, while Mrs Ali did not directly instruct the Claimant to return to work on Saturday 14 May 2016, she communicated stress towards the Claimant with regard to the Claimant taking time off work, linked to her pregnancy and illness. She, thereby, put considerable pressure on the Claimant to return to work. As a result, the Claimant felt compelled to return. The majority of the Tribunal considered that this action was unfavourable treatment and a detriment. The Claimant wished to take time off, as she felt extremely ill during the early stages of a precious pregnancy, but felt compelled to return to work, rather than resting and recovering. The majority considered that a reasonable employee would inevitably feel disadvantaged by being pressurised to return to work when they felt genuinely, considerably ill during a pregnancy.

87. The Tribunal unanimously concluded that Mrs Ali did not tell the Claimant, on 21 May 2016, to leave and return to work after giving birth to her child.

88. The Tribunal unanimously concluded that Mrs Ali did make the Claimant work late on 1 June 2016 and that this was unfavourable treatment and a detriment, in that the Claimant had not been warned or consulted about it and was required to work after normal working hours. The majority considered that the burden of proof shifted to the First Respondent to show that pregnancy was not part of the reason that Mrs Ali required the Claimant to work late. The majority noted that the Claimant had, on her return to work after her antenatal appointment, undertaken almost as many appointments that afternoon and evening as she normally undertook in a whole normal day's work.

89. The Tribunal unanimously concluded that Mrs Ali had not put pressure on the Claimant to decide when she wanted to commence maternity leave from June 2016 to August 2016 and she had not stated that repayment of SMP by HMRC would take three years.

90. The Tribunal unanimously concluded that, in June 2016, Mrs Ali had invited a client to make a complaint about the Claimant, when she repeatedly stated to Mrs O'Rourke that the Claimant's lateness was not what she expected of her employees and asked Mrs O'Rourke, repeatedly, if there was something Ms O'Rourke wanted to do about it. The Tribunal concluded that this was unfavourable treatment and a detriment; a reasonable worker would feel disadvantaged by their employer inviting complaints about them.

91. The Tribunal unanimously concluded that, on 29 August 2016, Mrs Ali was angry when she spoke on the telephone to the Claimant, did not listen to her and put the phone down on her and that, on 31 August 2016, Mrs Ali abused the Claimant by asking her, "If you are stressed, why are you still here?" These were both unfavourable treatment and a detriment. Regarding the first, a reasonable worker would feel humiliated and insulted. With regards to the second, a reasonable worker would consider that their continued employment was being questioned and put at risk.

92. The Tribunal unanimously concluded that Mrs Ali did dismiss the Claimant and that she did email the Claimant, refusing to pay her SMP.

93. The majority concluded that refusal to pay SMP was unfavourable treatment and a detriment; in that the Claimant would have been alarmed and worried about her ability to support herself and her child during her maternity leave and, further, that the refusal to pay SMP was an affront to the Claimant, who did have the right to maternity pay, which the First Respondent was denying.

94. The majority considered that the burden of proof did shift to the First Respondent show that pregnancy was no part of the reason that the First Respondent subjected the Claimant to these detriments and dismissed her.

95. The majority of the Tribunal concluded that the antenatal appointment was intrinsically linked to the Claimant's pregnancy. It found that the Claimant's pregnancy was part of the reason that the First Respondent asked the Claimant to take the appointment on a day off, rather than taking time off out of work. It decided that the Claimant's pregnancy was part of the reason that the First Respondent reacted negatively to the Claimant saying that she had a right to time off to attend such appointments, as a pregnant woman.

96. The majority considered that the Claimant and Mrs Ali's relationship soured from 11 May 2016, when the Claimant asserted her right to time off for antenatal appointments. It considered that the First Respondent did not welcome the Claimant taking time off when she was ill in pregnancy and communicated this by putting pressure on the Claimant to return to work. It decided that the First Respondent subjected the Claimant to a detriment by making her work late on 1 June 2016, after her antenatal appointment. The Claimant was dismissed when she was in the later stages of pregnancy. The majority noted the coincidence in timing between the Claimant becoming pregnant and exercising her right to time off due to her pregnancy and the sudden deterioration of the relationship between the two women, as evidenced by the First Respondent's numerous criticisms of the Claimant in the unsent letter of 23 May 2016 and repeated in the letter of dismissal. The majority found that found that the First Respondent's criticisms of the Claimant in this regard were not reasonable; it accepted the Claimant's evidence regarding each allegation of misconduct set out in the letter.

97. The majority concluded that the First Respondent has not shown that pregnancy was not part of the reason that she subjected the Claimant to the detriments during her pregnancy and later dismissed her. It concluded that the First Respondent took a negative view of the Claimant from 11 May 2016 and criticised her unreasonably, finding fault with her work on a number of occasions where this was not justified. She continued to display this negative attitude to the Claimant during her pregnancy, repeatedly being angry and rude towards about relatively trivial matters, such as the suitability of creams for a client and what the Claimant should have done having already sold the creams. While the majority accepted that there were other reasons in the First Respondent's mind when she dismissed, pregnancy was part of the reason that the Claimant was dismissed.

98. Further, the majority concluded that the First Respondent's negative attitude towards the Claimant continued after her dismissal and was manifested in her refusal to pay the Claimant Statutory Maternity Pay, even when the Claimant had set out her entitlement and provided the relevant link to a government website to corroborate her

assertions. The majority again decided that the First Respondent did not show that the Claimant's pregnancy was not part of the reason that the First Respondent initially refused to pay the Claimant's SMP entitlement, even when the Claimant explained and justified this entitlement.

99. The majority found that the First Respondent's unfavourable treatment of the Claimant was a continuing act from 11 May 2016 until the refusal to pay SMP and that all the complaints were therefore brought in time. The numerous detriments amounted to a continuing discriminatory state of affairs, which constituted an act extending over a period.

Liability of Second Respondent for Dismissal – Majority Judgment

100. The majority decided that the Second Respondent was liable, as agent of the First Respondent as principal, for dismissing the Claimant, pursuant to *ss109 & 110 Equality Act 2010*. The Second Respondent drafted the letter of dismissal on the First Respondent's behalf, acting on information provided by her, and dismissed the Claimant, also on the First Respondent's behalf. He was intimately involved in the dismissal process.

Pregnancy Discrimination – Minority Judgment

101. The minority found that the First Respondent did not subject the Claimant to a detriment when she asked her to rearrange her antenatal appointment for her day off. The minority considered that the First Respondent, as a small employer, was unaware of the legal responsibility to allow time off for antenatal appointments and, as soon as the Claimant had asserted her right, the First Respondent agreed that she could have time off work. The minority concluded that a reasonable worker would not have considered themselves to be disadvantaged in the workplace after this transitory misunderstanding.

102. The minority considered that the Claimant had returned to work voluntarily on 14 May 2016 and, as such, the First Respondent did not treat the Claimant unfavourably and that there was no detriment.

103. The minority decided that the relationship between the Claimant and First Respondent broke down some time in May, but not specifically on 11 May 2016. The minority concluded that there were a number of reasons why the relationship began to break down, including the Claimant not obeying instructions, and that the relationship did not break down as a reaction to the Claimant asking for time off for her antenatal appointment. The minority considered that the First Respondent had legitimate criticisms of the Claimant's performance, but that the Claimant did not accept the criticisms.

104. The minority considered that the First Respondent was a small business and that the relationship between the two women genuinely broke down, so that the Claimant and the First Respondent could not continue to work together. The minority concluded that the argument on 31 August was the final straw and that the First Respondent dismissed the Claimant because the two could not continue to work together.

105. The minority concluded that the First Respondent had shown that the Claimant's

pregnancy was no part of the reason that the First Respondent subjected the Claimant to any unfavourable treatment, or dismissed her.

Contribution to Dismissal – Majority Judgment

106. The majority concluded that the Claimant did contribute to her dismissal. While many of the criticisms of the Claimant by the First Respondent were trivial and unreasonable, some were not. In particular, the Claimant had been told by the First Respondent not to use endermologie rollers in reverse on the arms, but it appears that the Claimant told Alex Sullivan that the Claimant did use the rollers in reverse, even though Mrs Ali did not. The Claimant also left the shutters up in the shop on one occasion - although it is clear that no disciplinary action was taken against the Claimant at that time. The Claimant, at times, did not put the endermologie facial head in its secure holder. The majority found that the other matters of the criticism of the Claimant were trivial, or unreasonable, and were explained by the Claimant in cross-examination. For example, it was not correct that the Claimant had taken holiday leave without warning on 8 and 9 July 2016; further, the Claimant was entitled, on one occasion, to go to the hairdresser during a lunch hour and time in lieu.

107. The amount of contribution shall be decided at the remedy hearing, having heard submissions from the parties.

Unlawful Deductions from Wages and Holiday Pay – Unanimous Judgment

108. The Claimant told the Tribunal that the First Respondent had made deductions made from her pay. The Tribunal did not hear any evidence about unlawful deductions. With regard to her holiday pay claim, the Claimant said that she would have accrued holiday during her maternity leave and lost that holiday because she had been dismissed. The Claimant did not say that she accrued holiday before her dismissal but that, rather, the First Respondent failed to pay her for the holiday which would have accrued during her maternity leave.

109. In the absence of evidence of unlawful deductions or unpaid holiday pay, the Claimant's claims for unlawful deductions from wages and holiday pay failed.

Failure to Provide Written Statement of Terms and Conditions

110. The First Respondent did give the Claimant a letter at the outset of her employment, setting out most of the terms on which the Claimant would be employed. However, she did not give the Claimant a written statement of terms of employment which included the rate at which commission would be paid, or the Claimant's notice period following completion of her probationary period. As such, the First Respondent failed to provide the Claimant with a written statement of her terms and conditions which complied with the requirements of *s1(4)(a)&(e) Employment Rights Act 1996* within two months of her starting employment.

ORDER

111. A date for a Remedy Hearing will be fixed. The parties should write to the Employment Tribunal by 15 November 2017, giving their dates to avoid for a 1 day remedy hearing.

Employment Judge Brown

31 October 2017