EMPLOYMENT TRIBUNALS

Claimant: Ms Alison Roberts

Respondent: Spandex UK Limited

Heard at Bristol **On:** 4, 5, 6, 7, 8 December 2017
12, 13 December 2017 (in Chambers)
9 January 2018 (in Chambers)
5 February 2018 (in Chambers)
8 August 2019 (in Chambers)

Before Employment Judge Cooksey
Mrs LeVaillant
Mr Williams

Representation

Claimant: Ms A Palmer (counsel)

Respondent: Mr L Harris (counsel)

JUDGMENT

The Claimant was unfairly constructively dismissed by the Respondent contrary to section 98(4) Employment Rights Act 1996.

The Claimant was unfairly dismissed contrary to section 99 Employment Rights Act 1996. The principal reason for dismissal was connected with maternity leave.

The Claimant was not discriminated against because of pregnancy or maternity. The complaints of discrimination brought pursuant to sections 18 and 13 of the Equality Act fail and are dismissed.

The Claimant was victimised by the Respondent.

The Respondent did not unreasonably fail to comply with a relevant Code of Practice. No adjustment to compensation shall be made pursuant to section 207A Trade Union & Labour Relations (Consolidation) Act 1992.

No order is made for a financial penalty pursuant to section 12A Employment Tribunals Act 1996.

REASONS

The claim and resistance

1. By a claim form presented on 7.4.2017 the Claimant brought claims of:

   1.1 Constructive unfair dismissal
   1.2 Automatic unfair dismissal pursuant to section 99 Employment Rights Act 1996 and regulation 20 Maternity & Parental Leave Regulations 1999
   1.3 Direct sex discrimination
   1.4 Direct pregnancy / maternity discrimination
   1.5 Victimisation
   1.6 A claim for a fine (section 12A Employment Tribunals Act)

2. In its ET3 and grounds of resistance of 9 May 2017 the Respondent resisted all complaints brought. The Respondent also disputed the factual premise of certain complaints brought.

3. On 20 June 2017 the Claimant's representatives made an application to amend the grounds of claim. The Respondent did not resist the application and the amendments were made.

4. On 22 June 2017 there was a telephone case management preliminary hearing before Employment Judge Pirani. The claims and nature of resistance were identified and discussed, and orders made for the management of proceedings to hearing. A list of issues was to be agreed between the parties. The Respondent was given permission to serve an amended response following amendment to the grounds of complaint and took the opportunity to do so. Both parties were ordered to provide further particulars of their respective cases. The Respondent was to provide further particulars as to what information Mr Watson considered or took into account in rejecting the Claimant for the role of UK Aftermarket Field Sales Manager ("UK AFSM"). The Claimant was ordered to provide particulars of her allegation that she was isolated / excluded from the announcement of her pregnancy, and the allegation that the Respondent failed to allocate her work from the announcement of her pregnancy.

5. By email of 6 July 2017 the Respondent provided further particulars in respect of decision making relating to the UK AFSM role (bundle p.92).

6. The Claimant provided the clarification required of her (bundle p.101i) and adopted this as part of her evidence during supplementary questions in chief. This was to the effect that after announcing her pregnancy the Claimant had a strong perception that the atmosphere was different and less friendly towards her from senior management than previously, that she was included in discussions with management less frequently and her opinion was not valued as highly as beforehand.

7. On 28 November 2017 there was a preliminary hearing before Employment Judge R Harper. The Claimant wished to call an additional witness, and if that was allowed the Respondent also wished to call an additional witness. Judge Harper was not convinced as to the relevance of the additional witness evidence to be called but allowed both to

give evidence. The parties had also been in discussion in respect of disclosure and addressed Judge Harper on this. Material had been disclosed in partly redacted form. Judge Harper ordered that the Tribunal hearing the complaints and resistance could consider the redacted information and deal with remaining issues of disclosure at the hearing.

8. A list of issues was agreed between parties and provided to the Tribunal on day 1 of the merits hearing. The issues are recorded below.

Merits hearing

9. The hearing before us was listed for 5 days and timetabled broadly in accordance with the order of Judge Pirani.

10. Day 1 of the hearing was listed as a reading day. The parties attended in the morning of day 1 in order to provide documents, discuss the issues to be determined and to deal with the issues relating to documents / disclosure.

11. Before hearing from the parties we considered their pleaded cases. When the parties appeared before us we were provided with the following:

    11.1 Agreed list of issues.
    11.2 Agreed chronology.
    11.3 Agreed bundle of documents running to 361 pages. Additional pages were added to the bundle as set out below.
    11.4 Witness evidence relied upon by the Claimant. There were three witness statements in total, from the Claimant, Charlotte Bembridge and Angela Roberts.
    11.5 Witness evidence relied upon by Respondent. There were seven statements in total, from Kerry McGeown, Robert Jackson, Louise Lovell, Ben Scammell, Leon Watson, Beverley Meredith and Anita Nelson.
    11.6 Claimant's schedule of loss.
    11.7 A bundle of mitigation documents which we indicated to the parties would not be read unless following liability the question of remedy arose. As part of our case management issues relating to remedy were not to be dealt with at the hearing, save in respect of adjustments pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 which both parties pursued initially.

Agreed issues

12. The issues list agreed between the parties cross referred to the amended grounds of claim in order to particularise the various complaints brought. Drawing together the issues list and particulars, the matters which the Tribunal was to determine were as follows.

"Constructive dismissal

1. Did the Respondent breach the implied term of mutual trust and confidence contained in the Claimant's contract of employment by the alleged acts / omissions set out in page 10, paragraph 57 of the amended particulars of claim?

2. If so, did the Respondent's conduct taken separately or cumulatively amount to a fundamental breach of the Claimant's contract and a breach of the implied term of trust and confidence?

3. Did the Claimant affirm the contract and / or waive any of the breaches which are alleged to have occurred?

4. Did the Claimant leave employment with the Respondent because of the alleged repudiatory breach(es)? If the repudiatory breaches were not the sole cause of the resignation did they play a part in the Claimant's resignation?

Sex discrimination contrary to section 13 Equality Act 2010

5. To the extent that the treatment occurred outside the protected period (if at all), did the Respondent discriminate against the Claimant in that, because of a protected characteristic, the Respondent treated the Claimant less favourably than the Respondent treats or would treat others? NB some of the acts were post resignation and some were post-employment.

6. Does there need to be a comparator under section 13 and if so, who is the comparator?

7. Was the claimant subjected to less favourable treatment as set out in paragraph 49, page 11 of the amended Grounds of Claim?

8. If so, was the reason for the less favourable treatment because of the protected characteristic?

9. If the reason for the less favourable treatment was not the sole or main cause of the less favourable treatment did it have a significant influence or an influence that was more than trivial?

Sex discrimination contrary to section 18 Equality Act 2010

10. Was the claimant subjected to the unfavourable treatment as set out in page 13 paragraph 53 of the grounds of claim as amended?

11. Was the unfavourable treatment because of the Claimant's pregnancy or maternity under sections 18(2)(a), section 18(3) or 18(4) of the Equality Act 2010?

12. If pregnancy was not the only cause of the alleged treatment of the Claimant by the Respondent was it the effective cause?

13. Did the unfavourable treatment occur during the Claimant's protected period or was the treatment of the Claimant an implementation of a decision taken in the protected period, thereby to be regarded as occurring in that period (even if the implementation is not until after the end of that period) under section 18(5) Equality Act 2010?

Victimisation

14. Did the Claimant make a protected act under sections 27(2)(c) and 27(2)(d) namely make "an allegation (whether or not express) that A or another person has contravened this Act" in her statement dated 9 February 2017 and / or her email to the Respondent of 7 March 2017?

15. Was the Claimant subjected to a detriment by the Respondent under section 27(1) of the Equality Act 2010?

16. If so, was the Claimant subjected to the detriment because of the protected act(s)?

Automatic unfair dismissal

17. Was the Claimant's dismissal unfair pursuant to section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity & Parental Leave Regulations 1999, because the reason for her dismissal is connected with her pregnancy or maternity?

Time limits - discrimination

18. Are the acts of unfavourable treatment in time within section 123(1) Equality Act 2010?

19. If not are the acts of less favourable treatment or unfavourable treatment linked acts and part of a continuing state of affairs under section 123(3)(a)?

20. If the acts are found out of time, is it just and equitable to extend time under section 123(1)(b)?

Remedy / ACAS Code of Practice Uplift

21. Did the Respondent unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code") under section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 as alleged by the Claimant and if so, should any compensation be increased to reflect this?

22. Did the Claimant unreasonably fail to follow the ACAS Code under section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 as alleged by the Respondent and if so, should any compensation be increased to reflect this?

Fine

23. Should the Tribunal uphold the claim against the Respondent should the Respondent be ordered to pay a fine of up to £5,000 pursuant to the Enterprise and Regulatory Reform Act 2013 (Commencement No.5, Transitional Provisions and Savings) Order 2014?"

Particulars

13. In respect of the complaint of constructive unfair dismissal, the alleged fundamental breaches were set out in the amended grounds of claim at paragraph 57 (bundle p.61), and itemised from (a) to (n) as follows:

(a) Isolating the Claimant / excluding her from the moment she announced her pregnancy.

(b) From the announcement of her pregnancy the Respondent failed to allocate the Claimant any work / the Claimant only managed to keep herself occupied by her own efforts by assisting with the administrative team.

(c) Failing to consider and / or properly consider the Claimant for the role of UK Aftermarket Field Sales Manager which was a role she could have undertaken and / or failing to involve the Claimant in any consideration of her for the role of UK Aftermarket Field Sales Manager.

(d) Promoting the Claimant's male colleague Mr Scammell who was in her team and equally experienced as the Claimant to the role of UK Aftermarket Field Sales Manager without considering the Claimant for the role.

(e) Not informing the Claimant of the proposed new role / restructure / opportunities before the appointment was made on the day the Claimant gave birth.

(f) Not considering the Claimant or advertising the role.

(g) Failing to note the Claimant's ten year anniversary with the Respondent in the way that it did with other staff and the Claimant herself before her maternity.

(h) Failing to mark the Claimant's birthday in the way that it did with other staff and the Claimant herself before maternity.

(i) Failing to ensure that the Claimant received key correspondence or vital information such as the fact that her car was unroadworthy (this complaint was subsequently withdrawn by the Claimant prior to determination by the Tribunal).

(j) Refusing to allow the Claimant to work from home in preparation for the staff training that she was undertaking even though the Claimant was home based and had worked in this manner before maternity leave.

(k) Not keeping her informed of other vacancies such as the role of E-Business Co-ordinator.

(l) Failure to provide the Claimant with updates of changes within the business to enable her to keep in touch. For example, the Claimant was led to believe that her customers would be taken care of by a designated person during her absence ready for her return to work.

(m) Failure to inform the Claimant of key changes to the commission structure which affected her pay.

(n) The above acts were acts of discrimination on the grounds of the Claimant's pregnancy / maternity"

14. As for sex discrimination contrary to section 13, paragraph 49 of the amended grounds of claim (bundle p.62) alleged less favourable treatment as follows. Broadly the allegations made at (a) to (n) in respect of constructive dismissal were repeated. Allegations (c) and (f) were put in different terms. Further allegations were made at items (o) to (s). For convenience we set out only what differed from the constructive dismissal allegations.

(c) Failing to consider the Claimant for the role of UK Aftermarket Field Sales Manager which was a role she could have undertaken.
(f) The promotion of the Claimant's colleague Mr Scammell without considering the Claimant or advertising the role.
(o) The comment made on 10 February 2017 by the Respondent's Finance Director, Beverley Meredith that Mr Scammell had a defined career path implying that the Claimant did not.
(p) The Respondent's failure to investigate and / or uphold the Claimant's grievance.
(q) The comment in the grievance letter that both parties could learn lessons.
(r) The denial that Ms Meredith had made the comment about Mr Scammell's career path.
(s) Failing to properly consider or uphold the Claimant's grievance appeal in April-May 2017.

15. As for discrimination because of pregnancy and / or maternity paragraph 53 of the amended grounds of claim (bundle p.64) alleged unfavourable treatment. The particulars of unfavourable treatment at paragraphs 53(a) to (m) repeated the particulars alleged in respect of less favourable treatment set out above. The remaining allegations of unfavourable treatment repeated what was alleged in terms of less favourable treatment but in a different sequence, as follows:

(n) Failing to properly consider or uphold the Claimant's grievance appeal in April-May 2017.
(o) The above acts were acts of discrimination on grounds of the Claimant's pregnancy / maternity.
(p) The comment made on 10 February 2017 by the Respondent's Finance Director Beverley Meredith that Mr Scammell had a defined career path implying that the Claimant did not.
(q) The Respondent's failure to investigate and / or uphold the Claimant's grievance.
(r) The comment in the grievance letter that both parties could learn lessons.
(s) The denial that Ms Meredith had made the comment about Mr Scammell's career path.

16. Particulars of the victimisation and detriment alleged were given at page 14 paragraph 52 of the amended grounds of claim as:

(a) The comment made on 10 February 2017 by the Respondent's Finance Director, Beverley Meredith that Mr Scammell had a defined career path implying that the Claimant did not.
(b) The Respondent's failure to investigate and / or uphold the Claimant's grievance.
(c) The comment in the grievance letter that both parties could learn lessons.
(d) The denial that Ms Meredith had made the comment about Mr Scammell's career path.
(e) Failing to properly consider or uphold the Claimant's grievance appeal in April-May 2017.

17. During the course of the hearing when questioning witnesses or addressing the Tribunal the representatives used the allegations as set out at pp.62-64 to deal with complaints of constructive dismissal and discrimination, and the allegations at pp.65-66 in respect of victimisation.

18. Despite the way in which the section 13 claims were described in the issues list (matters falling outside the protected period) during the course of the hearing witnesses were cross examined on the basis of a comparative direct sex discrimination complaint based on gender or gave evidence in that vein. After all evidence had been taken but prior to us hearing submissions Mr Harris sought to clarify with Ms Palmer the premise of the s.13 complaints. Ms Palmer confirmed that the s.13 complaints were limited to complaints of pregnancy discrimination falling outside the protected period. There were no complaints of sex discrimination pursued which would require a comparative assessment with how a man would be treated. It was agreed that the protected period ended on 28.2.2017.

Disclosure issues: day 1

19. The issues relating to disclosure of documents was dealt with prior to the Tribunal commencing the scheduled pre-reading of witness statements and documents. The Respondent was unwilling to disclose certain documents sought by the Claimant in the absence of an order from the Tribunal. We heard submissions from both parties.

20. The first document sought by the Claimant was said to be the resignation letter of Louise Lovell. Louise Lovell had been employed by the Respondent for a period, then left that employment but later returned. On behalf of the Claimant we were told that Louise Lovell was made redundant by the Respondent during her maternity leave, but was offered an alternative post which she declined. Ms Lovell did not think that she was made redundant due to pregnancy, but Ms Palmer believed there was some connection between her redundancy and maternity / pregnancy.

21. In submissions Mr Harris told us that the letter in question was not a resignation letter, but correspondence in which Ms Lovell declined alternative employment. It had not been disclosed previously because the relevance of it to the instant proceedings was not understood. Mr Harris agreed to disclose the letter in question voluntarily. This was added to the bundle at pp.352a-b.

22. There were two further documents in the hearing bundle which were presented in redacted form. Ms Palmer sought unredacted versions.

23. The first of these was a document at p.211 of the bundle entitled "costs/savings" relating to the restructure which formed part of the Claimant's central complaints to the Tribunal. Several individuals affected by the restructure were identified, and their current and new roles were set out in tabular form, together with a total figure for their combined remuneration packages. Individual remuneration detail was redacted.

24. Ms Palmer told us that the Respondent relied upon this document as evidence of the restructure leading to various promotions including that of Mr Scammell. All individual figures were redacted and there was no good reason to refuse to disclose the detail in full. Ms Palmer articulated various concerns in respect of the figures and promotions which took effect as a result. Disclosure was required to determine whether or not the figures were genuine. Ms Palmer argued that confidentiality was no good reason to fail to disclose the information.

25. Ms Palmer made a similar submission in respect of a document at p.158a of the bundle. This was an email containing a table relating to the proposed structural changes and employee costs. The table was barely legible anyway, but individual remuneration had been redacted. The email was sent some four weeks before the Claimant learned of Mr Scammell's promotion.

26. In response Mr Harris confirmed that the Respondent would disclose unredacted versions of these two documents if so ordered by the Tribunal. The Respondent had concerns about doing so because the documents contained personal remuneration information for a number of employees. We were told that concerns relating to p.211 were not raised at the preliminary hearing the preceding week, and that an unredacted version of p.158a had not been requested previously.

27. Following deliberation the Tribunal ordered that the two documents be disclosed in unredacted form. We understood the Respondent's concerns relating to disclosure of individual remuneration packages but accepted Ms Palmer's submission that this was no basis to refuse to disclose in unredacted form. The contested material appeared to us to be relevant to the Respondent's decision making as to who to appoint to various roles and why, and was directly relevant to complaints brought by the Claimant. Mr Harris agreed to provide the unredacted documents and did so.

The evidence

28. The parties withdrew shortly after 11am and thereafter the Tribunal had a full reading day. All witnesses had prepared witness statements which, as indicated to the parties, were taken as read. We considered the witness statements and the documents referred to within them. The parties were advised that the Tribunal would not necessarily proactively read through all the documents in the bundle, and that they should bring any documents not referred to within the statements to our attention via cross examination and submissions.

29. We commenced hearing oral evidence on day 2. The hearing was timetabled for evidence to be heard from the Claimant for one and a half days, and two days was allocated for the Respondent's evidence. All witnesses called were cross examined. At the conclusion of the evidence we heard submissions on behalf of both parties in the afternoon of day five of the hearing.

30. On behalf of the Claimant we heard from:

- Miss Roberts herself
- Mrs Roberts, the Claimant's mother. She attended the meeting on 10 February 2017, grievance hearing and appeal hearing and took notes.
- Charlotte Bembridge. Aftermarkets Team Leader, November 2011 to July 2016.

31. On behalf of the respondent we heard evidence from:

- Kerry McGeown. UK Aftermarket Manager May 2013-July 2016; UK Operations Manager August 2016-October 2017; Director of Customer Relationships Management October 2017-present. The Claimant's line manager until July 2016.
- Leon Watson. Director of Sales and Marketing, December 1992-July 2012; General Manager UK, 2012 to date of hearing. He made the decision to promote Ben Scammell and heard the Claimant's grievance.
- Ben Scammell. Employed 2004-2009 and again from 2009 to date of hearing. Key Account Manager, 2013-July 2016; UK Aftermarket Field Sales Manager, August 2016 to date of hearing. He was promoted in August 2016 during the Claimant's maternity leave.
- Louise Lovell. Employed 1995 to 2009 as Telemarketing Supervisor; made redundant. Customer Services Manager, 2012 to date of hearing.
- Anita Nelson. Purchase Ledger Manager / HR Administrator, September 1987 to date of hearing. She acted as a note taker at grievance hearings.
- Beverley Meredith. UK Business Analyst August 04-January 09; UK Financial Controller January 2009 onwards. Involved in restructure, grievance and appeal hearings.
- Rob Jackson. Vice President of the Respondent from 1984. He heard the Claimant's grievance appeal.

32. Other individuals referred to in evidence but not called as witnesses included:

- Simon Blann. Field Sales Representative, March 13-June 16.

- Maggie Callen. Temporary ISR, July 2015 to June 2016.
- Lisa Kirkbride. Aftermarkets Territory Manager, July 2010 onwards.
- Rod Larson. Chief Executive Officer, December 2011 onwards.
- Luke Odell. Internal Service Coordinator, October 2012-October 2015; Internal Sales Representative November 2015-July 2016; Senior Internal Sales Representative July 2016-February 2017; UK Aftermarkets Territory Manager, February 2017-present.
- Andrew Pirie. Account Handler, 2014-April 2016; E-Business Coordinator and Advisor, Apr 2016-November 2016; UK Aftermarkets Coordinator, December 2016-October 2017; Marketing Content Assistant Europe, October 2017-present. Promoted in November 2016 during the Claimant's maternity leave.
- Phil Smallwood. Field Service Engineer, August 2007-November 2016.
- Victoria Thorne. HR consultant, Menzies Law. She attended the Claimant's appeal hearing.
- Samantha (Sam) Watson. Employed since 1990. Product Manager January 13-July 2016; Textile and Interior Manager August 16-present. Wife of Leon Watson.
- Julie Wood. Administrator, January 2005-present.

Delay in promulgation

33. Unfortunately there has been a delay in the provision of the reserved judgment due to lengthy periods of ill health on the part of the Employment Judge. I apologise to the parties for the delay arising from this and any resulting distress. I assure the parties that our decision was reached on full consideration of the written and oral evidence and the submissions made on behalf of the parties.

The facts

34. Having heard the evidence, considered documents and received the submissions of the parties we make the following findings of fact on the balance of probability. All page references are to the hearing bundle.

Introduction to parties

35. The Respondent is an international company which supplies materials, sign systems, displays and equipment to the sign making and graphics industries. The Respondent's UK headquarters is in Bristol. It had approximately 130 employees at the time of the events giving rise to these proceedings. Approximately 800 employees were employed across the group companies in the EU and Australia. The Respondent has no group human resource function.

36. At all material times Leon Watson was the UK General Manager and Corporate Marketing and Communication Manager of the Respondent. He took on this role around 2011.

37. The Claimant commenced employment with the Respondent as Customer Service Co-ordinator on 11.9.2006 (p.102).

38. Ben Scammell was also employed by the Respondent. He was initially employed from 2004 as part of the Telemarketing Sales team. In 2009 Mr Scammell moved into the Field Sales team (Aftermarkets). In the same year Mr Scammell left employment with the Respondent to take up a position with one of the Respondent's customers, Alpha Signs Systems. Mr Scammell returned to Spandex in late 2009 as a hardware field sales representative, with a specific remit to sell the Respondent's business capital equipment.

39. In 2010 the Claimant applied for and was promoted to a Field Sales Role. There were four candidates for the position. Following a competitive process, including giving a presentation and interview, the Claimant secured the role. This role was based from home and involved the Claimant being on the road for a number of days per week. The Claimant would attend the office for sales meetings and training. From this time on the Claimant was essentially home based when not on the road.

40. Since taking up his role Mr Watson has made a number of appointments and promotions in the absence of any competitive process and without interviews. He has identified who he thinks is the best candidate for the job based on his own knowledge of the individual's skills, experience and knowledge of products and applications. In the event of there being an obvious or clear candidate then a competitive process would not be followed. There would be no advertisement of any vacancy in these circumstances, whether internal or external.

41. Examples of such appointments / promotions include replacing the UK Aftermarket Manager Phil McMullen with Kerry McGeown, replacing the UK Service Manager (Mike Crow) with Suzanne Carus, and replacing the UK Customer Service Manager (Russell Neville) with Louise Lovell.

42. There have been occasions when a competitive process has been followed for appointments. This occurred in circumstances where broadly speaking the candidates for the role were equally qualified, even if their qualifications and / or experience was not identical or relative strengths and weaknesses differed amongst candidates.

43. In approximately January 2013 Amy Golding, field sales representative, was promoted to the position of Key Account Manager ("KAM") following a period of maternity leave. Ms Golding resigned in July 2013 due to the travel commitments involved. Thereafter Mr Watson promoted Mr Scammell to this KAM role, with a continuing emphasis on the sale of the Respondent's hardware and software offerings. There was no competitive process involved in this promotion. Mr Watson considered Mr Scammell to be the most appropriate candidate for the position based on his skills, knowledge and experience, and so appointed him.

44. In 2014 the Claimant was promoted to the role of Key Account Manager ("KAM") South. There was no competitive process undertaken. Mr Watson considered her the obvious candidate for the role due to her skills and experience and appointed her accordingly.

45. In 2015 the Claimant was appointed to the role of National Account Manager. Again there was no competitive process undertaken. Mr Watson considered her the obvious candidate for the role and appointed her accordingly. We heard evidence which we accept that Mr Watson considered the Claimant to be "absolutely the right person for this role".

46. In 2015 the Claimant was given additional responsibilities as part of her role, including looking after a significant customer called Signs Express, which had the capacity to spend £100,000 a year.

47. In 2015 Mr Scammell was given the additional responsibility of taking the lead to introduce a new brand / supplier to the business called ORAFOL. They manufacture films that the Respondent supplies. It quickly became the Respondent's third biggest supplier, responsible for £1.6 million of business with the Respondent.

48. By the time of the events giving rise to these proceedings Mr Scammell had a smaller pool of customers than the Claimant, but his customers had the potential to generate higher income than the Claimant's customers. The Claimant had a larger pool of customers than Mr Scammell, but each customer did not have the same revenue generating potential as Mr Scammell's.

49. At this time the Claimant reported to Kerry McGeown, Aftermarket Sales Manager. Mr Scammell reported to Mr Watson rather than Ms McGeown, due to Mr Scammell's role as a hardware sales representative and Mr Watson was director of hardware sales.

The Claimant's pregnancy

50. In November 2015 the Claimant learned that she was pregnant. The Claimant notified the Respondent of this in January 2016.

51. The Claimant first advised Ms McGeown of her pregnancy. Ms McGeown reacted with delight to the news. The Claimant advised that she was due to give birth around the end of July 2016. The Claimant told Ms McGeown that she did not intend to take 52 weeks of maternity leave, and that she intended to return full time as before.

52. Following this the Claimant and Ms McGeown discussed the Claimant's pregnancy with Beverley Meredith, the Respondent's Financial Controller who also has HR responsibilities. Ms Meredith congratulated the Claimant. They discussed certain formalities with the Claimant including her MATB1 form, and the need to advise the Respondent of midwife or hospital appointments so that these could be tracked on the Respondent's systems. The Claimant was asked about adjustments and confirmed that she did not require any.

53. It was left that the Claimant would raise any further support she required as her pregnancy continued with her line manager. The meeting was not documented in any way. It was also in January 2016 that Mr Watson learned that the Claimant was pregnant.

54. There was a further meeting between the Claimant, Ms McGeown and Mr Watson around March / April 2016.

55. The Claimant gave evidence that this meeting happened in February 2016. We prefer the Respondent's evidence that it happened in April 2016. One matter that was discussed in the meeting was the handover of the Claimant's customers to fellow employees, so that the customers could be properly taken care of during the Claimant's absence on maternity leave. The Claimant was a diligent employee, and on agreement

being reached as to how handover was to be handled, soon after the Claimant began the handover process. On the material before us the documents indicate the handover process was underway at the start of May 2016 at the latest (e.g. pp.147-158). Our finding also tallies with the Claimant's case, as clarified in closing submissions, that the alleged unfavourable treatment commences from April 2016 onwards and not January 2016 as pleaded. Given the chronology of the complaints nothing in our view turns on the date of this meeting in terms of liability.

56. At this meeting in March / April 2016 the issue of the Claimant driving was discussed, and it was agreed by all that the Claimant would have more difficulty driving while heavily pregnant. This would impact on her ability to visit customers, unless travelling as a passenger in a vehicle. There was also discussion of the handover of the Claimant's clients to other employees in the business who would cover for her during her maternity leave. The Claimant, Ms McGeown and Mr Watson all expressed views as to who the most appropriate covering employee would be for particular clients. The premise in most cases was for a geographical approach, where employees already had clients based on geographical area. The Claimant agreed in evidence that this was a sensible approach. Some accounts were allocated based on the experience of the sales team and the nature of the customer.

57. It was agreed that once the appropriate covering employee had been identified there would then be a period of handover whereby the covering employee was introduced to the customer. This generally took place with both the Claimant and intended covering employee visiting the customer for introductions to be made. The intention was that the Claimant would inherit these customers again upon her return to work following maternity leave.

58. It was also agreed that the Claimant would provide a list of her customers. The Claimant subsequently did so in an undated document (p.142-144). This specified the customer number, customer name, postcode for geographical area and who it was proposed would cover in the Claimant's absence.

59. The Claimant gave evidence which we accept that she was responsible for the handover, how it was conducted and the pace of the handover process. The handover had to be completed within a sensible time frame and prior to the Claimant likely having difficulties driving due to her pregnancy.

60. There was a meeting between the Claimant, Ms McGeown and Ms Meredith on 6.4.2016 The matters discussed at this meeting are recorded in a letter sent by Claimant dated 19.4.2016 (p.113). At the meeting the Claimant handed in her form MAT B1 which showed her due date to be 21 July 2016. It was agreed the Claimant would take 10 days of annual leave from 4.7.2016 and commence maternity leave on 18.7.2016. The Claimant raised no concerns in this correspondence. Ms Meredith replied on 3.6.2016 (p.114) setting out the Claimant's entitlements and also raised the issue of keeping in touch days, explaining that the Claimant was under no obligation to take part in them.

Allegation (a): isolation, exclusion and less friendly atmosphere

61. As for the allegation of isolation and exclusion, the Claimant gave evidence that from April onwards the atmosphere was different, less friendly, and she was not involved in

as many discussions as before. The allegation appeared to be directed to Ms McGeown on paper.

62. Within the bundle were various emails and text message exchanges which on their face reflected a positive friendly relationship between the Claimant and Ms McGeown (these documents are referred to in more detail below). These exchanges cover the period prior to the Claimant taking maternity leave and during it. On occasions during their communications with each other the language used was informal, related to personal matters, and they ended their messages with a kiss "x". These documents were put to the Claimant to challenge her evidence that she did not raise concerns with Ms McGeown because she considered her to be moody and unfriendly, and to assert that there had been no isolation of the Claimant.

63. A further email trail related to efforts Ms McGeown made to have the Claimant included on a spa treat day during her maternity leave (set out in more detail below). The Claimant agreed that Ms McGeown was being friendly on this occasion and seeking to have her included in something.

64. It was put to the Claimant that her allegation of isolation / exclusion was unfair to Ms McGeown. The Claimant replied that the allegation was not limited to Ms McGeown, but also related to Mr Watson.

65. At this point the Claimant gave evidence that when she was working from the office Mr Watson used to have regular informal discussions with her, at least weekly, during which he would seek her opinion on work matters. He would have similar discussions with Mr Scammell. The Claimant said that such discussions with her had diminished after she announced that she was pregnant.

66. During cross examination Mr Watson said he would ask for the opinion of employees on a number of matters. Who he asked was dependent on the nature of any particular enquiry and who was available. He said he would have a look around the office to see who was available and ask them into his office for discussion. He would ask employees other than the Claimant or Mr Scammell for their input. He said that he might ask for the Claimant's input twice daily if appropriate and if she was available. He said that following the Claimant's pregnancy there was no reduction in his requests for the Claimant's input. He referred to an email of 15.6.2016 seeking input which was sent to the Claimant and others (p.133).

67. It was agreed that the Claimant and Ms McGeown also had face to face discussions. In her witness statement the Claimant said there was minimal contact. Through cross examination of Ms McGeown it was put that they would have conversations a couple of times a week. Ms McGeown's evidence was that they would have conversations daily lasting around 15 minutes.

Factual findings

68. There is material relevant to whether the treatment complained of happened across the chronology of the Claimant's complaints.

Ms McGeown

69. The communication between the Claimant and Ms McGeown by email and text messages is instructive. This communication spans the period of the Claimant's pregnancy while still at work and extends into the Claimant's maternity leave after she had given birth.

70. Having regard to this communication it is apparent that there is mutual affection between the Claimant and Ms McGeown. They have a friendship. They use informal and friendly language when communicating. They exchange kisses in writing during their messages. The Claimant agreed in evidence when examples were put to her that there was easy communication between her and Ms McGeown. The communication between them is not limited to professional matters but is on occasion personal in nature.

71. In her email to Ms McGeown on 13.6.2016, over two months into the period of alleged unfavourable treatment, the Claimant used an emoticon in an email to Ms McGeown to convey her happiness at not having to drive to visit a customer. The Claimant felt able to communicate in informal terms with Ms McGeown at this stage.

72. Further, there are examples of contact where Ms McGeown makes enquiries as to the Claimant's welfare during her pregnancy. She was concerned as to how the Claimant's pregnancy was progressing, and how the Claimant was faring in the heat while pregnant. Ms McGeown demonstrated further care for the Claimant when her baby was overdue and used supportive language in her messages.

73. It is also notable that Ms McGeown made efforts to include the Claimant in a spa treat day, to which the Claimant had not originally been invited. Ms McGeown did not want the Claimant to miss out on the opportunity while she was on maternity leave and wanted the Claimant's hard work for the particular customer to be recognised. This is evidence of inclusion during maternity leave.

74. The day after the Claimant gave birth Ms McGeown sent her a congratulatory email, the Claimant replied with photographs of her baby, to which Ms McGeown replied "how beautiful".

75. The communications between the Claimant and Ms McGeown are inconsistent with the alleged isolation or exclusion or a less friendly environment having arisen. Had the treatment complained of taken place then we do not believe that the communications between them would have been in the terms that they are.

76. Further, the Claimant gave evidence that she did not raise concerns with Ms McGeown because she considered her to be a difficult or moody individual. That assertion is inconsistent with the contemporaneous communication between them and we do not accept it.

77. We also note that the Claimant offered a different explanation to Ms Meredith at the meeting of 10.2.2017. At that meeting the Claimant did not complain that there had been a reduction in the extent to which her opinion had been sought or that a less friendly environment had arisen. At the meeting the Claimant told Ms Meredith that she did not contemporaneously raise with Ms McGeown that she had little work to do because Ms McGeown was always busy (p.262).

78. The Claimant prepared detailed grievance and grievance appeal documentation. Her concerns were aired at some length at the grievance and appeal meetings. We note that the Claimant made reference to being side-lined but she did not complain that the atmosphere was less friendly or that her opinion was sought less during the entirety of the internal process. Given the detailed exposition of the Claimant's concerns we are satisfied that if the treatment alleged took place then the Claimant would have referred to it.

79. There was little distance between the parties in terms of the frequency of face to face contact between the Claimant and Ms McGeown. Whether daily or a few times a week we find that their contact face to face would be consistent with how they communicate in writing.

80. We prefer Ms McGeown's evidence in respect of this allegation. It is more consistent with contemporaneous documents than the Claimant's account. There was no less friendly contact from Ms McGeown, nor isolation or exclusion as alleged. On balance we find that face to face contact would take place daily. The Claimant's input was not sought less than previously.

81. We accept the Claimant's evidence that in a number of conversations she updated Ms McGeown on the progress of her handover before 13.6.2016 but did not raise that she was coming to the end of the handover. It is agreed that the Claimant raised no concerns with Ms McGeown during this period.

Mr Watson

82. The Claimant did not contemporaneously raise issues of isolation, exclusion or unfriendliness by Mr Watson with anyone, including with Ms McGeown despite the nature of their relationship and communication as we find it to be. Nor did she do so during the grievance process as described above.

83. There was documentary evidence before us of Mr Watson seeking the input of the Claimant and others on a particular issue on 15.6.2016 (p.133). We recognise that this was an email request as opposed to oral discussion, but nevertheless it demonstrates that Mr Watson did seek the Claimant's input and assistance. This occurs some two and a half months into the period of unfavourable treatment alleged in this complaint. At this point there was a little more than two weeks before the Claimant was due to take annual leave, prior to maternity leave.

84. There was no other documentary evidence of Mr Watson asking others for input which the Claimant could have contributed to but was not involved. Nor were there examples of Mr Watson asking others orally for input, but not the Claimant.

85. On balance we find that there was no difference in the way that Mr Watson would seek the Claimant's opinion.

Charlotte Bembridge / Louise Lovell

86. The Claimant relied on the evidence of Charlotte Bembridge in particular in respect of allegation (a). Charlotte Bembridge who used to be employed by the Respondent. In her witness statement she gave evidence that she learned she was pregnant in

February 2015 and informed her line manager Louise Lovell. She complained that subsequently she felt excluded from her normal tasks, that she was relocated to a far end of the office, and some of her customers were taken away from her. Her complaints in that respect were directed at Ms Lovell. Her witness statement also complained that Mr Watson spoke to her less during her pregnancy. She complained that she was on maternity leave at the time of her birthday and that she received no gift or card and was overlooked.

87. Prior to confirming the truth of her statement Ms Bembridge deleted the complaint relating to being overlooked at the time of her birthday. She had made an error with dates.

88. Ms Bembridge decided not to return to the Respondent following her maternity leave. At that point Ms Lovell wrote a reference for Ms Bembridge (349-351). It is a glowing reference, as Ms Bembridge herself described it.

89. We were taken to an email from Ms Bembridge to Ms Lovell and Ms Meredith dated 29.6.2016 (p.352). In it Ms Bembridge explained her decision not to return to the Respondent. She was going to pursue a new career as a personal trainer. She gave thanks for many happy years of working with Spandex and wrote she would miss everyone very much. She wrote that she had never worked in such a fantastic organisation where she loved the job and people so much. She declined a part time role that the Respondent had offered to her to keep her in the Respondent's employment. She offered to help out in the future if cover was needed. She explained that leaving the Respondent was the hardest decision to make. She hoped to stay in touch. She concluded the email in these terms:

"Lou you've been amazing and can't thank you enough. Xx
(Yes I'm crying whilst writing this – I'm crap at all this stuff)"

90. In oral evidence she said Ms Lovell was amazing during her pregnancy and she could raise any issues with her. She did not raise being relocated in the office with Ms Lovell. Ms Bembridge said she was a "trooper" and just carried on. Of her complaints regarding Mr Watson not asking her opinion as frequently she did not know whether that was a coincidence or not, or whether it was because she was pregnant. She did not know whether she felt as expressed in her witness statement because she was more sensitive at the time due to the changes her body was going through. It might have been that her opinion was not sought so much because it was known she was leaving the Respondent. She stood by the terms of her email at p.352.

91. Ms Lovell gave evidence in response. She was visibly upset when giving her evidence, especially when it was suggested she had discriminated against Ms Bembridge with whom she thought she had a good relationship. Ms Lovell denied relocating Ms Bembridge because of her pregnancy. She could not clearly recall the reason because of the passage of time but said there would be operational reasons behind that. Ms Lovell gave evidence of other operational and non-discriminatory factors being the reason why Ms Bembridge was involved with interviewing to the extent she was. She said she did not remove work or customers from Ms Bembridge without discussion, and that there were operational reasons for what was happening. Ms Bembridge used to visit the Respondent's offices with her baby after she had left employment. When Ms Bembridge subsequently wanted to return on part time hours that was agreed.

92. Ms Bembridge's complaints regarding Mr Watson were put to him briefly and he denied any change in his approach to her. He said he had for years tried unsuccessfully to get Ms Bembridge to join the Respondent. He spoke positively about the impact she had when employed.

93. The evidence of these witnesses did not assist us in finding facts or reaching conclusions. It appeared highly unlikely that Ms Lovell would discriminate against Ms Bembridge given the terms of the glowing reference which she wrote. More pertinently Ms Bembridge's email at p.352 was wholly inconsistent with the complaints that she made in evidence. Ms Bembridge was unclear whether events happened because of her pregnancy, her own sensitivity, or the fact she was soon to be leaving. Ms Lovell had difficulty recalling detail given the passage of time since the events complained of, but her evidence of operational reasons being the reason why things happened as they did is consistent with Ms Bembridge's view of matters in the document at p.352.

94. Of Ms Bembridge's complaint regarding Mr Watson she was not clear that pregnancy was the reason for any change in his attitude.

95. Our approach was to focus on the evidence of the remaining witnesses who could speak directly on the issues before us.

(b) failing to allocate any work / Claimant having to occupy herself with admin and discount work

96. The Claimant agreed that her handover had to be completed in a sensible time frame ahead of when she was likely to have difficulty driving or when she was not to be on the road. The Claimant also agreed that she was to dictate the pace of handover.

97. The Claimant did as part of the handover process attend customers with the employee who was intended to act as cover. The aim was that the customer would contact the cover employee instead of the Claimant after the handover visit. The Claimant would not refuse contact from a customer if they attempted to contact her directly. Following handover the customer would not often contact the Claimant, she would not contact them, and the covering employee rarely contacted the Claimant.

98. The Claimant undertook a number of visits with customers, which are recorded in a spreadsheet at p.147. These visits span 4.5.2016 to 29.6.2016, ending shortly before a period of annual leave and then maternity leave commenced. There are 41 visits made in total. The visits happen over 19 days. These happen at regular intervals until 15.6.2016. There is then a gap of some 14 days to the last visit.

99. In May 2016 the Claimant had 31 client visits over a period of 13 days (out of approximately 21 working days). In June the Claimant had visits with 10 customers over 6 days.

100. When an employee undertakes a task or has an interaction with a client it is logged on the Respondent's CRM system "salesforce". Each entry represents a task undertaken for a particular client. Within the bundle we had a printout from the system covering 1.5.2016 to 1.7.2016 (pp.148-158, not in chronological order). This was described as an activity log. There was no material before us to explain what task was undertaken

in respect of each entry. Minor or trivial issues do not need to be logged. Nor is it recorded how much time was spent on each task.

101. There are 429 entries in total over the period (p.150).

102. The Claimant's evidence was that from 14.6.2016 (p.155) the majority of her tasks were more administrative in nature. They were short tasks, lasting 3 to 4 minutes each.

103. Ms McGeown gave evidence in respect of the activity logs. She expressed the view that the Claimant would be engaged longer than 3-4 minutes per entry for certain clients given their particular demands.

104. It is not possible to determine how long the Claimant was involved on each task. It is clear that the Claimant had a number of contacts with clients from 3.5.2016. This is in addition to visits to clients which the Claimant undertook.

105. By email on 26.5.2016 to the consumables field sales team, including the Claimant, Ms McGeown invited them to a sales meeting arranged for 9-10.6.2016 (p.122). The first day was scheduled between 12.30pm to 5pm, and the second day from 9am to 5pm. The email states that due to then current events Ms McGeown and Mr Watson wished to have a group discussion on how the Respondent would grow its business in FY2017 in terms of revenue, margin and percentage margin gains. The email concludes "any questions, as always just ask". The Claimant replied that she had a midwife appointment on 10.6.2016 at 9am but would be present by 9.15am for the meeting. The Claimant did attend the meeting. She did not on those days seek an opportunity to raise any concerns as to isolation or that she was under capacity due to the rate of progress of handover. She raised no concerns.

106. In evidence the Claimant stated that she did not feel comfortable raising any concerns at the time, and that she felt it was the Respondent's responsibility to give her work. The Claimant explained that she did not want to raise her concerns in the presence of colleagues.

107. The Claimant did not seek the opportunity to discuss any concerns privately with Ms McGeown or Mr Watson. The Claimant said in cross examination that she felt vulnerable at the time. She was approaching her due date, felt isolated and not needed, and she did not have the confidence to raise concerns. The Claimant gave this explanation on a number of occasions during her evidence, including when documents were put to her which on their face suggested a positive friendly relationship with Ms McGeown.

108. The Claimant was taken to a number of emails where she was in contact with Ms McGeown. The Claimant accepted that on the face of these communications there was nothing to suggest that she was unhappy with the circumstances.

109. On 1.6.2016 the Claimant raised a query with Ms McGeown by email. The Claimant had a discount form for a particular customer, who had been chasing the Claimant for new pricing. Ms McGeown replied within ten minutes that she would check the position as soon as possible. The Claimant wrote a thankful reply adding a kiss "x". The Claimant agreed that there was easy communication with Ms McGeown.

110. On 7.6.2016 Ms McGeown emailed the Claimant asking if they could both go through the Claimant's opportunities list (p.127). The Claimant replied on the same day stating that she would be in the office the following day "after Eurosigns all day". This was a reference to a visit to another client. The Claimant also asked whether they would be getting a daily league that week, which relates to the Claimant's commission entitlement.

111. The opportunities list is an excel spreadsheet which lists the Claimant's clients or account customers. It identifies the account number, company name, postcode group, and person who was to cover the account in the Claimant's absence. It describes key points relating to that client and the opportunities which the account presented.

112. At this stage the Claimant's opportunities list was a work in progress. It was not completed until 14.6.2016, and then the Claimant emailed it to Ms McGeown (pp.130; 140-144). In her email the Claimant explained that the opportunities list had been broken down into sales area and asked whether Ms McGeown wanted the document in a different format (p.130).

113. The Claimant was asked in cross examination why it took her 7 days to complete the opportunities list. The Claimant gave evidence that she still had other additional work to do. In re-examination the Claimant said it took 7 days not because she had additional work to complete, but because she was waiting for other elements that needed to be included in the list. It was a work in progress, finalised on 14.6.2016.

114. On 13.6.2016 the Claimant sent an email to Ms McGeown entitled "next few weeks" (p.129). Following a friendly introduction the Claimant wrote that she had almost completed her handover visits. The Claimant referred to three outstanding handover visits for the clients Zest Graphics, Jag Signs and Partition. The email did not refer to the intended visit to Signs Express.

115. Zest Graphics and Jag Signs were to be allocated to an employee Mitch Anstey. In her email at p.129 the Claimant stated that Partition did not want her driving the distance to visit them, and used a smiley face emoticon when explaining this to Ms McGeown. We find that the Claimant was pleased not to have to drive that distance. Instead a fellow employee Dave Callen was to visit them in the next week or so. The Claimant continued her email by stating that her visit notes were up to date. She asked:

> "is there anything you would like me to do. I am happy to help out with Discounts or Admin if that would help?".

116. This was the first indication the Claimant had given that she had almost completed her handover visits.

117. In her email the Claimant did not complain that she had been left with no work to do or that she had capacity to take more on. In evidence the Claimant agreed that there was nothing in that email to convey the impression that she was unhappy with the circumstances.

118. From 14.6.2016 the Claimant did undertake more tasks relating to administration and discounts.

119. In cross examination the Claimant accepted that this work constituted an important part of the Respondent's business function. She had not previously been involved in administration. At the material time the Claimant and Ms McGeown knew that the administration team was short staffed. Dealing with discounts formed part of the Claimant's responsibilities in her National Account Manager role, in which she needed to complete discount forms. She had also dealt with discounts when holding other roles at the Respondent.

120. In cross examination the Claimant said "I was happy to do admin and discounts. I hoped that as I was coming up to 10 years [service] that my knowledge and skill set could have been put to better use."

121. The backlog of discount forms was causing difficulties for the Respondent and clients. Ms McGeown and the Claimant were aware of this at the time.

122. On 15.6.2016 Ms McGeown emailed the Claimant (p.131) confirming that the Claimant would see her daily league the following day. Paul Stone was copied in to the email, and Ms McGeown asked him to add Signs Express to the daily league. The Claimant replied to Ms McGeown with "thank you xxx".

123. The last handover visit on 29.6.2016 was to Signs Express, a significant customer for the Respondent. The Claimant had responsibility for managing the relationship with the customer's head office. This customer was a franchise with some 65 or so franchisees. The Claimant did not have responsibility for the individual franchises, which were allocated to Field Sales Representatives ("FSRs") on a geographical basis. Mr Watson also attended the meeting because the customer was particularly sensitive to how they were treated. Also in attendance were Ms McGeown and the intended covering employee Pam Arnold.

124. The Claimant sent a follow up email after this meeting to the consumables field sales team (p.146), Ms McGeown and Ms Arnold. This gave key points emerging from the meeting. The Claimant advised that there had been discussion of doing case studies for the group, and asked the recipients to contact Ms Arnold in that respect. The Claimant stated she would be sending out a group email that day or the following day to the client to advise that Ms Arnold would be looking after them.

125. The Claimant's handover took longer than anticipated. One of the covering employees Simon Blann left the business. This resulted in repeat handover visits with a fresh colleague who was to act as cover for the Claimant.

Project work

126. During cross examination of Ms McGeown an issue arose as to whether she and the Claimant discussed other projects which the Claimant could become involved in as handover progressed. This was not foreshadowed in witness statements and the Claimant gave no evidence in this regard. It was put to Ms McGeown that she knew the Claimant would have less work to deal with as handover progressed. Ms McGeown agreed with the proposition and said that is why she discussed a couple of projects with the Claimant. As a result these matters were not dealt with during cross examination of the Claimant.

127. In cross examination Ms McGeown said she discussed three projects with the Claimant. First, additional process / systems training which the Claimant could give to the CSR team given her experience in that area. Second, giving support and mentoring to the ISR team. Ms McGeown said that the Claimant showed a colleague (Leah) how to use systems for doing collated discounts for customers. Third, in respect of Signs Express, that Ms McGeown had said to the Claimant that while the franchisees were individually looked after by sales representatives, it would be useful to check on these relationships and whether they had changed with individual accounts. i.e. whether it made any difference having someone dealing globally with Signs Express accounts.

128. Via cross examination the Claimant disputed that the Claimant had been asked to help with the first two projects referred to above. The Claimant accepted that the third project was raised but in vague terms with no proper explanation of what was expected of her. Ms McGeown disagreed stating that they had a lengthy conversation, and that the work being discussed would help with the handover from the Claimant to Pam Arnold. Ms McGeown stated she would never watch an employee doing nothing.

129. We find that there was discussion of the third project as agreed, and on the evidence accept that this was discussed at some length. This is reinforced by the importance of Signs Express to the Respondent, and the likelihood that Ms McGeown and the Claimant would seek to ensure the client franchise was handled well. We also accept Ms McGeown's evidence that the Claimant supported Leah in the use of the Respondent's systems for doing collated discounts. Further we find there likely was some conversation in respect of additional training for the CSR and ISR teams generally. On the evidence we heard it is clear that the Claimant was held in high regard within the Respondent in respect of her knowledge and ability to train others. This is reflected elsewhere by Mr Scammell's invitation to the Claimant to train new starters in or about November / December 2016. However, save for the assistance given to Leah the further possible training to the CSR and ISR teams was not followed up, and the Claimant did not deliver it.

Discussion of personal email

130. 1.7.2016 was the Claimant's last working day prior to taking maternity leave. She worked the morning and then took a period of annual leave. The Claimant commenced maternity leave on 18.7.2016.

131. There was a dispute between the parties as to whether prior to leaving the office on 1.7.2016 the Claimant had a discussion with Ms McGeown regarding ongoing contact during maternity leave. The Claimant was clear in her evidence that she did have such a discussion and indicated to Ms McGeown that she wished to be informed of significant workplace developments by email to her personal email account. The Claimant provided her personal email address.

132. In cross examination Ms McGeown accepted that on 1.7.2016 the Claimant said that she wanted to be kept informed of significant developments and said that they discussed KIT days. Ms McGeown did not recall the Claimant asking to be contacted by personal email, she said that the Claimant later provided her personal email address which she had earlier given to Mr Stone. Ms McGeown later accepted that it was possible that the Claimant provided her personal email address on 1.7.2016 but that she forgot it, because she later asked for clarification (p.159). Ms McGeown accepted

that a woman on maternity leave who asks to be kept updated should be informed of important developments. Ms McGeown and the Claimant had specifically discussed updates regarding new products or change of products.

133. We accept the Claimant's clear evidence that she asked for significant updates to her personal email and provided her personal email address, and make that finding. Ms McGeown had limited recollection and conceded that the Claimant could have indicated that preference.

Allegations (c) to (f)

134. On 23 June 2016 the result of the EU referendum was that the UK voted to leave the EU.

135. We heard uncontested evidence which we accept as to the impact of the referendum result on the Respondent. There was an immediate impact on currency exchange rates with the Pound becoming weaker against other global currencies. This impacted on the Respondent's purchase pricing which increased between 9% to 14% depending on the currency (Euro, US Dollar, Yen) with the result that the Respondent's products would become more expensive for its UK customers.

136. We accept Mr Watson's evidence that due to uncertainty around what Brexit would mean for the UK the view was taken by the Respondent that such price increases could not be absorbed and would need to be passed on immediately to its customers. The Respondent also needed to make cost savings in the region of £100,000.

137. This was the context for the restructure which took place in the weeks following the referendum result.

138. Mr Watson gave evidence, which was not disputed, that he began working on the restructure during the last week of June 2016 and the first week of July 2016. Broadly he decided that the best strategy would involve a combination of (a) operational cost reduction (e.g. freight, packaging); (b) more focus on operational and sales excellence; and (c) focus on high growth markets such as textiles and interiors.

Documents

139. On 8 July 2016 at 10:40 Mr Watson sent an email to Mr Larson entitled "UK Restructure (Post Brexit)" (p.353). There were two attachments to that email. First a PowerPoint document entitled "Brexit Plan", and second an Excel spreadsheet entitled "Textiles & Interiors Forecast". Ms Meredith was copied in to that email. In the body of the email Mr Watson wrote "For discussion at 12.30".

140. The Brexit Plan Powerpoint document (p.205-212) set out what Mr Watson considered to be the impact of Brexit (p.206). This included that there would be little to no investment in a country surrounded by uncertainty and market contraction. In terms of recalibration of the UK Graphics market impacts included significant price increases, consolidation in the marketplace, and additional distribution. Also recorded was that less investment would result in less corporate branding programs.

141. The next Powerpoint slide is entitled “Spandex Brexit Strategy” (p.207) with three sub headings: “structure”, “improved customer experience” and “build stronger supplier relationships”. Under “structure” the plan included bullet points which stated:

- “Reduce cost structure and focus on new / adapted roles that will drive…
  - Operational excellence / improvement
    - Potential market contraction will require process & back office improvements to drive y-o-y growth
- Improved field support for KAM & FSR’s”

142. As for improved customer experience the plan recorded “more focus on product availability on key strategic products; improve customer touchpoints; continue to build compelling product portfolio (Equipment & Aftermarket)”.

143. The following three slides of the plan set out proposed new roles under the restructure together with the identity of the employee who it was envisaged would take on the new role.

144. The first of these (p.208) was the UK Operations Manager Role, against which Ms McGeown’s name was recorded. The focus of the role was set out in 6 bullet points within the slide.

145. The next slide (p.209) is important and we reproduce it in full:

“Ben Scammell – UK Aftermarket Field Sales Manager

Focus

- Provide guidance, support and mentoring to KAM’s & FSR’s
  - In the field 3-4 days a week
  - Work / visit with local KAM / FSR on individual poor performing, high-potential accounts
  - Identify training requirements
  - Ensure consistency in our customer approach to pricing, negotiation & use of business tools
  - Key role in ensuring how we retain good sales people in uncertain times
  - Utilise HW/SW “know how” to help the team be more effective in the field
- Continue to manage large Key Account customers (Eg. AST, First Fix, Sign Trade)
- Work closely with Operations Manager & suppliers to maximise growth opportunities to drive volume & GM improvement
  - Projects/Contracts/Tenders
  - Individual Price Support”

146. “HW” refers to “hardware”, and “SW” refers to software.

147. The final slide dealing with the three new roles (p.210) named Sam Watson (Mr Watson’s wife) against the role of “UK Textile & Interiors Sales Specialist”. There was

no challenge to Mr Watson's evidence that Mrs Watson was the only candidate given the specialist nature of the role and her 25 years of experience and knowledge of hardware and materials. No issue was taken at the hearing in respect of the appointment of Mrs Watson.

148. The next slide (p.211a, unredacted) is entitled "Costs/Savings" and states that the new structure will save £108,992 p.a. Beneath this are two tables which identify a number of employees and the cost of their remuneration packages under the current and proposed new structure, and how the savings of almost £109,000 in staff costs are to be achieved. Mr Scammell's new role would result in an increase of overall remuneration of approximately £6,000 to £77,840. Ms McGeown's remuneration was to be unchanged. Mrs Watson was to be paid less. Luke Odell (ISR) was to be made senior ISR. Four employees are recorded as having left the Respondent's business and that they would not be replaced. It is recorded that a further named employee "will be managed out". Reference is also made to a new post of "New Admin / E business", with no role holder identified.

149. The Claimant was not included within the table whether by reference to name or role. Nor was Lisa Kirkbride.

150. The final slide (p.212) related to the Senior ISR role and named Luke Odell as the proposed post holder, together with the focus for the role.

151. On 8 July 2016 at 14:16 Ms Meredith sent an email to Mr Larson entitled payroll changes, and copied in Mr Watson (p.158a, p.158a2). In the body of the email Ms Meredith asked Mr Larson to approve changes set out in a table which they had discussed earlier that day. The table set out remuneration changes for a number of individuals under the new structure, in similar but not identical terms to the table on p.211.

152. On 8.7.2016 Mr Larson replied and approved the restructure plan changes (p.158a).

153. Mr Watson then spoke with Ms McGeown regarding the UK Operations Manager Role. This was the more senior role in the restructure, and in order for it to be implemented she would have to accept the role.

154. Ms McGeown took seven to ten days to reflect on what was proposed before accepting the role. Upon her accepting Mr Watson then spoke to Mr Scammell to see if he would accept the UK AFSM role.

155. A job description was created for the UK AFSM role (p.213). It was created following discussion with Mr Scammell when he accepted the role, and so did not form part of the PowerPoint presentation. There were two key entries which we were taken to in evidence. First, against the heading "objectives, accountabilities and responsibilities" the job description stated "Develop programs to drive quality of CRM database". Second, against the heading "job skills" it states "comprehensive industry knowledge (AFT/HW/SW) and network (suppliers)". There was no suggestion that this document was fabricated for the purposes of litigation, or that Mr Scammell had not in fact been carrying out the responsibilities of the post.

156. On 18 July 2018 there was an email exchange between Ms Meredith and Mr Watson in respect of "new positions". Ms Meredith was concerned that she had not yet written offer letters to Ms McGeown and Mr Scammell and their new positions were planned to commence on 1.8.2016. She asked for the new, approved, commission structures for both. Mr Watson was due to leave on holiday the following day. He replied that if Ms Meredith thought they would accept the positions without knowing the commission structure then he could later that week create letters stating commission structure and targets were to be finalised.

157. The Respondent's pleaded case was that Mr Watson decided who would be given which role under the new structure, and that the Claimant was considered for the UK AFSM role but Mr Scammell was appointed because he was the strongest candidate primarily because (p.40 para.17):

(a) he was the Respondent's first ever KAM, therefore his experience in developing high potential accounts was unsurpassed in the business. He was the first and only employee to develop a £1 million account;
(b) he has a detailed understanding of how hardware / software products interact to improve the quality and speed in which customer jobs can be produced and to help the Respondent win new business;
(c) he is the only member of the sales team that has worked closely with one of the Respondent's suppliers to ensure brand equity and synergies are fully realised. His work with ORAFOL saw the Respondent's business with them go to £1.6 million in the first year of the official launch.

Oral evidence
The Claimant

158. In her witness statement the Claimant challenged whether the restructure really was due to the EU referendum result. In cross examination on the Brexit Plan (p.205) the Claimant accepted that the restructure took place as a result of Brexit, and that the restructure was not approved until the email from Mr Larson on 8.7.2016 (pp.158a; 158a2).

159. As for Mr Scammell's introduction of the ORAFOL brand the Claimant gave evidence that if she had been given that supplier she would have achieved the same as Mr Scammell did. Further, because ORAFOL took up much of Mr Scammell's time the Claimant said that he spent less time on other customers and industry changes, making her better suited for the UK AFSM role.

160. The Claimant gave evidence that she could have carried out the UK AFSM duties well. She stated that the Respondent's further and better particulars (p.92) relative to why she was not appointed to the UK AFSM role did not include reference to her management experience at Next which left her well placed to manage "external team support". The focus of the UK AFSM included identification of training requirements. The Claimant gave evidence that she had a flair for working with people, illustrated by Mr Scammell's recognition that she delivered high quality staff training (p.214; C.45). Identification of training requirements was a focus of the UK AFSM role (p.209).

161. The Claimant gave evidence that much of the UK AFSM role was previously carried out by Ms McGeown. The Claimant had previously converted seamlessly from a

customer services role into sales. She considered herself to be more organised than Mr Scammell.

162. When cross examined on her complaint that she was not informed of the restructure prior to commencing maternity leave, the Claimant accepted that the restructure was not approved until 8.7.2016. She said she had no evidence that anyone other than Mr Watson, Ms Meredith and the three individual appointees knew of the restructure prior to the announcement on 3.8.2016. The Claimant was concerned that Ms McGeown contacted her about a treat day to keep her in the loop (p.161), but did not raise the restructure. In cross examination the Claimant accepted that the restructure was not official at that point, and added that she was upset to find out about it later because she was unable to apply for the role. It was put to the Claimant that the failure to tell her about the role was not because she was a woman on maternity leave, as many other male and female employees who were not on maternity leave were also not told before the official announcement. The Claimant replied that she was a strong candidate for the role and therefore felt that she should have been told prior to the announcement so that she could apply.

163. In cross examination the Claimant said she felt the announcement was timed for when she would be out of the way on maternity leave and could not apply. She agreed that there was no interview process for the role, and that the Respondent's case that Mr Watson identified and appointed who he thought was the right candidate had always been consistent. She believed she would have had the opportunity to apply had she been in the workplace. It was put to the Claimant that her evidence was that she would be given the opportunity to apply when at work, by those she complains were keeping her out of the way. She replied that she did not have the opportunity because she was not in the workplace and was going on maternity leave for some seven months.

164. The Claimant accepted that she was advised of the restructure by an email to her work account, and that she accessed her work email account around ten days later (pp.187b, 191). She had been told orally of the changes before reading the email to her work account. The Claimant agreed that she would not have read the announcement at p.187b if it had been sent to her personal email account, as this was the day she gave birth. The Claimant maintained that she should have been told about the changes before the official announcement, and that she would have kept this information confidential.

165. The Claimant agreed that in her text messages with Mr Scammell following the birth of her child, and awareness of the restructure, there was no suggestion that she was unhappy with the circumstances. The Claimant was emotional when giving evidence at this point and explained she did not feel it appropriate to raise her concerns at that time. What should have been a very happy period for her family was tarnished by learning of the restructure and not being considered for the UK AFSM role.

166. The Claimant agreed that there was no internal recruitment competition for any of the three new roles, and to her knowledge nobody was told that they could apply for any of the roles.

167. The Claimant accepted that Mr Scammell had been promoted to a KAM a year before the Claimant was appointed to that same role. She also accepted that Mr Scammell had been selling hardware and software, and said that she had no experience of doing

so whatsoever. The Claimant considered that hardware / software experience was not a huge benefit to the UK AFSM role. She said she had experience of hardware even if she had no experience of selling it.

168. The Claimant gave evidence that Mr Scammell had broader experience than her in some areas, while she had broader experience than him in other areas.

169. Sales figures for the Claimant and Mr Scammell were included in the bundle (p.112b). The Claimant achieved 110% of her 2015 fiscal target, while Mr Scammell achieved 117%. The Claimant achieved 105% of her 2016 fiscal target whereas Mr Scammell achieved 113%.

170. In cross examination the Claimant accepted that Mr Scammell sold more than her, but said she had high achievement of sales and their respective figures were in the same ball park. She said Mr Scammell had a higher sales opportunity due to the nature of his accounts, but conceded that he achieved more in terms of pound notes. Both exceeded targets. She agreed that Mr Scammell had broader experience, better sales figures, and that these were legitimate factors to take into account when considering appointment.

171. In cross examination the Claimant accepted that the primary aim of the restructure was to benefit the Respondent organisation, and if she was considered the better candidate by Mr Watson then he would have appointed her.

172. In cross examination as to past promotions the Claimant accepted that she had previously been promoted without any competitive process. When appointed as a KAM she was not asked to apply for the role nor was there any form of competition. This occurred around the same time that Mr Scammell was given additional responsibilities. The Claimant accepted that there was no competitive process when she was appointed as NAM. She was appointed because she was perceived to be the correct person for the role. At the same time Mr Scammell was given the additional responsibility of managing the ORAFOL account. The Claimant agreed that an employer could appoint to roles without a competitive process generally, but felt that with two strong candidates for the UK AFSM role in 2016 she should have had the opportunity to apply and compete for the role.

173. It was put that Mr Watson's view that Mr Scammell was the strongest candidate had nothing to do with the Claimant being a woman. The Claimant answered that it did indirectly, because she was on maternity leave.

Mr Watson

174. In cross examination Mr Watson confirmed he decided who would be appointed, and stated that Mr Scammell was appointed for the reasons given at p.40 para.17. He gave evidence that once the roles were approved by Mr Larson then job descriptions were designed with the relevant individuals.

175. On day 4 of the hearing a new document was introduced (p.213a). This was a job description for the role of "UK Aftermarkets Manager", the role which Ms McGeown occupied prior to the restructure.

176. In cross examination of Mr Watson there was no detailed comparison of the job description at p.213a and that at p.213 for the proposed new role for Mr Scammell. Mr Watson denied that there had been changes at p.213 tailored to Mr Scammell. He said that there was an original job description for the UK AFSM role (which was not before us) but changes were made to that, and the job description at p.213 was achieved following negotiation with Mr Scammell.

177. In his witness statement Mr Watson gave evidence that he undertook a two stage process when considering the restructure.

178. First, that he considered in abstract what was required of the three new roles, including UK AFSM. The new structure was to provide the best support to the sales team "in the field" due to anticipated issues regarding volatile exchange rates, a migration from cut vinyl to print (which was more complicated and involved lower profit margins), and a relatively inexperienced sales team. Whoever managed the external sales team had to fully understand all the intricacies of digital printing and have a thorough working knowledge of the hardware (printers), software, media, profiles (which lets the printer know how much ink to put onto the material) and the application (LW.14). Of the UK AFSM role Mr Watson's evidence was that there would need to be more emphasis on managing large key accounts, providing better support to field sales staff, and having a very thorough knowledge of the digital printing process to support the team (LW.16).

179. Second, Mr Watson gave evidence (LW.18) that after considering the roles in abstract he then considered all of the then KAMs (the Claimant, Mr Scammell and Lisa Kirkbride) to determine who to appoint as UK AFSM. His evidence was that all three were strong performers and very good in the field. He said that the Claimant was "quickly discarded" from the process as she did not have the hardware experience, did not have the strongest sales track record, did not have experience outside of the Respondent, and had no prior experience of developing supplier relationships. He said that beyond Mr Scammell the main contender was Lisa Kirkbride because she had worked for large industry players. However, he said that there were inconsistencies in Ms Kirkbride's performance, and she had no experience of developing key supplier relationships. Mr Watson continued that Mr Scammell "edged it" because of his consistent overperformance against sales targets, hardware experience (in which he had specialised since 2010), and how he had built the ORAFOL supplier business which demonstrated an ability to build key supplier relationships. Mr Scammell developed the Respondent's first and only £1 million account (AST).

180. Mr Watson gave evidence that he did not at any stage consider that he should hold a competitive recruitment process among KAM's or the wider sales team. Mr Scammell was the obvious person for the role.

181. Via cross examination the Claimant challenged Mr Watson's evidence of a two stage process as being a fiction.

182. It was not the Claimant's case that Mr Watson harboured any hostility to pregnant women or women on maternity leave, but that he designed the roles around who would be available to fill them and because of pregnancy or maternity the Claimant was not considered.

183. In cross examination Mr Watson agreed that p.211a was not a structure chart, it was a list of roles that would change or not be replaced. The new roles had names allocated, and Mr Scammell was allocated to UK ASFM. This was also the case in respect of p.158a2.

184. Mr Watson agreed that the Powerpoint presentation was the first time he had put anything in writing about the three new roles. He agreed that at this stage he had allocated Mr Scammell's name to the UK AFSM role (p.209). At this point he had not spoken to individuals to determine whether they would accept any new role.

185. When cross examined on p.208 Mr Watson agreed that the second main bullet point ("continue to manage large key account customers") was a reference to Mr Scammell. The customers mentioned were Mr Scammell's customers. Mr Watson denied that Mr Scammell was the only KAM to manage large customers.

186. Mr Watson denied that he had designed the role for Mr Scammell from the outset

187. It was put to him that if he had first gone through an abstract process of designing the role, then he would have arrived at a different job description which would not be specific to Mr Scammell. Mr Watson maintained that he had gone through such an abstract process at the first stage. He said that the roles he proposed to Mr Larson were changes based on his knowledge of the people and his own experience of 2008-2010 when he had to respond to another financial crisis.

188. Mr Watson agreed that he had nothing in writing from the abstract process which he said he had undertaken. He told us that he had discussed new roles and who would fill them with Ms Meredith. She was not involved in deciding who was to be appointed.

189. Mr Watson was cross examined on the content of para.16 of his witness statement relating to the UK AFSM role and required qualities of the post holder. It was put that Mr Watson deliberately and retrospectively chose those qualities because they were areas where Mr Scammell did well and the Claimant would not do so well. Mr Watson denied this.

190. It was put that Mr Scammell managed large key accounts. Mr Watson replied that the Claimant also did so. It was put that from 2015 Mr Scammell managed a small number of large spending customers, whereas the Claimant had smaller spending customers. Mr Watson disputed this. He said Mr Scammell managed a large number of customers and sub dealers, while the Claimant managed a broader range of customers including some very large accounts including Sign Language and City Signs. Ms Palmer did not dispute that the Claimant had some large accounts, that was partly why the Claimant said that she could perform the UK AFSM role.

191. Ms Palmer put that Mr Watson had Mr Scammell in mind when he mentioned "continue manage large key a/c customers" and named three accounts managed by Mr Scammell. Mr Watson replied "I do think he meets the criteria. Mr Scammell did have more key accounts than the Claimant. The Claimant had more smaller accounts".

192. Mr Watson was cross examined in respect of the requirement of knowledge of hardware and digital printing (LW.14). Mr Watson agreed that Mr Scammell had that background and knowledge, and said that Lisa Kirkbride also did. He said that the

Claimant did not have that experience. In respect of hardware experience he said that it was not a requirement that applicants should have sold hardware in the past. His point was that there had been a significant shift in business from being 70% cut vinyl to 50% digital. He said that unless the applicant has thorough working knowledge of the printer, software, how it works and how to manipulate the image and control workflow, then they cannot support people in the field. His evidence was that a majority of recent hires (Pam Arnold, Dave Callen, Yvonne Ward) all have a background in hardware or hardware sales. He denied that the "hardware" criteria was used to justify after the event what he had intended from the outset.

193. There was no dispute that there had been a shift from cut vinyl to digital printing in the sector and that this had an impact upon margins and profitability for the Respondent. Nor was it disputed that the FSR team was relatively inexperienced in digital print media, that recent hires had been made to address this, but that the team still lacked experience in this regard.

194. Mr Watson denied saying that the hardware experience criteria was essential because the Claimant did not have this experience. He agreed that the Claimant did not have hardware experience but said that the Claimant was discounted from the process based on a number of factors.

195. Ms Palmer put that "hardware" references were being made to justify why Mr Scammell "edged it". Mr Watson denied that Mr Scammell "edged it". He said that the criteria for appointing Mr Scammell were simple. The criteria were experience and skill set. Mr Scammell had three more years of field experience than the Claimant, and one more year experience than the Claimant in the KAM role. Mr Scammell had worked for one of the Respondent's customers for a period and so had inner dealings with what they do and how they price jobs. Mr Scammell's hardware experience was important. Mr Scammell had experience of dealing with suppliers and developing launch or marketing programs with suppliers. Mr Watson said that the Claimant failed on every element.

196. Mr Watson denied that it was always his intention to appoint Mr Scammell to the new role, or that he chose criteria to match Mr Scammell's CV. Mr Watson said that he looked at the available candidates (Claimant, Ms Kirkbride, Mr Scammell) and Mr Scammell was "head and shoulders above".

197. It was put to Mr Watson that the Claimant would not be available to perform the role for a period of some seven months (the anticipated period of maternity leave), and that he did not deal with that in his written evidence. Mr Watson replied that he was not aware the Claimant was planning to take less than 12 months maternity leave. Ms Palmer asked how Mr Watson would deal with appointments if the Claimant was the best person for the UK AFSM role. He replied that it was irrelevant whether she was available. He denied designing the role for the person who was available to perform it immediately. He said Mr Scammell was the perfect candidate and the role was not designed for him.

198. Mr Watson said that if Ms McGeown had declined the Operations Manager role then she would have been the Aftermarket Manager. He denied designing the UK Operations Manager role for Ms McGeown, and added that she had little experience in procurement and freight logistics (specified on p.208).

199. Ms Palmer asked whether, if Mr Scammell was just embarking on a 12 month period of absence for family reasons, he would have designed the UK AFSM role around the Claimant. Mr Watson denied that he would. He said that a friend of the Claimant's, Suzanne Carus, was on maternity leave and attended the Respondent's office. He said that he asked Mrs Carus whether she would be returning to work after maternity leave, and if so that there was a job available and it was right for her. Mr Watson referred to the Respondent's note of the grievance meeting on 27.2.2017 (p.291), which records Mr Watson making the same point of offering Mrs Carus a promotion.

200. Ms Palmer queried whether Ms McGeown really would have continued in the UK AFSM role, given that it was necessary for the post holder to have hardware experience. Mr Watson replied that there would then have been a need to move some of the responsibilities of the post. She would need to be in the field for 3-4 days a week as recorded on p.209.

201. In respect of "ability to leverage our supplier relationships" (LW.16), Ms Palmer put that Mr Watson said that because it allowed him to rely on the work Mr Scammell did with ORAFOL, and the Claimant did not have that experience. Mr Watson replied "correct". This was a compound question and by his response Mr Watson was addressing what, on his evidence, was the question of relative experience.

202. Mr Watson denied applying criteria with the aim of appointing Mr Scammell, and denied that the real criteria in making appointments was the inconvenience of maternity leave.

203. It was put to him that if there had been a genuine open-minded abstract process of which of 3 KAM's to appoint as UK AFSM, then there must have been a possibility he would conclude the Claimant was the best candidate. Mr Watson denied this. He said he was open to the possibility that the Claimant was capable of doing the job, but based on his experience he did not think she was the best candidate.

204. Mr Watson was challenged on his earlier evidence that he had some form of job description in mind before going through the process of deciding who was the best candidate and committing anything to paper. Mr Watson replied that he was looking for a person to better support the sales team. Based on experience and skill set Mr Watson quickly formed the view Mr Scammell was the best candidate. Thereafter the job role was adapted to Mr Scammell. His abstract consideration related to supporting people in the field against changing market pressures.

205. In cross examination Mr Watson denied giving no thought to how he would deal with matters if the Claimant was the best candidate. He said that in his thought process the Claimant was quickly discarded, and so he did not give any thought to Ms Palmer's proposition as a result.

206. Mr Watson agreed that the UK AFSM role has a significant management element. He confirmed that Mr Scammell had no experience of managing people. He said Mr Scammell had more experience of managing process than the Claimant. Mr Watson was aware that the Claimant had significant management experience from her employment at Next.

207. It was put that Mr Watson chose not to focus in his evidence on the significant management element because that would assist the Claimant. Mr Watson denied this. He said that managing people and managing high ego sales people are different - people are managed through respect, Mr Scammell had the respect of his peers, and he and the Claimant got on well.

208. Ms Palmer explored other appointments in cross examination of Mr Watson. Mr Watson confirmed he was involved in the appointment of Mr Scammell as KAM in 2013. He denied designing that role for him. He said that he had promoted another individual, Amy Golding, to the KAM role in January 2013 following her return to work part time after maternity leave. Mrs Golding was assigned a number of accounts. Around January 2013 Mr Watson saw more divergence in the markets especially in respect of commercial print, and Mr Scammell moved into a hybrid role selling both aftermarket product and equipment. Mr Watson said that Mrs Golding resigned in July 2013 due to travel commitments, and he then decided to promote Mr Scammell to the KAM role that Mrs Golding previously had.

209. This evidence was inconsistent with Mr Watson's witness statement that Mr Scammell was the first KAM to be appointed (LW.18). Mr Watson said that this written evidence was a mistake.

210. Mr Watson denied that when the Claimant was made a KAM in 2014 this role was created for her. He said she was perfect for this role and was dealing with larger accounts in the South. He also denied that the NAM role which the Claimant was promoted to in 2015 was designed for her. Again he said that the Claimant was perfect for the role.

211. Mr Watson denied that by 2014-2015 the Claimant and Mr Scammell were equals within the organisation. He said Mr Scammell managed higher potential accounts that were not spending at the time.

212. Mr Watson agreed with the general proposition that it is rare that potential post holders have exactly the same qualifications and experience. If it was not immediately apparent who was the best candidate then the Respondent would hold a competitive interview process. Ms Palmer put that if two of the Respondent's employees had a "fair shot" at a job, they would expect an interview process. Mr Watson agreed that this would be so if there was not "such a gulf in terms of criteria". By way of example Mr Watson said that when the Claimant was moved to the KAM role, her skillset and sales numbers fully justified there being no process. There were other sales people in the region who he considered appointing, but the Claimant was "far above" them.

Ms McGeown

213. In her witness statement Ms McGeown gave evidence that in early July 2016 Mr Watson came to see her to discuss a possible restructure of the senior team. Mr Watson outlined his draft proposal and explained that he wanted her to take on the new role of UK Operations Manager. Mr Watson described the role to her in terms reflected by the PowerPoint presentation at p.208. Ms McGeown's evidence was that Mr Watson explained that he wanted to add a new UK AFSM role which would contain elements of Ms McGeown's former role but the emphasis would be on supporting the field sales team and KAMs. Mr Watson told her that he had Mr Scammell in mind for

this position, and based on what she knew Ms McGeown considered that Mr Scammell was the right person for the role. Ms McGeown was not asked to attend an interview process, and nor was Mr Scammell.

214. In cross examination Ms McGeown said that the general approach to promotions at the Respondent is that there would not be an interview process where there was an obvious candidate for a particular role. If there were a number of equally qualified employees then there would be an interview process. Employees are seldom exactly equally qualified, so there would be a "ballpark" approach to assessing the merits of potential candidates. There was an interview process in 2010 when the Claimant was appointed as an Aftermarkets field sales representative, because there were a number of employees whose experience and qualifications were equal in the sense above.

215. Ms McGeown said there were 4 sales teams at the Respondent, 3 external teams and 1 internal. The internal team deals with existing accounts in the business and are office based. The external teams are field based, and field work is of higher status and better remunerated than the internal teams. In respect of hardware there were teams dealing with (1) sign systems / metallic signs, e.g. the signs that can be seen at the roadside generally; (2) hardware and software; (3) aftermarkets. The hardware team sell a range of printers, laminators and associated software packages, and need to understand the package being sold.

216. Ms McGeown gave evidence that when Mr Scammell was appointed as a KAM in 2013 his role encompassed hardware and materials. She said that when both the Claimant and Mr Scammell were in KAM roles as of 2014 the sales potential of their respective customers was equal. Ms McGeown had no experience in hardware. She and others had received training but she was not at the level to allow her to sell the products in question.

217. The aftermarkets sales team deals with materials such as ink, paper, laminates, vinyls etc which are used in the machines being sold. "Consumables" is another word used to describe aftermarkets / materials.

218. Prior to the 2016 restructure Ms McGeown held the role of Aftermarkets Service Manager. She took some of these responsibilities into the new UK Operations Manager role. She was to continue with the customer data element of her former role, she would not simply be visiting in the field with sales people in the new role. No job description was before us in respect of Ms McGeown's former role at the time Ms McGeown was questioned, but one was produced on day 4 of the hearing (p.213A).

219. In cross examination Ms McGeown said there was significant difference between her former role and the UK AFSM role (p.209). In her former role Ms McGeown did not have any customers. The UK AFSM role did not include her former responsibilities of customer analytics nor being a power user for salesforce, nor generating reporting structures in salesforce. In her former role she did not provide guidance, support and mentoring to KAMs. She would work in the field when she wished to appraise staff or if requested. Her former performance reporting responsibilities continued in her new role. Her responsibilities to identify training requirements and ensure consistency in customer approach to pricing remained the same in the UK AFSM role. A key difference was that the UK AFSM role was field based unlike her former role.

220. In cross examination Ms McGeown agreed that she had managed her team for three years despite having no hardware experience. She said that this was not problematic pre-Brexit, but post Brexit the need to sell machinery to customers and secure sales for consumables had become more relevant. Better sales would generate more leads.

Mr Scammell

221. Mr Scammell gave evidence that in July 2016 Mr Watson said told him he was contemplating organisational changes flowing from the Brexit referendum outcome. Mr Watson told him about the new roles and said that he would like Mr Scammell to take on the UK AFSM role. Mr Scammell accepted the position. He gave evidence that there was no competitive process involved, which he found unsurprising as promotions at the Respondent are invariably based on management's knowledge of their team. He was not cross examined in respect of the restructure.

222. Ms Meredith gave evidence that in early July 2016 Mr Watson told her that he envisaged three new positions being created and also said who he thought would be the right candidates for the roles. He did not discuss why he had identified the candidates he had. At the time Ms Meredith considered these to be the best people for the roles.

223. We resolve the remaining factual disputes in our conclusions on allegations (c) to (f).

Communication with the Claimant during maternity leave

224. On 19.7.2016 Ms McGeown sent a text message to the Claimant (p.159-159a). Ms McGeown first asked how the Claimant was coping with her pregnancy in the hot weather. She then stated that she had a couple of things that she wanted to let the Claimant know about. Ms McGeown asked whether the Claimant would prefer to have the information sent to the email account she had provided Paul Stone (personal email) or wanted Ms McGeown to telephone the her. The message was written in informal and friendly language and ends with a "X".

225. The Claimant replied (p.159) in a similar tone. She asked Ms McGeown to email her on her personal account. Her message ends with a "X".

226. The exchange of messages continued around the progress of the Claimant's pregnancy (p.160). Ms McGeown then asked "would you like me to just send stuff as and when and you will catch up as and when you can be arsed / middle of the night when you can't get back to sleep?".

227. The Claimant replied "Yeah of course that's fine just send over as and when. If I have any questions then can give you a call. Is that OK? Xx". Ms McGeown replied "Of course chick X". Throughout the discussion both the Claimant and Ms McGeown included various "x" as a sign of affection.

228. Also around 19.7.2016 Ms McGeown was in contact with Larry Burke from a company called Arlon. Mr Burke was leaving Arlon around this time. He was arranging a treat day as a thank you to the external team at the Respondent, the choice of treat being between a spa day and karting. The proposed date of the treat day was 15.9.2016. The Claimant was not originally invited by Mr Burke. Ms McGeown made contact with

Mr Burke to ensure that the offer of a treat day was extended to the Claimant (pp.169-165).

229. The Claimant accepted in evidence that Ms McGeown's motivation for trying to include the Claimant in Mr Burke's treat day was to recognise the hard work that the Claimant did for this client.

230. On 21.7.2016 Ms McGeown sent an email to the Claimant's personal account headed "updates". She told the Claimant that Mr Burke was leaving Arlon, that a treat day was arranged for 15.9.2016, and that the Claimant was invited to attend. Ms McGeown recognised that the treat day was to be held not long after the Claimant was due to give birth. She wrote that the Claimant could take a view on attendance closer to the time (p.161).

231. The Claimant replied on 21.7.2016 (p.162). She spoke in informal friendly terms about the progress of her pregnancy. The Claimant thanked Ms McGeown for the offer of a spa day and asked for more details so that she could consider childcare arrangements. She asked if this would count as a KIT day. The Claimant signed her email off with "xxx".

232. Ms McGeown replied "I imagine we could pass this off as a KIT day!! K x"

233. Ms McGeown emailed the Claimant on 26.7.2016 to clarify matters relating to the spa day. The Claimant replied the following day to state that she could not attend the spa day for childcare reasons (p.186). Ms McGeown and the Claimant continued to discuss the Claimant's pregnancy. The Claimant's baby was overdue and the Claimant was upset. Ms McGeown used supportive language. It was a friendly personal conversation with both using "x" in their messages.

234. On 22.7.16 Ms McGeown sent an email agenda to a number of employees including the Claimant in respect of the Respondent's Sales Meeting scheduled for 3rd and 4th August 2016. The email was sent to the Claimant's work account only. The agenda does not expressly refer to any restructure (p.163-4), although Mr Watson was to give a "Business Overview" on 3.8.2016 at 2.30pm.

235. On 26.7.2016 Ms McGeown emailed the Claimant on her personal account to make arrangements for the treat day (p.187). On 27.7.16 the Claimant declined the offer of attending the spa day due to childcare difficulties (p.186). The email discussion continues in relation to personal matters concerning the Claimant's pregnancy, is in friendly terms and kisses are exchanged in the messages.

236. On 28 July 2016 Beverley Meredith sent a letter to Ben Scammell confirming his new position of UK Aftermarkets Field Sales Manager with effect from 1 August 2016 (p.187a). His salary was to increase. There was to be no change in OTE commission, but the commission structure would be changed to reflect the objectives in the new role and would be provided to Mr Scammell shortly.

237. Thereafter Mr Scammell was to be the Claimant's new line manager.

238. On 3.8.2016 at the sales meeting there was an announcement that Ms McGeown, Ms Watson and Mr Scammell would have new roles.

239. On 3.8.2016 Mr Watson sent an email to all the Respondent's staff entitled "organisational announcement" (p.187b-c). The email explains structural changes following the Brexit referendum result, and the roles which Ms McGeown and Mr Scammell were to occupy. Of Mr Scammell it was said that he "will be responsible for planning, implementing and directing the sales activities of the external Aftermarket team. Ben will continue to manage some of his current accounts, where he has managed to grow 30+ customers from £1.2m to £3.3m in just 3 years, whilst increasing the overall sales margin by 1.4%. Having Ben spend time with our external sales team and key customers will see a positive influence on our business.".

240. This email was sent to the Claimant's work account, but not her personal account.

241. On 3.8.2016 Paul Stone sent commission figures to the Claimant using her personal email account as requested (p.188)

242. The Claimant gave birth on 3.8.2016. Ms McGeown learned of this later that day.

243. On 4.8.2016 the Claimant's stepdaughter, who also worked at the Respondent, visited the Claimant and told her that Mr Scammell had been promoted.

244. On 4.8.2016 Ms McGeown sent an email to the Claimant at her personal account to congratulate her on the birth of her baby. The Claimant replied, attached photos of her baby, and said that she would arrange a visit in the next week or two. Ms McGeown replied "how beautiful". Kisses are exchanged in the emails between them (p.190).

245. On 9.8.2016 on behalf of the Respondent flowers were ordered and sent to the Claimant to congratulate her (p.192b).

246. On 12.8.2016 the Claimant accessed her work email and contacted Ms McGeown in respect of commission payments (p.191).

247. The Claimant used her work account for this purpose because a table included in the email was produced on a spreadsheet, and required the use of excel which was on her work laptop. This was the same account that the 3.8.2016 announcement (p.187b) was sent to.

248. On 15.8.2016 there was an exchange of text messages between the Claimant and Ms McGeown (p.192a). The Claimant was thinking of calling in to the office that Thursday (18.8.2016) and asked if Ms McGeown was free for a catch up. Ms McGeown replied that she was out of the office that day as she was going on holiday. She offered to call the Claimant the following day. The Claimant replied that the following day was not convenient for her, and asked when Ms McGeown was due to return from holiday. It is a friendly discussion and both used kisses in their messages. Ms McGeown did not reply to state when she would return from holiday.

249. In the evening of 17.8.2016 there was an exchange of text messages between the Claimant and Mr Scammell. After some pleasantries the Claimant wrote "I understand there have been some changes", explained that she was popping into the office the following day and asked if Mr Scammell would be there. In his reply Mr Scammell asked about the wellbeing of the Claimant's family, and said "it's been an (sic) strange

few weeks". He explained he was in Carlisle and would not be present in the office the following day but offered to telephone the Claimant on his drive back. The Claimant confirmed that a telephone call would be fine. She stated she had sent a text to Ms McGeown but not received a reply about her calling into the office. Mr Scammell replied that Ms McGeown was now on holiday until September and her phone may be switched off. The Claimant replied that she had had some text contact with Ms McGeown before her annual leave commenced. The tone of the exchanges is friendly. The Claimant sent Mr Scammell photographs of her baby by text (pp.193-197a).

250. At this stage the Claimant had not been informed of changes brought about to the Respondent's structure or her line manager by email to her personal email account.

251. On 18.8.2016 the Claimant and Mr Scammell had a discussion by telephone. Mr Scammell explained that the Brexit referendum outcome resulted in the restructure and his appointment to the new role. He advised the Claimant that these events would not change her own role. They also discussed the Claimant's baby. The Claimant did not raise any concerns with Mr Scammell in respect of the restructure and did not ask why she was not considered for any of the new roles. It was a short amicable phone call.

252. The Claimant gave evidence, which we accept, that during the telephone call she reminded Mr Scammell that Ms McGeown had agreed to keep her updated by email to her personal account. The Claimant presumed Ms McGeown had not informed Mr Scammell of this arrangement.

253. On 18.8.2016 the Claimant texted Mr Scammell with her personal email address (p.197).

254. On 19.8.2016 there was an exchange of text messages between Mr Scammell and the Claimant. Mr Scammell asked the Claimant if she was still picking up her work emails or if she wanted him to add her personal email address to the consumables email group. The Claimant did not want her personal email added to the consumables group due to concerns she would get a large volume information. She asked for "specific updates and meeting info" to be sent to her personal account, and she would access her work account as and when (p.197b-c).

255. Later on 19.8.2016 Mr Scammell emailed a number of the Respondent's employees, including the Claimant at her personal email address, in respect of a sales meeting on 14.9.2016 and the treat day to be held on 15.9.2016 (p.198). The Claimant replied on 24.8.2016 (p.215) and explained that she would not be attending as she did not have childcare and did not want to stay away from her baby at that stage. The Claimant had already advised Ms McGeown on 27.7.2016 that she would not be attending the treat day (p.186).

256. In September 2016 the Claimant had an informal visit to the office. She took her daughter with her to show her friends and colleagues. Mr Scammell was not present on that day. Ms McGeown was present and spoke with the Claimant. They discussed the Claimant's new baby.

257. They also briefly discussed the restructure, that it resulted from Brexit, and the new roles occupied by Ms McGeown and Mr Scammell. The Claimant was pleased for Ms

McGeown. The Claimant did not raise any concerns or queries in respect of the restructure or appointments made.

Handover from Ms McGeown to Mr Scammell

258. After some consideration Ms McGeown accepted her new role around 15th to 18th July 2016. She knew that Mr Scammell would become the Claimant's new line manager under the structure at a point before 3.8.2016.

259. Prior to 1.8.2016 Ms McGeown carried out a very limited handover with Mr Scammell when he was about to become the Claimant's line manager. Ms McGeown did not inform Mr Scammell of the Claimant's preference for contact to her personal email account. Ms McGeown suggested that Mr Scammell telephone the Claimant a reasonable period after the birth of her child to inform her of the restructure. Mr Scammell agreed with that approach. Mr Scammell was to decide what that reasonable period would be. He was a parent himself and drew on that when deciding when to contact the Claimant.

260. Mr Scammell did not know how much contact the Claimant wanted, or how she wished to be communicated with at this point. In evidence he said this was corrected following their telephone conversation of 18.8.2016. Mr Scammell agreed that a woman on maternity leave should be updated with pertinent work-related matters. He assumed that a woman on maternity leave would have input into what was considered pertinent and the frequency and means of contact. Consultation was important to establish these matters. He accepted he should have known of the preference for use of personal email.

261. Ms McGeown accepted that a woman on maternity leave should be informed of a restructure which affects them, but at an appropriate time. She also said that the update should not be to the detriment of others, a reference to informing the Claimant of the restructure before staff generally were made aware. Ms McGeown believed that the restructure might lead to redundancies. Ms McGeown accepted in principle that if a post is advertised internally, a woman on maternity leave should be advised of this at the same time as those remaining in the workplace, and while there was still an opportunity to apply.

262. Ms McGeown accepted that she was responsible for keeping the Claimant updated while she was her line manager. Her evidence was that she did consider who would speak to the Claimant about the restructure, and concluded that all staff should be informed at the same time. After the announcement was made on 3.8.2016 it was discovered that the Claimant was in labour. When she learned that the Claimant was in labour she thought of nothing other than this. Ms McGeown maintained that she could not inform the Claimant about the restructure before other employees, but accepted that she could have told the Claimant that there was to be an important announcement on 3.8.2016. Ms McGeown thought there should have been a follow up call to the Claimant to advise of the restructure.

263. In evidence Ms McGeown accepted that she did not telephone the Claimant as she said she would on 15.8.2016 (p.192a) because she did not have sufficient time as she was going on holiday. In the text exchange at p.192a Ms McGeown offered to call the Claimant the following day. The Claimant replied that the following day was manic as

she was registering the birth, and she asked when Ms McGeown was returning from holiday.

264. In response to questions from the Tribunal Ms McGeown said her view at the material time was that it would not be appropriate to update the Claimant of structural changes by means of an off the cuff telephone call or email, particularly as at the time that the Claimant had just had her baby. When asked why the email sent to all employees notifying them of the restructure could not have been forwarded to the Claimant's personal email account, Ms McGeown said that felt very impersonal given the nature of their relationship. She felt that they picked up on this when the Claimant attended the office in September 2016. When the Tribunal asked further questions in this respect Ms McGeown became upset and began to cry. She said "I probably misinterpreted what I should have done. I didn't give it a thought to send the email to her personal account". She accepted that the Claimant's request to keep her updated was reasonable, adding "I made a mistake. That's an honest answer. I thought it was very impersonal".

Allegation (g) The Claimant's ten year service anniversary

265. On 11.9.2016 the Claimant reached ten years of service with the Respondent.

266. The parties were agreed that the Respondent places considerable importance on such significant anniversaries and that they are celebrated within the Respondent.

267. During cross examination the Claimant did not disagree with the evidence of Ms Nelson at paragraphs 2 to 5 of her witness statement in respect of the practice at the Respondent. This was to the effect that the Respondent tries to retain a family business feel. Long service was celebrated at the ten year mark, and then at 5 year intervals thereafter. Each employee's birthday was also celebrated. Ms Nelson maintains a spreadsheet to remind her of the relevant date to be celebrated. If the employee is based at the Bristol headquarters then Ms Nelson would ordinarily give a card and gift to the employee's manager and a presentation would take place in the office. This did not always take place on the date of the event being celebrated. These types of awards were often made at planned sales meetings or other joint events where colleagues would be present to "make a fuss" of the employee in question. We find that this was the practice at the Respondent.

268. Mr Watson gave evidence which we accept that for employees working in the field it was rare for long service or birthdays to be celebrated on the actual day. There was a practice of celebrating in front of peers. There is no discussion with the employee in advance to inform them when such a presentation will take place.

269. Ms Nelson consulted her spreadsheet and noted that the Claimant's ten year anniversary was approaching. She obtained a congratulatory card and a gift for the Claimant - a bottle of champagne and glasses. She gave these to Mr Scammell and left it to him to arrange the presentation to the Claimant.

270. At this time Mr Scammell thought that the Claimant would be attending the sales meeting on 14.9.2016. He intended to make a presentation at that meeting. Mr Scammell did not tell the Claimant that there was a card and gift waiting for her.

271. When the Claimant said that she would not be attending that meeting Mr Scammell decided to make the presentation at a later date when it could be done in front of her colleagues. That took place on 8.12.2016 when the Claimant attended a two day sales meeting as part of her KIT days. Mr Scammell also publicly apologised for the lateness of the presentation.

272. On or about the date she achieved ten years' service the Claimant had no communication on behalf of the Respondent to congratulate her, or to inform her that she would receive a gift to mark the anniversary. Approximately a month later one of the Claimant's colleagues achieved ten years of service and posted an image of her gift on social media, a bottle of champagne and glasses (p.199b). The Claimant saw this and was upset by it. The Claimant's colleague was not on maternity leave.

273. During cross examination the Claimant accepted that a gift had been obtained for her and that it was Mr Scammell's intention to present her with it in front of her colleagues.

274. However she did not understand why Mr Scammell thought she was attending the September meeting given she had already told Ms McGeown she would not be. The Claimant said that Ms McGeown and Mr Scammell had not communicated regarding her attendance. When it was put to the Claimant that she was not treated differently to other colleagues she replied "had I been in the office and not on maternity leave I would have received my award at the sales meeting. I was overlooked". It was not the Claimant's case that the gift should have been sent in the post. She complained that not enough was done to let her know that there was a gift waiting for her, and that she had not been overlooked. The gift was not mentioned until she complained to Mr Scammell on 8.11.2016 that her anniversary had been missed, at which point Mr Scammell told her there was a gift for her in the office, and that it was his fault it had not yet been presented.

275. During cross examination Mr Scammell accepted that he could have acknowledged the Claimant's anniversary by text message on the day. He said he did not do so because the custom was to celebrate with colleagues at the earliest opportunity at a sales meeting or party. He said that there was no reason for the Claimant to have felt forgotten due to their relationship. The Claimant lived minutes away from the office and Mr Scammell accepted he could have asked her to come in for a special presentation but said he did not do so as a presentation had never previously been done in that way before.

276. Mr Scammell accepted that the Claimant had complained about the lack of celebration of the anniversary before the presentation happened. The Claimant also complained about lack of celebration of her birthday, and the recall of her vehicle (the withdrawn complaint). She may also have complained about not being able to prepare for training from home, but Mr Scammell could not recall either way.

Allegation (h)

277. The Claimant's birthday falls on 24th October.

278. The Respondent's practice is to celebrate employee birthdays with a gift and card signed by Mr Watson and the employee's colleagues. As with anniversaries this takes place at sales meetings or other significant events in front of colleagues.

279. On 23.10.16 it was Ms McGeown's birthday. The Claimant sent her a text message to congratulate her and typed three kisses. Ms McGeown responded and thanked the Claimant (p.200). On 24.10.2016 Ms McGeown sent a text to the Claimant to wish her a happy birthday. Her text was friendly and included kisses, as did the Claimant's reply (p.201).

280. On 24.10.2016 Mr Scammell sent the Claimant a text message to wish her a happy birthday (p.202). He also asked when he could telephone the Claimant. The Claimant replied that it was difficult to have a phone conversation due to childcare and suggested that she pop in to the office, asking when would be convenient. Mr Scammell replied that he would send the Claimant an email because he wanted to know if the Claimant was interested in delivering competitor training to new starters at the Respondent.

281. In these text message exchanges the Claimant was not told that there was a gift or card waiting for her in the office, whether for her birthday or long service anniversary.

282. The Claimant gave evidence that she did not receive any official contact from the Respondent's management to wish her a happy birthday. The card was not posted to her. Given that her ten year anniversary had not been marked she considered that the same was happening in respect of her birthday.

283. Ms Nelson gave evidence that she arranged a birthday gift for the claimant (bottle of wine) and card. She gave them to Mr Scammell for him to make arrangements to present to the Claimant. She knew that the Claimant was on maternity leave.

284. Mr Scammell's evidence was in the same terms as the anniversary gift. He wanted to make the presentation in front of the Claimant's colleagues. This was done in December 2016 at the same time as the long service presentation.

285. As above in respect of long service, it was not until her complaint on 8.11.2016 that the Claimant became aware that there was a birthday gift and card waiting for her in the office.

Allegation (j): Claimant required to prepare for training in the office

286. Following his text messages on 24.10.2016 (p.202), on 25.10.2016 Mr Scammell emailed the Claimant (p.214). He asked her if she would like to deliver competitor training to new starters at the Respondent as part of her Keeping In Touch days. Various dates in November 2016 were suggested. He made specific reference to the Claimant being "really good" at delivering training.

287. In the email exchanges which followed, the Claimant stated she would need to check her childcare arrangements and asked how long the training was envisaged to take. Mr Scammell replied that the training would take a full day. He also told the Claimant that he was planning the next sales meeting for the 8th and 9th December 2016, and the Respondent's Christmas party was to be held in the evening of the second day. He had not yet advised the team of this, and stated "it would be great if you could join us". Following further discussion of childcare, Mr Scammell offered the Claimant the opportunity to attend any one of the two days of the sales meeting.

288. On 29.10.2016 the Claimant emailed Mr Scammell. She agreed to deliver the competitor training on one of the suggested dates. She also stated she would attend both days of the sales meeting. The Claimant asked if she would be paid for her preparation time for the training day (p.222).

289. Mr Scammell replied on 31.10.2016 that the claimant would be paid for her preparation time, but that "this time will need to be taken in the office" (p.221). The Claimant asked why she had to prepare in the office. Mr Scammell replied on 1.11.2016 (p.223):

> "Keep in touch days are an important way of keeping in touch with both colleagues and with any company changes while you are absent for a long period of time on maternity leave to make the return to work smoother and less stressful.
>
> This means the time taken as 'keep in touch' days need to be used for meetings / training / product updates etc which can only be carried out in the office or an official training environment."

290. Shortly after this the Claimant and Mr Scammell discussed moving the training to the week commencing 12.12.2016.

291. On 8.11.2016 the Claimant had a conversation with Mr Scammell. She was angry about her long service and birthday not being celebrated at the time. He told the Claimant that there were gifts in the office for her and apologised for the late presentation. She also complained about not being able to prepare for the training at home. She did not raise Mr Scammell's appointment as UK AFSM.

292. Mr Scammell emailed the Claimant following this discussion (p.229). Although he accepted in evidence that the Claimant had complained to him, there was no reference to this in his email. Mr Scammell wrote that training the new starters week commencing 12.12.2016 would not be a problem and that there was flexibility all that week. He also said it would be perfect if the Claimant could use the morning of 8.12.2016 for preparation, prior to the sales meeting later that day which was only scheduled for half a day. He asked the Claimant for her preferred dates.

293. On 13.11.2016 by email the Claimant advised Mr Scammell that she could not arrange childcare so could not deliver the training and apologised for this. She was still going to attend the sales meeting (p.230). Mr Scammell replied that it was not a problem.

294. Prior to maternity leave the Claimant was (if not in the field) based at home and she would undertake any training preparation work at home. She thought that Mr Scammell's response at p.221 was not his usual behaviour. She felt as though she was not trusted to work from home. She would need to arrange childcare to prepare in the office, but at home could fit preparation work around caring for her baby.

295. In cross examination the Claimant agreed that Mr Scammell was flexible about the dates training was to be delivered, that she was not put under pressure to deliver the training, and that she knew she was under no obligation to accept doing a keep in touch day. She stated that she had always previously prepared at home, and the only difference on this occasion was that she was on maternity leave.

296. It was put to the Claimant that as she only had ten KIT days, it was not the best use of a KIT day if she was sat at home on her own. The Claimant disagreed, saying it allowed her to update herself on what competitors were doing. Mr Harris put that the Respondent's position was if a KIT day was being used then the Claimant was wanted in the office to keep in touch. The Claimant replied that the office environment was too noisy to allow her to properly prepare. This was a factor in her not undertaking the training, together with childcare issues. The Claimant agreed that she had not lost anything by not performing the training, and the KIT days were kept for other possible sales meetings.

297. Mr Scammell gave evidence that after the Claimant queried why preparation must be done in the office (p.221) he sought advice from Ms Meredith. The advice given was what Mr Scammell wrote at p.223. Mr Scammell gave evidence that he was told the main point of KIT days was to keep in touch. Because the Claimant lived nearby it made sense to ask her to attend the office as part of the KIT day. The Claimant could then have contact with her manager and colleagues. Mr Scammell accepted that the Claimant would ordinarily have undertaken training preparation at home. He accepted that the Claimant would have contact with colleagues when delivering training, and that she could have contacted colleagues by phone from home if she needed information when preparing training. Mr Scammell maintained that preparation should have been done in the workplace so that there would be further contact with colleagues.

298. Ms Meredith's evidence was consistent with that of Mr Scammell in terms of advice given to him on KIT days. In cross examination Ms Meredith maintained that preparation at home would not be beneficial as a KIT day because the Claimant would be isolated, even if the Claimant had contact with colleagues by telephone as part of her preparation work. She did not know what preparation work was involved. It was put to Ms Meredith that it was artificial to say that she needed to attend the office to prepare if that did not involve contact with colleagues. Ms Meredith responded that her advice was correct at the time, but if she knew at the time that the Claimant felt strongly then maybe she would have discussed a compromise with Mr Scammell. Ms Meredith maintained that it was not reasonable for the Claimant to prepare at home and deliver training in the office.

<u>Allegation (k) Not informing Claimant of the role of E-Business Co-Ordinator</u>

299. A "new admin / e-business" role was envisaged in Mr Watson's Brexit Plan (p.211a).

300. On 10.11.2016 the Respondent announced that Andrew Pirie had been promoted to the position of E-Business Co-ordinator.

301. Mr Watson gave evidence that he appointed Mr Pirie due to his knowledge of Hybris, work performance and his qualification in journalism. The role was not advertised internally or externally. No other employee was considered for the role. He added that he had no indication that the Claimant intended to return to the Respondent in anything other than her NAM role. Mr Watson's evidence in this respect was not challenged during cross examination, and we find these matters as facts.

302. There was reference to Mr Pirie during cross examination of Mr Watson in respect of the Claimant's grievance, but as one of a number of matters that had not been communicated to the Claimant (p.257).

303. The Claimant became aware of Mr Pirie's appointment in mid-November 2016.

304. In evidence the Claimant complained that this role was not advertised prior to appointment, no interviews took place, and it was a role she could have considered in order to ease her back into her own role.

305. In cross examination of the Claimant the content of Mr Watson's statement was put to her. This included that Mr Watson had appointed Mr Pirie to the position in part due to his knowledge of Hybris, which is an online stores platform. In cross examination the Claimant did not know what was meant by Hybris. She was aware that an online store had been created but had no knowledge of the platform. The Claimant also did not have a qualification in journalism, unlike Mr Pirie. Her evidence was that she could have obtained any further qualifications required for the role or learned other elements.

306. On using the role to "ease back" into her substantive role, the Claimant said in cross examination that based on being out of the workplace for eight months it could have been an option for her. It was put to her that the role was permanent and not temporary. The Claimant confirmed that she was not contending that the role should have been offered to her, but the absence of advertisement meant that the option to apply was not available. Mr Harris asked whether this was because the Claimant was on maternity leave, to which she answered yes. When she was asked if her case was that the role would be advertised if she was not on maternity leave the Claimant replied no, but she might have found out about the role if she was in the workplace. She would not necessarily have put herself forward for it, she simply did not know about the position.

307. In cross examination Mr Scammell stated he did not know about the e-business role. He was not aware of the position being offered internally. It was a marketing position and Mr Scammell worked in aftermarket sales.

<u>December 2016</u>

308. The Respondent's sales meeting took place on 8th and 9th December 2016. The Claimant attended both days as part of her keeping in touch days. Mr Scammell greeted the Claimant and was polite to her. The Claimant's ten year service and birthday were celebrated in front of her colleagues. The Claimant was presented with her gifts and cards to mark both events.

309. After the sales meeting the Claimant and Mr Scammell spoke. The Claimant told Mr Scammell "this doesn't feel important to me". She also said that in her view the sales team had behaved like children during the meeting.

310. The Claimant gave evidence that during the meeting there was no mention of Brexit or cost savings. She felt that the meeting was badly run and some sales staff were not paying full attention. She gave evidence that she felt she could have run the meeting more professionally than Mr Scammell, and she began to realise it would be difficult for her to return to work and be line managed by him.

311. The Respondent's Christmas party took place on 9.12.2016. A Christmas party was also held for employees' children. The Claimant attended the parties. On 10.12.2016

the Claimant sent an email to Ms Meredith and Ms Nelson to say thank you for the Christmas party which she enjoyed and also for the gifts given. She thanked them for their efforts and wished them a Happy Christmas (p.238).

Allegation (l)

312. On 13.1.2017 Mr Scammell invited the Claimant to the Respondent's next sales meeting scheduled for 19.1.2017. The consumable field sales team were advised of the meeting on the same day. The Claimant replied on 13.1.2017 that she could not attend because she was already signed up for a baby "sing and sign" class. She offered to prepare something in advance of the meeting if that was helpful. Mr Scammell replied that that was not necessary. He advised that there had been developments with Avery and 3M that he would be sharing with the team at the sales meeting. He said that he would keep notes and talk it through with the Claimant at a later point (p.242). The Claimant replied "that's great, thank you".

313. In oral evidence Mr Scammell accepted that he did not subsequently talk the Claimant through matters. He said he did have handwritten notes in a notepad.

314. Later in January 2017 the Claimant discovered that one of her customers, City Signs, had been reallocated to a new account manager. She had not been told about the reallocation by anyone at the Respondent. She learned of the reallocation when she received a message via social media from the owner of City Signs, a Mr Wilkins. Mr Callen had originally been the covering employee. The Claimant asked whether Mr Callen was looking after City Signs well, and was told that someone else, Mr Anstey was now covering.

315. In cross examination the Claimant accepted that she was involved in the handover process with Mr Watson and Ms McGeown, and that over a period of months there could be operational changes involving personnel. It was put to her that the change in covering field sales employee was such an operational decision. The Claimant replied that she had given much thought to who would be appropriate to cover this client due to the nature of the relationship. It was put to the Claimant that arrangements as to cover were not set in stone when the Claimant began maternity leave. The Claimant said that she thought arrangements were set in stone and that it was reasonable for her to think that. The Claimant accepted that a balance was to be struck in terms of the amount of communication with her during maternity leave, so that she would be updated appropriately but not bombarded with information. This was what she had asked Mr Scammell for (p.197b).

316. Mr Scammell gave evidence that the reallocation of cover was an operational decision. Mr Callen's territory changed and this resulted in a change to regional cover which involved City Signs. The reallocation was not limited to City Signs. He gave evidence that the rationale of the decision was to improve territory manager coverage, and that this was not the sort of matter he would have consulted the Claimant about while she was taking maternity leave. He would have updated her about this either during another KIT day or when she actually returned to work.

317. In cross examination it was put to Mr Scammell that he had no idea of what the Claimant's communication preferences were. He replied that he did not update the Claimant as and when it suited him. He maintained that City Signs were reallocated

because they were outside Mr Callen's territory and fell within Mr Anstey's territory. Mr Callen was struggling to look after the account. Mr Anstey had many years' service. Ms Palmer accepted that the reallocation decision was an operational one, but put that it was unfortunate that there was no contact with the Claimant to establish her preference for cover arrangements. Mr Scammell accepted this. Mr Scammell's preference was to tell the Claimant of this change upon her return to work as she would then inherit the account again.

318. Ms Palmer asked why Mr Scammell would wait for the Claimant to return before updating her, as he would need to keep track of things to update her about. Mr Scammell replied that he kept a log of things to update her about, and he had a drawer of product updates, samples and all other matters that he needed to update her on when she returned. No such material had been disclosed in Tribunal proceedings. When asked why for example no log was disclosed Mr Scammell replied that it was not there any more. He did not refer to these matters in evidence in his witness statement. He accepted that the reallocation of cover could have been better communicated to the Claimant. She could have been sent an email for that purpose.

319. In cross examination it was put that the Claimant used only three of her ten KIT days, and that there were various KIT days that could have been used to keep the Claimant updated. Mr Scammell gave evidence that he sent the Claimant various invites to meetings but she declined. It was put that it would have been more appropriate to spend an hour a month updating the Claimant on matters, instead of asking her to deliver training. Mr Scammell replied that he did not try to update her monthly.

320. In re-examination Mr Scammell gave evidence that the Claimant was still receiving updates to her work account.

<u>Allegation (m): failure to inform the Claimant of key changes to the commission structure which affected her pay</u>

321. The Respondent operates an end of quarter bonus scheme, which was referred to in evidence as the "kicker". The structure and earning scale of the respondent's UK Aftermarket commission structure had not changed for many years. The kicker, which formed part of that structure, has changed from time to time. These changes reflect the particular focus of the Respondent's business during any quarter, for example to focus on selling a particular product. The kicker accounts for approximately 7% of on target earnings. A change of kicker does not result in a change of OTE, but does affect earning potential and how OTE are achieved. When the kicker changes then up to 7% of OTE could vary depending on sales etc.

322. In November 2016 a decision was taken to change the kicker, to focus on the Respondent's in-house brand "ImagePerfect". Mr Watson was involved in making that decision. Previously ImagePerfect formed part of the kicker, but following the change it was to form the whole of the kicker.

323. The change to the kicker was to take effect from the start of February 2017.

324. In January 2017 Mr Scammell advised his team of the change to the kicker as part of his weekly conference call. The Claimant was not invited to participate in the

conference call. Mr Scammell did not advise the Claimant of the change at the same time as the conference call, or at all.

325. Later in January the Claimant learned of the change to the kicker. She had social telephone calls with two of her colleagues. During those calls her colleagues raised that the kicker had been changed. They had been informed of the change.

326. The Claimant gave evidence that she would have earned less under the new structure had she been working. This was not challenged. In cross examination she accepted that the change in kicker had no effect upon her earnings at the time because she was not working. She said she was not working because she was on maternity leave. Her evidence was that the change would have affected her when she returned to work, and that she planned to return to work in March 2017. She accepted that there could have been a further change in the kicker by the time that she returned to work.

327. The Claimant confirmed that her complaint was not of any failure to consult on the change of kicker, which happens regularly. The complaint was that she was not informed of the change. Her complaint was that she was not informed at the time of the decision and it would affect her future earning potential. Through cross examination the Claimant's case was that the lack of knowledge of the kicker would affect her ability to weigh up alternative roles and remuneration elsewhere.

328. Mr Watson accepted that the commission structure formed part of the Claimant's terms and conditions of employment, and the kicker was part of that. He agreed generally with the proposition that employees were entitled to know their OTE and criteria to achieve this. The kicker formed part of an employee's remuneration and it could affect achievement of OTE. Employees were entitled to know of the change so that they could modify their behaviour accordingly.

329. Mr Watson agreed that if there was a change which meant that less commission would be earned then the Claimant was entitled to know this at the same time as other employees.

330. Mr Watson accepted that the Claimant was entitled to know of the change in order to weigh up her earning potential with what was achievable in alternative employment.

331. Mr Watson accepted that there could have been better communication with the Claimant in respect of the change to the kicker. He said it would not have taken much effort to inform the Claimant of the changes, and this information could have been sent to her personal email account even if the kicker were subsequently to change. Mr Watson said that the Claimant knew that for employees returning from long absence the Respondent guarantees commission payments for three months. Ms Palmer put that the Claimant had not been informed of this, and Mr Watson was not able to state otherwise. He accepted that this may have been an example of poor communication.

332. Mr Watson agreed that the Claimant was entitled to know of the change of kicker at the same time as other employees, whether or not it was known to the Respondent that the employee was seeking alternative work.

333. Mr Watson said that the Claimant would have been told of the change on her return to work, her earnings were not affected in the meantime, and on that basis her grievance in this respect was not upheld.

334. It was put to Mr Watson that the Claimant could have been informed that a decision had been made to change the kicker when she attended the office for KIT days on 8-9.12.2016. Mr Watson said that nobody was told of the decision at that time, no change in kicker is ordinarily announced until the quarter when it begins to apply. There was however no particular reason why the Claimant could not have been informed of the change before that point.

335. Mr Scammell's evidence was that the Claimant was not invited to the conference call at which the change in kicker was announced. The change did not affect the Claimant at the time because she was not at work earning commission. He would have told her about the change upon her return to work, which he believed to be in July 2017. The same kicker applied to everyone. Mr Scammell's evidence regarding the kicker was not challenged in cross examination, although other instances of Mr Scammell not providing information to the Claimant were.

The Claimant's resignation

336. The Claimant arranged to meet Mr Scammell on 25.1.2017. When they met she provided Mr Scammell with her letter of resignation dated that day (p.251). She gave notice to expire on 28.2.2017, and stated that as she was on maternity leave she would not be returning to work before expiry of the notice.

337. In the opening paragraph of her resignation letter she wrote that her decision "has been prompted by several things that happened during my pregnancy and since my maternity leave began in July 2016 and which leave me clear that I cannot return".

338. Mr Scammell then emailed Ms Meredith to advise that the Claimant had provided her resignation letter and sought advice on the next course of action. Ms Meredith replied to ask what was said in the letter. Mr Scammell sent her a copy. Ms Meredith responded that it was important to ascertain what the Claimant meant by her reference to being unable to return due to events during her maternity leave.

339. Mr Scammell replied by email, giving an account of what happened during his earlier meeting with the Claimant. He advised that the Claimant was leaving to join All Signs in a part time sales role. He also wrote that the Claimant said that after attending the December sales meeting she had lost the motivation, interest and desire to step back into the role and that she has no interest in dealing with stress and long hours. Further, that she also mentioned that as her partner was working away they could not both have jobs that require them to be away from home (p.248).

340. In cross examination the Claimant accepted that Mr Scammell's account (p.248) was an accurate account of what she said to him. The Claimant did not recall mentioning her partner's travel commitments. She did say that his work pattern was unpredictable, but her evidence was that this would not have affected her return to the Respondent as she planned to use a child minder.

341. She did say she had lost all motivation following the sales meeting. She gave evidence that she did not feel able to return and be line managed by Mr Scammell but did not feel it appropriate to tell him this. She agreed that at the time she resigned no-one at the Respondent was aware that she was unhappy and was leaving for that reason. The Claimant agreed that all concerned believed that the Claimant was leaving for personal reasons. she did not complain of the matters which she does in these proceedings.

342. Mr Scammell was disappointed by the Claimant's decision to resign but pleased that the Claimant had found a role which he understood suited her circumstances perfectly. He knew that she was personal friends with Mr Wood, the Director of All Signs. Mr Scammell's evidence in this respect was not challenged.

The Claimant's employment by All Signs

343. The Claimant gave evidence and was cross examined about her contact with Mr Wood at All Signs. She gave evidence that she had always worked very closely with him and that they had a good relationship. Periodically Mr Wood would ask the Claimant to come and work for him. In August 2016 after her child was born one of Mr Wood's team, referred to as Kevin, visited the Claimant. They spoke about Mr Scammell's promotion. Kevin offered the Claimant a job at All Signs if she wanted it. The Claimant did not pursue this as she intended to return to the Respondent, and because she anticipated that the role at All Signs would pay significantly less.

344. In November 2016 the Claimant met Mr Wood and Kevin. Mr Wood asked the Claimant for her personal email address so that he could email her with terms and tempt her to join All Signs. Mr Wood spoke about flexibility and part time hours.

345. On 30.11.2016 the Claimant provided her personal email address to Mr Wood (p.236).

346. On 12.12.2016 Mr Wood sent the Claimant an employment offer letter for the role of Account Executive, which referenced recent discussions of the role. An overview of the role was provided. The start date was March 2017. The salary was £30,000 per annum pro rata with a 27 hour working week which was flexible, with days and hours to be discussed and agreed. Commission was to be negotiated (p.237).

347. On 4.1.2017 the Claimant sent a text to Mr Wood, asking if they could meet to discuss her job offer. Arrangements were made for them to meet on 9.1.2017.

348. The Claimant gave evidence that although she hoped to negotiate her salary the pay could not be increased. She was disillusioned with her role at Spandex. She decided to accept the role at All Signs.

349. On 15.2.2017 the Claimant and Mr Wood agreed the Claimant's part time hours by text (p.241).

350. In cross examination the Claimant said that as of the date of the Christmas party (9.12.2016) she was still planning on returning to work at the Respondent, as she stated in her grievance appeal meeting (p.333). Her evidence was that despite all the complaints now raised, as of 9.12.2016 she felt she did not have any other option and was going to try and put events behind her. The Claimant was taken to her texts with

Mr Wood on 30.11.2016 and the job offer, and it was put that only upon being made an offer of employment did she decide to resign. The Claimant said that she did not make her decision at the November 2016 meeting with Mr Wood, but did so later. It was put that the final straw prompting her resignation was the change to the kicker. The Claimant's evidence was that she resigned based on that and all the other matters that she complained of. She had been intending to return to the Respondent because she had no other options, and for financial reasons needed to return to work there.

351. Ultimately the Claimant gave evidence that there were a number of factors operating on her decision to resign: she had an alternative option from All Signs; that resulted in financial stability for the Claimant and her family; the changing of the kicker and all that had happened before that; and that she did not feel able to report to Mr Scammell after the sales meeting in December 2016.

The Claimant's grievance

352. After becoming aware of the Claimant's resignation, on 26 January 2017 Ms Meredith wrote to the Claimant (p.254). Ms Meredith accepted the Claimant's resignation and expressed concerns in respect of the first paragraph of the resignation letter which referred to events during pregnancy and maternity leave "which leave me clear that I cannot return". Ms Meredith wanted to discuss this with the Claimant at a convenient time.

353. On 9 February 2017 the Claimant prepared a written grievance (p.255-258). She recorded that she wished to fully set out the events that had resulted in her resigning. She found the situation emotional and was concerned about her ability to fully articulate her complaints orally. She wrote that she considered she had been badly treated during pregnancy and more so during maternity, and that many of her points which followed were sex discrimination. There then followed 28 numbered paragraphs in what is a considered and detailed document. The opening three paragraphs summarised the Claimant's positive work history at the Respondent. Paragraph 4 contends that the Claimant had been side-lined and forgotten about since the announcement of her pregnancy, as a consequence she had lost all trust in the Respondent resulting in her decision to resign. The remaining paragraphs record the Claimant's concerns, and in the main replicate the complaints before us relating to the period to 9 February 2017. The Claimant asked for the document to be treated as a formal grievance and wrote that she hoped lessons would be learned from her experience.

354. 9 February 2017 is also the date of receipt by ACAS of the early conciliation notification (p.51).

Allegation (o): defined career path

355. On 10th February 2017 a meeting was held to discuss the Claimant's reasons for resigning. The Claimant was accompanied by her mother Mrs Roberts. Ms Meredith was present, as was Ms Nelson.

356. Mrs Roberts works as an independent HR consultant, and at the material time was a member of the Chartered Institute of Personnel and Development and Director of HR for another organisation. Mrs Roberts took handwritten notes during the meeting

(p.266-268a) which were subsequently typed up (p.261-263). Mrs Roberts did not speak at the meeting save for when the Claimant became too distressed to do so.

357. Ms Nelson was present to take notes. The Respondent produced typed but not handwritten notes of the meeting (p.264-265).

358. At the start of the meeting the Claimant provided a copy of her grievance to Ms Meredith. The Claimant explained that these matters left her with no option but to leave the Respondent. Ms Meredith looked at the grievance document as this point. She read it through quickly and immediately formed the view that the complaints were very serious. She read that the Claimant was complaining about treatment she had received during her pregnancy and maternity and complained of sex discrimination. She understood that the Claimant was complaining of discrimination in respect of the UK AFSM role and appointment of Mr Scammell. The disputed "defined career path" comments are alleged to have been made subsequent to this.

359. Mrs Roberts' typed notes record (p.261) that after Ms Meredith read the grievance document the Claimant initially set out her concerns that she had been side-lined since she became pregnant. Ms Meredith asked whether the Claimant mentioned that to anyone, particularly Mr Watson or Ms McGeown. The Claimant replied that she did not do so initially and that when she commenced maternity leave she just wanted to get on with her pregnancy. She added that she also did not raise matters because her line manager changed to Mr Scammell and that this was one of her issues of complaint – that she "could have gone for" that role. The reply by Ms Meredith is recorded as:

> "it's not a legal requirement for us to advertise a role; if we feel someone is right for a role we can give it to them, especially if they have a clear career path defined for them, as Ben has".

360. Mrs Roberts' handwritten notes record a comment in similar terms at the same point of discussion: "not req. if we feel person is right for bus + have a clear career path as B" (p.266).

361. The handwritten notes continue with discussion of contact with the Claimant during maternity leave, which runs from the first to second page and flows naturally. Above this at the very top of the second page is a further manuscript entry which says "Had identified a career path for B" (p.267). These words do not form part of the natural exchange being recorded at the start of page two.

362. The Respondent's typed notes (p.264) record Ms Meredith saying that "the Company does not have to advertise for applicants for position if, when restructuring, or promoting they have a suitable candidate." The notes record that Ms Meredith quoted various other cases where this had happened. No reference is made to any "defined career path".

363. Further entries in Mrs Roberts typed notes include the following:

363.1 After the disputed discussion regarding Mr Scammell and appointments, the meeting moved on to the issue of contact with the Claimant during maternity leave. Ms Meredith then took time to read the Claimant's grievance in detail before discussion continued.

363.2 Ms Meredith said she believed the Claimant's statements but needed to investigate.

363.3 Ms Meredith said she could not deal with matters that day and needed to ask advice from the Respondent's lawyers.
363.4 Ms Meredith then said "you have handed in your resignation, we should treat this as what? Is it that you want compensation from us?". The Claimant replied that she wanted her document treated as a grievance.

364. As for the Respondent's notes, headed "exit meeting", entries include:

364.1 Ms Meredith said it was an informal chat and it was not normal for someone else (Mrs Roberts) to attend. It was explained Mrs Roberts was present to support the Claimant who was feeling very emotional.
364.2 Mrs Roberts confirmed that all the complaints were of sex discrimination.
364.3 Ms Meredith then asked if the Claimant was looking for compensation. The Claimant said not at that stage.
364.4 Mrs Roberts mentioned that the case had been lodged with ACAS.

365. Later on 10.2.2017 Ms Meredith wrote to the Claimant and asked whether she wished her earlier document to stand as her grievance. Ms Meredith also wrote that ordinarily under the Respondent's grievance procedure the hearing would be conducted by a line manager but in the circumstances it was more appropriate for it to be dealt with by Ms Meredith and Mr Watson (p.259). Although not stated in terms this was because certain complaints were made against her line manager.

366. The Claimant did not know of Mr Watson's involvement in matters relating to other complaints, such as the restructure and Mr Scammell's appointment as UK AFSM. The Claimant did not object to him hearing the grievance.

367. On 14.2.2017 the Claimant replied to Ms Meredith (p.269) to confirm that her document dated 9.2.2017 stood as the detail of her grievance.

368. She added that she was not happy with certain comments during the 10.2.2017 meeting which did not give her confidence that her grievance would be dealt with fairly. Four numbered points followed. Point 2 was that Ms Meredith had explained that Mr Scammell had been appointed to the new role in line with "his clear career plan and that there was no obligation to advertise the vacancy". The Claimant wrote that she was unhappy that this was said in the context of her raising concerns about her own treatment during maternity. She asked why she did not have a career plan or the opportunity to apply. Point 3 was that if there was "no requirement to advertise jobs" this is how pregnant women are overlooked for jobs.

369. By the same correspondence the Claimant sent Ms Meredith a copy of the notes which her mother had taken.

370. Thereafter arrangements were made to convene a grievance hearing, which took place on 27.2.2017. During this period Ms Meredith did not challenge the accuracy of the notes which the Claimant supplied. The Claimant was not provided with the Respondent's notes of 10.2.2017.

Oral evidence

371. In cross examination the Claimant said that the "defined career path" comment was made after she raised her concerns as to Mr Scammell's appointment as UK AFSM,

which she did not have the opportunity to apply for. The Claimant was clear that the comment was said. The comment appeared in the notes taken by her mother, which were sent to Ms Meredith but not challenged as being inaccurate. The Claimant explained she felt the disputed comment was an explanation as to why Mr Scammell had been given the job instead of her. It was put to her that one interpretation of the disputed comment is that Mr Scammell was a favourite and has a career path, whereas the Claimant did not, and that this had nothing to do with maternity leave. The Claimant replied that where a male had a career path, but she did not, then that in itself was sex discrimination. The Claimant repeated this later in her evidence. In cross examination the Claimant continued that the disputed comment was made to justify her not having the opportunity to apply. When it was put that Mr Scammell was appointed on merit, as opposed to because he was not on maternity leave, the Claimant replied "I'm not saying it is because of maternity leave" but repeated that it was sex discrimination where a man has a career path and a woman does not.

372. The Claimant and her mother both gave evidence that Ms Meredith referred to Mr Scammell having a defined career path on two occasions.

373. Mrs Roberts gave evidence that she did not see Ms Nelson take notes, save for recording the names of the attendees. In cross examination Mrs Roberts said she was crystal clear that the disputed comment was used twice. It was put that she did not follow up on what was meant by the disputed comment during the meeting of 10.2.2017. Mrs Roberts agreed, and said she did not do so because she had been warned not to speak at the meeting by Ms Meredith, was concentrating on keeping an accurate note, and also because the context was clear at the time the comment was made. The comment was later added to the Claimant's grievances. Mrs Roberts said that the comment was made at an early point in the meeting, and that the meeting had not become emotional at that stage.

374. The Tribunal asked Mrs Roberts why there was a separate reference to career path on p.267. Mrs Roberts said that she could not fit the words in when Ms Meredith used the expression. When asked why it was not recorded in the written flow as with all other entries, Mrs Roberts said it was because it had been repeated and she thought she had already recorded it. When asked why it was not included in sequence she did not know and could not recall why it appeared where it did.

375. Ms Meredith gave evidence in her statement that she had been responsible for all issues relating to finance, buildings, payroll and HR since approximately 2012. She had no HR training and seeks advice when required. Prior to meeting the Claimant on 10.2.2017 she believed she was simply having an exit interview with the Claimant. After making initial introductions she was provided with the Claimant's grievance document. She started to read it, and then realised the numbered complaints spanned several pages. This happened before any detailed discussion of the contents, or statement that the Respondent was not legally obliged to advertise roles. She quickly realised there was a significant problem and felt very unprepared. She accepted saying that there was no legal requirement to advertise every position if there was a suitable candidate, and believed she referred to her own and the Claimant's promotions when doing so.

376. In respect of the disputed comment Ms Meredith's evidence was that she had no recollection of saying it, and that the comment did not appear in Ms Nelson's notes.

Ms Meredith said this was not her type of language and that the Respondent did not have defined career paths for its employees.

377. Ms Meredith gave evidence that on reading the Claimant's grievance she explained that she would need some time to investigate as some of it was serious, some issues were about supposed company errors and others were about personal sensitivity.

378. The Claimant's notes of the meeting record that Ms Meredith made a comment to that effect (p.262).

379. In cross examination Ms Meredith said she did not recall using the disputed words and added that she did not believe she did so. Nobody at the Respondent had a defined career path, and she did not know why she would use that expression as a result. She denied using the expression in an unguarded moment, because Mr Scammell was male and the Claimant was a woman taking maternity leave. It was put to her that she had been sent notes of the meeting which made clear reference to the disputed comment, that the Claimant had asked it to be added to her grievances, but that Ms Meredith did not challenge the content. Ms Meredith agreed that she did not dispute the content. She said she had no HR training and did not know she had to reply if she disputed it. She was under the impression the complaint would be dealt with at the grievance hearing, and any inaccuracies in the notes could be raised at that stage. She agreed with the proposition that it was not necessary to have training to disagree with content which was seen as inaccurate, but said she did not realise she needed to take issue at that stage. She believed the Claimant's notes were "not exactly accurate" at the time.

380. In response to questions from the Tribunal Ms Meredith said that when she read the Claimant's resignation letter and the reference to things happening during pregnancy / maternity leave she was very concerned. She did not know whether the reference was to personal matters. She quickly realised the seriousness of the Claimant's complaints when she briefly started going through the grievance document. There was no group HR function.

381. Ms Nelson's evidence was that she was asked to attend the meeting on 10.2.2017 to take notes. She referred to her typed notes and considered them a fair reflection of the meeting. The Claimant provided her list of concerns at the start of the meeting, and Ms Meredith was not anticipating the meeting would unfold in the way that it did. She witnessed Mrs Roberts taking notes. She did not recall Ms Meredith referring to Mr Scammell having a defined career path.

382. In cross examination Ms Nelson maintained that she did make handwritten notes during the meeting which she typed up straight after the meeting. It was put that there had been requests for notes to be disclosed and handwritten notes had never been provided. Ms Nelson replied that her handwritten notes were thrown away after she had made a typed version - it was not her normal practice to keep handwritten notes, and she did not think it was an official meeting. She said it was not obvious to her that serious matters were being raised at the beginning of the meeting. In response to questions from the Employment Judge Ms Nelson repeated that she threw the handwritten notes away because it was an informal meeting and she did not realise it was serious. Ms Nelson was taken to references in the Claimant's notes to discussion of sex discrimination and constructive dismissal, which Ms Nelson accepted were

discussed. Ms Nelson said that at that point she realised that the Claimant was raising serious issues. Ms Nelson continued that despite recognising the seriousness of matters at the meeting she went on to dispose of the handwritten notes "in error". She was not involved in consideration of the accuracy of the Claimant's typed notes.

383. In the grievance outcome letter dated 3.3.2017 Mr Watson wrote that no employee at the Respondent has a planned career path, but everyone has a development plan which is discussed at year end reviews (p.316).

384. In his witness statement (para.3) Mr Watson said "Spandex likes to nurture the talent of its employees and assist them to progress their career within the business". When asked what this means Mr Watson said that the Respondent looks internally to recruit for new roles, and has paid for employees to obtain qualifications to develop further if they see themselves in a particular role.

385. When asked whether there was any difference between this and a career path Mr Watson said there was no difference.

386. Mr Scammell gave evidence that he had no career plan as such, but he believed Mr Watson knew that he wished to manage the field sales team and that he wanted his career to progress in that direction. In cross examination he confirmed that he and Mr Watson would regularly have informal conversations, including his career aims at the Respondent. Similar conversations were held with other members of Mr Scammell's team.

387. We find that Ms Meredith did make the disputed comment in the terms alleged. She used the career path expression on two occasions. Our reasons for this are as follows.

388. The Claimant and her mother considered the complaints to be serious. As recorded in her document the Claimant wished them to be treated as a grievance under the Respondent's procedures. On the same day that the document was finalised the Claimant contacted ACAS for the purposes of Early Conciliation, a necessary step in the bringing of an employment tribunal claim.

389. Mrs Roberts understood that her role was to act as a note taker. She is an experienced HR professional and member of CIPD. She understood the importance of taking an accurate note of a meeting such as the one held on 10.2.2017.

390. The handwritten note made by Mrs Roberts seeks to identify the speaker and what was said and record the flow of conversation, as opposed to summarising.

391. It is agreed that Ms Meredith used words to the effect that the Respondent was not obliged to advertise for applicants. This is recorded in the Claimant's handwritten notes, as well as both parties' typed notes.

392. Mrs Roberts' handwritten notes record the flow of conversation from that agreed point onwards, including the disputed comment. The disputed comment does not appear out of context. The handwritten notes continue to record the ongoing discussion and identity of the speakers. The content recorded after the disputed comment represents a natural evolution of what was being discussed in our view.

393. The written complaint on 14.2.2017 that the disputed comment was made (p.269) reinforces that it was said. That was a genuine and not fabricated further complaint.

394. We did have concerns in respect of the further recorded comment at the top of the second page of the handwritten notes (p.267) because this was not recorded within the body or flow of the note. In all other respects Mrs Roberts managed to capture all comments contemporaneously in the manner of a conversation. Mrs Roberts struggled to explain why she made this entry in the way that she did. Nevertheless we found Mrs Roberts to be a truthful and compelling witness generally, and there was no suggestion that her note was deliberately false.

395. We found Ms Meredith and Ms Nelson to be significantly less credible witnesses on this particular issue. Ms Nelson gave contradictory evidence as to whether or when she realised matters were serious. Her evidence that she disposed of her handwritten notes because she did not realise matters were serious quickly unravelled, the end point being that she disposed of the handwritten notes despite recognising that the meeting and matters discussed were serious. The high point of her evidence was that she had no recollection of the comment, not that the comment was not made. She had received no HR training, as is the case with Ms Meredith. Ms Nelson's notes are in the form of a summary, rather than a record of the discussion as made by Mrs Roberts.

396. Ms Meredith's witness statement was to the effect that she had no recollection of using the disputed comment, it was not her type of language, and that defined career plans are not something the Respondent does. Her oral evidence was that she did not recall saying it and she believed she did not say it. Ms Meredith was unable to give a firm denial that she made the comment.

397. The comment is made very soon after Ms Meredith read the Claimant's concerns, and when discussing Mr Scammell's appointment.

398. For these reasons we find the comment was made.

399. We also find that the expression "defined career path" is not ordinarily used within the Respondent. We accept Mr Watson's evidence that employees have a development plan, but this is not ordinarily referred to as a "career path" or "defined career path". Employees can indicate an interest in gaining qualifications or experience in areas which could then be supported by the Respondent.

(p) failure to investigate / uphold the Claimant's grievance

Grievance hearing

400. On 21.2.2017 Ms Meredith wrote to the Claimant and invited her to attend a grievance meeting on 27.2.2017. The letter states that Mr Watson would hear the grievance, Ms Meredith would be present in a HR capacity, and Ms Nelson would attend to take notes (p.273). The Claimant was asked to provide details of witnesses by 23.2.2017 if relevant. The Claimant initially wanted the hearing to be conducted by telephone. Ms Meredith did not agree because she considered a meeting in person would be in the best interests of everyone. Following some childcare arrangements being made the Claimant agreed to meet in person (p.283a-d).

401. The grievance hearing took place on 27.2.2017 as scheduled before Mr Watson. The Claimant was accompanied by Mrs Roberts who took notes (p.283f-m handwritten; p.284-288 typed). Ms Meredith attended and Ms Nelson took notes (p.289-291).

402. In evidence the Claimant complained that Mr Watson interrupted her on occasions when she was making her points during the meeting. Mrs Roberts' notes record that Mr Watson "cut in" on a number of occasions. Mr Watson disputed that use of terminology but accepted that he intervened on occasions in order to clarify matters. The Respondent's notes of the meeting do not reflect any such interventions, and instead suggest that there were occasions when the Claimant made no reply to Mr Watson's points. In light of these matters and our findings regarding note taking on 10.2.2017, we found Mrs Roberts' notes to be a more reliable record.

403. Prior to the hearing Mr Watson had undertaken some investigation. He had considered the Claimant's written grievance, other documents and the Claimant's use of her work email account. He had also spoken to Ms Meredith, Ms McGeown and Mr Scammell.

404. At the start of the meeting the Claimant summarised her past positive work history. After she had announced her pregnancy she felt matters were handled well initially, but when she began working in the office full time she felt side-lined and had no work to do. She had offered to help with admin work because she had finished all that she had been asked to do regarding the handover. Mr Watson apologised if the Claimant felt that this was derogatory. He said that the organisation was "highly sensitive" to how the Claimant wanted to work and that admin seemed the least strenuous work. Mrs Roberts explained that the point in issue was that the Claimant had to volunteer to do different work. Mr Watson replied to the effect that the Respondent was "driven by the individual".

405. We note there was no explicit complaint that the Claimant had no longer been asked for her opinion on matters after announcing her pregnancy, which is a complaint before us. Nor was there a complaint that the atmosphere became less friendly.

406. Discussion moved to the appointment of Mr Scammell. The Claimant explained that she heard of his appointment through visitors at hospital and not from the Respondent. The notes record that Mr Watson "cut in" at this point and we find that he did so intervene. Mr Watson said that the Claimant left with her work phone and laptop and that the organisation did not expect her to use them for work purposes. The Claimant said "what?" because she did not understand Mr Watson's comment. Mr Watson replied that there was email activity and a lot of information on the Claimant's work account. The Claimant explained that she only logged in to her work account to delete rubbish, as she had explained to Ms McGeown she would do. The Claimant told Mr Watson that she had given her personal email address to Ms McGeown for contact and told her she would not access emails to her work account. Mr Watson did not dispute this, but repeated that there was activity on the work account.

407. Mr Watson then moved on to give an explanation to the Claimant for the restructure following the Brexit referendum result. He said that he and Ms Meredith "put stuff together" (meaning proposals) and Mr Larsson agreed them three weeks later. Mr Watson said the organisation needed someone to focus on the field and Mr Scammell was absolutely the right person for the business because he had external experience, has worked for a sign maker, has more hardware and software experience, and his biggest asset was supplier management. He referred to Mr Scammell's experience with Orafol (at around the time the Claimant was promoted to NAM) and that he had generated £1.6 million in sales. As to the position not being advertised, Mr Watson told the Claimant that she had twice benefitted from roles not being advertised because she was the right person for the job.

408. Mrs Roberts asked whether there were other potential candidates for the NAM role which the Claimant was appointed to. Mr Watson said “no, not like her”.

409. The Claimant then turned to the topic of her 10 year anniversary. Having only mentioned the topic Mr Watson intervened and said “no argument”. The Claimant explained how the failure to mark the anniversary impacted on her, and that she would have been happy to get a text message or something to say that there was a gift in the office for her. She acknowledged that the Respondent celebrates such anniversaries in front of colleagues, but the milestone was not acknowledged and she had to raise it.

410. The Claimant then moved to the topic of her birthday not being marked. Mr Watson intervened, saying “you’re right. How should we manage this in the future?”. The Claimant suggested a card could be sent in the post, saying that there was a gift waiting for the recipient. Mr Watson responded that both Mr Scammell and Ms McGeown had sent congratulatory birthday texts to the Claimant. He repeated that the Claimant was right about the anniversary as it was such an important milestone, but that some of the delay was attributable to the desire to celebrate with peers.

411. In respect of competitor training and KIT day concerns, Ms Meredith told the Claimant that the Respondent formed the view that preparing at home was not a suitable use of a KIT day. In respect of the e-business co-ordinator role not being advertised the Claimant said that she may have been interested in it because her circumstances had changed. Mr Watson responded that Mr Pirie was appointed because he has a marketing qualification and is the best for the job.

412. Changes to which employees were covering the Claimant’s accounts in her absence were also discussed, in particular regarding City Signs. Mr Watson apologised, accepted that such changes could have been better communicated to the Claimant, and said that the changes were the result of the post Brexit restructure.

413. In discussion of the kicker Mr Watson accepted that the Claimant “possibly” should have been told that the kicker had changed. He said other employees were advised of the change at the time by conference call.

414. The Claimant raised her loss of trust in the Respondent. Mr Watson made a fulsome apology in response and said he was surprised to hear of her resignation given how happy he understood her to be at the time of the Christmas party. He said that the Claimant remained part of the Respondent’s plans, and that she could be accommodated if she wished to return part time. He was shocked that the Claimant had not raised her concerns earlier.

415. Mrs Roberts replied that it was important to view the cumulative effect of matters, particularly in light of Ms Meredith stating Mr Scammell had a defined career path, which she said was a further clear example of sex discrimination. Ms Meredith denied making the comment. Mrs Roberts insisted that the comment was made and produced her notes. Ms Meredith again denied the comment, and Mrs Roberts alleged that this was a lie.

416. Mr Watson said that Mr Scammell was the best person for the job. When challenged on how he could know that objectively he said “because I know”. He repeated that the Claimant had previously benefitted from such an approach. The Claimant also challenged the timing of the announcement of Mr Scammell’s promotion in that she was about to give birth and was out of the way. Ms Meredith said that Mr Watson knew

all employees because the Respondent was a small company. Mr Watson went on to give an example relating to Suzanne Carus, saying that when she was coming back from maternity leave several years previously he had a discussion with her about a job which involved promotion which he considered her to be the right person for.

417. At the conclusion of the meeting the Claimant confirmed that she had said all that she wanted to, and no further clarification was needed.

418. The Claimant's employment ended on 28.2.2017. The protected period ended on the same date.

419. On 1.3.2017 the Claimant commenced fresh employment with All Signs.

Grievance outcome

420. Mr Watson sent the Claimant a grievance outcome letter dated 3.3.3017 (p.314-318). No aspect of the Claimant's grievance was upheld, even in part.

421. Mr Watson summarised the Claimant's complaints under six categories. The first was the handover of work during pregnancy. Mr Watson noted the Claimant's complaint that she had little to do once she had completed her handover in May / June 2016, that she had discussed stopping working in the field and driving with Ms McGeown, and that the Claimant had volunteered to do administrative work on 13.6.2016. He apologised if the Claimant felt "down-graded". He said that this was not the intention and noted that the Claimant did not raise this as an issue at the time. Mr Watson considered that the organisation felt an appropriate balance had been struck, but accepted that the Claimant felt differently. He wrote "there are lessons we can both learn here". He made suggestions as to what the Respondent would do in the future in similar circumstances.

422. The second issue was the appointment of Mr Scammell and the disputed "career path" comment. Mr Watson set out the rationale for the restructure and that he decided to create 3 new roles. The UK AFSM role was intended to give more direction and support to the field sales team. He wrote that based on his detailed knowledge of the sales team, including the Claimant, it was decided that Mr Scammell would be appointed to the role. None of the roles were advertised internally or externally, which has been the Respondent's consistent approach to filling such roles, unless it is obvious that no outstanding candidate exists. The selection of Mr Scammell was "an easy one" based on skills and experience. He wrote that the Claimant had benefitted from promotions in similar circumstances and assured the Claimant that she was considered as part of the process and not overlooked.

423. As for the career path comment Mr Watson said that he was not present in the first meeting and so could not comment on context. He wrote that no employee has a planned career path, although everyone has a development plan discussed at year end reviews.

424. He said that the timing of the announcement of Mr Scammell's appointment was coincidentally made on the day the Claimant gave birth. He apologised for the Claimant hearing about this informally. He wrote that it was his intention she should hear about it as soon as possible, but did not feel it appropriate to contact her when she was about to give birth. He believed he could have been criticised had he done so.

425. The third issue was the anniversary and birthday complaints. Mr Watson wrote that Mr Scammell and Ms McGeown had sent the Claimant congratulatory text messages for her birthday, and that in November 2016 Mr Scammell explained that there were gifts ready for the Claimant to be presented with at her next visit. The Respondent celebrates such events in front of peers and was hoping to do so with the Claimant at the nearest opportunity. Mr Watson accepted that the Claimant was very upset by these matters and apologised. He took on board the Claimant's comment that it would have been appropriate to send a card on the day to mark the event in question. He wrote that the Respondent would take it on board as a learning point for the future.

426. The fourth issue related to KIT days and competitor training. Mr Watson wrote that there was no obligation on the Claimant to undertake KIT days, no obligation on her to deliver the training, and he understood that the Claimant did ultimately decline to deliver the training. He wrote that the Respondent would usually ask that KIT days are undertaken at the office, so the Claimant had not been treated differently.

427. Fifth, Mr Watson moved on to the appointment of Andrew Pirie. He was appointed because Mr Watson considered him to be the right person for the job. He expected the Claimant to return to her NAM role at the end of maternity leave.

428. The sixth matter dealt with communication with the Claimant during maternity. Mr Watson wrote that the Claimant kept her company laptop and phone during maternity leave. He was aware that the Claimant logged on occasionally, but noted the Claimant's explanation that she only did so to delete emails. Mr Watson concluded that the Claimant had the tools to maintain as much contact with the business as she wanted to. He wrote that he was sorry the Claimant felt more contact should have been maintained with her during maternity and would endeavour to improve this aspect in the future. He did not expressly deal with the Claimant's contention that she provided her personal email address for contact.

429. In respect of the change to the kicker Mr Watson wrote that the commission structure had not changed but accepted that the focus of the kicker had changed to support business needs.

430. In his conclusions Mr Watson wrote that he was genuinely sorry that the Claimant had lost trust in Spandex, and that some of the communication issues could have been resolved if the Claimant had brought these to the attention of the Respondent sooner. He maintained that a role remained open for the Claimant and asked her to reconsider her resignation. Mr Watson continued:

> "In summary, I am not upholding any aspect of your grievance. In this letter I have identified where we will take away some learning points and have acknowledged that you have felt hurt and disappointed. However, I do not feel, having reviewed all the evidence, that you were treated in a different way because either you were pregnant or on maternity leave or that the company has acted unreasonably".

431. The Claimant was advised of her right to appeal and did so.

Oral evidence

432. In cross examination the Claimant confirmed that her complaint of failure to investigate was limited to the "defined career path" comment. She agreed that during the grievance hearing this disputed matter was raised and that Mrs Roberts' notes were produced. It

was put that there was no further investigation to be performed. The Claimant had no answer to that assertion.

433. The Claimant gave evidence that she did not feel listened to because the outcome was that her complaints were not upheld. It was put that the complaints were not upheld because Mr Watson did not accept that she had been discriminated against, and the Claimant agreed with that proposition. The Claimant also agreed that the grievance outcome was due to Mr Watson not accepting the Claimant's version of events, as opposed to because of gender, pregnancy or maternity leave being taken.

434. In respect of the grievance outcome comment that there were "lessons we can both learn", the Claimant agreed that the Respondent approached her grievance in a sympathetic way to a degree. She did not consider that the Respondent fully understood the impact of certain events upon her, such as having no opportunity to apply for the UK AFSM role and concerns regarding her anniversary and birthday. The Claimant disputed that there were lessons both parties could learn, namely that the Claimant had not raised her concerns more contemporaneously. She offered to help with discounts because she wanted to do some work rather than none. She had hoped she would be given more work at the time. It was put that Mr Watson did not write the "lessons" comment because of the Claimant's pregnancy, maternity leave, sex or because she had raised a grievance. The Claimant replied that "all this came from the fact I was on maternity leave and pregnant".

435. As for any denial of the career path comment, the Claimant was insistent that the comment was made. She was taken to the grievance outcome letter and it was put that Mr Watson did not deny that the comment was made (p.316). The Claimant repeated that Ms Meredith made the comment. Mr Harris asked whether the Claimant's case was that Ms Meredith denied making the comment because the Claimant was taking maternity leave. The Claimant replied that she did not know.

436. Mr Watson was not challenged in cross examination on any failure to investigate.

437. In cross examination Mr Watson confirmed that the Claimant's complaints regarding the UK AFSM role were a significant part of the grievance process, and that he made the relevant decisions which were being complained about. Through a number of questions Ms Palmer put that Mr Watson was therefore not an independent decision maker and should not have chaired the grievance. Mr Watson was not familiar with the concept that someone should not be a judge in their own cause. He said he was not aware that if the grievance related to him then he would be an inappropriate person to chair the grievance.

438. Nevertheless, Mr Watson eventually accepted that he was not an appropriate person to chair the grievance on a legal basis but said that the Claimant did not object to him chairing. He maintained that it was not obvious to him at the time that he was not independent, but it became obvious during cross examination.

439. Mr Watson was cross examined on his grievance decision making. He was taken to the grievance relating to communication failures and lack of regular updates in certain respects (p.257 para.24), and the notes of grievance hearing where Mr Watson accepted the Claimant's points and apologised (p.287 3rd entry). He accepted that his apology was unqualified. He was taken to the grievance outcome and the section dealing with communication issues. It was put that the issue of covering employees being reallocated, which he apologised for at the hearing, was not dealt with. Mr Watson's evidence was that he tried to say that he was aware that the Claimant was

picking information up from her work account, and that he should have said that the Respondent should sent more information to the Claimant's personal account. He did not know why he failed to do so. It was put that it would have been helpful if he made an admission and apologised in the outcome letter. Mr Watson replied that it would have been helpful if he said that information should have been sent to the personal email account.

440. In respect of the kicker Mr Watson accepted that this had changed, that it could affect (but not change) OTE, and that staff should know about such changes so that they can modify their behaviour accordingly. He said it would not have taken much effort to advise the Claimant of the change, and that should have been done using her personal account even though the kicker could change again before her return to work. She should have been told at the same time as other employees. Mr Watson said the Claimant was entitled to know of the change if only to weigh up offers of alternative employment. On the basis of this evidence Ms Palmer put that that this aspect of the grievance should have been upheld. Mr Watson said "on the basis it would not have changed the Claimant's earning potential, we elected not to uphold that element of the grievance". He disputed that the complaint should have been upheld but believed that there could have been better communication at the time. It was put to him that there was no such comment in the outcome letter. Mr Watson replied that this was because her earnings had not changed. He agreed that commission formed part of the Claimant's terms and conditions of employment. After further questioning Mr Watson agreed that he should have accepted the Claimant's point regarding failure to inform of the change to the kicker and apologised.

441. It was put that Mr Watson made concessions in the outcome letter but removed all the benefit of that when he rejected the grievance in full. Mr Watson replied that he could have said that he was not upholding the grievance save as set out in any concessions. He did not accept that he was determined to reject all the complaints brought but accepted that communication should have been better. He maintained that the Respondent had not acted unreasonably. Ms Palmer put that it was contradictory to say that there were lessons to learn but deny that the Respondent had acted unreasonably. Mr Watson said that he did recognise the contradiction.

442. In cross examination Mr Watson was taken to his grievance conclusions in respect of the handover of work, and his comment that there were "lessons we can both learn", and asked why in view of the content he did not partially uphold the grievance in this regard. He maintained that the Claimant was busy in the lead up to her maternity leave and that she volunteered to do admin work. Mr Watson denied that he was determined not to uphold any element of the grievance because the Claimant had alleged discrimination.

443. In respect of the anniversary and birthday issues Mr Watson accepted that the Claimant's note of the grievance meeting was accurate (p.285), that he conceded that the Claimant was upset by how these milestones were handled at the time, and that there were learning points for the Respondent. In cross examination Mr Watson maintained his evidence in respect of the Respondent's practice of celebrating such events with peers. He said that the Claimant's perception that she had been forgotten was not fair, due to what he said was the standard practice. He denied that he was resiling in evidence from the acceptance of there being learning points as expressed in the grievance conclusions.

444. In cross examination Mr Watson was asked what changes had been made at the Respondent following the Claimant's grievance. He replied that the Respondent would

look at how gifts are distributed in the future, and at the time of the Tribunal hearing there was no process in place to celebrate anniversaries. It was put that nine months after the grievance outcome nothing had changed at the Respondent, despite the reference to learning lessons in the outcome letter. Mr Watson confirmed that nothing had changed. He denied that his comment about learning lessons amounted to empty words.

(r) Ms Meredith's denial of the career path comment

445. In cross examination the Claimant was asked whether in her view Ms Meredith denied making the comment because the Claimant was taking maternity leave. The Claimant replied that she did not know, but maintained that the comment was made and that when Ms Meredith realised that the comment would "go against the Respondent" Ms Meredith withdrew the comment. Ms Meredith's evidence was that she did not recall making the comment and did not believe she would use those words.

Allegation (s): Failure to properly consider or uphold the Claimant's grievance appeal

446. On 8.3.2017 the Claimant appealed against the grievance outcome by email to Ms Meredith (pp.292; grounds 319-325). The appeal grounds were detailed and consisted of forty five paragraphs, which cross referred to her initial grievance and the reasons given in the outcome. She also complained that Mr Watson avoided some of the detail of her grievance in reaching his conclusions, and despite Mr Watson agreeing with her on certain issues at the grievance hearing no aspect of the grievance was upheld. The Claimant complained of unfair treatment and discrimination, as she had done in her grievance.

447. The grounds of appeal included:

447.1 That Mr Watson referred to activity on her work email to undermine her complaint. She repeated the understanding she had with Ms McGeown.
447.2 That Ms Meredith's denial of the defined career path comment was unprofessional. Despite knowing that the grievance related to Ms Meredith she was allowed to play a role in the grievance hearing.
447.3 That Mr Watson went out of his way to decline every element of her grievance.
447.4 That Mr Watson did not respond to her grievance item number 24 – the lack of communication on reallocation of covering employee – so she concluded that he dismissed that complaint as irrelevant.
447.5 That Mr Watson was disingenuous in his conclusion on grievance item 25 (not informing of change to kicker), in concluding that the commission structure had not changed. She complained that she learned of the change because a friend in the sales team told her.
447.6 That Mr Watson sought to blame her for not communicating better with the Respondent. She was upset by the comment that she and the Respondent had lessons to learn. The crux of her grievance was poor communication by the Respondent.
447.7 She could not understand why Mr Watson agreed with her on some of her grievance points, but no element was upheld. She did not believe the Respondent would learn anything from the process.

448. In evidence we were taken to paragraph 29 of the appeal grounds, in which the Claimant wrote that the manner of how she learned of Mr Scammell's promotion was not relevant and was a smokescreen used by Mr Watson to avoid the discrimination involved in promoting Mr Scammell. She did not believe it was a coincidence that the promotion took place on the day that she gave birth.

449. On 9.3.2017 ACAS issued the early conciliation certificate by email.

450. On 7.4.2017 the Claimant presented her form ET1.

451. The appeal hearing took place on 28.4.17. Robert Jackson, the Group Vice President (Eastern Europe, Scandinavia, Italy and Corporate Development) chaired the grievance appeal meeting. The Claimant was accompanied by Mrs Roberts. Ms Meredith attended, as did Victoria Thorne a HR consultant from Menzies Law.

452. Both parties produced notes of what was discussed at the grievance hearing. The Claimant's notes were at p.326 (handwritten) and p.333 (typed). The Respondent's notes made by Ms Thorne were at p.336.

453. At the hearing Ms Thorne's role was queried, and she confirmed that she was present as a note taker and not to give advice. Ms Meredith's presence was also challenged because the grievance related to her in part. Ms Meredith said that she was present to observe, not to take notes, and said she would not contribute to the meeting. The Claimant was not content with Ms Meredith's presence but reluctantly agreed to proceed.

454. Mr Jackson told the Claimant that he had read her appeal letter and previous meeting notes and asked her how she wanted to proceed at the hearing. The Claimant asked that her grounds of appeal be taken as read so that it would not be necessary for her to go through her grievances on a point by point basis. The Claimant was emotional and explained that she did not feel comfortable. It was agreed that the appeal document would be taken as read, and that the Claimant would highlight some key areas for Mr Jackson orally.

455. The matters which the Claimant raised orally included:

    455.1 That no aspect of the grievance was upheld despite Mr Watson accepting that there were lessons to learn. The Respondent's notes record that Mr Jackson accepted that there was "an apparent dichotomy" in that regard.
    455.2 That she had provided her personal email address to Ms McGeown for contact during maternity leave in respect of important information, but the notification of Mr Scammell's appointment was sent to her work account. Mr Watson's comments that there had been activity on her work account were hurtful, she had simply deleted unnecessary work emails and that was later in the year.
    455.3 That Ms Meredith said Mr Scammell had a career path, but the Claimant did not have one.
    455.4 That there was no communication with her in respect of her ten years' service anniversary.
    455.5 That she was not informed of the change to commission / kicker but learned this through a friend who works at the Respondent.
    455.6 She was side-lined during pregnancy.

456. There was a break to allow the Claimant to consider whether she had said all that she wished to. When the meeting reconvened it was confirmed that the Claimant had stated her case. Mr Jackson said that he would investigate matters and respond in writing the following week.

457. In her appeal document and the appeal meeting the Claimant did not complain that her opinion had not been sought as much as it previously had been during the period of handover, or that the atmosphere was less friendly.

458. Following the meeting Mr Jackson spoke to Mr Watson and Ms McGeown about the matters raised. Mr Jackson made no notes of those discussions.

459. On 5.5.2017 Mr Jackson sent his appeal outcome letter to the Claimant (pp.339-344). Mr Jackson set out his findings under eight separate headings. The first five replicate the headings used by Mr Watson in his outcome letter. The remaining three headings relate to the Mazda car issue (withdrawn), communication during maternity leave and the kicker. No element of the Claimant's appeal was upheld.

460. In respect of handover of work during pregnancy Mr Jackson stated that although Mr Watson had already spoken to Ms McGeown as part of the grievance, Mr Jackson decided to speak to her himself for the purposes of the appeal. There was no indication or evidence that Mr Jackson spoke to Mr Scammell in respect of the Claimant's communication preferences.

461. Mr Jackson accepted that there were lessons to be learned in respect of handover of work during pregnancy, but did not know what more the Respondent could have done without there being an indication from the Claimant that she felt side-lined. He said that Ms McGeown did not recall discussion about using the Claimant's personal email to keep in contact, and Ms McGeown's recollection was that the Claimant was happy to receive everything to her work email.

462. Mr Jackson accepted Mr Watson's assertion that he considered the Claimant for the UK AFSM role before appointing Mr Scammell. As for the announcement of Mr Scammell's appointment he found that this was sent to the Claimant's work email and so she was notified on the same date as other employees. He added that the company was not expecting her to access her emails at that time, and that there was a plan to tell the Claimant of the appointment at an appropriate time after the birth of her daughter (p.341).

463. Mr Jackson apologised for the anniversary and birthday issues but found that arrangements had been put in place and a presentation would occur when the Claimant next visited the office. He found it was reasonable to ask the Claimant to attend the office to prepare to deliver training as part of a KIT day. Mr Jackson accepted Mr Watson's account that he did not consider the Claimant for the e-business co-ordinator role, and found that this was not unreasonable.

464. As for communication during maternity leave Mr Jackson accepted that there may have been some miscommunication in this regard – the Claimant believed she had an agreement to receive updates to her personal email but Ms McGeown had no

recollection of this. Mr Jackson wrote that he probably would have expected the Claimant to raise that she was not getting the information she wanted with Ms McGeown or Mr Scammell. He wrote that the Claimant retained access to her work email account. He found that the Respondent maintained reasonable and appropriate contact with the Claimant during maternity leave.

465. As for reallocation of cover for the Claimant's accounts, Mr Jackson recorded that neither Ms McGeown nor Mr Scammell advised the Claimant of this because she was still on maternity leave, and he did not find this to be unreasonable. He found that to inform her of this during maternity leave could have been construed as inappropriate. The Claimant would have been advised of this on her return to work or a KIT day.

466. Mr Jackson accepted that there was a change to the kicker, but not to the commission structure, and concluded that this did not affect the Claimant because she was on maternity leave at the time. He believed that the Claimant was due to return to work in July 2017, and she would have been told about the change then. Mr Jackson expected the Claimant to raise the change with Mr Watson or Mr Scammell, rather than relying on something she had heard from colleagues.

467. Mr Jackson then turned to the appeal point that Mr Watson upheld no complaint but accepted there were lessons to be learned. Mr Jackson concluded that Mr Watson had made appropriate apologies and also noted some learnings for the company, which he found was not unreasonable. He agreed it was not for the Claimant to learn lessons. He hoped the Claimant accepted the Respondent's point that things might have panned out differently if the Claimant had raised her concerns before resigning.

468. Mr Jackson wrote that for the reasons he gave, and the reasons given by Mr Watson in the grievance outcome, he could not accept that the Claimant had been discriminated against. He did not uphold the appeal. Mr Jackson stood by Mr Watson's acknowledgments and lessons to be learned by the company. Mr Jackson found the Respondent had not acted unreasonably.

469. He asked the Claimant if she would be willing to meet him again to go through the various elements of her grievance and suggest steps which the Respondent could implement to avoid being in this situation again.

470. The Claimant's complaints regarding Ms Meredith were not dealt with in the appeal outcome.

Oral evidence

471. The Claimant was cross examined as to the basis of her allegation that her appeal was not considered. The Claimant confirmed that her complaint was that Mr Jackson failed to uphold her appeal, not that he failed to consider it.

472. In cross examination the Claimant said that in light of Mr Watson's acceptance that there were lessons to learn her grievance should have been upheld, at least in part. She gave similar evidence in respect of points where Mr Jackson found in her favour but did not uphold the appeal. It was put to her that there was a distinction between identifying learning points and accepting that the Respondent had discriminated or behaved unreasonably. The Claimant recognised the distinction but did not agree with

the findings made by Mr Jackson. She did not believe she had been considered for the UK AFSM role because she could not apply. The Claimant confirmed that her case was that she should have been given the opportunity to apply, and the fact that her grievance and / or appeal were not upheld means that she was discriminated against, because if the Respondent was not going to discriminate her grievance and appeal would have been upheld. Unless the Respondent agreed with the Claimant then there must be discrimination.

473. The Claimant referred to past occasions when she and Mr Scammell had been appointed at the same time. She said that during the instant restructure the only difference was that she was on maternity leave. Her case was that the announcement was timed to coincide with maternity leave so that she could not challenge it.

474. We found Mr Jackson's evidence to be unsatisfactory generally. We found him to be evasive, dismissive, reluctant to engage with questioning, and reluctant to explain his thought processes in respect of the appeal. We formed the view that this was deliberate.

475. We appreciate that Tribunal proceedings can result in individuals being nervous and this can affect the evidence they give. We do not consider that this explains Mr Jackson's evidence. On hearing him we considered him to be an intelligent man, and it is apparent he holds a senior role within the Respondent group. Nevertheless, straightforward questions or propositions were met with avoidance rather than a nervous response. Several attempts had to be made to elicit answers, and even then those attempts were not always successful.

476. Mr Jackson was cross examined in respect of his appeal outcome letter. On the issue of handover during pregnancy, he was asked what lessons he accepted were to be learned. He replied that there were lessons that communication could be improved in general. He was unable to provide any specific lessons learned during questioning, some seven months after the outcome letter was sent to the Claimant. He said he did not have anything specific in mind when he wrote that there were lessons to be learned.

477. We found it quite strange that Mr Jackson would have written in terms that there were lessons to be learned when he had nothing specific in mind at the time. In his appeal conclusion he made express reference to learnings mentioned by Mr Watson. This was compounded by nothing actually having been implemented in terms of learnings since the appeal hearing. If the reference to lessons to be learned was made in good faith then we would have expected him to have something specific in mind, and for it to have been acted on to some extent.

478. Mr Jackson said that he did not take notes of his investigation with Ms McGeown because he did not realise he was required to.

479. As for Mr Jackson's conclusion that he was not sure how the announcement of Mr Scammell's appointment could have been handled differently, Ms Palmer put to him the earlier acceptance in evidence by Ms McGeown that an email could have been sent to the Claimant's personal email account on 3.8.2016 as requested as an example. Mr Jackson did not accept this. He said he found significant email traffic from the Respondent to the Claimant's work account, and the Claimant was considering

those emails in light of her then responses. For that reason he said it was not a fundamental failure. Mr Jackson did not explain the traffic or responses in any detail.

480. In cross examination Mr Jackson was resistant to assertions that the Claimant should have been informed of significant matters to her personal email account. Ms Palmer asked Mr Jackson whether he was aware following investigation that the Claimant had specifically told Ms McGeown she would not be accessing her work account, and so to use her personal email. He replied that his recollection was that the Claimant also stated she would be picking up significant emails to her work account from time to time. He said that emailing the personal account was not to be the exclusive means of communication.

481. This it seemed to us was not entirely inconsistent with what Mr Jackson said he had been told by Ms McGeown when investigating as was recorded in the appeal outcome letter, i.e. that the Claimant was happy to receive everything to her work account. The reference to the Claimant "also" stating she would periodically pick up emails to her work account is not consistent with an understanding that all communication would be to the work account. The same point applies to Mr Jackson's evidence that contact to the personal account was not to be the "exclusive means of communication". His evidence that there was not a "fundamental failure" because emails were sent to the work account also appears at odds with an understanding that all contact would be to the work account.

482. It was put that Mr Jackson was insistent that emailing the Claimant's work account and disregarding her request was acceptable. Mr Jackson did not engage with that question. He replied by reference to paragraph 7 of his witness statement that during the appeal the Claimant made clear that her fundamental concern was the appointment of Mr Scammell and that she was not considered for the role. Mr Jackson then said "when the Claimant makes clear to me that's the reason she's there, the fundamental problem, I'm more likely to focus on that piece".

483. We had concerns as to this evidence. The Respondent's notes of the appeal record (p.337) the Claimant confirming that her main points related to communication with her during maternity leave and Mr Scammell's appointment, together with other matters. Mr Jackson's evidence was not factually accurate. It also appeared to us to be an attempt to sidestep Ms Palmer's proposition. Further, it tended to show that Mr Jackson gave little consideration to matters other than the UK AFSM role.

484. As a result of Mr Jackson's evidence Ms Palmer explored whether he had considered all of the Claimant's appeal points. Mr Jackson said he considered all but focussed on the key point of appointment / promotion. Mr Jackson's evidence was that he did not know that he could uphold the appeal in part and thought there had to be a yes or no outcome to the complaints.

485. Mr Jackson accepted that the Claimant felt forgotten. As for why the Claimant was not told there were gifts for her in the office Mr Jackson's evidence was that the Claimant was pregnant at the time and it was therefore considered inappropriate to contact her at that point. Ms Palmer assisted Mr Jackson with the chronology, as a result of which he ultimately accepted that the Claimant was not pregnant at the time of her anniversary or birthday, and there was nothing inappropriate about contacting her at the time of those milestones.

486. Mr Jackson's rationale for it being inappropriate to contact the Claimant at that point was not factually accurate. The concession that it was not inappropriate to contact the Claimant during maternity leave was also not consistent with the appeal conclusion on reallocation of cover – that telling the Claimant about this at the time could have been construed as inappropriate as she was on maternity leave. We acknowledge that there is different subject matter being communicated, but Mr Jackson's evidence related to the propriety of communication during maternity leave.

487. When asked whether it would be appropriate to mark the anniversary on the day by a message and say there was a gift waiting, Mr Jackson said he did not give that the slightest thought. He said that the Respondent had for a long time celebrated such events with the employee with colleagues present. The Claimant was dealt with in exactly the same way as other people in the same circumstances.

488. We were concerned to hear that not the slightest thought had been given. It was another of the Claimant's key complaints that she had been overlooked and that there should have been some earlier communication with her in respect of the anniversary and birthday. It is recorded as such in both sets of notes of the hearing (p.334; 337). The Claimant had expressly stated during the appeal hearing that someone could have communicated with her, if only a card or email from the senior management team. In the Respondent's meeting notes it is recorded that the Claimant made the point that she waited two months before being told there were gifts waiting for her. Point 30 of her grounds of appeal made the same point. On Mr Jackson's evidence he did not give the slightest thought to what the Claimant was complaining about in this respect. It appeared to us to be a dismissive response and designed to avoid scrutiny of his decision making.

489. It was put that Mr Jackson was determined to uphold Mr Watson's decision making on every level. His reply was that the Respondent was a small organisation and does not always get everything right, but with the limited experience he had his focus was on the appointment to the UK AFSM role and whether it was discriminatory or unfair. Mr Jackson considered it was neither.

490. In giving this reply Mr Jackson did not directly engage with the question and relied on the restructure as being the key complaint to explain his failure to uphold any aspect of the appeal.

491. In response to a subsequent question Mr Jackson denied being determined not to uphold the appeal because the Claimant had complained of discrimination.

492. In re-examination Mr Harris took Mr Jackson to p.323 paragraph 29, where the Claimant stated that the manner of her hearing about Mr Scammell's appointment was not relevant and was a smokescreen to deal with the discriminatory promotion. Mr Jackson was asked whether the Claimant told him she was upset by the manner in which she found out about the promotion. Mr Jackson's evidence was that he did not recall. He went on to repeat that he focussed his energies on the UK AFSM complaints "but other pieces were discussed. It was obvious the Claimant was very upset by the whole scenario. Was she unhappy regarding communication? Yes I recall her mentioning that".

493. The Claimant did more than mention communication concerns, it was a central aspect of her grievance and appeal. Mr Jackson's evidence appeared to us to be an attempt to downplay the communication issues.

494. During questions from the Tribunal an effort was made to understand how much time Mr Jackson dedicated to complaints other than those related to the UK AFSM appointment. Mr Jackson did not directly engage. He repeated that he focussed on the key piece as agreed with the Claimant and Mrs Roberts. Another attempt was made by the Tribunal to elicit an answer. Mr Jackson replied that he was led by the Claimant to spend more time on the UK AFSM aspects. That again was not what was actually agreed at the appeal meeting. Ultimately there was no clear answer by Mr Jackson to the Tribunal's question. This appeared to us to be deliberate.

495. In response to Tribunal questions Mr Jackson said that this was the first time he had dealt with an appeal and accepted that his knowledge was limited in that regard. He said he had very little guidance as to what process he should follow at the appeal. As a matter arising from our questions Ms Palmer put to him that Ms Thorne was present as a HR consultant and so it was incorrect to say he had little guidance. Mr Jackson accepted this. This was so despite her apparently being present in only a note taking capacity.

496. The Employment Judge asked Mr Jackson what findings he reached about the Claimant not being told contemporaneously on her personal email about her change of line manager, specifically whether he found that the Claimant was not told because of the birth of her daughter on 3.8.2016. Mr Jackson replied "no". The Employment Judge asked, if that was so, why he referred to "a plan to inform you personally of this appointment at an appropriate time after the birth of your daughter" in his conclusions (p.341). Mr Jackson replied that following investigation he believed there was a plan to discuss matters with the Claimant at an appropriate time. This did not address the question. The Employment Judge put it again. Mr Jackson replied:

"I don't have a proper answer to your question. I would have taken at face value that we would have spent time talking to the Claimant in the right manner at the right time.

497. We were concerned that Mr Jackson was not able to give a proper answer and explain his appeal findings and rationale on one of the Claimant's key complaints. Mr Jackson's evidence that he took matters at "face value" was also not reassuring.

498. In re-examination on this point Mr Jackson said that Ms McGeown did not believe there was an exclusive arrangement that emails would only be sent to her personal email account. The default was that they were sent to her work account.

499. On 9.5.2017 the Respondent presented its form ET3. The grounds of resistance were amended on 4.6.2017 (pp.76-91). The particulars of claim were amended on 19.6.2017 (p.52 onwards). On 6.7.2017 the Respondent provided further and better particulars. On 9.10.2017 the Claimant provided further and better particulars.

Law and submissions

500. Ms Palmer and Mr Harris both prepared written submissions which were supplemented orally, for which we are grateful. With respect to the parties we do not intend to set out

those submissions in full, but we confirm that we have considered them during our deliberations. Both counsel were agreed that the central issues related to the UK AFSM allegations (c) to (f).

Constructive unfair dismissal

501. Section 94 Employment Rights Act 1996 ("ERA") provides for the right not to be unfairly dismissed. Section 95(1)(c) ERA provides that an employee is dismissed by his employer 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.

502. Section 98 Employment Rights Act 1996 provides:

"(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

503. Section 98(2) ERA provides for the potentially fair reasons for dismissal, as further defined by subsection (3). Section 98(4) ERA provides:

"[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

504. Whether an employee is "entitled" to terminate the contract of employment "without notice by reason of the employer's conduct" and claim constructive dismissal must be determined in accordance with the law of contract. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment (**Western Excavating v Sharp [1978] IRLR 27**). The reasonable range of responses test is not appropriate.

505. A repudiatory breach is one in which the contract breaker has shown an intention, objectively judged, to abandon and altogether refuse to perform the contract (**Tullet**

Prebon v BGC Brokers [2011] IRLR 420). This is to be assessed from the perspective of a reasonable person in the position of the innocent party.

506. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462).**

507. The test of whether there has been a breach of the implied term of trust and confidence is objective. As held in **Malik**, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

508. It is not necessary in each case to show a subjective intention on the part of the employer to destroy or damage the relationship. That the employer does not intend his actions to show that he does not intend to be bound by the terms of the contract is irrelevant to whether his behaviour evinced that intention (**Lewis v Motorworld Garages Ltd [1985] IRLR 465**).

509. The burden lies on the employee to prove the breach on a balance of probabilities. Unless it constitutes a breach of the implied term as to trust and confidence, it is not enough to prove that the employer has done something which was unreasonable, or that it has caused *some* damage to the relationship. There is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment. The breach must be so serious that the employee is entitled to regard themselves as entitled to leave immediately without notice.

510. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract (see for example per Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A**). The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the employment relationship.

511. Employer conduct which is on the face of it repudiatory will not breach the implied term of mutual trust and confidence if the employer has reasonable and proper cause for it (**Hilton v Shiner Ltd [2001] IRLR 727, EAT).** Whether the employer has reasonable and proper cause is to be determined objectively and not by applying a range of reasonable responses test.

512. The fundamental breach must cause the employee to resign. The breach must be an effective cause of the resignation and need not be "the" effective cause (**Wright v North Ayshire Council 2014 ICR, EAT**). The crucial question is whether the repudiatory breach played a part in the dismissal. Even if the employee resigns for a whole host of reasons, the employee may claim constructive dismissal if the repudiatory breach is one of the factors relied upon.

513. The employee must resign without affirming the contract. In her submissions Ms Palmer referred us generally to the content of Harvey on Industrial Relations and

Employment Law Division D1/3/F(1) para.523 onwards, dealing with affirmation in constructive dismissal cases, which we have considered. The principle of affirmation only applies once the employee has become aware of a breach of contract by the employer. Ms Palmer emphasised that there was no fixed time for an employee to make up their mind to resign, and so a delay per se will not amount to affirmation in law, albeit it will often be an important factor.

514. In his written submissions Mr Harris addressed us on affirmation and the last straw principle, and referred us to **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493.** We have considered this authority and in particular what Dyson LJ held at paragraphs 15 to 22.

515. Notwithstanding the above references, during the course of oral submissions both parties were agreed that the case before us was not a "final straw" case in the sense that it was not a case in which it must be established that the final incident has contributed, however slightly, to a series of earlier incidents, failing which cumulatively there has been no repudiation of contract by the employer.

516. Ms Palmer expressly did not rely on the "kicker" allegation as a last straw in the foregoing terms. She referred us to the Claimant's language in the grievance appeal that the kicker complaint was a last straw, but in essence that was lay language explaining the trigger for resignation. Ms Palmer argued that the Claimant had not affirmed any earlier matters contributing to breach of the implied term of mutual trust and confidence.

517. In the event that an employee is constructively dismissed, we must then consider whether there was a potentially fair reason for the dismissal, and if so whether the dismissal was fair in the circumstances pursuant to section 98(4) ERA 1996.

Section 99 ERA

518. Section 99 ERA 1996 entitled "Leave for family reasons" provides:

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

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

(2) In this section 'prescribed' means prescribed by regulations made by the Secretary of State.

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

(a) pregnancy, childbirth or maternity,
…
(b) ordinary, compulsory or additional maternity leave,
…

and it may also relate to redundancy or other factors.

…

(5) Regulations under this section may—

(a) make different provision for different cases or circumstances;
(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.]

519. The reasons prescribed, by the Maternity & Parental Leave Regulations 1999 regulation 20(3), are reasons connected with –

(a) the pregnancy of the employee;

…

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

520. Regulation 20(5) provides that paragraphs (3) and (3A) of regulation 19 apply for the purposes of paragraph (3)(d) as they apply for the purposes of paragraph (2)(d) of that regulation.

521. The protection given by s.99 covers equally dismissals during or after the protected period (except that dismissal because the woman has given birth is only automatically unfair if it brings her period of maternity leave to an end, which is not in issue before us).

522. The statutory provisions do not require an employee with sufficient qualifying service to prove that the reason for dismissal was pregnancy or a connected reason. It is for the employer to establish a fair reason. The employee must adduce some evidence to raise the issue as to whether the dismissal is for a reason related to pregnancy, but if this is done the employer will have to refute this in the course of establishing a fair reason. If it is shown that the reason is pregnancy or maternity then there is no possibility of the employer claiming that the dismissal is reasonable in all the circumstances and therefore fair.

523. As for the meaning of connected with, in **Clayton v Vigers [1990] IRLR 177** the EAT held that, in accordance with the decision of the House of Lords in **Brown v Stockton-on-Tees Borough Council [1988] IRLR 263**, the words "any other reason connected with her pregnancy" (in predecessor legislation) ought to be read widely so as to give full effect to the mischief at which the statute was aimed. Accordingly, the submission that the words must mean "causally connected with" her pregnancy rather than "associated with" was not accepted.

524. In **Clayton** the EAT held that the background to the employer's decision to dismiss was pregnancy or after effects of it (inability to find replacement cover) and this was part of the reason for dismissal.

525. Connected with is not to be construed in the same manner as "because of". It is sufficient if the principal reason for dismissal is associated with pregnancy or maternity.

Discrimination

526. Section 39 Equality Act is entitled "employees and applicants" and provides:

"(2) An employer (A) must not discriminate against an employee of A's (B)-

…
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment."

(4) An employer (A) must not victimise an employee of A's (B)—

…
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(7) In subsections (2)(*c*) and (4)(*c*), the reference to dismissing B includes a reference to the termination of B's employment—

…
(*b*) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

527. Pursuant to section 4 Equality Act 2010 sex, pregnancy and maternity are protected characteristics. Section 13 makes provision for direct discrimination as follows:

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

…

(8) This section is subject to sections 17(6) and 18(7).

528. Section 23(1) provides that on a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

529. Section 18 Equality Act 2010 entitled "Pregnancy and maternity discrimination: work cases" provides:

"(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,

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

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

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

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

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

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(*a*) it is in the protected period in relation to her and is for a reason mentioned in paragraph (*a*) or (*b*) of subsection (2), or
(*b*) it is for a reason mentioned in subsection (3) or (4)."

530. Section 27 provides for victimisation:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(*a*) B does a protected act, or
(*b*) A believes that B has done, or may do, a protected act.

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

(*a*) bringing proceedings under this Act;
(*b*) giving evidence or information in connection with proceedings under this Act;
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

Pregnancy / maternity

531. For complaints brought under section 18 there is no comparative requirement. The parties were agreed that the protected period ended on 28.2.2017 which is the effective date of termination (regulation 7(5) Maternity and Parental Leave Regulations 1999).

532. Where the unfavourable treatment is because the woman is on compulsory leave or because she is exercising or seeking to exercise, or has exercised or sought to, a right to ordinary or additional maternity leave, the protection afforded by section 18 can be relied upon whether or not the unfavourable treatment occurs during the protected period.

533. Where the unfavourable treatment is because of pregnancy, the protection afforded by section 18 applies during the protected period, save that where the unfavourable

treatment in issue implements a decision taken during the protected period, that treatment is to be regarded as occurring in that period even if the implementation is not until after it has ended.

534. Prior to the start of submissions Mr Harris sought clarity on the nature of the Claimant's complaints of sex discrimination - whether these were put on the basis that the Claimant was a woman where a comparative approach was required, or due to pregnancy complaints falling outside the protected period. We had heard evidence relative to the comparative approach based on gender. Ms Palmer confirmed that the complaints were brought on grounds of pregnancy and / or maternity during the protected period. The complaints of sex discrimination contrary to section 13 were to deal with allegations of pregnancy discrimination falling after the protected period. The grievance outcome was subsequent to the protected period, as was the grievance appeal process. It was the Claimant's case that any discrimination because of pregnancy not falling within section 18 was still as a matter of law sex discrimination and could therefore fall within section 13 instead. There were no complaints of discrimination based on gender where a comparative approach would be required.

535. Both parties were agreed that in such circumstances the proper approach, pursuant to the judgment of the European Court in **Webb v EMO Air Cargo (UK.) Ltd [1994] IRLR 482**, was that the Claimant was not required to prove that the Respondent would have treated a man differently.

536. Section 18(7) of the Equality Act provides that section 13, so far as relating to sex discrimination, does not apply where section 18 applies. Section 18(7) does not otherwise preclude a complaint of direct pregnancy or maternity discrimination being brought pursuant to section 13.

537. In **Webb** the European Court of Justice held that the dismissal of a female worker on account of pregnancy constituted direct discrimination on grounds of sex (paragraph 19). Further, at para.24, the Court held that "… there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons."

538. When **Webb** returned to the House of Lords (**Webb v EMO Air Cargo (U.K.) Ltd (No. 2) [1995] IRLR 645**) Lord Keith held (at para.11):

> "The ruling of the European Court proceeds on an interpretation of the broad principles dealt with in Articles 2(1) and 5(1) of the Directive 76/207/EEC. Sections 1(1)(a) and 5(3) of the Act of 1975 set out a more precise test of unlawful discrimination and the problem is how to fit the terms of that test into the ruling. It seems to me that the only way of doing so is to hold that, in a case where a woman is engaged for an indefinite period, the fact that the reason why she will be temporarily unavailable for work at a time when to her knowledge her services will be particularly required is pregnancy is a circumstance relevant to her case, being a circumstance which could not be present in the case of the hypothetical man".

539. We agree with the parties that **Webb** is authority for the proposition that a woman who has been treated less favourably because of pregnancy, or maternity, has been

subjected to sex discrimination and does not need to establish that a man would have been treated differently. If the reason for the treatment is pregnancy then the less favourable treatment resulting is unlawful sex discrimination. Discrimination because of pregnancy or maternity is inherently sex discrimination. Where a section 18 claim cannot be brought due to the operation of s.18(7), that is no barrier to the claim being brought under section 13 based on the protected characteristic of sex, pregnancy or maternity.

Unfavourable treatment

540. In **Trustees of Swansea University Pension & Assurance Scheme v Williams [2015] IRLR 885** guidance was given on the meaning of "unfavourably" by Langstaff P. Although that case concerned section 15 of the Equality Act 2010 the guidance is equally applicable in the context of section 18.

541. The EAT held that "unfavourably" cannot be equated with the concept of "detriment" (para.27), which is assessed from the perspective of the employee. Nor does the word 'unfavourably' require a comparison with an identifiable comparator, whether actual or hypothetical, as would the description 'less favourable'. Instead, 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. At para.29 Langstaff P held:

> "treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be."

Because of

542. Mr Harris submitted, correctly, that the case before us does not involve the application of an inherently discriminatory criterion, unlike for example the case of **James v Eastleigh Borough Council [1990] IRLR 288**. As such, the Tribunal must determine what was the "reason why" the alleged discriminator acted as they did, and whether that was because of the protected characteristic in issue. A causal connection is required.

543. During submissions we were referred to the case of **Interserve FM Ltd v Tuleikyte [2017] IRLR 615** and we have considered this during our deliberations. The Tribunal upheld the complaint of direct discrimination under section 18(4), on the basis this was a case involving an inherently discriminatory criterion due to the blanket application of policy. The EAT found that it was not such a case and allowed the appeal, the case being remitted to determine the reason why.

544. As to the approach to the question of whether unfavourable treatment was "because of" the protected characteristics of pregnancy or maternity, the EAT confirmed that the same approach is to be taken in respect of a direct discrimination claim under section 18 section as under section 13 (para.17).

545. In **Nagarajan v London Regional Transport [1999] IRLR 572, HL**, it was held that if the protected characteristic (there, race) had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, however, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

546. In **Amnesty International v Ahmed [2009] IRLR 884**, the EAT, Underhill P held:

> "… The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives …
>
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. *James v Eastleigh* is a case of this kind….The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it …, "gender based". In cases of this kind what was going on inside the head of the putative discriminator—whether described as his intention, his motive, his reason or his purpose—will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed…
>
> But that is not the only kind of case. In other cases—of which *Nagarajan* is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh*, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling *James v Eastleigh* and *Nagarajan*. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

547. As for the application of the 'but for' test, the EAT gave the following guidance:

> '' … although … the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex … it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else—all that matters is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.''

548. Subsequently in **Onu v Akwiwu [2014] EWCA Civ 279** Underhill LJ considered what will constitute the "grounds" for a directly discriminatory act and said:

> "42 What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in *Nagarajan* called his 'mental processes' (p 884D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in *Nagarajan*: see pages 885-6."

549. Returning to **Interserve**, at para.20 Simler P said "In domestic law, the point is well established that the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination". After considering further extracts from **Ahmed** which we too have borne in mind Simler P continued (at para.21):

> "The same point has been made in the context of unfavourable treatment because of pregnancy or maternity cases in two cases in the EAT: *Sefton Borough Council v Wainwright* [2015] IRLR 90 and *Hair Division Ltd v Macmillan* [2013] EqLR 18. It follows that it is necessary to show that the reason or grounds for the treatment - whether conscious or subconscious - must be

absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under s 18."

550. We were also referred to the case of **Johal v Commission for Equality & Human Rights UKEAT/0541/09/DA**, 2nd July 2010. The claimant in that case told her employer that she wished to take maternity leave from 1 December 2007 until 5 January 2009 and added "I would like to remain on the IT network as I would like to continue to read certain email alerts. In addition I will be grateful if I was kept in the loop with regards to vacancies and training packages within the Commission while I'm away". During her maternity leave a potentially suitable vacancy arose, but the claimant was not informed of it and missed the opportunity to apply. She brought a claim of sex discrimination alleging she was not informed of the vacancy because of her maternity leave.

551. The tribunal found that the reason for that treatment was administrative error, not the fact of her maternity leave. Maternity leave was the occasion for the treatment complained of; it was not the cause of the treatment. The EAT held that the factual finding was permissible, and there was no error of law in the Tribunal's reasoning.

552. In submissions Mr Harris argued that Johal was instructive when considering the case before us. The Claimant in Johal had argued that she would have known about the vacancy had she not been on maternity leave. He emphasised the conclusion of the EAT that maternity leave was the context or occasion for why she was not informed but was not the reason why. He argued that the Claimant's case was to like effect, that maternity was the context but not the reason why there was any unfavourable treatment, in respect of most of the allegations save for the complaint of isolation / exclusion and the central complaints (c) to (f).

553. In submissions Ms Palmer contended that Johal was distinguishable. She drew our attention to the Tribunal's conclusion that the Respondent genuinely intended to keep the Claimant notified of vacancies but that there was a breakdown in the administrative system which the Respondent had put in place to keep those absent from work notified of job vacancies, and that the Claimant could reasonably have done more herself to keep in touch, particularly since she had been made aware that advertisement of the role was pending. She referenced the finding that others on maternity leave had been advised of the post, which reinforced "the reason why" as being an administrative error in Ms Johal's case. Ms Palmer argued that this was not so in respect of the claims before us. In her submission there was no intention to tell the Claimant about the restructure, nor an intention to give her birthday and work anniversary gifts. In short that the relevant alleged discriminators took the view that they would take such steps when they get around to it, which is very different to an administrative error.

554. Ms Palmer added that there was a restructure and deliberate decision not to tell the Claimant to apply, and deliberate decisions not to tell the Claimant about the gifts that were waiting for her. Ms Palmer also referenced Ms McGeown's evidence in respect of contact with the Claimant, to the effect that she had made a mistake in not emailing the Claimant's personal account, and that this was very different from an administrative error. There was some dispute between the parties as to Ms McGeown's evidence. We indicated that we would consider our own notes of evidence to resolve matters and

have done so. In summary Ms Palmer argued that the case before us involved a series of decisions or omissions, not a single error as in **Johal**.

Claimant's reserved position

555. Ms Palmer developed submissions relating to Interserve and Johal "to reserve the Claimant's position if no more". Ms Palmer's concern was as follows. The Tribunal in **Johal** considered and applied **Shamoon** when considering the reason why (see Johal para.25). Ms Palmer noted that this approach was upheld by the EAT to the extent it was said that the Tribunal was entitled to approach matters in that way. Ms Palmer continued that in the more recent case of Interserve there could be an application to appeal. Interserve did not expressly cite Shamoon**,** but did refer to Johal, so that there was "indirect" reference to Shamoon in Interserve. She argued that Shamoon was a case on direct sex discrimination of the kind falling within section 13 where a comparison is required; the ratio (to ensure circumstances are not materially different between the person subjected to discrimination and comparators) is not required for pregnancy or maternity cases. Ms Palmer acknowledged that the House of Lords in Shamoon stated that there may be cases where it is appropriate to look at the reason why first, before considering less favourable treatment. She queried whether application of Shamoon was helpful in a section 18 case where no comparator was needed. Ms Palmer acknowledged that the meaning of "because of" is the same in both section 13 and section 18 complaints of direct discrimination. She did however query whether this meant that a Tribunal must look for objective reasons for the treatment complained of, because if so it could be that a woman on maternity leave could be required to show that there was an intention to discriminate, which is not ordinarily required.

556. Our approach is to apply the law which is binding on us. Through the burden of proof provisions we must consider whether there is a prima facie case of unfavourable treatment, and if so whether that was because of the protected characteristics of pregnancy and / or maternity as expressed in section 18. We have recorded above the authorities relating to determination of the "reason why" and these are the principles we seek to apply. This involves consideration of the mental processes of the alleged discriminator, not motive. The reason why someone discriminates against another is irrelevant.

557. We recognise that no comparative exercise is required for section 18 but we are not troubled by the application of Shamoon in Johal, which arose in the context of answering the reason why. As Ms Palmer acknowledged, Shamoon itself is authority that it may be appropriate to focus on the reason why. The reference to Shamoon in Johal was in the context of addressing whether the unfavourable treatment was "because of" the protected characteristics in issue.

558. We were also referred to the case of **Visa International Service Association v Paul [2004] IRLR 42**. The Tribunal in that case found as facts that Mrs Paul had expressed an interest in moving from the department in which she worked to the dispute resolution section. Mrs Paul became pregnant and took maternity leave. During her maternity leave there was a re-organisation at her workplace, and an analyst position became available in the department she was interested in moving to. The role was advertised internally but not filled. It was then advertised externally and filled.

559. The Tribunal found that Mrs Paul was not notified of the vacancies and was not otherwise aware of them. They found the failure to notify was a deliberate act and amounted to pregnancy related detriment. The reason the employer failed to inform was because Mrs Paul was on maternity leave. They also found that Mrs Paul was not shortlistable due to lack of experience, but that she would have applied had she been aware of the vacancies. The employer in that case advanced no reason for failing to inform Mrs Paul of the vacancy.

560. The Tribunal upheld her complaint of constructive unfair dismissal – Mrs Paul had deliberately not been informed of a vacancy which existed in an area she was interested in working in.

561. The EAT upheld the Tribunal's finding in respect of Mrs Paul. Although the Respondent argued that Mrs Paul was not shortlistable, that the EAT held missed the point. Mrs Paul's case was not that there had been a failure to inform her of a job opportunity which was illusory. It was that she believed she was suitable, and the employer's failure to inform fatally undermined trust and confidence. Her case was not dependent on her losing the chance of applying.

562. Mrs Palmer relied on this authority to contend that even if the Claimant in this case had no chance of securing a job, the failure to inform is still capable of amounting to a fundamental breach because in her mind the Claimant had a chance.

563. Mr Harris argued that the case was distinguishable and that we should not inevitably reach the same conclusions as in that case, because the case before us was of a very different nature. This was on the basis that there was no recruitment exercise in the instant case, and no vacancy to inform the Claimant about. There was no deliberate failure to inform the Claimant in the circumstances. It is not a case where the Claimant missed an opportunity to apply, there was no opportunity for her or anyone else to apply. Individuals were instead selected and appointed. Instead the Claimant's case was one of deliberate exclusion.

564. Ms Palmer accepted the distinction in respect of the advertisement of the vacancy. She contended that the Claimant's case was that it should have been advertised, but there was a deliberate decision by Mr Watson not to do so in order to deprive the Claimant of the opportunity to apply.

Victimisation

565. The concept of detriment is determined from the point of view of the claimant. A detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment (**MOD v Jeremiah [1979] IRLR 436)**. An unjustified sense of grievance cannot amount to a detriment, the alleged detriment must still be objectively capable of being regarded as such (**Derbyshire v St Helens MBC [2007] IRLR 540**, paragraph 37 per Baroness Hale; **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 at 292, paragraph 35).

566. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful. In **Garrett v Lidl Ltd UKEAT/0541/08** (16 December 2009, unreported), the EAT held that it was not appropriate for a tribunal to have

dismissed victimisation claims simply because it had rejected the claims of discrimination.

567. A similar situation occurred in **Deer v University of Oxford [2015] EWCA Civ 52**, **[2015] IRLR 481.** Elias LJ held:

"If there was a failure to carry out a proper investigation and the reason was the fact that the settled claim and/or claim 1 had been lodged by the appellant, then the appellant would have established her case notwithstanding that a fuller investigation would in fact have produced nothing of value." (para.46)

and at para.48:

"if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim."

Burden of proof

568. Section 136 Equality Act makes provision for the burden of proof as follows:

"(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."

569. As for the operation of the burden of proof we have considered the guidance given in **Igen Ltd v Wong [2005] EWCA Civ 142** and **Barton v Investec Securities Ltd [2003] IRLR 332**.

570. There is a two-stage process to the drawing of inferences of direct discrimination. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in **Madarassy v Nomura International plc [2007] IRLR 246**, **CA**, "could conclude" must mean "a reasonable tribunal could properly conclude" from all the evidence before it . The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.

571. The Employment Tribunal may take into account all the evidence including that from the Respondent in deciding if a prima facie case has been established. Adequate explanations are not to be taken into account at the first stage.

572. Evidence of unreasonable and less favourable treatment coupled with a difference in protected characteristic is not sufficient evidence in itself without "something more" to

reverse the burden of proof. Something more is required to entitle the Employment Tribunal to infer, in the absence of a satisfactory explanation, a discriminatory reason for the less favourable treatment and reverse the burden.

573. **Law Society v Bahl [2003] IRLR 640** held that in appropriate circumstances the "something more" can be an explanation proffered by the Respondent for the less favourable treatment that is rejected by the Tribunal. If the Respondent puts forward a false reason for the treatment, but the Employment Tribunal is able on the facts to find another, non-discriminatory reason, it cannot make a finding of discrimination. An inadequate or unjustified explanation does not of itself amount to a discriminatory one.

574. Discrimination may be inferred if there is no explanation for the unreasonable behaviour. But it is not then the mere fact of unreasonable behaviour which entitles the Tribunal to infer discrimination. It is not unreasonable conduct 'without more' but rather the fact that there is no reason advanced for it.

575. If the burden does shift, then the employer is required only to show a non-discriminatory reason for the treatment in question.

Financial penalty

576. Section 12A(1) of the Employment Tribunals Act 1996 provides that

"(1) Where an employment tribunal determining a claim involving an employer and a worker—

(*a*) concludes that the employer has breached any of the worker's rights to which the claim relates, and
(*b*) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim)."

577. Section 12A(2) provides that regard shall be had to an employer's ability to pay when deciding whether to order a penalty and if so the amount.

578. The relevant explanatory notes state:

"100.Section 12A does not prescribe the features which employment tribunals should take into consideration when determining whether a breach had aggravating features; this is for the employment tribunal to decide, taking into account any factors which it considers relevant, including the circumstances of the case and the employer's particular circumstances. The employment tribunal should only take into account information of which it has become aware during its consideration of the claim. A non-exhaustive list of factors which an employment tribunal may consider in deciding whether to impose a financial penalty under this section could include the size of the employer; the duration of the breach of the employment right; or the behaviour of the

employer and of the employee. The concept of aggravating features in section 12A is not the same as the existing regime of aggravated damages in discrimination claims in England and Wales.

101.An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake."

Conclusions

Allegation (a)

Discrimination

579. The unfavourable treatment alleged is that the Claimant was not involved in as many conversations or discussions as before announcing that she was pregnant, and that the atmosphere was less friendly.

580. On the facts as we find them to be there was no reduction in the requests for the Claimant's input, and the atmosphere was no less friendly than previously. On that basis alone the allegation of discrimination fails on that basis and is dismissed.

581. Even had we found there to be unfavourable treatment as alleged, it is clear to us that in no sense whatsoever was this because of the Claimant's pregnancy and / or intended exercise of maternity leave rights.

582. The original allegation contended that there had been unfavourable treatment from the moment she announced her pregnancy in January 2016. The Claimant amended the premise of the complaint during the hearing, to the effect that the unfavourable treatment alleged commenced in April. As of January 2016 Ms McGeown and Mr Watson knew that the Claimant was pregnant and that she would be exercising a period of maternity leave. That there is no unfavourable treatment alleged for the period of three months thereafter points away from pregnancy and / or maternity having a material influence on the mental processes of Ms McGeown and Mr Watson.

583. We turn to the allegation so far as it related to Ms McGeown. It is apparent that she and the Claimant had a strong, friendly relationship. Ms McGeown was genuinely delighted when she learned of the Claimant's pregnancy. She knew that the Claimant intended taking a period of maternity leave since January 2016.

584. Having regard to the content of emails and text messages between the Claimant and Ms McGeown there is clear affection between them. They had a friendship. There are

examples of contact where Ms McGeown makes enquiries as to the Claimant's welfare during her pregnancy. She was concerned as to how the Claimant's pregnancy was progressing, and how the Claimant was faring in the heat while pregnant. Ms McGeown demonstrated further care for the Claimant when her baby was overdue and used supportive language in her messages. Ms McGeown made efforts to include the Claimant in the spa treat day, to which the Claimant had not originally been invited.

585. The overwhelming evidential picture is that Ms McGeown viewed the Claimant's pregnancy and maternity leave positively. Ms McGeown gave evidence that she had had two periods of maternity leave herself and accordingly would not discriminate against the Claimant on that basis alone. We observe that it is quite possible for someone to discriminate because of a protected characteristic which they themselves have. However on the material before us it is clear that the protected characteristics in issue had no material influence so far as this allegation is concerned.

586. Even had there been a change in the frequency that the Claimant's input was sought, we would have found that was because of the Claimant's availability and / or the nature of the particular query.

587. The same considerations influenced our findings that the unfavourable treatment alleged did not take place. The communications between the Claimant and Ms McGeown are inconsistent with isolation or a less friendly environment having arisen.

588. Another aspect of this complaint related to whether Mr Watson no longer sought the Claimant's input when she was in the office, contrary to what he used to do. The detail of this contention emerged for the first time while the Claimant was being cross examined. When the Claimant was having difficulty reconciling her evidence of exclusion by Ms McGeown by reference to contemporaneous emails, she said that the allegation was not limited to Ms McGeown but also involved Mr Watson. She said that his previous practice of asking for her input on a weekly basis changed.

589. There was documentary evidence before us of Mr Watson seeking the input of the Claimant and others on a particular issue on 15.6.2016 (p.133). It demonstrates that Mr Watson did seek the Claimant's input and assistance some two and a half months into the period of unfavourable treatment alleged in this complaint. At this point there was a little more than two weeks before the Claimant was due to take annual leave, prior to maternity leave. The sole piece of relevant documentary evidence demonstrated that the Claimant's pregnancy or intention to take maternity leave had no material influence on Mr Watson's requests for the Claimant's input.

590. There was no other documentary evidence of Mr Watson asking others for input which the Claimant could have contributed to but was not involved. Nor were there examples of Mr Watson asking others orally for input, but not the Claimant.

591. The Claimant did not contemporaneously raise issues of isolation, exclusion or unfriendliness by Mr Watson with anyone, including with Ms McGeown despite the nature of their relationship and communication as we find it to be. She did not raise these matters in the meeting of 10.2.2017 or during the grievance when explaining the matters that she considered amounted to discrimination because of pregnancy or maternity.

592. On balance we find that the Claimant's input was sought on the occasions it was because she had relevant expertise and was in the office. Pregnancy and / or maternity had no material influence.

Constructive dismissal

593. Viewed through the spectrum of constructive unfair dismissal we conclude that there is no material capable of contributing to breach of the implied term of mutual trust and confidence. There was no change to the frequency of requests for input, nor an unfriendly atmosphere created. A reasonable person in the position of the Claimant would not consider that at unfriendly atmosphere had arisen or her input was sought less frequently. Even had there been a reduction in the frequency of oral requests for input there was reasonable or proper cause for this, namely that no need for the Claimant's input had arisen or that she was not available in the office.

Allegation (b)

Discrimination

594. The allegation as pleaded was that from the Claimant announcing her pregnancy in January 2016 there was a failure to allocate her work, and she only managed to keep herself occupied by her own efforts assisting the administrative team. As with allegation (a), the factual basis of this allegation was amended during the hearing to the effect that the failure to allocate work relates to the period from April onwards.

595. We deal firstly with the handover arrangements. At the meeting in March / April 2016 it was agreed that the Claimant would when heavily pregnant have difficulty driving to visit customers as she had previously done. An approach was agreed as to the handover of her customers to colleagues who would cover in her absence. It was agreed that the Claimant would dictate the pace of this handover process, and that it should be concluded before the Claimant had difficulties driving. Since the announcement of her pregnancy the agreed approach adopted was that the Claimant would work as usual and raise any further support she required with Ms McGeown.

596. The handover arrangements were made because the Claimant would be absent on maternity leave and not able to meet the needs of her customers. An appropriate colleague was identified and allocated to service the customer's usual needs. The intention was that the Claimant would inherit these customers once more on her return from maternity leave. There was a need for timely implementation of the arrangements because driving would likely become difficult for the Claimant because of pregnancy.

597. There is no dispute that the Claimant was a diligent employee and soon after the March / April meeting she began the handover process.

598. Inevitably as the handover progressed the Claimant had less of her usual accounts to deal with. There was a reduction in the sort of work which the Claimant ordinarily did on a day to day basis, as contemplated by all parties.

599. Much of the Claimant's work in the period to mid-June 2016 related to the handover process and making notes of handover visits. Most of the customer visits took place in May 2016. The Claimant also had work to complete in this period in respect of her

opportunities list which she provided to Ms McGeown in mid-June 2016. Considering the activity log this also indicates that the Claimant undertook other work throughout this period. As reflected by our findings of fact it is not possible to be precise as to the nature of the work undertaken or time involved on the matters recorded in the activity log, but it is clear that there were other tasks being undertaken by the Claimant through to the middle of June 2016.

600. The handover arrangements themselves do not amount to unfavourable treatment. The process was agreed by all, with the proper objectives of catering for and retaining customers so that they could be returned to the Claimant in due course.

601. The handover arrangements were agreed in part because the Claimant was pregnant, would have difficulty driving in due course, and because she would be absent on maternity leave.

602. The reason why the Claimant's normal day to day workload reduced was because of the progress of the handover process, not because of pregnancy or maternity.

603. On 13.6.2016 the Claimant advised Ms McGeown that she had almost completed her handover. This was the first clear indication that Ms McGeown had as to handover progress and that it was nearing completion. We find that there was still work which the Claimant had to complete in respect of handover. There were still a limited number of client visits to undertake. The activity logs reveal that the Claimant undertook further work from mid-June 2016 onwards, although the nature and duration of it is not clear.

604. The premise of the allegation is that the Respondent failed to allocate the Claimant any work. On the facts that is not an entirely accurate portrayal. The Claimant clearly had a considerable amount of work to do in respect of the handover itself. That was so from the March / April 2016 meeting onwards. The Claimant was to dictate the pace of handover and did so.

605. It was not until 13.6.2016 that the Claimant informed Ms McGeown that handover had almost been completed. In her email the Claimant informed Ms McGeown that limited customer visits remained.

606. At this point the Claimant's opportunities list had not been completed and returned to Ms McGeown.

607. In her email the Claimant included an emoticon to express happiness and relief that she was not required to drive to perform a particular handover visit. More importantly the Claimant asked whether there was anything Ms McGeown would like her to do. The Claimant stated in terms that she would be happy to help out with discounts or admin work if that would assist.

608. The tone of the email is at odds with the contention that the Claimant considered this work beneath her status or demeaning. Had the Claimant so felt then we consider that she would have raised, in tactful terms, that her skills may be put to better use by performing other work.

609. We do not consider it unfavourable treatment that Ms McGeown did not, prior to this point, allocate the Claimant any further work. By agreement the Claimant was trusted

to dictate the pace of handover. The Claimant was, and Ms McGeown considered her to be, a diligent employee. Ms McGeown did not know how close the Claimant was to concluding the exercise, or that she had the capacity to take on further work, because the Claimant did not say so. It was not because of the Claimant's pregnancy and / or intended exercise of her maternity leave rights.

610. As set out above in respect of allegation (a), the content of communications between the Claimant and Ms McGeown during her pregnancy and maternity leave reflect a close friendly relationship, easy communication, and an absence of complaint by the Claimant as to her circumstances. These again demonstrate in our view that the protected characteristics had no material influence in respect of allegation (b).

611. As for the period following 13.6.2016 it is agreed that the Claimant undertook more work on discounts and administration. In the circumstances this does not in our view amount to unfavourable treatment. The Claimant volunteered to undertake this work. She expressly stated that she was happy to undertake it in her email.

612. Although the Claimant stated in evidence that she had hoped her experience could have been put to better use, that is quite different from what she actually conveyed to Ms McGeown. She made no contemporaneous complaint about performing work of this nature when volunteering to do it or thereafter. We find that the Claimant genuinely was happy to help out with work of this nature.

613. The Claimant knew that the Respondent's administration team were short staffed. There was a backlog of discount forms at the material time which was causing difficulties for the Respondent, and both the Claimant and Ms McGeown were aware of this. The Claimant had experience of discounts due to the nature of her current and past roles. There was a clear operational reason for the Claimant to volunteer her assistance.

614. We are not dealing with a case where administration or discount work was imposed upon the Claimant. It was not in our view unfavourable treatment for Ms McGeown to accept the Claimant's offer to assist with this work.

615. We are clear that the reason why the Claimant did perform this sort of work is because there was an organisational need for it at the time, the Claimant had the skills to assist, and volunteered to do so. The Claimant's pregnancy or intended maternity leave had no influence on Ms McGeown accepting the Claimant's offer of help.

Project work

616. On the material before us the discussion of project work takes place around the time of the March / April 2016 meeting. It took place before the Claimant had made any significant progress in respect of her handover, and prior to the email of 13.6.2016.

617. Our findings of fact are that there was discussion of certain projects. Of the matters discussed the Claimant did assist a colleague, Leah, in the use of the Respondent's systems for doing collated discounts. Otherwise, very little of what was discussed in terms of project work was implemented, and so did not give rise to additional work for the Claimant to do. There was no follow up of project work by either the Claimant or Ms McGeown, prior to the Claimant's email of 13.6.2016.

618. When the Claimant advised that she had almost completed handover she volunteered to do work of a particular kind, at a time when assistance was needed in that respect. There was no mention of any particular project work.

619. Although the Claimant was not utilised in respect of any other project work we do not consider this to amount to unfavourable treatment. We repeat our conclusions above in respect of the period from 13.6.2016 onwards. The reason why the Claimant did not have further involvement in the projects which had earlier been discussed is because when her handover was nearly complete she offered to perform work with discounts and there was a need for her assistance. Pregnancy or maternity had no influence on the Claimant not performing more work on projects.

Constructive dismissal

620. We do not consider that the reduction in the work which the Claimant had due to the progress of handover contributes anything to breach of the implied term.

621. The approach taken was rational and the product of discussion and agreement. There was proper cause to ensure customers were well served and retained in the Claimant's absence, and ensure handover was completed prior to any possible driving difficulties. In that sense the process was intended to preserve trust and confidence, by allocating appropriate covering employees, so that the Claimant could inherit her customers once more on her return from maternity leave.

622. That the Claimant was not allocated additional work prior to 13.6.2016 does not contribute to breach of the implied term. The Claimant was by agreement trusted to dictate the pace of handover and raise matters with Ms McGeown should a need arise. The Claimant did so on 13.6.2016 in the terms above.

623. Objectively considered from the Claimant's perspective, even if she had capacity to take on further work before this date there could be no contribution to breach of the implied term until she advised Ms McGeown of the position. There was reasonable and proper cause for Ms McGeown not allocating further work in the period prior to 13.6.2016. She believed that the Claimant was still completing her handover and did not know that the Claimant had the capacity to take on more work.

624. That the Claimant undertook work on discount and administration from 13.6.2016 onwards does not contribute to breach of the implied term. While this work was of lesser status to what she ordinarily did there was a business need for assistance with such work, the Claimant had relevant expertise, and happily volunteered to give such assistance. There was reasonable and proper cause for Ms McGeown to accept the Claimant's offer of assistance.

625. That the Claimant did not deal with much of the project work which had been discussed contributes nothing to breach of the implied term. When it was understood that the handover was nearly completed the Claimant volunteered to perform other work. The Claimant did not offer to assist with project work.

Allegations (c) to (f)

General points

626. In submissions Ms Palmer clarified that it was not the Claimant's case that Mr Watson had any particular animus against women who take maternity leave. Rather it is her case that Mr Watson designed the roles arising in the restructure around those who were available, in particular Mr Scammell. The Claimant was on maternity leave and Mr Watson did not know that she intended to return to work after around seven months, but believed she intended to take a full year's maternity leave.

627. It was contended that the criterion relating to hardware / software experience was an artifice to justify the appointment of Mr Scammell. This was an acknowledgement that Mr Scammell had significantly greater knowledge and experience than the Claimant in this respect.

628. The Claimant argued that Mr Watson's evidence that he had considered what was required by way of restructure and the nature of the roles without documenting any aspect of his thinking was a fiction. We deal with this aspect first.

Abstract process

629. There was no dispute as to the following matters:

629.1 In recent years there had been a shift in the industry. From being approximately 70% cut vinyl the market moved towards digital print media. At the time of the events complained of digital media accounted for around 50% of the market.
629.2 The shift to digital printing resulted in reduced profit margins for the Respondent.
629.3 Digital printing was more complicated than the cut vinyl approach.
629.4 Selling materials or consumables required a good knowledge of hardware (printers), software, media, profiles (which lets the printer know how much ink to put onto the material) and the application.
629.5 The Respondent's FSR team was relatively inexperienced in this respect.
629.6 New FSRs were recruited with such experience in an effort to address this.
629.7 Those appointments were made prior to the events giving rise to these proceedings.
629.8 Despite those appointments at the time of the events complained of there remained a lack of experience of hardware and software applications within the FSR team.

630. There was no dispute that:

630.1 the Brexit referendum result had an immediate adverse impact on the Respondent.
630.2 Mr Watson genuinely perceived the effects of Brexit would have further adverse impacts on the Respondent's profitability.

631. The Claimant ultimately accepted in evidence that the restructure which took place was in response to the Brexit referendum outcome and perceived adverse impacts.

632. Against that background we conclude that it would be remarkable indeed if Mr Watson, who had previous involvement in making appointments to address the lack of experience within the FSR team, did not give consideration during the restructure to the impact of the shift to digital and need for experience and knowledge of hardware, software, consumables and substrates.

633. This was an issue which the Respondent and Mr Watson were seeking to address in any event. The decreasing profitability brought about by the shift to digital printing was put in even sharper focus by the Brexit referendum outcome and perceived difficulties it would cause to the Respondent's profitability.

634. There was an ongoing lack of FSR experience in this regard. Consideration of a management role that could assist the FSR team in changing and challenging market conditions would be rational.

635. A job description was produced for the UK AFSM role (p.213). This was produced following discussion with Mr Scammell. Against "job skills" the job description sets out a requirement for "comprehensive industry knowledge (AFT/HW/SW)". As Mr Harris correctly argued in submissions, there was no suggestion that the job description was fabricated for the purposes of litigation.

636. Further, it was not contended that Mr Scammell had not been performing the role as described since his appointment. This indicates that the requirements in respect of hardware, software and aftermarkets were genuine requirements for the role.

637. On the face of it the matters which Mr Watson said he considered in respect of hardware etc during the disputed "abstract" process were implemented.

638. There was a genuine need to cater for the migration to digital printing. This was less profitable for the Respondent. That became even more challenging given perceived financial implications of Brexit where profitability would be reduced generally. Recent hires had experience of digital printing prior to the events complained of. This reflects the focus which Mr Watson and the Respondent were putting on hardware and software experience. Such experience was recorded in the job description for the UK AFSM role which was not alleged to be fabricated. These attributes were genuinely required of the post holder going forward.

639. We consider these matters to be powerful evidence that Mr Watson would and did consider a role which could support the external sales team in respect of hardware, software and consumables in a changing market.

640. Another criterion which Mr Watson said he had in mind was the ability to leverage supplier relationships in order to maximise growth opportunities.

640.1 Given the dynamic of the shift to digital and Brexit with decreasing profit margins, on its face this appears a rational criterion to consider in respect of the UK AFSM role. It reflects a need to make more of the opportunities and relationships which existed.

640.2 In submissions Mr Harris referred us to the job description for Ms McGeown's role pre restructure, UK Aftermarket Manager (p.213a). The responsibilities

include “take the lead role in developing and managing supplier & service based partnerships”.

640.3 We accept Mr Harris’ submission that this and the UK AFSM role are not the same overall, but that this criterion is present in both job descriptions does demonstrate the need to develop and leverage supplier relationships when managing the Aftermarket team.

641. We also bear in mind the Claimant’s evidence when she accepted that when Mr Watson was dealing with the restructure he did so with the Respondent’s best interests in mind, and that had he thought the Claimant was the correct person for the role then he would have appointed her. We had the benefit of assessing Mr Watson’s evidence during searching cross examination by Ms Palmer. The Claimant nevertheless knows Mr Watson far better than us. This evidence is not consistent with the proposition that Mr Watson deliberately designed a role with qualities not required by the Respondent in order to avoid the inconvenience of the Claimant’s maternity leave.

642. The Claimant relied on the absence of documentation recording Mr Watson’s thought processes during which he said he considered what restructure was necessary, what roles should be created, and assessed potential appointees against the needs of the roles.

643. In submissions Ms Palmer argued that one would expect some documentation from such a process, and / or evidence of some consideration by Mr Watson as to how he would deal with matters in the event he considered the Claimant to be the best candidate for the UK AFSM role.

644. Over the course of the hearing we formed a clear impression that the Respondent is run, and Mr Watson operates, in an informal way.

645. In respect of previous appointments:

645.1 There was no dispute that in the past Mr Watson had made a number of appointments to roles without any form of competitive process.

645.2 In those circumstances vacant roles are not advertised.

645.3 Such appointments include but are not limited to the Claimant and Mr Scammell’s appointments to previous roles before the matters complained of here.

645.4 These appointments were made following “ballpark” assessments of employees who could fill these roles by Mr Watson.

645.5 There was no hint of complaint by anyone about past appointments being made in this way, whether at the time or during these proceedings. We conclude that individuals accepted that Mr Watson operated in this way.

646. Although we heard about these past appointments there was no exploration of the extent to which the decision making involved was documented. There was no material to indicate that they were well documented, so that the UK AFSM restructure was handled differently, which might shed light on whether there had been unfavourable treatment and the reason why. Nor was there material to show an absence of documentation during past appointments, which might tend to show that the absence on this occasion was not unusual.

647. In respect of the appointments post restructure no commission structure had been put in writing for the individuals to be appointed, but Mr Watson hoped that they would accept the roles without sight of these. This is despite clear evidence given to us of the importance of commission and understanding how OTE are to be achieved for employees in this field and roles of this nature. It again reflects an informality of approach.

648. Ms Meredith, who deals with the Respondent's HR issues, has no human resources training. The same is true of Ms Nelson.

649. The content of what Mr Watson said he did during the disputed abstract process was not particularly complex.

649.1 That he considered the impact of Brexit on the Respondent was not in dispute. We infer nothing adverse from the failure to document his thought processes in this respect

649.2 It was not disputed that Mr Watson drew on his past experiences of restructure following the 2008 financial crisis. Nor was it disputed that he decided the best strategy would be (a) operational cost reduction; (b) more focus on operational and sales excellence; (c) focus on high growth markets such as textiles and interiors. In cross examination the Claimant stated that there had always been a focus on sales excellence, but we find a need for further emphasis on that standard in the circumstances was part of Mr Watson's thinking. Nothing turns on a failure to document this.

649.3 Of issues relating to the migration to digital printing and that the sales team was relatively inexperienced, it is not in dispute that these were issues for the Respondent and well known to Mr Watson prior to events giving rise to the restructure. We infer nothing adverse from the failure to document this.

649.4 He envisaged three roles as a result of the restructure. He considered in broad terms what the key elements of the roles would be.

649.5 Of the UK AFSM the key elements of the role were the focus on supporting the sales team especially regarding the challenges of the shift to digital printing, and leveraging supplier relationships. Broadly he considered there was a need for the external sales team to be managed by someone with in depth knowledge of digital printing including hardware, software, the media and the like.

649.6 The key elements of the UK Operations Manager position were driving down costs and gaining efficiencies by adapting internal processes.

649.7 Of the textiles role there was no challenge to Mrs Watson being the only candidate given the degree of specialism involved, and also her 25 years of experience and knowledge of hardware and materials. This latter element also reinforces the emphasis said to have been placed on hardware / software experience by Mr Watson as being genuine.

649.8 That he considered three individuals for the UK AFSM role. He assessed them by reference to their sales figures, hardware / software experience, and experience of building supplier relationships.

650. The nature of what is said was being considered is not such that it would inevitably have to be documented in order to properly deal with the contemplated restructure. We will return to the alleged comparative assessment of the Claimant and Mr Scammell.

651. When matters were committed to writing in Mr Watson's PowerPoint Brexit plan, what emerged was not a complex or detailed report or set of proposals.

651.1 The impact of Brexit was summarised in 9 bullet points (p.206).
651.2 The strategy to be adopted was summarised in a single slide (p.207). It expressly refers to increased field support for KAMs and FSRs, and building a compelling product portfolio in equipment and aftermarkets. Both of these are relevant to the creation of the UK AFSM role and is consistent with what Mr Watson said he was considering but did not document.
651.3 The focus of the proposed three new roles were set out in a slide each in a series of bullet points.
651.4 No fuller job descriptions had been prepared for the roles at this point.
651.5 Of the UK AFSM role the focus included providing support and mentoring to KAMs and FSRs in the field, and utilising hardware and software know how to help the team be more effective.

652. Mr Scammell's name is recorded against the UK AFSM role. The focus also states "continue to manage large key account customers". At this point Mr Scammell is clearly the intended appointee, although he himself did not know about the proposals at this point.

653. Other employers or individuals might well have documented more of their thought processes during the period of the disputed abstract consideration. We must assess matters by reference to the circumstances of this case. Mr Watson operates with a degree of informality. Even if the view is held that a failure to document matters was unreasonable, we would not conclude that there had been unlawful discrimination on that basis alone.

654. In her submissions Ms Palmer argued that it made no sense that hardware experience should be essential to the UK AFSM role. In part that submission was based on there being existing hardware sales and aftermarkets teams, but this was not explored in evidence. A further limb of the submission was based on Ms McGeown having been Aftermarket Manager for three years without hardware experience. In cross examination Ms McGeown dealt with this argument. It had not been problematic pre-Brexit but post Brexit the need to sell machinery to customers and secure consumables sales was more relevant. Mr Watson gave evidence that at the time of Ms McGeown's appointment it was not problematic because the market was 70% cut vinyl, whereas there was a very different situation at the time of the restructure. There is no dispute in that regard and we accepted that evidence.

655. A further strand of this submission related to Mr Watson's evidence that if Ms McGeown had refused the Operations Manager role she would remain the Aftermarket Field Manager. The restructure was contingent on Ms McGeown accepting the new post. Ms Palmer challenged this on the basis that she did not have the required hardware experience. Mr Watson replied that he would have needed to find a way of moving some of her responsibilities, and she would need to be in the field. We find that Mr Watson gave no real thought to what would happen if Ms McGeown declined the Operations Manager role, and given that she accepted it he had no need to.

656. A similar submission was made based on Mr Watson's evidence that he gave no thought to what would happen if the Claimant was the best person for the UK AFSM

role given she was on maternity leave. Mr Watson said it was irrelevant whether she was available and gave the example relating to Suzanne Carus. We place no reliance on the evidence relating to Ms Carus. There was no evidence that Mr Watson's approach to her took place in anything like the circumstances prevailing in June / July 2016 when there was a need to act quickly. Mr Watson's evidence continued that he assessed the three candidates for the roles and the Claimant was quickly discarded based on skills and experience to support field sales against changing market pressures. Mr Watson did not give thought to what would happen *if* the Claimant was the best candidate for the role because that situation did not arise.

657. Ms Palmer took a point relating to Mr Watson's evidence that Mr Scammell "edged it".

657.1 During the course of Mr Watson's oral evidence there was some confusion as to what was meant by "Ben edged it". This evidence was given after Mr Watson referred to a comparative assessment of Mr Scammell and Lisa Kirkbride for the UK AFSM role.

657.2 Initially it appeared that Mr Watson's evidence was that Mr Scammell edged it over the Claimant, which was at odds with his evidence that the Claimant was quickly discarded due to lack of hardware experience. As a result the Tribunal made enquiries of Mr Watson in this respect. Mr Watson apologised for his use of language but said that Mr Scammell did not "edge it" over the Claimant, and that had that been the case then there would have been a competitive process.

657.3 This arose from the Tribunal seeking to understand Mr Watson's evidence. Having regard to his witness statement and oral evidence it is clear that Mr Watson's account is that Mr Scammell edged it over Ms Kirkbride because there were inconsistencies in her sales performance and she had no experience of developing key supplier relationships. His evidence remained that there was a significant distance between the Claimant and Mr Scammell.

657.4 We infer nothing adverse from these exchanges. They arose from the Tribunal seeking to clarify matters, and there was no inconsistency in Mr Watson's evidence. His apology for his use of language was not necessary.

658. Otherwise, as for the assessment against the criteria which Mr Watson said he had in mind, there is no material in this respect which shed light on whether the abstract process took place or not.

659. After careful consideration of the evidence and submissions, and scrutiny of the evidence which Mr Watson gave under detailed cross examination, we accept Mr Watson's evidence that the abstract process did take place as he says.

660. Mr Watson considered what was required in the restructure and conceived three roles with their key responsibilities. That process was not influenced by the Claimant's pregnancy or maternity, but by the needs of the respondent going forward.

Allegation (c)

Discrimination

661. Mr Watson did not fail to consider or properly consider the Claimant for the UK AFSM role. The unfavourable treatment alleged is not made out. This allegation fails on the facts.

662. Mr Watson did consider the Claimant against the key elements of the UK AFSM role.

663. As for the assessment against sales figures, having regard to the sales figures before us (p.112b) both the Claimant and Mr Scammell performed well and above targets. Objectively Mr Scammell performed better than the Claimant. We accept that Mr Watson formed that view during his assessment. On the material before us the respective sales figures are within the sort of "ballpark" that might give rise to a competitive process, but there were other factors considered by Mr Watson.

664. In respect of hardware and software experience we accept that Mr Watson formed the view that there was a significant distance between the Claimant and Mr Scammell in terms of knowledge and experience. This was acknowledged by the way in which the Claimant's case was put, alleging that criteria were chosen which favoured Mr Scammell and not the Claimant.

665. Further:

665.1 Mr Scammell had been employed as a hardware field sales representative when he returned to the Respondent in 2009. When he was promoted to KAM in 2013 his role had an emphasis on selling hardware and software. That emphasis continued.
665.2 In contrast the Claimant accepted that she had no experience of selling hardware or software whatsoever.
665.3 There was no challenge to Mr Scammell having significantly greater hardware / software experience than the Claimant.
665.4 Knowledge and experience in this area was clearly an important element of the restructure, not simply in terms of individual roles but the shift in the marketplace generally.

666. As for supplier relationships and the ability to leverage these:

666.1 There was no dispute that Mr Scammell had built the ORAFOL supplier business to in excess of £1.6M in a year.
666.2 There was no dispute that Mr Scammell developed the Respondent's first and only £1m account, with AST.
666.3 There was no dispute these matters demonstrated an ability to build and nurture key relationships.
666.4 The Claimant did manage large key accounts such as City Signs, but in evidence could not point to similar examples regarding her own ability to leverage supplier relationships. The Claimant gave evidence generally that she believed she could have achieved the same as Mr Scammell had she had the ORAFOL account, but that is not what took place.

667. We accept that Mr Watson considered these matters and concluded that there was a significant distance in terms of ability to demonstrate experience of leveraging supplier relationships. Objectively assessed we form the same view.

668. In terms of length of experience it was not correct that Mr Scammell was the first ever KAM to be appointed. This emerged during cross examination of Mr Watson and he properly amended his evidence in that regard. Mr Scammell amended his witness statement in this respect prior to giving evidence. This we accept was a genuine error and we have not drawn any adverse inferences in this regard.

669. Otherwise it was correct that Mr Scammell had one years' more experience than the Claimant in the position of KAM, and she accepted this.

670. Viewed in the round we accept that Mr Watson considered there to be a significant distance between the Claimant and Mr Scammell. He reached that view quickly but after considering the candidates appropriately against the relevant criteria. We are satisfied that the Claimant's pregnancy or maternity did not influence Mr Watson's assessment of the candidates. His assessment was based on his knowledge of their respective skills and experience. The Claimant was "quickly discarded" from the assessment process thereafter.

671. Another aspect of allegation (c) is that Mr Watson failed to involve the Claimant in any consideration of her for the UK AFSM role, i.e. hold a competitive process.

672. There was no dispute that the practice at the Respondent is to hold a competitive process only when the potential appointees are on a ballpark assessment equally well qualified. Otherwise Mr Watson would appoint who he sees fit in the absence of any such process. This approach has not previously been complained of.

673. We accept that Mr Watson formed the view that the Claimant and Mr Scammell were not within such a ballpark and that a competitive process was not required. We are satisfied that the protected characteristics in issue had no influence on Mr Watson's view.

674. Objectively we consider that the Claimant and Mr Scammell's skills and experience for the role were not sufficiently close to give rise to a competitive process.

675. The Claimant's own evidence was that the Respondent could generally appoint individuals to roles without a competitive process if potential appointees were not within the same ballpark.

676. In these circumstances we conclude that the unfavourable treatment alleged is not made out. The Claimant and Mr Scammell were not in the same ballpark on Mr Watson's assessment. Objectively assessed we form the same view.

677. The Claimant's pregnancy or maternity had no influence on the failure to involve her in a competitive process. There was no competitive process because Mr Watson considered that the Claimant was not in the same ballpark in terms of skills and experience.

Constructive dismissal

678. Viewing matters from the perspective of a reasonable person in the position of the Claimant we conclude that there is no material capable of contributing to breach of the implied term. There was consideration of the Claimant against the criteria Mr Watson

had in mind. There was a significant distance between the skills and experience of the Claimant and Mr Scammell. Consistent with Mr Watson's previous practice no competitive process was followed as a result.

679. There was reasonable or proper cause for the lack of competitive process in the circumstances.

Complaint (d)

Discrimination

680. There is considerable overlap between complaint (d) and complaint (c).

681. For the reasons given above we find that the Claimant was considered for the role.

682. Further, this allegation is put on the premise that the Claimant and Mr Scammell were equally experienced to perform the UK AFSM role. For the reasons given above we find that Mr Watson concluded otherwise, and that there was significant distance between them in terms of relevant skills and experience. The Claimant's pregnancy or maternity had no influence on his assessment and conclusion. Objectively assessed we conclude that the Claimant and Mr Scammell were not equally experienced to perform the UK AFSM role.

683. The unfavourable treatment alleged has not been established. We are satisfied that the protected characteristics in issue had no material influence.

Constructive dismissal

684. In light of the distance between the Claimant and Mr Scammell when assessed against the criteria for the role we do not consider that Mr Scammell's appointment is capable of contributing to a breach of trust and confidence. The Claimant accepted she had no experience whatsoever of selling hardware. Mr Scammell had long specialised in that field. The Claimant was considered for the role.

685. For these reasons and what we say above in respect of allegation (c), allegation (d) fails.

Allegation (e)

Discrimination

686. Allegation (e) complains of a failure to inform the Claimant of the proposed new role / restructure / opportunities *before* the appointment was made on the day the Claimant gave birth (3.8.2016).

687. Insofar as this complaint refers to "opportunities", for the reasons we give above there was no "opportunity" in the sense of a role the Claimant could apply for nor any competitive process to miss. There was no unfavourable treatment. The Claimant's pregnancy or maternity had no influence on her not being told of any "opportunity" before 3.8.2016.

688. As for not informing the Claimant about the new role or restructure, it was only after Mr Watson determined who he wished to appoint to the roles that the prospective appointees were themselves informed. Otherwise only Mr Watson, Ms Meredith and Mr Larson knew of the restructure.

689. There is no evidence that Lisa Kirkbride was aware of the restructure. She was not involved in any competitive process.

690. On 22.7.2016 Ms McGeown emailed a number of employees in respect of the forthcoming sales meeting scheduled for 3-4.8.2016. There was no reference to any restructure. Employees were simply informed that Mr Watson would give a business overview. This was sent to the Claimant's work and not personal email account. On 3.8.2016 by email the Respondent's staff were advised of the restructure and appointees.

691. There was no unfavourable treatment of the Claimant in not informing her of the new role or restructure before 3.8.2016. Rather we consider this allegation to be a complaint that the Claimant was not treated more favourably than the other employees, namely those in the organisation who were not appointed and also did not know of the new role or restructure. Applying **Williams** an individual may be said to be treated unfavourably if they are not in as good a position as others generally would be. That the Claimant did not receive advance notice does not constitute unfavourable treatment in our view.

692. Even had we considered that the failure to inform did amount to unfavourable treatment, it is clear that the failure to inform was not because of the Claimant's pregnancy or maternity.

693. We accepted Ms McGeown's evidence that she did not inform the Claimant of these matters because the restructure and cost savings involved affected other individuals. There were redundancies. We accept Ms McGeown formed the view that this information was sensitive and that all employees should be informed at the same time. Until then the information was to be kept confidential. That was the reason why the Claimant was not informed of the new role or restructure before the appointment was made on 3.8.2016. The Claimant's pregnancy or maternity had no influence on this decision or failure.

694. We also refer to our conclusions above as to the nature of the relationship between the Claimant and Ms McGeown, and that generally the Claimant's pregnancy or maternity had no influence on the earlier allegations of unfavourable treatment addressed to Ms McGeown.

695. In her written submissions (para.11) Ms Palmer sought to reformulate allegations (c) to (f) and encapsulate them in three limbs. The third was "having appointed Mr Scammell, failing to inform C in a timely manner".

696. Mr Harris took issue with the reformulation because this would give rise to an allegation of a failure to inform beyond 3.8.2016. This was not the allegation as pleaded, and he urged us not to go beyond the complaints as they were phrased.

697. No application to amend the complaints was made on behalf of the Claimant. We have proceeded to deal with the complaints as pleaded, and not as reformulated in Ms Palmer's submissions.

698. We did consider the period from 3.8.2016 and what communication there was with the Claimant as part of our assessment of the evidence generally. Had the allegation related to the period of 3.8.2016 onwards then we would have held that there was no unlawful discrimination.

699. We found that the Claimant did ask Ms McGeown to inform her of significant workplace developments to her personal email account. The only specifics discussed were updates on new products or changes of products. Otherwise there was no particular discussion as to what precisely the Claimant wished or was to be kept informed of. A change in line manager is a significant development.

700. In her handover to Mr Scammell regarding contact with the Claimant Ms McGeown did not mention the Claimant's preference for contact on her personal email. Instead they discussed contacting the Claimant by telephone a reasonable period after the birth of her child. Mr Scammell was to make the call.

701. After the restructure announcement was made on 3.8.2016, Ms McGeown learned that the Claimant was in labour. How the Claimant was faring during child birth clearly dominated Ms McGeown's thinking. Ms McGeown thought it would be very impersonal to simply send an email or have an off the cuff conversation in any event given the nature of their relationship. We accept that evidence in light of the findings we make as to the nature of their relationship.

702. Ms McGeown's failure to advise the Claimant of the restructure by email to her personal account was not because of maternity of pregnancy. It was because she wished to have a telephone conversation to discuss matters given the nature of their relationship, and on 3.8.2016 she learned that the Claimant was in labour. She considered it was inappropriate to contact her by telephone for obvious reasons.

703. Thereafter the reason why there was a delay informing the Claimant to her personal account was that the Claimant had given birth, and a decision had been taken for Mr Scammell to contact the Claimant a reasonable period after the birth.

704. The Claimant's pregnancy or maternity was not the reason why she was not informed of the restructure on 3.8.2016, or the period thereafter.

705. During submissions we were referred to the case of **Visa International Service Association v Paul [2004] IRLR 42**. In our view there are material distinctions between the circumstances of Paul and this case in respect of allegations (c) to (f).

706. Unlike Mrs Paul's case there was no vacancy to inform of. This was because of Mr Watson's practice of appointing or offering roles to individuals without a competitive process unless there were a number of candidates who on a ballpark analysis were broadly equally qualified. Prior to the events giving rise to these proceedings there were no complaints about this practice being used. The Claimant and Mr Scammell, as well as others, had been promoted in this way previously.

707. For reasons given above we found that the Claimant's pregnancy or maternity had no influence on the roles envisaged during the restructure and comparative assessment of candidates.

708. Further, the failure to inform in Mrs Paul's case was a deliberate act because of pregnancy. In the instant case the failure to inform of the restructure or that the Claimant was being considered was because of the practice of appointing and not holding a competitive process unless individuals were in the same ballpark. We accepted Mr Watson's evidence that he considered the Claimant and Mr Scammell were not in the same ballpark. Objectively we reached the same conclusion. That the Claimant was not informed of this was not influenced by the protected characteristics of pregnancy or maternity, another distinguishing feature.

709. In light of our findings we do not accept Ms Palmer's submission that the circumstances were a deliberate contrivance to prevent the Claimant from "applying".

710. We can readily understand why the Tribunal in Paul came to the conclusions which it did on the facts found. However we consider that the circumstances before us are materially different. We do not consider the Paul case to be determinative of whether the Claimant has been unfairly constructively dismissed or subjected to unlawful discrimination for these reasons. We have approached the question of constructive dismissal by reference the authorities outlined in our summary of the relevant law, particularly those of **Woods** and **Malik**.

711. In the circumstances that the Claimant was not advised of the restructure or new role prior to the appointment being made on 3.8.2016 does not affect trust and confidence. That would involve notification being given prior to all other employees being informed generally. The announcement involved redundancies, and there was reasonable and proper cause to advise all employees at the same time.

712. Otherwise there were no "opportunities" for the reasons already stated, and we refer to our conclusions above in that respect.

713. If we were dealing with an employer who tended to advertise positions, invite applications and conduct a competitive process with applicants as a matter of course then our assessment would be different, but we must deal with the circumstances of this particular case. To do otherwise would be to assess matters against an artificial standard.

714. We do not demur from the principle that a woman on maternity leave should be informed of vacancies of which she would otherwise be unaware while on maternity leave.

Allegation (f)

715. There is again considerable overlap between this and the foregoing allegations. For the above reasons we find that the Claimant was considered for the role. There was therefore no unfavourable treatment or material capable of contributing to breach of the implied term. This aspect of allegation (f) fails on the facts.

716. Further for the reasons given above Mr Watson's consideration of the Claimant and failure to appoint her was not influenced by the protected characteristics in issue.

717. What remains of the allegation is that the role was not advertised. In the premises we do not consider that this amounts to unfavourable treatment, nor that it contributes to breach of the implied term.

718. The role was not advertised because Mr Watson followed his usual practice of considering potential candidates for the roles based on a ballpark assessment. Upon such assessment the candidates were not broadly equally qualified. As such there was no competitive process nor advertisement of the role internally. It is a long standing practice about which no complaint had previously been made. The protected characteristics in issue had no influence upon this at all.

719. That the Claimant considers there should have been a departure from the established practice and advertisement even when there are broadly speaking no equally qualified candidates is not consistent with the proper approach to establishing unfavourable treatment in **Williams**. It cannot be said that the Claimant is not in as good a position as others generally would be.

720. Continuation of the usual practice to appointments and advertisements which had previously been accepted by all does not contribute to breach of the implied term. There was proper cause for there to be no advertisement given the established practice and assessment of the respective candidates. We repeat what we say above regarding **Visa v Paul**.

Complaints g and h

721. Allegations (g) and (h) are similar complaints.

722. Allegation (g) complains of failing to note the claimant's ten year anniversary in the way that it did with other staff and the claimant herself before her maternity. Allegation (h) relates to the Claimant's birthday.

723. This complaint inevitably involves some consideration of how the Claimant was treated in comparison with other staff to determine whether there has been unfavourable treatment, but we do not lose sight of the correct approach under section 18 to consider whether there has been unfavourable treatment and if so whether this was because of the protected characteristics in issue. No comparison in terms of less favourable treatment is required.

724. As recorded in our findings of fact the Respondent places considerable emphasis on significant anniversaries of service. This commences with celebration at ten years of service, and then at five yearly intervals thereafter.

725. On 11.9.2016 the Claimant achieved ten years' service with the Respondent. She had not previously had a significant workplace anniversary to be celebrated in the customary way. The allegation that there was a failure to note the Claimant's service anniversary in the way that it did it with "the Claimant herself before her maternity" is therefore erroneous.

726. As for how the Respondent notes such significant anniversaries with other staff, there was no material dispute between the parties as to the established practice. A card and gift are acquired by Ms Nelson and provided to the employee's manager for a presentation to be made. For employees based at the Bristol headquarters the presentation would take place in the office. This does not always take place on the day of the event to be celebrated. The intention is to "make a fuss" of the employee at planned sales meetings or other events such as parties where the employee's colleagues can be present. This can result in delays between the event and the celebration. For employees working in the field it is rare for the event to be celebrated on the day itself.

727. The delay involved could be a period of months. Mr Watson gave evidence which we accept that for employees in the field the delay could be as much as two to three months.

728. There was no evidence that employees were customarily given their cards and gifts on the day of the event to be celebrated. Nor was there evidence that employees were ordinarily notified that there was a card or gift waiting for them if the celebration could not happen on the day of the event to be marked.

729. By the time of her ten years' service anniversary the Claimant had been on maternity leave for a period of almost two months. On 19.8.2016 Mr Scammell emailed the Claimant in respect of a forthcoming sales meeting to be held 14.9.2016 and the spa day (p.198). On 24.8.2016 the Claimant informed Mr Scammell that she would not be attending as she did not wish to stay away from her baby (p.215). The Claimant had already told Ms McGeown this, but Ms McGeown had not communicated this to Mr Scammell.

730. A card and gift were obtained for the Claimant. The Claimant was not told of this at the time. On 8.11.2016 the Claimant raised a number of complaints with Mr Scammell including that her anniversary had been overlooked. It was then that she was told about the card and gift waiting for her. A presentation was made at the sales meeting on 8.12.2016 in front of the Claimant's colleagues, almost three months after the event to be celebrated.

731. On the facts the way in which the Claimant's anniversary was noted was not different to the way the anniversaries of other staff are noted. A card and gift were obtained in and presented to her at a sales meeting in front of her colleagues. As with other colleagues the Claimant was not told on or about the day of the event that a card and gift had been acquired. There was a delay between the event happening and the presentation, as is the case with other employees who are in the field and not present in the office, until there was a suitable occasion to celebrate with colleagues. As there was no difference in respect of how the anniversary was noted, we conclude that there has been no unfavourable treatment.

732. In her evidence the Claimant complained that Mr Scammell could have told her that there was a gift waiting for her and not enough was done to let her know that there was a gift waiting for her. Mr Scammell accepted that he could have told the Claimant earlier. In her written submissions at paras.33-34 Ms Palmer took the point that Mr Scammell did not think to tell the Claimant about the cards and gifts when he wished her a happy birthday by text or ask how she would like to receive them.

733. That however is not what ordinarily happens when there are anniversaries to be noted, and there is no unfavourable treatment in the circumstances given the way in which this allegation is phrased. There was no complaint before us that the failure to advise that there was a card and gift waiting, or to ascertain how the Claimant wished to receive them, was an act of discrimination.

734. Further, it appeared to us that this line of approach in the Claimant's case amounted to a complaint that there was a failure to treat the Claimant more favourably than other staff in the way it marked her anniversary. This it appeared to us involved an approach which Langstaff P cautioned against in **Williams** when considering whether treatment was unfavourable. Instead we considered objectively whether the Claimant was not in as good a position as others generally would be.

735. We considered the reason why the Claimant's anniversary was marked as it was. The Claimant's case was that had she not been on maternity leave then she would have been in the office, and she would have received her gifts at the September sales meeting.

736. Having regard to the relevant law, this is in our view an erroneous approach to the question of whether treatment is "because of" the protected characteristic. The fact that a Claimant's protected characteristic is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. It is necessary to show that the reason or grounds for the treatment - whether conscious or subconscious - must be pregnancy or absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under section 18.

737. As above the Respondent's practice for celebration was not in dispute. That the Claimant happened to be on maternity leave at the time of the events to be celebrated should not be equated with the reason why there was a delay in celebrating them. The gifts and card had been acquired for her.

738. The reason why there was a delay in the celebration was that there was not an opportunity to do so in the customary way in front of the Claimant's colleagues until December 2016. We are completely satisfied by Mr Scammell's explanation in these terms. That the Claimant was on maternity leave forms part of the context but not the reason why. We accept that he had in mind a presentation at the sales meeting in September 2016, but this was not possible as the Claimant did not wish to attend at that time because she wished to spend time with her baby. This is not to be equated with a failure to mark the anniversary then because of pregnancy or maternity leave. There was no opportunity to make the presentation in the customary way until the sales meeting commencing 8.12.2016. The presentation was then made in accordance with the usual practice in front of her colleagues.

739. We do note that Mr Scammell did congratulate the Claimant by text message on her birthday, as did Ms McGeown. This in our view is inconsistent with pregnancy or maternity leave having a material influence on how her anniversaries were celebrated. Rather, it reflects the nature of the relationship they had with the Claimant and

reinforces that the established practice was the reason why the timing of the presentation was as it was.

740. We do note that the Claimant complained about being overlooked in November 2016. Contrary to the Claimant's evidence we accept that a gift had been bought for her at this point, as Mr Scammell explained to her on the occasion of her complaint.

741. In submissions there was something of an evolution in the Claimant's case from that which was pleaded to a complaint that not enough had been done to advise the Claimant that there were gifts waiting for her and the Claimant felt forgotten as a result. This is not the complaint before us. That Mr Scammell accepted that he could have told the Claimant about the gifts earlier than he did does not affect our assessment of the reason why.

Complaint (h)

742. This complaint was essentially the same as complaint (g), save that the Claimant had previously had her birthday celebrated, whereas the long service anniversary in September 2016 was the first to be celebrated for the Claimant.

743. For essentially the same reasons as with complaint (g) we find that there was no unfavourable treatment.

744. The Claimant's birthday fell on 24.10.2016. On the day she received congratulatory messages from Ms McGeown and Mr Scammell. The next occasion for a presentation to be made in accordance with the Respondent's established practice was the December sales meeting. The presentation was made at that meeting in front of the Claimant's colleagues.

745. In the circumstances we do not consider this amounts to unfavourable treatment. The event was noted in the same way that the Respondent does with other staff.

746. As with complaint (g), the delay in celebration was not because of the protected characteristics in issue, but because there was not an opportunity to do so in the customary way in front of the Claimant's colleagues until December 2016. The protected characteristics had no material influence. The Claimant's absence on maternity leave was context for the delayed presentation, but not the reason why.

747. We refer to but do not repeat our analysis in respect of complaint (g).

Constructive dismissal

748. We turn to assess these allegations through the lens of constructive dismissal. We do not consider that allegations (g) and / or (h) contribute to breach of the implied term.

748.1 There was a clear custom for celebration which the Claimant was also aware of.

748.2 This custom inevitably involved some delay in making presentations in front of colleagues. This was well known to employees through experience of the undisputed custom, even if through involvement in celebrating the anniversary or birthday of a colleague rather than their own.

748.3 We find that there was reasonable cause to attach importance to work anniversaries and birthdays. It was part of the culture which the Respondent sought to foster that a "fuss" was made of employees in these circumstances.
748.4 There was reasonable cause to delay such celebrations to occasions when colleagues could be present, such as sales meetings or parties.
748.5 The Claimant's anniversary and birthday were celebrated.
748.6 There was good reason for not celebrating the Claimant's milestones at the September 2016 sales meeting, because she did not wish to attend.
748.7 The next occasion for so celebrating before us was the December 2016 sales meeting, at which the celebration happened. That appears to be the first occasion for the celebration of the Claimant's birthday at a sales meeting.
748.8 The delay in respect of the birthday was not on the facts unusual or of such nature as to affect trust and confidence.
748.9 The delay in respect of the anniversary was longer, but still within the range of delay that happens for employees who are field based and not in the office. The period of delay was affected by the Claimant's inability to attend the September 2016 meeting.
748.10 There was good reason to wait for an appropriate time to celebrate in accordance with the custom.

Allegation (i)

749. This complaint was withdrawn and dismissed.

750. Contrary to Mr Harris' submission we do not consider that pursuit of the allegation undermined the Claimant's credibility as a witness.

751. The nature of the complaint was that the Claimant did not receive correspondence that her car was unroadworthy. The Claimant's evidence was that had she not been on maternity leave then she would have been in the office and this correspondence would have been delivered to her by hand. In our view that would reflect the wrong approach to "the reason why". Pregnancy and maternity were the context for the Claimant's absence, but not the reason why she did not receive the correspondence. The withdrawal was appropriate.

Allegation (j)

752. This allegation was that the Respondent refused to allow the Claimant to work from home in preparation for the staff training that she was undertaking even though the Claimant was home based and had worked in this manner before.

Discrimination

Because of

753. As for the reason why the Claimant was required to prepare in the office, this was clearly documented in Mr Scammell's emails to the Claimant. The Respondent's oral evidence was consistent with that contemporaneous documentation.

754. The Claimant's case was that she had always previously prepared at home when delivering training, and the only difference on this occasion was that she was on maternity leave. We have been cautious not to confuse the context with the reason why. The Claimant inevitably had to be on maternity leave in order have the opportunity of a KIT day in the first place. That the Respondent sought to have the preparation done at the office while the Claimant was on maternity leave is not an answer to "the reason why" question.

755. On the first occasion that Mr Scammell said that the preparation had to be completed in the office, he did so because he believed this would maximise the Claimant's contact with her colleagues, and that this would be the best use of a KIT day. We are entirely satisfied that this is why Mr Scammell told the Claimant that she would need to prepare in the office.

756. On the second occasion that he explained this to the Claimant he did so because he had been advised by Ms Meredith that in order to have contact with colleagues and keep up with company changes KIT days can only be done in the office. This accorded with Mr Scammell's earlier view. Ms Meredith was the point of contact for HR concerns. Mr Scammell conveyed that advice to the Claimant. The Claimant's pregnancy or maternity had no material influence on the requirement to prepare from the office, although they were inevitable preconditions for discussions about KIT days.

757. We are satisfied that Ms Meredith did not give the advice she did because of the Claimant's pregnancy or maternity leave. She did so because of her strong view that preparation must be conducted in the office in order for KIT days to be as effective as possible.

758. Ms Meredith was of that view even though she did not know what was involved in the Claimant's preparatory work, or whether it would even involve contact with colleagues. She maintained in evidence that the KIT day should take place in the office even if the Claimant would have the same contact with colleagues by phone when preparing from home. Her evidence was consistent with her earlier advice to Mr Scammell and we accepted it. The reason why she advised as she did was to maximise what she considered to be the purpose of a KIT day.

Unfavourable treatment

759. In his submissions Mr Harris argued that KIT days are a statutory construct under Regulation 12A of the Maternity & Parental Leave Regulations 1999. He relied upon regulation 12A(6) to contend that there was no right conferred on an employer to require that any work be carried out during maternity leave, nor any right on an employee to work during the period. On that basis it was argued that the employer can decide whether to offer a KIT day at all, and if so what type of activity is involved. If the employee does not wish to undertake the work then she does not have to agree to it. On that basis Mr Harris argued that there could be no unfavourable treatment in the circumstances because there was no right to a KIT day in the first place.

760. Mr Harris further argued that an employee's belief that the work could be undertaken in a manner more advantageous to her does not render an employer's insistence on a KIT day on particular terms unfavourable treatment.

761. At first blush there was material pointing towards unfavourable treatment of the Claimant. She held a senior role. She was respected for her skills in delivering training. This is clear from Ms McGeown's previous discussion with the Claimant about undertaking project work and training, including training Leah. It is also clear from Mr Scammell's email which expressly records that the Claimant was "really good" at delivering training. The Claimant was previously based in the field, and otherwise worked from home. When delivering training previously she had habitually been trusted and allowed to prepare for that training at home. She was not required to attend the office to prepare. Following discussion with Mr Scammell the Claimant agreed to deliver training as a KIT day.

762. The preparation consisted of the Claimant updating her own notes and refreshing her memory on competitors and the price book. It was necessary to undertake the preparation work in order to properly deliver the training. The preparation did not necessarily require contact with colleagues. In the event that the Claimant did have a need to speak to colleagues that could have been done by telephone

763. What prevented the training from happening was a requirement that the Claimant must prepare in the office. The Claimant could not obtain childcare for the relevant date. Another factor was that the Claimant considered that the noise of the office environment made it difficult to prepare. This latter factor has no connection to pregnancy or maternity.

764. However we accept Mr Harris' submission that we must consider regulation 12A(6) when determining whether the Claimant has been treated unfavourably.

765. Whether there is to be a KIT day, what it is to involve, and where this is to take place are matters for discussion and agreement between employer and employee. An employer has no right to require the employee to work, and the employee has no right to work. In this instance the employer and employee were unable to reach agreement as to where the preparation work should take place.

766. No pressure was applied to the Claimant to prepare from the office. There was nothing unfavourable about the language used by Mr Scammell in his communication with the Claimant. Although the training envisaged as a KIT day did not take place, the Claimant agreed that she had not lost anything as a result of the inability to reach agreement on where the training should take place. She retained her KIT days for future use.

767. That any contact with colleagues needed for preparation could take place by telephone as opposed to in person does not alter the position that KIT days are a matter for agreement between employer and employee. Mr Scammell and Ms Meredith genuinely held the view that it would be beneficial to prepare in the office, that this would involve incidental contact with colleagues beyond what was necessary to prepare, and this furthered the objectives of a KIT day.

768. Further to that we accept Mr Harris' submissions in respect of the test for unfavourable treatment. That the Claimant considered that it would be more advantageous for her to complete the training at home rather than the workplace does not result in unfavourable treatment.

769. In the premises we find that the Claimant was not treated unfavourably by refusing to allow her to prepare from home.

Constructive dismissal

770. We do not consider that this allegation contributes to breach of the implied term because of the need for agreement to be reached between employer and employee as to what is to be undertaken in respect of KIT days, and that consensus could not be reached on this occasion.

771. We also find that there was reasonable or proper cause to require the preparation to be conducted in the office. This was to allow the Claimant to keep in touch with colleagues and the organisation following her absence on maternity leave.

Allegation (k)

772. This allegation is of failure to inform the Claimant of other vacancies. The one vacancy in issue before us was the role of e-business co-ordinator to which Mr Pirie was appointed in November 2016.

Unfavourable treatment

773. The role to which Mr Pirie was appointed was not advertised internally or externally.

774. There was no vacancy in the Visa v Paul sense to inform the Claimant or others about. There was no advertisement of the role.

775. Mr Pirie was appointed as a result of Mr Watson's usual practice when making appointments or offering roles. There was no competitive process because on a ballpark approach there were no candidates who were broadly speaking equally qualified.

776. On the facts there was a significant distance between Mr Pirie and the Claimant in terms of skills and experience. Mr Pirie had knowledge of the Hybris online stores platform. The Claimant did not know what was meant by Hybris, but was aware that an online store had been created. Unlike Mr Pirie the Claimant did not have a qualification in journalism.

777. The Claimant was aware of Mr Watson's practice in making appointments and the lack of advertisement of roles that inevitably results if there are no equally qualified candidates. She had previously been appointed and promoted in this way.

778. In our view the unfavourable treatment which the Claimant complains of is that Mr Watson continued with his customary approach, but that he should have adapted this during her maternity leave to inform her of "vacancies" or other roles which he was considering appointing to during her maternity leave.

779. In the circumstances of this particular employer and the way in which appointments are considered, we view this as a complaint of a failure to treat the Claimant more favourably than other employees. It involves departing from the ballpark assessment practice involved in offering roles and making appointments. This does not amount to

unfavourable treatment. It cannot be said that the Claimant was not in as good a position as others generally would be, by failing to raise the role with her.

780. Further, we were not persuaded by the Claimant's evidence that the e-business role was one which could have been used to ease her back into her NAM role. The e-business role was permanent and not temporary.

781. At the material time there was no indication from the Claimant to anyone at the Respondent that she wished to consider easing herself back to work by undertaking a different role. As at the Respondent's Christmas party in December 2016 the Claimant's intention was to return to work in her NAM role.

782. We recognise, as the EAT held in Paul v Visa, that the loss of an illusory opportunity may still seriously damage trust and confidence. However in the instant case there was no opportunity at all, whether for the Claimant or anyone other than Mr Pirie, given the customary approach taken to appointments. Nor was the failure to inform the Claimant a deliberate act.

783. If Mr Watson had contrary to his settled practice ensured that the role was advertised and subsequently the Claimant was informed of it, then in our view the Claimant would not have applied. The Claimant herself confirmed that she would not necessarily have put herself forward for the role. Given that the role required for example knowledge of Hybris and the Claimant did not know what that was, we do not consider that she would have pursued it and applied.

Because of

784. It is clear to us that the Claimant's pregnancy or maternity had no influence whatsoever on the failure to inform her of the e-business co-ordinator "vacancy".

785. There was no vacancy advertised. Looking at matters more broadly in terms of a failure to inform that the post was being appointed to, Mr Scammell did not know about the e-business role or that Mr Watson was considering making an appointment to it. This is why Mr Scammell did not inform the Claimant of any matters in respect of the role.

786. As for Mr Watson he considered who to appoint to the role in accordance with his usual practice. He considered Mr Pirie to be the clear candidate and no other person was considered by him. In accordance with his usual approach there was no requirement for a competitive process. No other person was informed of the role as a result.

787. Mr Watson was not involved in discussing the Claimant's preferences for what sort of information she wished to have communicated to her during maternity leave, nor was he responsible for communicating with the Claimant. He had no indication that the Claimant wished to return in anything other than her existing role.

788. He had no indication of a need to adapt his usual approach of offering or appointing to roles without a competitive process unless potential appointees were equally qualified on a ballpark basis.

789. The Claimant's pregnancy or maternity had no influence on his handling of these matters, and specifically on any failure to communicate with the Claimant regarding the e-business role.

Constructive dismissal

790. We do not consider that that there was any damage to trust and confidence in the circumstances. There was no vacancy. The usual practice to appointments was followed. The Claimant would not have applied if aware of the role.

Allegation (l)

791. This allegation complained that there had been a failure to provide the Claimant with updates of changes within the business to enable her to keep in touch. The specific contention argued before us was that the Claimant was led to believe that her customers would be taken care of by a designated person during her absence ready for her return to work.

792. The issue on the evidence was that there was a change in the covering employee dealing with City Signs, and that the Claimant was not informed of this. She learned of the change from the owner of City Signs.

Unfavourable treatment

793. An element of the dispute before us related to the Claimant's evidence that she believed arrangements for who was to cover in her absence were "set in stone". On the material before us there was no evidence of discussion capable of giving rise to such an agreement. In any event it was not disputed that there was a good operational reason for the change in covering employee. Mr Callen was originally allocated to City Signs, even though the customer was outside his territory. He was struggling to look after the account with time. A decision was taken during the Claimant's maternity leave to allocate the account to Mr Anstey. Mr Anstey was an experienced employee and the account fell within his territory.

794. While there was good reason for the change of covering employee, the unfavourable treatment alleged is that the Claimant was not informed of the change.

795. The failure to tell the Claimant that there had been a change of covering employee is unfavourable treatment in our view. The Claimant had invested considerable effort in identifying the appropriate covering employee. While there was generally a geographical approach that was not so in all cases. City Signs were one such example. City Signs were a significant account for the Claimant and for the Respondent generally. The allocation of this covering employee was the product of discussion between the Claimant, Ms McGeown and Mr Watson. Handover meetings were arranged to ensure the customer was content with the arrangements prior to the Claimant commencing maternity leave. All wished to ensure that the customer was content and well served, with the understanding that the Claimant would again inherit the account on her return from leave.

796. The Claimant had asked to be kept updated in respect of significant workplace developments to her personal email address. As recorded in our findings of fact she

had asked Ms McGeown to be updated on significant work issues, and specifically discussed product updates. Further, on 18.8.2016, she reminded Mr Scammell that she had asked Ms McGeown to keep her updated of significant work issues to her personal email account. Mr Scammell was clear that the Claimant had declined having her personal email added to the group email address, but that she wished to get specific work updates and meeting information to her personal email, and she would pick them up as and when.

797. The change of covering employee for City Signs was a significant matter. It was a significant customer of the Claimant. The employee originally allocated to cover was the product of discussion and was one of those exceptionally allocated on a non-geographical basis. The Claimant was not advised of the change by email to her personal account. Nor was she advised of this by other means in a timely fashion. The failure to inform her, particularly on her personal email, constitutes unfavourable treatment.

Because of

798. The Claimant had asked Mr Scammell to update her on significant work developments by email to her personal account. That he did not do so despite that request called for an explanation.

799. Mr Scammell gave evidence that he had been keeping a log of things to discuss with the Claimant. This log had not been disclosed, and nor was it referenced in his witness statement. The notes had been destroyed. Initially we had concerns as to this evidence. However during the course of re-examination we were taken back to an email dated 13.1.2017 from Mr Scammell to the Claimant (p.242). In it Mr Scammell told the Claimant that there had been developments with the customers Avery and 3M which would be shared with the team later that week. He added “I’ll keep notes and talk it through with you after”. The Claimant replied “that’s great, thank you”.

800. We were satisfied that Mr Scammell had indeed been keeping notes of matters to update the Claimant about.

801. The Claimant’s reply at p.242 also indicated that she was content to have information provided orally. She did not reply insisting that the information be emailed to her personal account.

802. On close consideration of Mr Scammell’s evidence we are satisfied that the Claimant’s pregnancy or maternity are not the reason why he failed to inform her of the change to the covering employee for City Signs.

803. Ms McGeown’s failure to convey to Mr Scammell that the Claimant wished to be updated on significant work matters was an error on her part, and not influenced by the protected characteristics in issue. It is no foundation for us to infer or conclude that Mr Scammell’s mental processes regarding this allegation were materially influenced by the protected characteristics.

804. On 18.8.2016 the Claimant asked Mr Scammell to inform her of significant work developments to her personal email. Precisely what constituted significant was not discussed.

805. In evidence Mr Scammell accepted that he had no clear idea of what the Claimant's communication preferences were, or at least what sort of information she wished to be provided with. We accept that he took the view at the time to update the Claimant generally at KIT days, rather than always doing so at the time of any developments themselves. Mr Scammell was cross examined on this basis and accepted these propositions.

806. As can be seen at p.242 he did also give the Claimant some updates at the time of events or alluded to future discussion to update her about matters. This is not consistent with Mr Scammell failing to inform the Claimant about matters because of maternity or pregnancy.

807. Mr Scammell accepted that the approach he took was based on his preference or understanding of what was significant and had to be conveyed.

808. In considering the reason why we have also had regard to other exchanges, in which it is clear that Mr Scammell was communicating in friendly terms with the Claimant, and chatting about the Claimant's baby (p.196, p.202). We can also see that Mr Scammell spoke of phoning the Claimant, and while she sometimes explained that this was difficult due to childcare (p.202), the Claimant was nevertheless amenable to having a phone conversation (p.203). They also discussed meeting in person.

809. Viewing matters in the round we conclude that the reason why Mr Scammell did not inform the Claimant of the change to covering employee was because he did not properly understand the Claimant's preferences, or the sort of information she required, and took the view he would update her generally at KIT days. His failure to inform of the change of covering employee was not because of pregnancy or maternity. The Claimant happened to be on maternity leave at the time of the failure.

Constructive dismissal

810. A reasonable person in the position of the Claimant would consider that trust and confidence was damaged by the failure to inform of the change in covering employee at the time. We refer to what we say above regarding the importance of this particular client, and the considerable effort invested by the Claimant into the allocation. It was a significant matter. The Claimant had asked to be updated about such matters.

811. The Claimant was entitled to consider that she should have been informed of it, and that trust and confidence was damaged by the failure.

812. Mr Scammell's explanation that he misunderstood the Claimant's preferences is no reasonable or proper cause for the failure to inform the Claimant. Nor does it assist the Respondent that Mr Scammell intended to inform the Claimant at some later KIT day. The Claimant did not know this. There was no proper cause to delay providing this significant information.

813. We find that this failure did some damage, but not serious damage, to the relationship of trust and confidence.

Allegation (m)

Discrimination

Unfavourable treatment

814. The failure to inform the Claimant of the change to the kicker constitutes unfavourable treatment.

815. The kicker, or end of quarter bonus scheme, accounts for approximately 7% of quarterly on target earnings. There is no change to OTE with a change to the kicker, but the potential to earn OTE is affected.

816. Mr Watson was clear in his evidence that the Claimant was entitled to know of the change of kicker at the same time as other employees. He agreed that a change in kicker could affect OTE, and that there was a need to inform so that employees could modify their behaviour in order to achieve OTE.

817. Mr Watson was also clear that the commission structure formed part of the Claimant's terms and conditions of employment. There was a copy of the Claimant's contract of employment in the bundle but this related to a previous role as opposed to her NAM position. We relied on what Mr Watson said in evidence.

818. Mr Watson also agreed that the Claimant was entitled to know of a change of kicker even if she was not earning commission at the material time. He agreed that this should happen to allow the Claimant to understand her earning potential, or to weigh up offers of alternative work. He agreed that it would have been easy to inform the Claimant of the change by email.

819. The information which was not conveyed related to the important issue of remuneration. On the material before us, and Mr Watson's clear evidence, we conclude that the failure amounts to unfavourable treatment.

820. It is irrelevant that the Claimant was not earning at the material time. She was considering returning to work in March 2017. The kicker may or may not have changed before then. She was entitled to be informed of the change at the same time as other employees. It amounted to a significant workplace development.

Because of

821. It was Mr Scammell who failed to inform the Claimant of the change to the kicker. Mr Scammell did not invite the Claimant to the weekly conference call advising of the change to the kicker.

822. We refer to our conclusions in respect of the previous allegation and that Mr Scammell's failure was not influenced by pregnancy or maternity. Mr Scammell's explanation for not informing her of the kicker change at the time was that the Claimant was not earning commission at that point, and that he would have advised the Claimant about this change on her return from maternity leave.

823. The Claimant was not earning commission because she was on maternity leave. We must not confuse the reason why the Claimant was not earning with the reason why she was not informed of the change.

824. On close consideration of the evidence for essentially the same reasons as in the previous allegation we are satisfied that that Mr Scammell did not fail to convey the change because of the Claimant's pregnancy or maternity leave. The real reason for the failure was Mr Scammell's view that the Claimant was not affected by the change because she was not earning commission at the time. That the Claimant was not earning because she was on maternity leave is the context but not the reason why there was a failure to inform her.

Constructive dismissal

825. Assessing matters from the perspective of a reasonable person in the Claimant's position, the failure to inform her of the change to the kicker did damage the trust and confidence which she was entitled to have in the Respondent.

826. The Claimant's view that she was entitled to this information at the same time as everyone else is reasonable. Mr Watson gave the same evidence. It matters not whether the Claimant was earning at the time. The change had a bearing on the ability to earn OTE, and overall earning potential. The Claimant was intending to return to work in approximately two months. That Mr Scammell thought the Claimant would be returning in July 2017 is irrelevant. It was not disputed that the Claimant would, if working, earn less following the change to the kicker. The Claimant was entitled to form the view that she should know of the change even if she was not earning commission at the time.

827. In this respect there is some similarity between the circumstances of this allegation and the case of Visa v Paul. In Paul it was irrelevant that the opportunity to apply for the vacancy was illusory. What destroyed trust was the failure to inform of a vacancy that Mrs Paul had no prospect of being shortlisted for. In the instant case the Claimant asked to be informed of significant workplace developments and the change to the kicker constitutes such a development. It is irrelevant that the Claimant was not earning commission at the material time. What matters is that she was not so informed when she should have been. It is this which damaged the trust which the Claimant was entitled to have in the Respondent. The Claimant and Mr Watson were at one on the entitlement to know of the change at the same time as others, whether earning or not, and even if only for the purpose of weighing up earning potential and considering alternative employment.

828. There was no reasonable or proper cause for the failure to advise the Claimant of the change at the same time as other employees. All that was required was for an email to be forwarded to her.

829. We accept that this was another matter which Mr Scammell intended to tell the Claimant about in due course at a KIT day or some other meeting. That is no proper explanation for the failure to inform her at the same time as other employees. It was a conscious decision not to tell her about the change to the kicker at the time others were informed.

Constructive dismissal generally

830. We must assess matters from the viewpoint of a reasonable person in the Claimant's position. The Claimant was unaware of any communication breakdown between Mrs McGeown and Mr Scammell.

831. The allegations relating to constructive dismissal on which the Claimant has succeeded are (l) and (m).

832. We consider that allegation (l) did some damage to the relationship of trust and confidence, but in and of itself did not seriously damage or destroy the implied term.

833. We consider the effect of allegation (m) to be more serious. It was another failure to inform, compounding the failure to inform in allegation (l). We also consider the effect of allegation (m) in itself on the implied term to be more significant than the failure in (l). The latter failure related to remuneration and earning potential.

834. We consider that in and of itself the failure to inform the Claimant of the kicker change did serious damage to the relationship of trust and confidence.

835. Considering (l) and (m) together the failures to inform did serious damage to the relationship of trust and confidence.

836. Applying **Malik** the Respondent breached the implied term of mutual trust and confidence.

837. Any such breach is fundamental, entitling the Claimant to resign at once.

838. We do not consider that the Claimant has waived or affirmed the breach. It was only in January 2017 that the Claimant learned she had not been informed of changes relating to the covering employee. The last and most significant event took place only days before her resignation.

839. The breach must be an effective cause of the resignation, it need not be the only cause.

840. We have considered the evidence relating to the Claimant's contact with Mr Wood. It is clear that she was discussing an alternative role with him prior to the events which we find constitute the fundamental breach.

841. The Claimant's own evidence was that there were a number of factors operating on her decision to resign: the offer of employment from All Signs and financial stability; that she did not wish to report to Mr Scammell; the change to the kicker; and the earlier events which she had complained of. Many of these earlier allegations have not been made out in these proceedings. It was put to the Claimant that the final straw (as explained above in respect of submissions) prompting her to resign was the change to the kicker. The Claimant replied that she did resign based on that and what had happened before.

842. Viewing matters in the round, while there were a number of matters weighing on the Claimant's decision to resign, we are satisfied that the change to the kicker was an

effective cause of the resignation. The same is true of the failure to inform of the change in covering employee.

843. We conclude that the Claimant did resign in response to the fundamental breach.

844. No potentially fair reason for dismissal was advanced on behalf the Respondent. It appears to us that the most realistic candidate would be "some other substantial reason". There is no such reason in our assessment. There being no fair reason for the dismissal, we find that the Claimant was unfairly constructively dismissed.

845. Had there been a fair reason for the dismissal we would have gone on to consider whether the dismissal was fair in the circumstances of the case. We would have concluded that the dismissal was unfair on that basis. A reasonable employer would have complied with the Claimant's requests for significant work information to be sent to her personal email account. A reasonable employer would have provided her with this information at the time of the events in question. A reasonable employer would have advised of the change in covering employee when the decision was made, and in respect of the change of kicker at the same time as it communicated the change to other employees. The failure to do so falls outside the band of reasonable responses. The dismissal is unfair.

Section 99 ERA 1996

846. Section 99 of ERA 1996 provides that an employee is unfairly dismissed if the reason or principal reason is prescribed or if the dismissal takes place in prescribed circumstances. Section 99(3) ERA provides that the reason or set of circumstances must relate to (among other matters)

846.1 pregnancy;
846.2 maternity;
846.3 ordinary, compulsory or additional maternity leave

847. The reasons prescribed (by MAPLE SI 1999/3312 regulation 20(3)) are any connected with (a) the pregnancy of the employee or (d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave

848. As for the meaning of connected with, in **Clayton v Vigers [1990] IRLR 177** the EAT held that, in accordance with the decision of the House of Lords in **Brown v Stockton-on-Tees Borough Council [1988] IRLR 263**, the words "any other reason connected with her pregnancy" (in predecessor legislation) ought to be read widely so as to give full effect to the mischief at which the statute was aimed. Accordingly, the submission that the words must mean "causally connected with" her pregnancy rather than "associated with" could not be accepted.

849. In **Clayton** the EAT held that the background to the employer's decision to dismiss was pregnancy or after effects of it (inability to find replacement cover) and this was part of the reason for dismissal.

850. Connected with is not to be construed in the same manner as "because of". It is sufficient if the dismissal is associated with pregnancy or maternity.

851. The Claimant was employed for more than two years and is not required to prove that the principal reason for dismissal was connected with pregnancy or maternity. Sufficient evidence has been adduced to raise the issue as to whether the dismissal is connected with a prescribed reason. No fair reason has been established by the Respondent.

852. We find that the principal reason for dismissal is connected with maternity because:

852.1 The Claimant requested to be informed of significant workplace developments to her personal email while on maternity leave, to allow her to keep in touch with changes in the business.
852.2 She was not informed of certain significant workplace developments while on maternity leave. This is why the Claimant resigned.
852.3 Mr Scammell, who was responsible for providing such updates, did not inform the Claimant of matters at the time of events themselves. Instead he took the view that he would inform at a point in the future, at a later KIT day or something of that sort – a further connection with maternity.
852.4 In respect of the kicker, the Claimant was not told of the change because she was not earning at commission at the time. She was not earning because she was on maternity leave. That she was not earning is connected to maternity. That she was not told of the change to the kicker is connected to maternity.
852.5 Mr Scammell formed the view he would tell the Claimant about the change when she returned from maternity leave, another connection

853. We find that the Claimant was automatically unfairly dismissed for a reason connected with maternity leave.

Allegations (o) onwards

Protected acts

854. The Claimant's grievance, provided by hand to Ms Meredith on 10.2.2017, satisfies sections 27(2)(c) and (d) of the Equality Act. The Claimant did a protected act.

855. The Claimant's email of 8.3.2017 complaining of "blatant sex discrimination" satisfies sections 27(2)(c) and (d) of the Equality Act. The Claimant did a protected act. Reference to the email being sent on 7.3.2017 in the issues list is erroneous. Nothing turns on that, all parties were aware of the document relied on as a protected act.

856. No issue of knowledge arises. All those alleged to have victimised the Claimant had knowledge of a (if not both) protected act(s) prior to the detriments they are said to have subjected the Claimant to.

857. In the first complaint of victimisation Ms Meredith had knowledge of the protected act moments before it is alleged she subjected the Claimant to detriment.

858. No issues arose under section 27(3) Equality Act.

Allegation (o) "defined career path"

Detriment

859. The detriment alleged is that Ms Meredith said to the Claimant:

> "It's not a legal requirement for us to advertise a role; if we feel someone is right for a role we can give it to them, especially if they have a clear career path defined for them, as [Mr Scammell] has"

860. This was said in the context of the Claimant complaining about Mr Scammell's appointment, that she did not have the opportunity to apply, and that this amounted to discrimination.

861. We must assess the question of detriment from the point of view of the Claimant. A detriment exists if a reasonable person would or might take the view that Ms Meredith's conduct had in all the circumstances been to her detriment.

862. We conclude that the Claimant was subjected to detriment.

862.1 She was told that Mr Scammell was appointed because he had a defined career path.
862.2 Further the Claimant did not have such a "defined career path" as described by Ms Meredith.
862.3 It was entirely reasonable for her to conclude that she had been treated differently and adversely in comparison with Mr Scammell in respect of the existence of a career path.
862.4 This clearly conveyed to the Claimant that the appointment was not made entirely on merit, and that preferential treatment of Mr Scammell had resulted in his appointment.
862.5 The Claimant otherwise had no knowledge of how Mr Scammell had come to be appointed as UK AFSM. She was entitled to rely on what Ms Meredith said to her, and that this was the reason for Mr Scammell's appointment.
862.6 On that basis alone we conclude that the Claimant was subjected to detriment.

863. Further, it was not correct for Ms Meredith to say that Mr Scammell was appointed because of any defined career path. Ms Meredith had no involvement in the appointment of Mr Scammell, and nor was she aware of Mr Watson's reasons for appointing Mr Scammell. Ms Meredith told the Claimant something which she could not have known or believed to be correct. Although the Claimant was not aware of this at the time, we consider that this also amounts to a detriment. It is also relevant to the "reason why" question.

Burden of proof

864. We consider that the burden of proof passes in respect of the victimisation complaint. There is a prima facie case that the Claimant was subjected to detriment because of the protected act:

864.1 The detriment arises very soon after Ms Meredith became aware of the protected act.
864.2 Ms Meredith clearly appreciated that the Claimant was complaining of discrimination in respect of Mr Scammell's appointment.

864.3 The Claimant's evidence was that the words which constitute the detriment were used to justify Mr Scammell's appointment and the Claimant not having the opportunity to apply for the UK AFSM role.

864.4 Viewed in context the detriment does indeed appear to be an effort by Ms Meredith to justify Mr Scammell's appointment and the Claimant having no opportunity to apply.

864.5 In what was intended to be an exit interview there was discussion of the Claimant's grievances. Ms Meredith went beyond understanding the Claimant's concerns and sought to explain a number of them away as being non-discriminatory. We do not say that we expect Ms Meredith to be silent in such a meeting, but on the basis of our findings and the notes of the meeting it is clear to us that Ms Meredith was pushing back on the complaints made. This was despite Ms Meredith telling the Claimant that she believed what the Claimant was saying.

865. Further, there was clear evidence from Mr Watson that the Respondent does not operate something called a "defined career path" nor use that expression. There was evidence that the Respondent's end of year review process was akin to a defined career path. Ms Meredith used the expression twice in discussion with the Claimant. It appears to be a deliberate choice of language as opposed to a slip of the tongue.

866. Additionally when using the words which constitute the detriment Ms Meredith said something which was not correct – Mr Scammell was not actually appointed because he had a defined career path. Ms Meredith had no involvement in the appointment of Mr Scammell, and nor was she aware of Mr Watson's reasons for appointing Mr Scammell. Ms Meredith told the Claimant something which she could not have known or believed to be correct.

867. There is a clear inference to be drawn from these factors that the protected act was operating on Ms Meredith's mind, causing her to say something which she did not know to be correct to justify the UK AFSM appointment.

868. Ms Meredith also asked the Claimant whether she was seeking compensation. This is another indicator that the protected act was operating on Ms Meredith's mind during the meeting. She was considering what the final destination of the discrimination complaints might be.

869. The protected act need not be the only reason for the detriment. It is sufficient if it had a material influence. It is not necessary for a person to consciously subject another to a detriment because of a protected act. It is sufficient if subconscious mental processes result in subjection to detriment because of the protected act.

870. There being a prima facie case that the Claimant was subjected to detriment because of the protected act, the burden fell on Ms Meredith to satisfy us, on balance, that the protected act had no material influence.

871. Ms Meredith failed to do so:

871.1 Ms Meredith's evidence was that she did not know why she would use the language. As a result Ms Meredith had obvious difficulty discharging the burden. There was no express positive case as to why she used the language.

871.2 There was no explanation of why Ms Meredith might seek to justify Mr Scammell's appointment on this basis even though she did not know the reason why he was appointed.

871.3 Ms Meredith gave evidence that she was taken by surprise at the 10.2.2017 meeting when the Claimant set out her concerns and provided her grievance letter. She said that she expected it to be a mere exit interview. That surprise could be, at least in part, an explanation for the words used.

871.4 We are not completely persuaded by the explanation that this was meant to be a mere exit interview and what unfolded was so surprising that Ms Meredith used the language she did. It is clear that Ms Meredith did have concerns as to the content of the Claimant's resignation letter beforehand. That was why the meeting was being held, to understand what were the matters that the Claimant said happened during pregnancy and maternity which left her clear she could not return to the Respondent. In response to questions from the Tribunal Ms Meredith said that she was "very concerned" when she read that section of the Claimant's resignation letter. There was some conflict in Ms Meredith's evidence in this respect which affected the credibility and cogency of her explanation.

871.5 We do accept that Ms Meredith was surprised to see the level of detail in the Claimant's grievance, but that is not in our view a complete explanation of why she used the language she did.

871.6 It does not explain why Ms Meredith said something which she did not actually know about i.e. the reasons for Mr Scammell's appointment.

871.7 Further, the expression was used twice. This appears to be a deliberate choice of language. That the Claimant's grievance was serious and detailed, and more so than Ms Meredith was anticipating, does not completely explain why the expression was used twice.

871.8 We have considered but reject Mr Harris' argument that Ms Meredith might have misspoken. Ms Meredith's use of language was consistent on two occasions. It was a considered choice of words and accurately recorded by Mrs Roberts.

872. Ms Meredith having failed to discharge the burden on her, we find that Ms Meredith subjected the Claimant to detriment because of the protected act. On appreciating that the Claimant was complaining of sex discrimination she very quickly sought to push back and advance a non-discriminatory reason for the UK AFSM issues, which reason she did not actually know to be correct. We do consider that to some extent Ms Meredith was taken aback in the circumstances given the seriousness of the complaints raised. However we conclude that the protected act did have a significant and material influence on Ms Meredith's actions. Her actions were conscious and deliberate.

Discrimination

873. This complaint falls within the protected period and the complaints of pregnancy / maternity discrimination are brought under section 18.

874. Viewed in an objective sense of what is adverse compared to that which is beneficial, to state that Mr Scammell was appointed due to a defined career path which the Claimant did not have amounts to unfavourable treatment.

Reason why

875. Ms Palmer argued that there was a prima facie case for pregnancy or maternity discrimination because a man had a defined career path whereas a female did not. We reject that argument. It is a difference of treatment and status which, without more, does not give rise to a prima facie case. In any event there was no discrete legal claim in that respect before us. What was required of the Claimant was to establish a prima facie case that Ms Meredith said what she did because of the Claimant's pregnancy or maternity. We did not consider that she did so. The matters which we refer to as passing the burden of proof in respect of victimisation do not amount to something more in the context of the pregnancy or maternity discrimination complaints.

876. The only other allegation pertaining to Ms Meredith related to the requirement to prepare in the office, and there was nothing in that regard which added to the instant complaint so as to give rise to a prima facie case. The Claimant happened to have been pregnant and taken maternity leave, and that was the context for the matters giving rise to the Claimant's grievances and the exchange on 10.2.2017. They were not the reason why Ms Meredith said what she did.

Allegation (p): failing to investigate or uphold the Claimant's grievance

877. The allegation of failure to investigate was limited to one matter - whether Ms Meredith made the defined career path comment. In evidence the Claimant accepted that Mr Watson did investigate this issue during the grievance hearing. This element of the complaint fails and is dismissed.

878. As for failing to uphold the Claimant's grievance, the grievance hearing took place on 27.2.2017, before the end of the protected period. The outcome letter was sent to her on 3.3.2017, after the protected period had ended. There was no clear evidence as to when Mr Watson decided not to uphold the Claimant's grievance. If this was before the end of the protected period then the complaint of pregnancy discrimination should be brought pursuant to s.18. If he decided not to uphold after the end of the protected period, then the complaint was to be brought as pregnancy discrimination via s.13 with no need for a comparator. Ultimately this posed no difficulties to our decision making. We are clear that failure to uphold the grievance constitutes less favourable or unfavourable treatment, or a detriment. The real issue is the reason why there was a failure to uphold, and the same approach applies to that question whichever claim is in issue.

Burden of proof: victimisation

879. We are mindful that Mr Watson dismissed grievance complaints of discrimination, and that we too have reached the conclusion that the Claimant was not discriminated against in these respects. That does not however dispose of the allegation of victimisation. It is still perfectly possible that the protected acts were a material influence on his rejection of the grievances. It is important to note that Mr Watson did not simply reject the discrimination complaints. He also denied that the company had acted unreasonably (p.318). This is important in our view.

880. By deciding to chair the grievance Mr Watson placed himself in an invidious position. The central complaint of the grievance related to Mr Watson's own decision making in appointing Mr Scammell. Mr Watson was clearly not an impartial or independent decision maker on that basis alone. Before us the central allegation was put on the basis that Mr Watson had no overt animus towards pregnant women or those on maternity leave. In the circumstances there was clearly scope for the protected characteristics to operate on his thinking regarding the restructure and appointment if only at a subconscious level. We dismissed the complaints relating to discrimination, but this serves to demonstrate just how difficult and challenging a position Mr Watson put himself in when chairing the grievance.

881. Mr Watson was obviously aware of the protected acts before dealing with the grievance. His evidence was that when he read the grievances which constitute the protected act he was taken aback by the range of issues.

882. There was ample material before us for the burden of proof to pass. In particular we were concerned by issues relating to:

882.1 The Claimant's complaint generally that she had not been kept informed of significant work developments by email to her personal account as she had requested.
882.2 The failure to inform the Claimant of the change to the kicker, that there had been a change in which employee was covering City Signs, and the change in who was line managing her.
882.3 That Mr Watson made a number of significant concessions during the grievance hearing, but no element of the grievance was upheld, and instead Mr Watson concluded that there had not even been unreasonable conduct on the Respondent's part.
882.4 Mr Watson's statement in the grievance outcome conclusions that there were learning points for the Respondent. By the time of the Tribunal hearing the evidence was clear that nothing had been considered or implemented in terms of learning points.

883. We deal with these and additional points in further detail.

884. In respect of the complaint that the Claimant had not been kept informed generally by contact on her personal email as requested:

884.1 The grievance meeting notes demonstrate on their face that Mr Watson attempted to sidestep the complaint of failing to keep the Claimant informed on her personal email account. There were specific complaints in this respect at points 8 and 24 of the Claimant's grievance.
884.2 While discussing the failure to inform the Claimant that Mr Scammell had become her line manager, Mr Watson cut in. This was not to clarify matters. Instead he was quick to emphasise that the Claimant retained her work laptop and phone.
884.3 The Claimant was confused by this and repeated her point that she had asked for communication on her personal email. Again Mr Watson did not engage with the point, and repeated that there was activity on the work account.
884.4 There was a clear impression conveyed to us that Mr Watson recognised that there had been a failure to comply with the Claimant's reasonable request

regarding contact. He was however determined to emphasise the work email access in order to put matters in the most favourable light for the Respondent. He did not engage with the complaint the Claimant made. We infer that this was because the Claimant had made a protected act complaining that this amounted to discrimination.

884.5 In the grievance outcome Mr Watson again did not engage with the Claimant's complaint regarding contact to her personal email. Instead he again sought to emphasise that the Claimant had kept her work laptop and had accessed her work email account. On that basis he wrote that the Claimant had all the tools necessary to maintain as much contact as she wanted to.

884.6 This is despite saying in the grievance conclusions on this point that "everyone is different and wants a different level of contact during their maternity period".

884.7 The Claimant had explained clearly to Mr Watson what her preferences were. There is no indication in the grievance minutes or outcome letter that Mr Watson had been told by Ms McGeown that the arrangement was for contact to be made to the Claimant's work account. There was no dispute that the Claimant's request to be kept informed by personal email had not been acted on, yet Mr Watson still concluded that the Respondent had not acted unreasonably.

884.8 We infer that this was because the Claimant made a protected act complaining of discrimination, and notwithstanding his significant concessions Mr Watson was unwilling to find unreasonable conduct because he believed this would compromise the Respondent's position in respect of those complaints.

885. In respect of the change of covering employee, of which the Claimant was not informed:

885.1 During the grievance hearing Mr Watson apologised for this and accepted that this could have been communicated better (p.287). It was a clear concession.

885.2 Mr Watson's grievance outcome omitted any reference to this particular complaint.

885.3 In oral evidence Mr Watson said he should have written that the Respondent should have sent information such as this to the Claimant's personal email.

885.4 We infer that Mr Watson avoided dealing with this complaint or even finding that it was unreasonable because the Claimant had complained of discrimination. Mr Watson was concerned that accepting unreasonable conduct would compromise the Respondent's position in respect of those complaints.

886. In respect of the change to the kicker of which the Claimant was not informed:

886.1 During the grievance hearing Mr Watson accepted that the Claimant "possibly" should have been told about it.

886.2 That was not reflected by the grievance outcome. That complaint was dismissed on the basis that the commission structure had not changed, even if the kicker had.

886.3 Mr Watson's oral evidence was in stark contrast to the grievance conclusion. He was clear that the Claimant should have been informed of this change at the same time as other employees, that it would have taken little effort to do so, and the Claimant was entitled to the information even if not earning

commission at the time. Commission formed part of the terms and conditions of employment and the kicker influenced commission.

886.4 Mr Watson conceded in evidence that he should have accepted the Claimant's grievance relating to the kicker.

886.5 This was another of the Claimant's complaints of discrimination and unreasonableness in her grievance.

886.6 We infer that Mr Watson avoided acknowledging even unreasonableness because the protected act alleged that this incident was discriminatory.

887. In her grievance the Claimant had stated that she hoped lessons would be learned. That language was adopted by Mr Watson in the grievance outcome letter. In respect of the complaint regarding handover and the Claimant being left with little work he wrote "there are lessons we can both learn here".

888. Reading this section in isolation, the point apparently being made is that the Claimant did not raise concerns about having little work, and when she did mention that the handover was nearing completion she volunteered to undertake discount work. Mr Watson wrote that the Respondent would try harder to ensure that no employee was left without meaningful work towards the end of their pregnancy. These are the respective lessons.

889. However, in his concluding remarks when rejecting every grievance complaint he wrote that he had identified learning points, as set out in his letter. These included complaints relating to handover during pregnancy, and also related to celebration of anniversaries and birthdays, and communication generally during maternity leave.

890. Mr Watson had also made concessions during the grievance hearing. As for the failure to mark the Claimant's anniversary, during the grievance hearing Mr Watson interrupted the Claimant to say "no argument". As for the failure to mark her birthday, during the grievance hearing Mr Watson asked the Claimant for suggestions as to how things could be improved for the future.

891. Despite the reference to lessons to be learned the evidence of the Respondent before us was clear - nothing had been learned. Since the grievance process there was no further consideration of these learning points or how they could be implemented. No learning points were implemented. Nothing had been acted on by the time of the Tribunal hearing.

892. In oral evidence Mr Watson accepted that it was a contradiction to have made the concessions resulting in the comment there were lessons for the Respondent to learn yet deny that the Respondent had acted unreasonably.

893. We infer that the Claimant's reference to learning lessons in her grievance had been adopted by Mr Watson when dismissing her complaints, and these were empty words designed to mollify or placate the Claimant when dismissing her grievance. This was so because the Claimant had made a protected act complaining of discrimination, and Mr Watson was sugar coating the rejection of the grievance even on the basis of unreasonable conduct.

894. There was a prima facie case that the protected act was a material influence on Mr Watson's rejection of the grievance, his failure to deal with certain complaints, and his

finding that the Respondent had not even acted unreasonably. He was unwilling to find even unreasonable conduct because the Claimant had made a protected act.

Burden of proof: discrimination

895. Insofar as this complaint was alleged to be because of pregnancy or maternity we do not consider that a prima facie case was established.

896. The Claimant's case was that Mr Watson did not have any particular overt hostility in respect of pregnant women or those on maternity in respect of the central allegation. We do not consider it realistic that the position would be different when Mr Watson was considering the grievance. There was no evidence before us to explain why there would be such a change in Mr Watson's attitude. Further, in evidence the Claimant accepted that Mr Watson did not reject the grievance due to these protected characteristics.

897. The same failures as described above are in issue, but we did not consider there to be material to indicate that pregnancy or maternity was the reason why the grievance was rejected.

Victimisation: Did Mr Watson discharge the burden?

898. Mr Watson did not discharge the burden on him.

899. Mr Watson accepted that he had made an unqualified apology at the grievance hearing in respect of the failure to inform of change of covering employee. He accepted that the complaint was not dealt with. In evidence his explanation was that he did not know why he failed to deal with the complaint in the grievance outcome. That is no cogent explanation in our view.

900. Part of his explanation in this regard was that in his conclusions he tried to write that he was aware that the Claimant was picking up material from her work account, and that he should have said that the Respondent should have sent more information to her personal account.

901. Even in this explanation Mr Watson continued to rely on the Claimant having access to her work account, which does not engage with the complaint made but rather seeks to side-step it. Ms McGeown had not told Mr Watson that she had no recollection of an agreement regarding personal email, or that the Claimant was content to receive all communication to her work account.

902. It is also notable that the explanation acknowledges that there had been a failure to communicate to the personal account, but still no such complaint was upheld, and the ultimate conclusion was that the Respondent had not acted unreasonably. There was also no explanation for why Mr Watson did not set out what he told us he should have written in his grievance outcome letter.

903. In respect of the failure to communicate the kicker change Mr Watson was emphatic in evidence that the Claimant should have been informed at the same time as others. Nevertheless he initially disputed that the complaint should have been upheld, his oral evidence being that the Claimant was not earning commission at the time. However

this was not the basis on which that grievance was rejected in the outcome letter. Ultimately Mr Watson accepted in evidence that the Claimant's complaint in this respect should have been upheld. This was not a cogent explanation for his failure to uphold this element of the grievance, if only on the basis of unreasonableness.

904. Against this background Mr Watson continued to insist that the Respondent had not acted unreasonably. Nevertheless he agreed that there was a contradiction between the concessions he made at the grievance hearing and that there were lessons to learn, versus his conclusion of no unreasonable conduct.

905. We accept that there may be distinctions to be drawn between acknowledging learning points and acceptance of unreasonable conduct. However Mr Watson made significant concessions in respect of complaints of failure to inform the Claimant or keep in touch. We do not believe that Mr Watson genuinely believed there was no unreasonable conduct by the Respondent when he wrote the outcome letter.

906. During the course of cross examination it was put to Mr Watson that he should have upheld the Claimant's grievance at least in part. His response was that he did not know he could partially uphold a grievance. We have considered this as a possible explanation for the failure to uphold, and do note that Ms Meredith who deals with HR matters and was present for the grievance hearing does not herself have training in HR matters. However we do not consider that the failure to uphold is entirely explained by a lack of understanding that the grievance could be upheld in part. Mr Watson broke the Claimant's complaints down into categories. Each and every one was rejected. Each and every one was considered not to involve unreasonable conduct by the Respondent. Mr Watson was never in the position where he might have upheld some categories of the Claimant's complaints but not others, so that there might ultimately be confusion as to whether the grievance would overall be upheld or only partially so. Viewed individually each category of complaint was found not to involve unreasonable conduct. Given the finding of no unreasonable conduct no issue arose as to whether the categories of complaint might individually be partially upheld.

907. We do consider that Mr Watson rejected complaints of discrimination because he believed the Claimant had not been discriminated against. However that does not explain the failure to even deal with certain elements of the grievance in the outcome, the acceptance that matters should have been upheld which were not, nor the conclusion that there had been no unreasonable conduct by the Respondent.

908. Mr Watson failed to discharge the burden on him. We are satisfied that the protected act had a significant influence on Mr Watson's failure to deal with certain complaints, failure to uphold them and the conclusion the Respondent had not acted unreasonably.

Conclusions on victimisation

909. We find that the Claimant was victimised in the following ways:

909.1 Failing to uphold the Claimant's complaint that she had not been informed of significant changes to her personal email account, including a change in who was line managing her.

909.2 The failure to uphold, and even give a conclusion on, the complaint of a failure to inform of change in covering employee.

909.3 The failure to uphold the complaint of a failure to inform of the change to the kicker.

909.4 The rejection of the grievance on the basis the Respondent had not acted unreasonably.

910. We consider that these matters were deliberate, and not the product of subconscious mental processes.

911. We add that the Claimant's grievance complaints regarding the restructure were not formulated in the same way as the pleaded case before us. They were not limited to telling her of the restructure or opportunities etc *before* 3.8.2016.

912. We assessed the impact of this conclusion on the other allegations, particularly allegations c to f. Our conclusions in respect of the central allegations remained the same. In the instant allegation Mr Watson was significantly influenced by the protected act. The circumstances are markedly different in respect of the central allegation, and we found Mr Watson to be credible in the evidence he gave regarding the restructure and appointments made. His explanation was consistent with undisputed matters which were material to the future direction of the Respondent following Brexit and the shift to digital media in the sector.

Allegation (q): the comment in the grievance letter that both parties could learn lessons

913. There is considerable overlap between this and the previous allegation. As Ms Palmer stated in submissions it is really just a facet of allegation (p).

914. We considered this statement when determining whether the burden passed in respect of allegation (p).

915. The detriment alleged is that the comment was made yet no aspect of the complaint was upheld, even on the basis of unreasonableness. This is in the context of Mr Watson having made concessions during the grievance hearing.

916. We find that this amounted to a detriment, and not an unjustified sense of grievance.

917. We refer to our reasoning and conclusions in respect of allegation (p) above. The comments in the grievance letter that there were lessons for the Respondent to learn were attempts to mollify or placate the Claimant when rejecting her grievance. The protected act was a material influence on the comments being made. No lessons were actually learned or implemented.

918. We have considered that the comment "both parties could learn lessons" was made in respect of the handover arrangements, when the Claimant ultimately volunteered to do discount work. Our conclusion in respect of that particular allegation was is that it was not discriminatory and nor did it contribute to breach of the implied term. We found that the arrangement was that the Claimant would drive handover, and that she did not until 13.6.2016 raise that her handover was almost complete so that she had capacity to take on alternative work instead.

919. At face value and read in isolation the comment "both parties could learn lessons" is, so far as it relates to the Claimant, making the point that the Claimant should have raised a lack of work sooner than she did.

920. However, the lessons which Mr Watson said the Respondent would learn in respect of handover were to ensure a more proactive approach by management, so that employees would not be left without meaningful work. No such lessons were learned or implemented. The words used were hollow words.

921. In light of our findings in respect of allegation (p) we find that the comment in issue in this allegation was influenced by the protected act. The later reference to lessons the Respondent (as opposed to both parties) would learn was so influenced. Consistent language was used in respect of the handover determination. We conclude that the protected act was a material influence on the words used in this allegation, if not the only reason why the words were used.

922. There was no prima facie case that the comment was made because of pregnancy or maternity. We refer to what we say in respect of allegation (p) generally.

923. Our provisional view is that this allegation adds little if anything to allegation (p).

Allegation (r)

924. Ms Meredith's denial that she said something which she did actually say satisfies the test for unfavourable treatment and detriment in our view. The comment was made during the protected period and the non-comparative approach under s.13 is not engaged.

925. Ms Meredith was present at the grievance as an "observer" despite being the subject of certain complaints. Both parties' notes of the meeting record a firm denial by Ms Meredith that she made the comment.

926. In the Claimant's notes (p.287) it is recorded that the Claimant's mother was explaining matters relating to poor communication with the Claimant during maternity leave. She was explaining the importance of seeing the cumulative effect of matters on the Claimant, then said "not least when [Ms Meredith] said at our last meeting that [Mr Scammell] has a 'defined career path', which was further clear sex discrimination".

927. "No I didn't" is Ms Meredith's recorded reply. Mrs Roberts produced her note of the 10.2.2017 meeting and contended that Ms Meredith said the word on more than one occasion. Ms Meredith's recorded reply is "No I didn't, I wouldn't use those words".

928. The Respondent's notes taken by Ms Nelson (p.291) state: "her mother said that [Ms Meredith] had said there was a career path mapped out for [Mr Scammell] of which [Ms Meredith] denied and I agree so her mother said she felt this was sex discrimination".

929. It is clear there was a firm denial by Ms Meredith during the grievance hearing. That contrasts with her evidence to us that she had no recollection of making such a comment. On the basis of the Respondent's notes Ms Nelson also firmly agreed with

Ms Meredith's denial. This again is in contrast with her evidence to us that she had no recollection of the language being used on 10.2.2017.

930. We concluded that Ms Meredith's use of the career path expression on 10.2.2017 amounted to victimisation. Following that meeting the Claimant complained of discrimination in respect of the comment.

931. At the time of the denial Ms Meredith did not suggest that she may have misspoken or been misheard. In any event we find she used the comment on two occasions and deliberately so on 10.2.2017.

932. We conclude that the protected acts were a material influence on Ms Meredith's denial. She was concerned that admitting the remark would constitute an admission to the allegation of discrimination. She denied making the comment because of this.

933. We do not consider that there is a prima facie case that Ms Meredith denied making the comment because of the protected characteristics of pregnancy or maternity. That the Claimant had previously been pregnant and had taken maternity leave at the time of the denial is not sufficient. It is context rather than material going to the reason why.

Allegation (s) failure to properly consider or uphold the grievance appeal

934. The Claimant accepted in evidence that her appeal was considered. That concession was made prior to Mr Jackson giving evidence. The complaint of a failure to properly consider the appeal was not withdrawn.

935. A failure to properly consider or to uphold the appeal is clearly capable of amounting to unfavourable treatment, less favourable treatment in the non-comparative sense, or a detriment.

Victimisation

Failure to properly consider

936. On Mr Jackson's own evidence he did not properly consider a key aspect of the Claimant's grievance, namely that there should have been communication at the time of the Claimant's ten year service anniversary to inform her that there was a gift waiting for her.

937. In his oral evidence Mr Jackson stated that he did not give this the slightest thought. He did not uphold the allegation.

938. The Claimant had made a protected act. There was a failure to consider this aspect of the grievance. The failure to properly consider amounts to a detriment. The existence of a protected act and a failure to consider is not sufficient to pass the burden without "something more".

939. Mr Jackson gave evidence on a number of occasions that he focussed on the key piece of the UK AFSM appointment but considered all matters. He said that he focussed on the key piece as agreed with the Claimant and Mrs Roberts.

940. We found Mr Jackson's evidence that he focussed on the "key piece" to be unsatisfactory.

941. As set out in our factual findings, we formed the view that he gave that evidence to avoid propositions that were put to him.

942. The propositions related to communication to the Claimant's personal email account, and the extent to which he considered other complaints.

943. Mr Jackson gave that response when the Tribunal sought clarity on the extent to which he considered other matters. There was no direct answer to our questions. We formed the view that this was deliberate.

944. Mr Jackson's evidence relating to "the key piece" as agreed with the Claimant was misleading and not factually accurate. At the appeal hearing it was agreed that the Claimant's complaints would be taken as read. All those points were therefore before Mr Jackson.

945. The Claimant did go on to highlight key aspects of her grievances. This was not limited to the UK AFSM role at all. The appeal hearing notes of the Claimant and Respondent both record several key points being highlighted orally. Among these was the Claimant's grievance that there should have been some earlier communication with her in respect of her service anniversary and the birthday, if only to let her know there was a card and gift waiting for her.

946. In his appeal conclusions Mr Jackson appeared to acknowledge the impact on the Claimant of the failure to communicate contemporaneously with her in respect of her anniversary and birthday. He apologised. In light of his oral evidence that he did "not give the slightest thought" to what she complained of, it is rather difficult to see the acknowledgment as genuine.

947. The appeal conclusions do not deal with the Claimant's complaint in this respect. Mr Jackson did not uphold the allegation on the basis he accepted there was a plan to mark the events in the future when the Claimant would attend the office.

948. We reject Mr Jackson's evidence that he properly considered all matters as being false. His own evidence is that he did not properly consider one of the key matters that the Claimant outlined orally, and her complaint that there should have been contemporaneous communication.

949. It was also false to state that that there was a key piece to focus on. There were several key pieces highlighted orally.

950. We consider that these matters go further than an assessment of Mr Jackson's credibility.

951. We do not infer victimisation from the failure to consider the grievance complaint itself. The authorities are clear that inferences are not to be drawn merely from unreasonable conduct. Mr Jackson's false explanation that he properly considered all matters is rejected. It was also false to say there was *a* key piece to focus on. We conclude that

this amounts to the "something more" required for the burden of proof to pass. We infer that the failure to properly consider was because of the protected act.

952. Mr Jackson did not discharge the burden of proof for the reasons given above. His own evidence was that he did not give a moment's thought to what the Claimant was complaining of in this allegation.

953. Mr Jackson victimised the Claimant by failing to properly consider her grievance appeal in this respect.

Failure to uphold

Burden of proof

954. The reference to there being lessons for the Respondent to learn, yet no complaint was upheld even in part, is significant.

955. We acknowledge there may be a distinction to be drawn between learning lessons and not upholding complaints.

956. During the appeal Mr Jackson accepted the apparent "dichotomy" between Mr Watson acknowledging lessons to learn and the concessions he made, yet no matters were upheld at grievance stage.

957. This statement was made after Mr Jackson had considered the notes of grievance hearing and grievance outcome, and the Claimant's appeal documentation.

958. There were fulsome apologies by Mr Watson, no arguments in respect of the anniversary and birthday complaints, yet all complaints were rejected and no unreasonable conduct found. Mr Jackson recognised the contradiction on the material before him.

959. Mr Jackson did not refer to any dichotomy in the outcome letter. However he does (p.344) turn to the Claimant's point in respect of learning lessons. Mr Jackson concludes that something has gone wrong because the Claimant had resigned, and it was appropriate to apologise and identify learnings. Mr Jackson stood by Mr Watson's acknowledgements of failings and lessons to be learned.

960. Mr Jackson did not find unreasonable conduct by the Respondent in any respect.

961. On the evidence the Respondent has done nothing to learn lessons since the time of the grievance process. There is no evidence of any contemplation or implementation of any lesson.

962. In his evidence Mr Jackson told us that he wrote that there were lessons to learn, even though he had nothing specific in mind at the time he wrote this.

963. The burden of proof passes:

963.1 Mr Jackson stood by the acknowledgements and concessions which Mr Watson made. Mr Jackson also acknowledged shortcomings by the

Respondent and recorded that there were lessons to learn. Nonetheless no element of the appeal was upheld, even on the basis of unreasonable conduct.

963.2 As for Mr Jackson's reference to lessons which the Respondent had to learn, he wrote those words despite having nothing specific in mind at all. This is so despite him standing by Mr Watson's earlier acknowledgements at grievance stage. The supposed lessons have not been contemplated or acted upon since the grievance process.

963.3 The words were hollow and disingenuous. We infer that reference was made to learning lessons in order to mollify or soft soap the Claimant when rejecting her complaints and finding that there had not even been unreasonable conduct on the Respondent's own findings.

964. We consider this to be "something more" in respect of the failure to uphold and pass the burden of proof.

965. Further and / or separately to this the burden of proof passes in respect of the failure to uphold the anniversary and birthday complaints because:

965.1 In the outcome on this appeal issue Mr Jackson did not engage with the Claimant's point that she should have been communicated with contemporaneously. This is despite it being a key matter highlighted orally during the appeal. We infer that this was avoidance.
965.2 Mr Jackson initially gave evidence that the Claimant was pregnant and so it would not have been appropriate to contact her.
965.3 He then changed his evidence when it was pointed out that she was not pregnant and was on maternity leave, and accepted that contacting her would not have been inappropriate.
965.4 We infer that Mr Jackson did not deal with and uphold the Claimant's complaint in this regard because of the complaint that it was discriminatory.

Was the burden discharged?

966. In his grievance investigation Mr Jackson spoke to Ms McGeown. She told him that she had no recollection of an agreement that the Claimant be kept updated to her personal email account. She told him that the Claimant was content to receive everything to her work email.

967. Mr Jackson and Ms McGeown were not challenged in cross examination in respect of what was said during the investigation, and whether Ms McGeown did indeed say what Mr Jackson recorded in the outcome letter. Although no notes were made of the investigation there was no suggestion that there was anything sinister about this.

968. We form the view that it would not be appropriate in the circumstances to doubt that Ms McGeown did give that explanation, or that Mr Jackson relied upon in when dealing with the appeal.

969. The language that Mr Jackson used in evidence was not entirely consistent with what is recorded in the grievance appeal outcome letter regarding Ms McGeown's recollection. Nevertheless in the absence of a challenge to Mr Jackson we consider it

would be inappropriate to doubt that Mr Jackson did rely on Ms McGeown's explanation when considering the appeal and whether it should be upheld. That was not put to him in cross examination. We have reflected on our own assessment of Mr Jackson's evidence generally but remain of this view. There was material before him on which basis he could properly reject the grievance appeal complaints of failure to contact using personal email.

970. Mr Watson did not have such material before him when considering the grievance.

971. We are satisfied that this was the reason why the appeal complaints regarding contact to the personal email account were not upheld. The protected act had no material influence on Mr Jackson's rejection of complaints that there had been no communication to the personal email account.

972. Ms McGeown's explanation to Mr Jackson regarding use of personal email had no bearing on the determination of the birthday and anniversary complaints. Mr Jackson accepted in evidence that it would not have been inappropriate to contact the Claimant contemporaneously to let her know there was a card and a gift. This is the aspect of the Claimant's complaint which was avoided in the outcome.

973. We have considered Mr Jackson's explanation that this was the first appeal he had chaired, and that he did not know that he could partially uphold a grievance.

974. We do not consider this to be a cogent explanation. Mr Jackson conceded that he could have sought advice from Ms Thorne if needed. Despite Ms Thorne supposedly being present only to take notes Mr Jackson clearly did believe he could seek guidance from her if he required it. That guidance was not sought. There is no evidence of Mr Jackson considering at the time whether he could partially uphold, nor of seeking advice from Ms Thorne or anyone else. Mr Jackson also rejected each individual category of appeal. He did not find there to be unreasonable conduct in the circumstances. The question of partially upholding did not come into the equation.

975. There is no tension in the language used in the outcome letter to suggest that Mr Jackson was in the territory of partially upholding the individual complaints, had he known that he could do so. When dealing with the Claimant's appeal point that there were lessons to learn but nothing was upheld by Mr Watson, Mr Jackson concluded that something had gone wrong because the Claimant had resigned and that appropriate apologies were made by Mr Watson. On the anniversary complaint he did not deal with the Claimant's point, which is hardly a reflection that Mr Jackson was torn between upholding or not.

976. As for this being the first appeal he conducted, that does not explain why he failed to deal with the Claimant's point which was clearly identified as being key during the appeal process.

977. We also bear in mind our earlier conclusion that the protected act had a material influence on Mr Jackson's failure to consider this allegation.

978. For these reasons we find that the burden of proof is not discharged. The protected act had a material influence on Mr Jackson's failure to uphold this particular complaint.

979. In cross examination there were no other specific challenges to Mr Jackson's decision making on the various categories of complaint. Although we found him to be an unsatisfactory witness we accept that the protected act had no material influence on the UK AFSM restructure conclusion that he reached. The outcome in that respect was based on what Mr Watson told him of the restructure and his decision making. We reach the same conclusion in respect of the KIT day complaint, appointment of Mr Pirie, the withdrawn complaint regarding the Mazda car and the kicker complaint. The conclusions in respect of Mr Pirie were based on Mr Watson's account of how he was appointed. Mr Jackson's conclusion on the kicker was founded on the fact that the Claimant was not earning because she was on maternity leave.

Discrimination

980. Ms Palmer's cross examination of Mr Jackson was based entirely on the premise that his failure to properly consider or uphold the appeal was because of the protected acts. The Respondent's case that pregnancy or maternity had no influence on Mr Jackson's consideration and conclusions was not traversed in evidence. It was not put to Mr Jackson that these protected characteristics influenced matters. Ms Palmer's closing submissions were again predicated entirely on the failure to consider or uphold being because of the protected acts, which is not surprising given the approach in cross examination.

981. Had Mr Jackson been cross examined on the basis that the protected characteristics were the reason why he failed to properly consider or uphold, it is almost inevitable that he would have denied the assertion. However it would be inappropriate for us to consider the burden had passed or not been discharged when Mr Jackson has had no opportunity to deal with the proposition and offer an explanation.

982. The complaints that the failure to properly consider and / or uphold were because of pregnancy or maternity are dismissed.

Adjustments

983. Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 provides that if a party has unreasonably failed to comply with a relevant Code of Practice then the Tribunal may, if it considers it just and equitable in all the circumstances, increase or decrease any award it makes by up to 25%.

984. The relevant Code in issue is the ACAS Code of Practice on disciplinary and grievance procedures (2015).

985. The Respondent took no point in respect of adjustments. The Claimant did argue that there had been an unreasonable failure to comply. This was based upon Mr Watson not being an appropriate person to hear the grievance because he was the subject of it. The submission is that Mr Watson was not independent or impartial, but we were not taken to any provision of the Code in this respect.

986. Paragraphs 32 to 47 of the Code deal with grievances generally, paragraphs 41 onwards deal with grievance appeals.

987. No provision of the Code provides that the grievance should be heard by an independent or impartial person. Paragraph 32 relates to action of the employee raising a formal grievance with a manager who is not subject of the grievance, but that is a different issue. Paragraph 43 provides appeals should be dealt with impartially, but there is no such provision in respect of the original grievance hearing.

988. There has been no failure to comply with the Code of Practice. No adjustment will be made.

Financial penalty

989. We have considered the statutory language and the relevant explanatory notes. The matters relating to unfair dismissal (ordinary and automatic) are no basis to make such an order. There were no malicious acts. The matters founding the successful complaint were not prolonged but related to events in January 2017. They were deliberate decisions in that a view was taken not to inform the Claimant at the time that she should have been informed. We are satisfied Mr Scammell genuinely intended to inform the Claimant at a later point, although that does not assist the Respondent in terms of liability.

990. As for the victimisation claims which we have upheld these involved deliberate acts. This is frequently so in cases of victimisation, and we do not consider it appropriate to equate deliberate action with an automatic order for a financial penalty. The Respondent has no dedicated human resources function, but that does not explain the victimisation which we found. We upheld complaints of victimisation against the person responsible for human resources issues within the Respondent. There are matters which were not upheld throughout the grievance process but were not materially influenced by the protected act, and we reach the same conclusions in respect of the discrimination complaints as the decision makers. Viewing matters in the round we make no order for a financial penalty.

Remedy

991. We invite the parties to consider whether agreement can be reached on the question of remedy. If this cannot be done then the parties shall write to the Tribunal to request the listing of a telephone hearing at which a remedy hearing can be listed and appropriate directions given.

Employment Judge Cooksey
Date: 6 March 2020