EMPLOYMENT TRIBUNALS

Claimant: Mrs A Gannapureddy

Respondents: 1. Chester Desserts Limited
2. Faisal Mohammed

Heard at: Manchester (by CVP) **On:** 26-30 July 2021. 8 September and 1 November 2021 (in chambers)

Before: Employment Judge McDonald
Mrs A Eyre
Mr N Williams

REPRESENTATION:

Claimant: Miss M Cornaglia (Counsel)
Respondents: Miss L Amartey (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

<u>In relation to the First Claim (2400185/2020)</u>

1. The claimant's claim that she was discriminated against because of pregnancy and maternity in breach of s.18 of the Equality Act 2010 fails against both respondents and is dismissed in relation to the following allegations on the List of Issues relating to this claim: 7(b), 7(f), 7(g).

2. The claimant's claim that she was discriminated against because of pregnancy and maternity by the first and second respondents in breach of s.18 of the Equality Act 2010 succeeds in relation to the following allegations on the List of Issues relating to this claim: 7(a), 7(c), 7(d), 7(e), 7(h)

3. The claimant's claim that she was indirectly discriminated against because of religion or belief in breach of s.19 of the Equality Act 2010 fails against both respondents and is dismissed.

4. The claimant's claim that she was subjected to discrimination arising from disability in breach of s.15 of the Equality Act 2010 fails against both respondents and is dismissed.

5. The claimant's claim that the first and second respondents failed to make reasonable adjustments in breach of s.20 and s.21 of the Equality Act 2010 succeeds.

6. The first respondent made unlawful deductions from the claimant's wages for the period 25 September 2019 to 2 October 2019 and from 2 October 2019.

7. The claimants' claim for an award under s.38 of the Employment Act 2002 fails and is dismissed.

In relation to the Second Claim (2413552/2020)

8. The claimant's claim that she was discriminated against because of pregnancy and maternity in breach of s.18 of the Equality Act 2010 fails against both respondents in relation to the following allegations on the List of Issues relating to this claim: 5(a) and 5(b).

9. The claimant's claim that she was discriminated against because of pregnancy and maternity in breach of s.18 of the Equality Act 2010 succeeds in relation to allegation 5(c) on the List of Issues relating to this claim as against both the first and second respondents.

10. The first respondent made unlawful deductions from the claimant's wages by failing to pay her notice pay and accrued holiday pay. It did not make unlawful deductions of arrears of pay.

11. The claimant's claim that she was victimised in breach of s.27 of the Equality Act 2010 succeeds in relation to the first and second respondents.

12. The claimant's claim of "ordinary" unfair dismissal is dismissed because the claimant was not employed for two years or more.

13. The claimant's claim of automatic unfair dismissal against the first respondent under s.99 of the Employment Rights Act 1996 succeeds.

Remedy

1. The total award to the claimant is the sum of £38,677.27. consisting of the following elements:

    a. Compensation under the EqA for which both respondents are jointly and severally liable: £35,743.72

b. Compensation for unfair dismissal and unlawful deductions from wages for which the first respondent is solely liable: £2933.55

2. Those sums must be paid to the claimant free of any deductions.

3. The recoupment regulations do not apply.

REASONS ON LIABILITY

Introduction

4. The claimant has brought two claims against the respondents which the Tribunal has decided should be heard together. In brief, claim number 2400185/2020 ("the first claim") is a claim of disability discrimination, pregnancy discrimination and other complaints which was filed on 10 January 2020. Claim number 2413552/2020 ("the second claim") includes claims relating to the claimant's selection for redundancy, including pregnancy discrimination and automatically unfair dismissal because of pregnancy. It was filed on 2 September 2020.

Preliminary Matters

5. The first respondent had not filed a response to the first claim. The second respondent had filed a response to the first claim with very limited details. At a preliminary hearing on 6 January 2021 Employment Judge Johnson refused permission for the first respondent to file a response to the first claim out of time, and also refused an application by the second respondent to amend his response to the first claim.

6. On the first day we dealt with the following preliminary matters:

<u>The first and second respondents' participation in relation to the first claim</u>

7. At the start of this final hearing we heard submissions from the parties about the extent to which the two respondents should be allowed to participate in relation to the first claim. After hearing submissions and deliberating, we decided that:

- The first respondent should not be allowed to participate in proceedings in relation to the first claim except to the extent of providing its written submissions in relation to remedy if that is required.

- The second respondent was allowed to defend the first claim only to the extent of putting forward evidence, challenging the claimant's evidence by cross examination and making submissions on the issue of whether he was the claimant's employer and on remedy.

8. On the afternoon of the first day we gave oral reasons for our decision. Neither party requested those reasons in writing.

9. There were no restrictions on the respondents' participation in the second claim.

Reasonable Adjustments

10. The respondents accept that the claimant is a disabled person by reason of the effects of dyslexia. At the start of the hearing, the following reasonable adjustments were agreed:

- That the claimant be given extra time to find pages in the bundle of documents for the hearing ("the Bundle");
- That there be regular breaks after an hour or so of evidence by the claimant;
- That the respondents' witnesses turn off their cameras when the claimant was giving evidence.

11. The first two adjustments were agreed. There was some discussion about the third adjustment because the way the request was phrased suggested that the respondents' witnesses might be in some way intimidating the claimant. Miss Cornaglia clarified that the adjustment was being requested because the claimant suffers from anxiety and was nervous about the proceedings and so would be intimidated by having too many witnesses on screen. Once it was clear that the claimant was not suggesting that the respondents' witnesses were in any way actively seeking to intimidate the claimant, Miss Amartey confirmed that the respondents had no objection to that reasonable adjustment in light of the claimant's anxiety.

The issues in the case

12. The parties had agreed a List of Issues dated 30 June 2021. To assist the Tribunal, we asked the parties to divide that list into two: one dealing with the first claim and the other dealing with the second claim. Both Lists of Issues are included at the Annex to this Judgment.

13. During the hearing, it was agreed that there was no issue between the parties about the claimant's employment status. It was agreed that she was an employee and that her employer was the first respondent. The second respondent is potentially liable as an individual in relation to the acts of discrimination which he is said to have committed.

14. On the first day of the hearing Miss Cornaglia also accepted that the claimant could not have a claim for "ordinary" unfair dismissal because she was employed for less than two years. Her unfair dismissal claim would fail unless it was an "automatically" unfair pregnancy dismissal under s.99 of the Employment Rights Act 1996 ("ERA") and Regulation 20 of the Maternity and Parental Leave Regulations 1999 ("The MPLR").

Documents and CCTV footage

15. There was a bundle of documents consisting of 1,414 pages. That included (at pages 1360-1414) the witness statements for the respondents' six witnesses and for the claimant. The agreed List of Issues was at pages 1353-1357. In light of our decision on the first day about the extent of the respondents' participation in relation to the first claim, the parties agreed to prepare overnight a revised List of Issues identifying which of the issues related to the first claim and which to the second claim.

16. In addition to the written documentation the respondents had supplied CCTV footage. This was of the meeting which took place on 10 October 2019. That was relevant to the dispute about whether the respondents had failed to make a reasonable adjustment in relation to the time given to the claimant to sign a contract on that date. Miss Amartey clarified that she did not intend that the Tribunal should watch the whole of the recording. She agreed to provide by 9.45am on the second day an indication of the point in the recording at which the claimant was handed her contract and the extent to which the respondents said the Tribunal needed to watch the rest of the footage. The footage was video only with no audio.

17. On the morning of the second day, Miss Amartey confirmed those extracts from the CCTV footage which it was felt it would be helpful for the Tribunal to view prior to hearing evidence. As a result of the need to take time to do that, we started the claimant's evidence on the second day at around 11.30am. We also took the opportunity of reviewing the CCTV footage in chambers in reaching our decision.

Evidence, submissions and the scope of the hearing

18. We spent the first day of the hearing dealing with the preliminary matters referred to above and in reading. In the Bundle there were witness statements for the claimant and for six of the respondent's witnesses. Because of our decision on the first day about the extent to which the respondents were entitled to participate in relation to the first claim, Miss Cornaglia confirmed that she would not be cross examining three of those witnesses, namely Adil Hussain, Taymor Rashid and James Wilson. We did not hear from those witnesses nor form the respondents' other witnesses in relation to matters covered by the First Claim..

19. On the second day we heard the claimant's evidence. She was cross examined by Miss Amartey in relation to the second claim. On the third day of the hearing the Tribunal asked questions of the claimant and she was re-examined by Miss Cornaglia.

20. Our findings of fact from the start of the claimant's maternity leave (i.e. events covered by the Second Claim) take into account the evidence we heard from the respondents' witnesses as well as the claimant's evidence. On the third day, we also heard evidence from Mr Paul Morris ("Mr Morris"), the Operations Manager for Icestone Gelato and from Reza Muini ("Mr Muini") who worked with the claimant. On the afternoon of the third day and morning of the fourth day we heard evidence from the second respondent ("Mr Mohammed"). The respondents' witnesses' evidence was confined to the issues in the second claim for the reasons explained above.

21. The Tribunal had proceeded on the basis that the hearing was in relation to liability and remedy. Miss Cornaglia at the end of the evidence applied to postpone

the issue of remedy with a view to the claimant providing further evidence on remedy. We decided to refuse that application. Employment Judge Ainscough's case management order dated 2 September 2020 (pp.36-46) had listed the hearing on the basis it was to deal with liability and remedy. The case management orders specifically provided that the claimant's witness statement address remedy. There had been no application to vary that case management order either prior to or at the start of the hearing. The claimant was represented throughout the proceedings.

22. On the fifth day of the hearing Miss Cornaglia and Miss Amartey provided their written submissions. After reading those we heard their oral submissions. We then reserved our decision. We also directed that the parties provide further written submissions on two matters. They were the correct basis for calculating any holiday pay due to the claimant and the correct treatment of the benefits which the claimant had received jointly with her husband after her dismissal.

23. We met to deliberate in chambers on 8 September 2021 and again on 1 November 2021. The Employment Judge apologises to the parties that absences from the Tribunal and other judicial work has led to a delay in promulgating the judgment in this case.

Findings of Fact

Background

24. The claimant was employed by the first respondent at the Icestone Gelato Café in Chester ("the shop") from September 2018 until her dismissal in June 2020. Icestone Gelato is a franchise operation. The first respondent held the franchise for the shop. The second respondent is the owner and director of the first respondent. In these findings of fact we refer to him as "Mr Mohammed" to make them easier to read. He was actively involved in the day to day running of the shop and for most of the claimant's employment he was her line manager.

25. Icestone's Head Office in Bradford provides support to the franchised shops in terms of branding, menus and ensuring quality control. It also provides "back office" support in dealing with things such as complaints and staffing issues.

26. As Operations Manager for the Icestone Gelato brand, Mr Morris was in regular contact with the franchised shops and their managers, including Mr Mohammed. That contact included providing instructions about relatively day to day matters such as how reps visiting the shop should be dealt with (p.542). He was part of the WhatsApp group for staff and managers at the shop (p.546) ("the staff WhatsApp group"). In the WhatsApp conversations in the Bundle Icestone's head office is referred to as "HQ" though it is clear that the first respondent is not owned by Icestone or part of any larger group company structure.

27. The claimant has a background in catering and hospitality. She attended catering college and by 2018 was employed as a chef/manager at a restaurant in a care home.

28. The respondents accept that the claimant was at all relevant times a disabled person for the purposes of the Equality Act 2010 by reason of word dyslexia. This

causes her difficulty with reading and writing. There was a dispute about whether the respondents knew about the claimant's disability.

29. The claimant is married to an Indian national. Both she and her husband are practising Hindus. We find that her religion did not prohibit her from working on Sundays. However, she did attend Temple on Sundays which in practice restricted her ability to work at certain times on Sundays. We deal with this issue in greater detail in "Sunday working" at paras 130-135 below.

<u>September 2018-December 2018 – interview, employment and promotion</u>

30. The shop opened in April 2018. A previous colleague of the claimant worked at the shop and told her that the first respondent was looking for staff. The claimant texted Mr Mohammed on 22 September 2018 and it was agreed that she would attend the shop for an informal interview with him on 24 September 2018 (pp.1342-1343).

31. In her text message the claimant explained that she was "unable to work Sundays" and explained that she wore Indian jewellery that she was unable to remove for religious reasons. She also explained that there were a few dates she would need to have off and asked whether it would be a problem if she needed to take 6 weeks off in one go. We find that she and her husband were planning on taking an extended trip to India though they had not at that point decided exactly when that would take place. She did not in that message refer to her dyslexia. Her explanation, which we accept, was that based on past experience she was worried about mentioning her disability to prospective employers in case that would put them off employing her.

32. There was a dispute about what was said at that interview. The Bundle included handwritten notes which the respondents said Mr Mohammed had made at the interview (pp.128-132). Those notes record him asking the claimant whether she had a disability which could affect her work and her replying "no I'm ok". They also record Mr Mohammed telling the claimant that the contract is a zero hours contract but that the need is for full time staff working 35-40 hours.

33. The claimant's evidence was that Mr Mohammed took no notes during the interview. She had not been sent any notes at the time. She said the notes at pp.128-133 did not accurately record what was actually said at the interview. We accept her evidence about what happened at the interview. Her recollection of the interview was clear and we found her evidence about it reliable. We did not hear evidence from Mr Mohammed in relation to this for the reasons explained at paras 4-6 above.

34. We find that at the interview the claimant told Mr Mohammed about her word dyslexia and that he told her that other staff could help her with any problems this caused at work. He reassured her that the till calculated the moneys to be given as change to customers so that should not cause her any problems.

35. We also find that Mr Mohammed did not say that the contract was a zero-hours contract. We find that the claimant was told she would be working full-time which in practice would be 35-40 hours per week. We accept the claimant's evidence

that had Mr Mohammed said the contract was a zero-hours contract she would not have taken the job because her financial situation was such that she needed a guaranteed minimum income. We also find that at the interview the claimant said she would need Sundays off.

36. As a result of the interview, the claimant was employed as a Store Assistant Gelatist by the first respondent from 24 September 2018. Her pay was initially £7.83 per hour (i.e. the relevant national minimum wage rate). The claimant was not given a written contract of employment at that point nor were her terms of employment otherwise confirmed in writing. We accept the claimant's evidence that she had not seen the Icestone Gelato Staff Handbook (ppp.114-124) before it was included in the Bundle. The version in the Bundle post-dates Covid 19 and dates from September 2020 at the earliest (p.116).

37. From the time the claimant was employed until the COVID related lockdown in March 2020, the shop was open from 10.30 am until 11.00 pm. Staff tended to either work "early" shifts from 10.30 a.m. to 4 p.m. or to work a "late" shift from 4 p.m. until the shop closed. Because of the need to clean up after the shop closed at 11 p.m., the late shifts in practice often extended beyond 11 p.m. and sometimes beyond midnight. Staff would sometimes work a "double shift" from 10.30 a.m. to closing up time.

38. We find that the process in terms of booking time off was that an employee would enter in the staff diary the time that they wanted off (pp.649-1084). The person preparing the rota (who for most of the period January/February 2019 to September 2019 was the claimant and at other relevant times was Mr Mohammed) would draft the rota based on the absences recorded in the diary. Staff could challenge or ask for further flexibility in the rota if it did not suit their needs once it had been shared on the staff WhatsApp group.

39. In December 2018, the claimant was promoted to Assistant Manager (p.553). As a result, her pay increased in January 2019 to £8.33 per hour (page 135). On 29 December 2018 the other Assistant Manager resigned with immediate effect. From that point, managerial matters at the shop were dealt with by Mr Mohammed or the claimant. Although there was no written confirmation provided we find that from that point on the claimant was the de facto manager of the shop, albeit Mr Mohammed continued to play an active role in supporting her and in providing cover at the shop.

<u>January to March 2019 – managerial duties, changes in staffing and the claimant's request to reduce her hours</u>

40. As already mentioned, from January 2019 one of the claimant's tasks as manager was to prepare the draft weekly staff rota for approval by Mr Mohammed. Once approved by him, the rota would be posted on the staff WhatsApp group. It was not uncommon for one of the staff to ask for a shift on the approved rota to be swapped because they were no longer available. That was usually accommodated by getting someone else to cover that shift.

41. One of the shop closing up tasks was cashing up the takings for the night. That was usually done by Mr Mohammed or managerial staff. In practice, that meant that from December 2018 the claimant was working both late shifts and double shifts

on a regular basis so that she could lock up. Staff at the shop clocked in and clocked out. The claimant's clocking cards, each of which covered a 3 week period, were at pp.149-168 of the Bundle. The parties had agreed a schedule of the claimant's weekly hours during her employment (p.167). Based on those, we find that from the week of her promotion (16 December 2018) to the end of March 2019 the claimant's average weekly hours were 40 hours per week, with a high of 50.5 hours one week.

42. The claimant was feeling increasingly ill and tired because of the number of hours she was working and the lateness of some of her finishes after closing up. By early March 2019 she was telling Mr Mohammed that she was finding things difficult at work and that everything was getting on top of her (p.377). There was a difficulty in finding reliable staff and on occasions the claimant or Mr Mohammed had to pick up extra shifts because staff rang in sick at the last minute.

43. To and try and address the staffing problems, Mr Mohammed's nephew, Taymor Rashid (known as "Tee") began working in the shop from early March 2019. He lived in Bradford and was provided with paid accommodation when he was in Chester. He would usually do late shifts including closing up. We find that he was in effect the shop's assistant manager.

44. On 15 March 2019 at 10:37 a.m. (p.574) Mr Mohammed wrote a message to the staff WhatsApp group explaining that because of a lack of business, the first respondent would need to reduce staff hours. He said he would seek to share the hours between staff as fairly as he could. We find that this did not apply to the claimant and Tee, who Mr Mohammed considered as "management" rather than "staff" (p.457 at 5:43 p.m.).

45. We find that during this period the relationship between the claimant and Mr Mohammed continued to be a close and mutually supportive one. The claimant relied on Mr Mohammed for guidance on matters such as cashing up, calculating VAT and dealing with staffing issues. He also provided support on non-work matters, giving her advice on the difficulties she was having in her personal and family life and even at one point volunteering to act as a mediator to try and resolve a family dispute (p.404 - 16 March 2019 at 12:39 a.m.). They had daily WhatsApp conversations which would sometimes go on until the hourly hours of the morning after starting around the time of closing up the shop 11 p.m. – midnight). Those WhatsApp exchanges were peppered with jokes and emojis.

46. On 27 March 2019 the claimant told Mr Mohammed in a WhatsApp message that she needed to reduce her hours for the good of her health (message at 3:58 p.m.). She said she no longer wanted to do double shifts and would prefer to work mornings to get a sleeping pattern established. We find it probable that at that point the claimant knew or at least suspected that she was pregnant which heightened her concerns about the impact of her working pattern on her health and wellbeing.

<u>April 2019 – pregnancy and change in hours.</u>

47. On 3 April 2019 the claimant told Mr Mohammed that she was pregnant. The due date was 22 November 2019. That means that at the date the claimant told Mr Mohammed the pregnancy was in its early stages. We find that Mr Mohammed

agreed that the claimant's hours would be reduced to 36 hours per week with no requirement to work late shifts or double shifts. This was not confirmed in writing.

48. Based on the claimant's clocking-in cards and the staff rotas we find that the last double shift the claimant did was Tuesday 2 April 2019 (p.158). After her late shift on Monday 15 April 2019 (p.159) the claimant did not work another late shift until the start of her maternity leave apart from 6 June 2019. On that date her clocking-in card shows she worked from 7.19 pm to 22.08 pm (p.161). According to the rota (p.1190) she worked from 2-8 p.m. on 20 October 2019. Otherwise, her shifts were early shifts with her clocking off times being between 4.30 p.m. and 5 p.m.

49. From 6 April 2019 the relevant National Minimum Wage increased to £8.21 per hour. The claimant's hourly rate increased to £8.71 to reflect that-the extra 50p per hour being what she was paid because she was the shop manager. On 5 April 2019 Mr Mohammed provided the claimant with a "to whom it may concern" letter confirming that she had been employed as a Manager at the shop since September 2018 "on a permanent full-time position". The letter confirmed that as she "is promoted to Store Manager recently I can confirm that her projected annual salary will be over £24,000 per year (p.1194). We find that the claimant and her husband were looking for a new home at the time and that letter was provided by way of a financial reference/confirmation of earnings.

50. Around that same time the claimant was chasing Mr Mohammed for her P60 and for clarification of her tax code. We find that Mr Mohammed's accountant dealt with the production of pay slips and any queries about pay, including holiday pay. We find that throughout the claimant's employment there were delays in payslips being provided and queries about tax codes and holiday pay being resolved by the accountant (e.g. p.414, p.429, p.500). The claimant and colleagues also had to chase Mr Mohammed for confirmation of when wages would be paid each month. It was always paid at the end of the month but not necessarily on the same date or day of the week because Mr Mohammed had to wait for the accountant to work out the wages due.

51. Mr Mohammed's father had a heart attack on 21 April 2019 and he was away on leave for the last week of April 2019. Mr Morris became increasingly hands on at the shop during his absence. On 25 April 2019 the claimant told Mr Morris she was pregnant. He sat her and Tee down in the shop and told Tee about the pregnancy (p.450).

52. It is accepted by the respondents that no pregnancy risk assessment was completed at this stage nor when the claimant first told Mr Mohammed she was pregnant. We find that there were relevant risks which should have triggered the carrying out a risk assessment. Her job involved being on her feet for long periods of time, lifting boxes and bending and reaching to scoop the gelato creations sold in the shop.

53. We find that the claimant asked for details of her employer's maternity policy and ante-natal policy but was not provided with either. On the balance of probabilities, we find the first respondent did not have an "ante natal policy" in the

sense of a separate policy document dealing only with that topic. The Staff Handbook (pp.114-124) does include a section on "Maternity/Paternity leave and pay." (p.120). We find the claimant was not provided with that handbook at any point during her employment.

54. The claimant says that she asked for time off to attend ante-natal appointments but was not granted it. We have recorded our findings on this issue at paras 126-129 below under the heading "Ante-natal appointments".

May to June 2019 – Adil Hussain, the claimant's trip to India

55. By May 2019, Mr Morris was getting exasperated with the continued issues at the shop, specifically staff sickness, absence and unreliability. There were also problems with failures to stick to the rules about stock control and cleaning which were leading to customer complaints and to food having to be thrown away. Mr Morris expressed strongly worded criticism on the staff WhatsApp group, saying "Chester (i.e. the shop) is becoming a joke. Staff if you can't or won't work leave". (p.592 at 11:53 a.m.). We find that Mr Morris was not at that point expressing criticism of the claimant. On 7 May 2019 Mr Morris told staff on the WhatsApp group that moving into the summer he would be "controlling the business in cooperation with our colleague [Mr Mohammed]" (p.593).

56. As part of an effort to improve matters, Adil Hussain ("Adil") started working in the shop from early May 2019. Adil was the nephew of Mr Mahboob Hussain ("Mabby"), one of the owners of the Icestone Gelato franchisor business. He had experience of working at other Icestone stores including Icestone's Bradford store (p.593). He lived in Bradford and was provided with accommodation in Chester while he was working at the shop. Mr Morris directed that he should be given at least 50 hours per week in shifts and he tended to work either a double shift or from 12 to closing up (p.593 1:48 pm).

57. On 16 May 2019 the claimant sent a message to the staff WhatsApp group to let her non-managerial colleagues that she was expecting a baby and that she would be away from the business from November on maternity leave. She explained that the baby was due on 22 November 2019 and said that she was "not leaving the business for good". At that point, therefore, her intention was to return to work after maternity leave (p.597). in her message she explained she wanted people to know why she had finished shifts early and because she would be getting bigger (p.597).

58. Although Mr Morris was taking a more active role in managing staff at the shop, we find that the claimant continued to prepare the draft staff rotas. By 12 June 2019 the takings in the shop were down so Mr Mohammed asked the claimant to re-do the rotas to reduce the number of staff working. He did so because the takings were not enough to justify the number of staff that were being allocated shifts on the rota. (p.497-498 on 12 June 2019). We find that there was at this point no suggestion of the claimant's hours being reduced below the 36 hours agreed in April 2019.

59. In early May the claimant had again raised with Mr Mohammed her proposed extended trip to India which she had referred to in her interview. The trip was to see her husband's family. On 10 June 2019 the claimant confirmed to Mr Mohammed that the dates of the India trip would be "23 June to about the 23 July" (p.495 at

10:11 a.m.). That was so they could undertake the trip before the baby was born. Mr Mohammed raised no objection and it was agreed that she would put the dates in the work diary so Mr Mohammed could remember she was away then.

60. The claimant's last day in the shop before her trip to India was 20 June 2019. She was due to be away for 4 weeks. At Mr Mohammed's request, she had prepared the draft rotas for those four weeks in advance. In a message to the staff WhatsApp group she told staff that in her absence they should contact Tee about work issues (p.608).

July to August 2019 – return from India, Adil's behaviour

61. The claimant arrived back from India on 14 July 2019. Her first day back at work after the trip to India was Tuesday 23 July 2019.

62. While the claimant was away, it had been decided that the shop floor should be mopped at the start of each day. That meant lifting the tables out of the way. On her return to work (by which time she was 5 months pregnant) the claimant pointed out to Mr Mohammed in a WhatsApp message that she should not be lifting tables by herself. Mr Mohammed's response was to suggest that the claimant might need to change her shift to start at 12 so that whoever else was in could do the table lifting and floor mopping before the claimant got in (p.501). Had she done so, each of her shifts (and consequently her pay) would have been reduced by 1 ½ hours.

63. The claimant felt vulnerable in her role at that point. She asked Mr Mohammed by WhatsApp whether the requirement to move tables to mop the floor had been introduced to "kick [her] off mornings" (p.501 at 10.25a.m.). Mr Mohammed responded that he was "seriously annoyed" by this suggestion. He told the claimant that "no one had it in the back of their mind about you not being able to lift the tables" and that the task was added simply "to clean the floor" (p.502). We find that what Mr Mohammed said was accurate. The task had been introduced to improve cleanliness but no thought had been given to how the task would impact on the claimant as her pregnancy progressed.

64. The claimant was evidently worried about the issue of lifting the tables because she asked Mr Mohammed a few days later on the 28 July 2019 whether he had spoken "to them" (presumably Mr Morris and Icestone HQ) about the tables. Mr Mohammed confirmed he had "mentioned it", though he does not set out what had been said or agreed (p.504 at 7:58 pm). No pregnancy risk assessment was carried out at this point.

65. The claimant continued doing the draft rotas when she returned from India (p.503, 26 July 2019 at 11:59 a.m.). The rotas and clocking in cards from July 2019 onwards show that the claimant working 5 or 6 early shifts until the week ending 25 August 2019.

66. As her pregnancy progressed, the claimant found it difficult to carry out some of the tasks required in the shop. By 20 August 2019 she was finding that she could not reach the front scoops for scooping or could not get to the cakes to serve them to

customers. When stock was delivered and had not been put away, she sometimes found it difficult to fit past it.

67. During this time the claimant's shifts overlapped with Adil's. When he saw her unable to carry out tasks he would pull a face. It is accepted in his written witness statement that he told the claimant that "maybe she shouldn't be in work" if she couldn't carry out the tasks required. We find based on the claimant's witness statement evidence that he also told the claimant that being pregnant she should not be in work and that if he had a pregnant wife he would not allow her to work.

68. On 20 August 2019 the claimant reported Adil's comments to Mr Mohammed by WhatsApp . She said Adil talked to her "like rubbish" and reported what he had said. She told Mr Mohammed that she was "pregnant not disabled", that health and safety and risk assessment came into it and asked Mr Mohammed "how do you think that makes me feel when he says I should not be at work" (p.522). In terms of when Adil made his comments we find on balance they were made on (or continued up to) the 20 August 2019 when the claimant reported them to Mr Mohammed.

69. Mr Mohammed reacted angrily to this. He sent a long WhatsApp message to the claimant on the same day (p.522 at 5:42) in which he said that she was paid more than any manager in any store, was allowed just to do morning shifts and allowed to take Sundays off when no other manager was. He said he had made changes to her job because of her pregnancy but could not make any more changes. He expressed frustration that he was having to pay someone to do those parts of the job that she "cant or wont be able to" do and asked "what am I paying you for??".

70. In relation to Adil's comments that the claimant should not be in work, Mr Mohammed wrote that that was not Adil bullying the claimant but asking why he should he do extra work when they are paid to do his job. He went on to write that he was not prepared to make changes to suit any one individual and that if the claimant, Adil, Tee and other staff could not work the times and shifts needed to cover store hours and if there was no improvement in cleanliness and reviews "you can all leave". He said that "When I am back Adil is getting finished and so is Tee if tou [we find that should be "you"] are unable to do the work that needed of tou then I'm sorry but I cant help you any further you'll need to look for another job too".

71. The claimant responded by WhatsApp that same day (p.522-523) to say she was grateful to Mr Mohammed for allowing her to work early shifts, that she could do her job but needed help with certain things and that she cared deeply about the shop and the business.

72. Mr Mohammed then sent a long message to the staff WhatsApp group (p.623 at 6.10 p.m.) expressing his concern about staff behaviour with regards to swapping shifts, calling in sick at the last minute and taking extra breaks. He wrote that he would be "reviewing everyone's work on my return and if you are not fit for the job at hand I will be finishing you on that day". He made clear that the warning applied to "everyone that includes the managers".

73. The claimant saw that message and asked Mr Mohammed on the WhatsApp chat she had with him whether that warning applied to her. He confirmed that he

would be speaking to everyone and "if you or any of the others are unable to fulfil what I need and no improvements are made then yes you or the others will be finishing with me" (p.523 at 7.01 p.m.). We find that contrasts with previous position where Mr Mohammed had criticised other staff but not the claimant.

74. Mr Mohammed did, however, post a further message on the staff WhatsApp group a few minutes later remining staff that "[the claimant] is the manager and should be respected as so if you are unable to take instructions from her take it from me…do as she asks of you to do she's trying to do her job to make your jobs easier if you cant listen then leave" (p.623 at 7:05).

75. We also find that Mr Mohammed had spoken to Adil's uncle, Mabby, about Adil a few times but, in Mr Mohammed's words "my hands are tied with the Adil situation…he's his nephew and that's the reason he's still here" (p.520). Although Adil's shifts and those of the claimant continued to overlap, we find that Adil did not repeat the kind of comments reported by the claimant on 20 August 2019 after that date.

<u>1 to 11 September 2019 - claimant's concerns about maternity leave, "zero hours" comment, demotion and sickness absence</u>

76. By the first week of September 2019 the claimant was increasingly concerned about the arrangements for her maternity leave. She had not had confirmation from Mr Mohammed or the first respondent of what her maternity pay entitlement was. There had still been no risk assessment undertaken. She worked one day in the week ending 1 September 2019 and was on holiday for the rest of that week (p.165).

77. Around that time she was trying to have a chat with Mr Mohammed but finding it difficult to pin him down to do so. She had understood that she and Mr Mohammed had arranged to meet on 4 September to discuss these matters but that meeting did not take place On 5 September 2019 the claimant asked Mr Mohammed in a WhatsApp message for the contact number or email for "HR or Head office" because it was getting late in her pregnancy and she hadn't had a risk assessment. She also asked him to confirm that the meeting they were due to have on 4 September would happen on Saturday because "I need to address some concerns" (p.529 at 11:47 a.m.).

78. Mr Mohammed's message in response denied that there had been an arranged meeting and said that he could "see clearly what your aim is with this" from the way she had worded her message and that he didn't like "being taken for a fool". He wrote that he would talk to her at work on the following Saturday, i.e. 7 September 2019.

79. The claimant in turn replied to say that she didn't understand what Mr Mohammed meant about the way she had worded her message and that she was just trying to sort everything out given that she only 6 weeks left in work and had not even had a risk assessment yet (p.529 at 12.20 p.m.).

80. It appears that the claimant and Mr Mohammed did meet on or around 7 September 2019. There were no notes of that meeting and it was not referred to in the claimant's witness statement. However we find based on the WhatsApp

messages the claimant sent to Mr Mohammed at 12.51 p.m. and 1.40 pm on 10 September 2019 (p.531-532) that they discussed her holiday entitlement, maternity pay and what job she would return to after maternity leave.

81. In her message at 1.40 p.m. on 10 September the claimant referred to job security and that Mr Mohammed had said (presumably at the meeting on the 7th) that she would still have a job "but not sure how many hours". Her message went on to say she had spoken to ACAS and "they said the same job role and hours should not change as I am guaranteed the same on return to work".

82. Mr Mohammed's response at 5.31 p.m.(p.532) was that the claimant was on a zero hours contract "which means you don't have a set number of hours so the only guarantee you have is of zero hours and when the business need arises then to be given hours". As we recorded at para 44 above, we find it had been agreed the claimant would work 36 hours per week and had not been on a zero hours contract.

83. Mr Mohammed followed that up with a further message at 5.38 p.m. in which he said that in light of the business being quiet he would be reducing hours and that "as I mentioned in conversation you are unable to fulfil all the duties required of a manager, late working, weekend working, placing deliveries away due to you saying you are unable to lift items etc I can no longer maintain paying other staff additional wages to cover the duties of a manager which you are unable to fulfil so in light of this from next week you duties will revert to a regular team member, at the standard minimum wage when hours are available for me to give to you".

84. The claimant tried to contact Mr Mohammed to discuss what he had said in his message but was unable to do so. She told him that she had phoned work to say she was in a lot of pain and would not be in the following day. On the following day, 11 September 2019 she went to see her GP. He signed her off work until 25 September with "Stress at work and pharyngitis" (p.1197). We accept the claimant's evidence that she was very upset and worried by what had happened. We find that the relationship between her and Mr Mohammed was at this point very strained. He did not respond as readily to her WhatsApp messages and when he did respond his messages were terse or accusatory.

<u>12 September to 27 September 2019 – the claimant's grievance and grievance meeting</u>

85. On 14 September 2019 the claimant and Mr Mohammed met at the shop. The claimant handed him a grievance letter which she had prepared the previous day (p.1199-1201). That evening she also emailed the grievance to Icestone HQ (p.1198).

86. The grievance said that not long after the claimant had informed Mr Mohammed of her pregnancy in April 2019, she had noticed a change in attitude towards her. She said she felt she had been discriminated against because of pregnancy and maternity in breach of the Equality Act 2010. She referred specifically to:

a. Being demoted from managerial duties due to not being able to put heavy deliveries away and due to asking for help with things she could not do because of her pregnancy

b. The failure to carry out a risk assessment

c. Failure to provide information about the first respondent's maternity leave policy and maternity pay

d. Not being paid for time off to attend ante natal appointments

e. Not doing anything about Adil's comments

f. Never being provided with a written contract since she started work.

In the grievance letter the claimant said that she had tried to resolve matters informally at the meeting on 7 September 2019 but nothing was resolved. Instead Mr Mohammed had informed her of the decision to demote her. She confirmed she was raising a formal grievance, anticipated a grievance meeting would be held and noted her right to be accompanied by a colleague or trade union representative at that meeting,

87. Mr Mohammed's immediate reaction to the grievance was to remove the claimant from the staff WhatsApp group (at 5.40 p.m. on 14 September (p.627)). He followed that up at 5.55 p.m. with a message to that WhatsApp group telling staff that the claimant "is not to be contacted for any work-related issues, she is currently off work and will remain so until further notice". He said all issues should instead be directed to him.

88. The claimant and Mr Mohammed had a further WhatsApp exchange between 6.08 p.m. and 6.36 p.m. (pp.533-534). Mr Mohammed's initial message was deleted but we find based on the claimant's response that Mr Mohammed took the grievance as a personal attack on him. The claimant in that WhatsApp exchange told him it was not personal and that she did not want to be on bad terms with him. However, she had been worried and stressed about getting everything in place for when she started maternity leave. She had not been provided with basic information about her maternity pay nor had a risk assessment been carried out.

89. The claimant noted that she had been removed from the staff WhatsApp group and asked whether that meant she had lost her job because she had given Mr Mohammed her grievance letter. Mr Mohammed responded that she would be added back in to the group "when you decide to return to work and if business permitting hours are available" (p.533 at 6.27 p.m.). He also said that it was best that the claimant contact head office directly regarding work enquiries from now on (p.533 at 6.29 p.m.). He did not respond to the claimant's two subsequent messages.

90. On 19 September the claimant reminded Mr Mohammed by WhatsApp message that her sick note expired on Wednesday 25 September. She said she had a midwife appointment on Thursday 26 "so I am happy to come back Friday [i.e. the day after her appointment] to work and do my regular hours as usual" (p.534 at 10.59 a.m.). He did not respond to that message nor to her follow up message on

Sunday 22 September (p.534 at 7.41 p.m.). As she correctly pointed out in that message, the rota for the week commencing 23 September 2019 had by then been finalised and circulated to staff on the staff WhatsApp group (p.627 at 8.34 p.m.). The claimant was omitted from that rota (p.1187). She was also omitted from the subsequent weekly rotas prepared by Mr Mohammed until the one for week commencing 14 October 2019 (p.1190).

91. Having heard nothing back from Mr Mohammed, the claimant and her husband went to the shop on Monday 23 September 2019 to pick up her keys to the shop. She did so assuming she would be working an early shift on Friday of that week. Tee was at the shop. It's accepted the claimant was not given the keys. There is a dispute about what he told the claimant. We find, based on the claimant's evidence and the WhatsApp exchange which took place shortly afterwards between the claimant and Mr Mohammed (p.534 at 1.09 p.m., 1.31 p.m. and 3.07 p.m.) that Tee did tell the claimant that she was not allowed in the shop and that he didn't know whether she even had a job there. We do accept that Mr Mohammed had not told Tee that the claimant was dismissed. We find it probable Tee was basing his response to the claimant on the limited information which Mr Mohammed had provided to staff via the staff WhatsApp group chat about the claimant's situation.

92. Mr Mohammed's response to the claimant reporting what Tee had said was to send her a WhatsApp message in which he said that she was not on shift on Friday, that she would be given the keys on return to work when shifts were available to her but that the business was not in a position to offer any shifts due to the sudden downturn in takings since the holiday period finished (p.534 at 1.31 p.m.). There was then a further exchange of messages (pp.534-535) in which the claimant said that in the past few months since her pregnancy her hours had been fixed 10.30-4.30 Monday to Saturday and queried how there could be no hours for a manager if the shop was open. Mr Mohammed replied angrily to say that it was not for the claimant to dictate what hours he gave her and that she had been unable to fulfil what was required of her even prior to her pregnancy. He said he was now managing the shop himself.

93. He said that the claimant had said she could not do evening shifts and weekend working and suggested that was due to personal problems at home. He referred to the time he had spent listening to the claimant's personal problems, said the allegations in her grievance were unfounded and accused the claimant of harassing him. The claimant in response denied that, queried why Mr Mohammed was bringing her personal life into the discussion and denied that she had ever said she could not work evenings as opposed to preferring to work the early shifts. She said she was just trying to sort out what she was entitled to in terms of holiday, sick pay and maternity before she finished work for maternity leave.

94. As we have already recorded, we find that Mr Mohammed had been very supportive of the claimant and certainly prior to her pregnancy this had included listening to her concerns about family and personal issues. We do not accept, however, that he had voiced any concerns about her ability to carry out the managers role prior to her being pregnant.

95. In terms of next steps, Mr Mohammed wrote that a meeting would be arranged at a mutually convenient time to discuss all matters and that he would be in touch regarding that over the next coming days (p.535 at 4.14 p.m.).

96. A grievance meeting took place on 27 September 2019. It was held at the shop and was chaired by Mr Morris. The claimant attended with a friend. Mr Mohammed was not in attendance. Mr Morris's wife also attended. The claimant's understanding was that she managed another Icestone Gelato shop.

97. There were handwritten (pp.1202-1209) and typed up (pp.1210-1212) notes of that meeting in the Bundle. The handwritten notes included notes of the risk assessment carried out at that meeting. The typed-up version of that risk assessment was also in the Bundle (pp. 1221-1223). The claimant had signed the typed-up grievance meeting notes and typed up risk assessment at the subsequent meeting on 10 October 2019. However, she disputed their accuracy. As we explain at paras 249-253 below, we found that there was a failure to make a reasonable adjustment at the meeting on 10 October 2019 because the claimant was not allowed to take the documents she signed at that meeting home to read them. In light of that, we find we cannot take her signing those documents as in itself confirmation of their accuracy. Our findings about what happened at the meeting take into account the claimant's evidence, the documents referred to above and the subsequent text and email exchanges between the claimant, her legal advisors and Mr Morris in the Bundle (pp.1224-1231 and pp.1234-1237).

98. We find that a risk assessment was carried out at the meeting on 27 September 2019. There was a discussion of those aspects of work which the claimant found difficult, namely lifting heavier stock when it was delivered, reaching over to scoop the gelatos and negotiating some of the tighter spots in the shop. We find that Mr Morris asked the claimant to get a further doctor's note to say that she could not do certain jobs at work. We also find that the claimant said she had absolutely no problem with working evenings as long as there were no deliveries to put away but that Mr Morris thought this would be problematic because it was difficult to predict when a delivery might arrive which the claimant would not be able to put away. We find that Mr Morris said that they could not let the business suffer and that the claimant could not "come to work and do nothing". We find that Mr Morris told the claimant to ask her GP to extend her sick note for a further two weeks up to the point when the risk assessment had been formally typed up and the claimant could return to work.

99. When it comes to the grievance, we find that Mr Morris agreed to provide a written contract and that he said the claimant would be paid for any ante-natal appointments she attended during her working hours. The claimant was to provide details of those appointments. Mr Morris also agreed to provide information about holidays and maternity entitlement. We find Mr Morris suggested that Mr Mohammed had done his best to accommodate the changes the claimant requested. We find Mr Morris also said that at the meeting that the changes to the claimant's working hours were to accommodate her personal and family issues rather than because of her pregnancy. We do not accept that was accurate. Although the claimant had reduced her hours to some extent prior to her pregnancy, the agreed reduction to 36 hours per week with no late shifts was agreed after she told the respondents about her

pregnancy. We also find that the claimant made clear at the grievance meeting that she was ready and keen to return to work.

28 September 2019 to end of October 2019 – follow up to grievance meeting, grievance outcome meeting, written contract and return to work

100. After the meeting the claimant chased Mr Morris by WhatsApp messages for confirmation of when he would provide her with the promised information and the written contract. We requested and were provided with clean and ordered copies of the WhatsApp conversation at pp.1224-1231. From those we find that on 2 October 2019 the claimant (correctly) pointed out that her September 2019 payslip (p.143) only included Statutory Sick Pay and that she had appeared not to have been paid anything from 21 September 2019 onwards. On the following day she sent another message to say that since her GP could not extend her sick note (because she was fit for work from 25 September 2019) she should be suspended on full pay if she was not allowed to return to work until the risk assessment was typed up (p.1229).

101. We find that the claimant was fit for work and intended to return to work on 27 September 2019. Our finding is that at this point her contract was for 36 hours per week at £8.71 per hour. We find that she was not paid for the 3 days 27-30 September nor for the first 2 weeks of October.

102. The follow up meeting was arranged for the 10 October 2019. The claimant was not sent any documentation prior to that meeting. It took place at the shop. Mr Morris, the claimant and Mr Mohammed were present. The claimant sat opposite Mr Morris while Mr Mohammed sat on an adjacent table. At the meeting the claimant was given three documents to sign, namely the typed notes of the grievance meeting, the typed-up risk assessment and a written contract of employment. She signed all three documents at the meeting.

103. There were no notes of the meeting. Based on the evidence we heard and our viewing of the CCTV footage we find the meeting lasted around 2 hours in total. We find that the claimant was given 10-15 minutes time to read a document which she, Mr Morris and Mr Mohammed then signed. She was then given a second document which she, Mr Morris and Mr Mohammed signed some 10 minutes later. It seems to us that those were the risk assessment and the notes of the previous grievance meeting. We say that because those documents were only signed in one place. In contrast, the contract was signed in two places by the claimant and Mr Morris (once at the end of the document and once on the second page (p.1214). That seems to us to be the document signed right at the end of the meeting.

104. We find that the claimant was not given a significant amount of time to read the contract during the meeting. Instead, we find that Mr Morris talked her though it. There was no suggestion from the CCTV footage that we saw that either Mr Morris or Mr Mohammed expressly intimidated the claimant in any way at that meeting. We accept the claimant's evidence that she was told that she needed to sign the documents at the meeting and that she was allowed the opportunity to take them home and read them before signing despite asking to do so. We find that despite the meeting being good natured, the claimant felt pressurised to sign rather than protest. Given the context and her concerns about her job we accept that she found the meeting intimidating. She was keen to get back to work (having been unpaid since

21 September 2019) and felt her job was vulnerable. We find that Mr Morris was keen to get the documents signed so the grievance could be resolved so the business could move on.

105. The three most significant elements of the contract signed by the claimant on 10 October 2019 were her job title, rate of pay and working hours. The job title (clause 2 on p.1213) was "Shop Assistant". The rate of pay was £8.21 (clause 6 on p.1214). The working hours were a minimum of 18 Hours per week (clause 7 on p.1214). The contract therefore reflected the claimant's demotion from manager (with a consequent reduction in hourly rate) and the reduction in her working hours set out by Mr Mohammed in his WhatsApp messages of 10 September 2019. The contract was inaccurate in other ways, specifically in giving the claimant's start of employment as 2 October 2018 rather than 24 September 2018 (clause 3 on p.1213).

106. We accept the claimant's evidence that her dyslexia means she needs more time to read documents and without that time she can find them difficult to understand. We accept her evidence that those difficulties are increased where the claimant feels under pressure or intimidated. We accept that an amendment was agreed to the contract at the meeting. That was changing the reference in clause 6 (p.1214) to refer to pay being on the basis of a 7-day week rather than the "five days Monday to Friday" in the original version. The claimant signed that amendment. However, we accept her evidence that it was not until she got home and discussed the document with her husband that she realised that it incorrectly stated her job title, hours and pay.

107. On 15 October 2019 (3 working days after the meeting), Cheshire, Halton & Warrington Race & Equality Centre ("the REC") wrote to Mr Morris on the claimant's behalf to assert that she was not bound by the contract (pp.1235-1237) because she had not fully understood it. The email stated that given her dyslexia it was unreasonable for the claimant to be required to sign the contract in the circumstances she was required to sign it and that it did not reflect the terms of her contract. It referred specifically to her being employed as a Store Manager at £8.71 per hour working a 35 (sic) hour work whereas the contract stated that she was employed as a Shop Assistant at £8.21 per hour working an 18-hour week. The letter also raised the failure to carry out a risk assessment, failure to pay for time off for antenatal appointments and the requirement to work Sundays as breaches of the employer's legal obligations towards the claimant.

108. The claimant returned to work in the week commencing 14 October 2019. The rotas were now being prepared by Mr Mohammed. We find that there was a significant decrease in her hours compared to the hours she was working previously. For the week commencing 14 October 2019 she was on the rota to work 3 shifts totalling 18 hours (p.1190). There were two shifts from 12-6 p.m. and a Sunday shift from 2-8 p.m. The claimant worked that Sunday shift and did not raise any issues about doing so. The rota for the week commencing the 21 October was not in the Bundle but the claimant's clocking in card shows that the claimant worked two shifts from 12-6 p.m. (p.168). She had been on the rota to work Sunday 27 October 2019 but did not do so. We record our findings about this at para 135 under "Sunday

working". Even as originally intended, however, the shifts totalled only 18 hours that week.

109. Her payslip for 31 October 2019 (p.144) was calculated at the rate of £8.21 per hour rather than £8.71 per hour. Mr Morris had not supplied a copy of the first respondent's maternity policy before her maternity leave started.

110. Saturday 26 October 2019 was the claimant's last day in the shop. She was then on leave until 3 November 2019 when her maternity leave started. From 15 October 2019 the REC regularly chased Mr Morris for a response to the concerns raised in their letter of 15 October 2019. After initially proposing a further grievance meeting on 11 November 2019, Mr Morris's stance was to refuse to engage with the REC (pp.1234-1248).

<u>November 2019 to 31 March 2020 - the claimant's maternity leave and maternity pay, lockdown and Mark Burnham</u>

111. The claimant was on maternity leave from 3 November 2019. Her son was born on 27 November 2019. The claimant did not receive her pay and payslip for October 2019 at the end of that month as expected. She sent Mr Mohammed a chasing WhatsApp message on 2 November 2019 (p.537). He replied to explain he was waiting for the accountant to provide the payslip confirming the amount due so that he could pay her. He confirmed he would chase the accountant when he was back in work on Monday 4 November 2019. The claimant sent another chasing message on 4 November (p.538 at 6.55 p.m.) and Mr Mohammed sent the payslip through at 9.25 a.m. the following morning (p.538 at 9.12 a.m.). That October payslip dated 31 October 2019 was for 35 hours work and 71 hours holiday pay, all at £8.21 per hour.

112. The claimant was paid on 29 November 2019 but chased Mr Mohammed for her payslip on 1 December 2019 (p.538 at 3.13. p.m.). Mr Mohammed sent it to her on the following morning (p.538 at 9.12 a.m.). She chased him for her December payslip on 29 December 2019 and on 2 January 2020 asked him to confirm who she should speak to about her payslips because she was getting no response from Mr Mohammed or Mr Morris (p.538). Mr Mohammed did not respond to that message nor to her last message on 30 January chasing for her January pay and her payslips for that month and for December (p.539). We find that throughout her employment period Mr Mohammed was reliant on his accountant to work out what pay the claimant was entitled to and prepare her payslips accordingly.

113. The claimant received her January pay on 31 January 2020 and her February pay on 3 March 2020 (p.1255). The REC filed the claimant's first Tribunal claim against the respondents on 10 January 2020 and were writing to Mr Mohammed about it. On 31 March 2020 he said in an email to the REC that he did not have funds to pay the claimant. We find that represented the reality of the situation. By then the COVID related Lockdown was in place and the shop was operating as a take-away/delivery business only (p.1257). The claimant's outstanding Statutory Maternity Pay was ultimately paid by HMRC (pp.1339-1341).

114. Mr Mohammed had by January 2020 been looking for a buyer for the shop for some time. In January 2020 a potential buyer, Mark Burnham, was identified. For the

claimant it was submitted that he was appointed the manager of the shop in the claimant's place. Mr Mohammed's evidence was that Mr Burnham was not employed by the first respondent but was paid by the Icestone Gelato business to run the shop alongside Mr Mohammed while Mr Burnham decided whether he wanted to go through with buying the shop. We prefer Mr Mohammed's evidence on this point. We find that Mr Burnham was not employed by the first respondent. We also accept that the impact of the pandemic meant that what was meant to be a short-term arrangement continued for longer than the few months originally anticipated.

April 2020 to 28 May 2020 - Redundancy process and notice of dismissal.

115. On 13 April 2020 Mr Mohammed sent letters to all employees warning them of redundancies (pp.1278-1291). He explained that the closure of the shop in accordance with lockdown guidance had resulted in a reduction in the number of employees needed. From 23 March 2020 when the COVD lockdown started the shop opened from 4 - 11 p.m. rather than 10.30 a.m.–11 p.m. and operating as a take-away/delivery service only. The rotas for March-July 2020 (pp.1260-1277) show Mr Burnham either working or on standby for between 5 and 7 days each week and a decreasing number of hours for staff in the shop. We accept Mr Mohammed's evidence that because he or his sons worked between 5-7 shifts per week there was only a requirement for 2 (at most 3) other staff in the shop in addition to the 2 delivery drivers working each week.

116. The redundancy warning letters were in identical terms and invited the addressee to a one to one consultation meeting to be carried out by telephone with Mr Mohammed at a specified time on Saturday 18 April 2020. In the claimant's case the telephone meeting was set for 12 p.m. (p.1279). The claimant in her evidence said she did not remember receiving that letter, sent by email at 7.08 p.m. on 13 April (p.1278). She confirmed the email address was correct and we prefer Mr Mohammed's evidence that the email was sent on the 13 April 2020.

117. We accept that the claimant did not read the email either because did not register it at the time or because it went into her junk folder. She did not attend the telephone meeting with Mr Mohammed at the appointed time on 18 April 2020 and we find she would have done so had she read the email. We find Mr Mohammed called her at 12 p.m. but getting no answer left her a voicemail referring to his email/letter of 13 April 2020. The claimant emailed in response at 12.46 p.m. to say she had not received an email and asked that any issues be raised with the REC (p.1292). Mr Mohammed responded an hour later saying he would re-send his email and that it was not about the ongoing Tribunal case. He explained that the claimant would have an opportunity to discuss with him why she should not be made redundant, that she would be given the same opportunity as any other staff member and that he was happy to speak to her any time that day. The claimant responded at 7.08 p.m. to say she had just seen Mr Mohammed's email and that she would respond to him on Monday or Tuesday after she had sought legal advice (p.1292).

118. The claimant took legal advice and on Monday 20 April at 4.05 p.m. emailed Mr Mohammed to acknowledge receipt of the emailed letter from 13 April 2019 which he had sent her. She said she had not received the email on the date it was sent. She asked for confirmation of the staffing reductions being made and why her role as

manager was no longer needed. She also asked whether, if that role was no longer needed, Mr Mohammed was going to offer her the role of delivery driver as a suitable alternative role in preference to other candidates. She confirmed she was happy to rearrange the consultation meeting that week (pp.1293-1294).

119. Mr Mohammed responded by email at 10.47 p.m. (p.1293). He told the claimant that she was not a manager, referring to the contract she signed on 10 October 2019. He doubted that she had not seen the original emailed consultation letter because she knew the time the call was due to happen. (We find that she knew that because Mr Mohammed had mentioned it in his voicemail). He said she had his number and that she could contact him any time that day to let him know her thoughts on why she should not be selected for redundancy. He said that if she called him that day that was her final opportunity to have her views heard. We see no reason to interpret the "today" as meaning anything other than the day the email was sent. Mr Mohammed was therefore giving the claimant the hour or so between 11 p.m. and midnight to call him.

120. The claimant responded by email at 12.35 the following day to say she could not speak that day because the baby was unsettled but that she would be happy to speak to Mr Mohammed at 12 noon "tomorrow" (i.e. the 22 April 2020). She followed that up with an email at 7 a.m. on the 22nd day to confirm the 12 noon call. She said that if Mr Mohammed did not respond by 11.30am she would assume that he could not make the call. Mr Mohammed did not respond but the claimant called him at 12 noon and at 12.10 p.m. on the 22 April and sent Mr Mohammed two further emails attempting to make contact. Having received no response from Mr Mohammed by phone or email the claimant emailed him again on 23 April 2020 to ask what was happening, suggest they could discuss the redundancy by email if he would prefer and saying the best time for a phone call for her would be between 12-1 p.m. weekdays (pp.1293-1298)

121. Mr Mohammed did not respond to that nor to subsequent emails from the claimant and the REC on her behalf. As well as requesting information about the redundancy they referred to the fact that the claimant had not been paid her SMP and to any dismissal potentially being unfair and a breach of the Maternity and Parental Leave Regulations and the Equality Act (pp.1299-1302). On 24 May 2020 the claimant requested that she be provided with a letter setting out her terms of employment (p.1303).

122. On 28 May 2020 the claimant was emailed a letter confirming her dismissal for redundancy. The letter acknowledged that she was entitled to one week's notice (p.1304-1305). We find the effective date of termination was 7 June 2020. The letter did not give details of the criteria or selection process which had led to the claimant being selected for redundancy. We find that there were no formal selection criteria and no selection process carried out by reference to any selection criteria. Mr Mohammed's evidence was that the selection decisions were made based on the needs of the business. We find that one element of that which Mr Mohammed did take into account was the availability of the employee to work evening and late shifts so they could lock up the shop at close if required and their flexibility in terms of hours they could work.

123. The redundancy warning letter sent to staff invited them to a telephone meeting. However, Mr Mohammed confirmed in his evidence that he met face to face with staff still working in the shop at that time. That included the 3 employees who were retained after the redundancy exercise namely Jessie, Dan and Ellen. We find that they each had the opportunity to speak (at least in the case of Ellen at some length) with Mr Mohammed about their situation and to make representations about why they should not be made redundant. There were no notes of those meetings. In Ellen's case, Mr Mohammed's evidence was that he would have selected her for redundancy had she not spoken to him the impact redundancy would have had on her family and financial circumstances. In the case of Dan, Mr Mohammed's evidence was that he told Mr Mohammed that he would not be able to return home to Wales and so needed to keep working. Mr Mohammed said Jessie brought in lots of student trade.

Employees at the shop after the redundancy selection process

124. We have accepted the respondents' evidence that post-redundancy there was no one employed by the first respondent in a managerial position. Instead, managerial duties were carried out by Mr Mohammed and Mr Burnham who was directly employed by Icestone Gelato.

125. Based on the staff rotas for March 2020 to July 2020 (pp.1260-1277) we find that Dan, Ellen and Jessie worked shifts regularly from 28 May 2020. Those rotas show that Jessie's shifts were usually 4-8 p.m. whereas Dan and Ellen worked from various times from 4 p.m. onwards until close of the shop.

The Claimant's appeal against dismissal

126. The claimant appealed against her dismissal by an email dated 1 June 2020. She said that she had not been consulted with prior to the redundancy and that there had been no details provided of the selection process, the pool for selection and criteria used for selection. She noted that the shop remained open, albeit for takeaway orders only. The appeal meeting took place on 8 June 2020 at 3.00pm. At the claimant's request it took place by telephone rather than face to face. That was to reflect both the claimant's concerns about COVID and her childcare situation (pp.1311-1314).

127. Based on the claimant's and Mr Mohammed's notes, we find that that meeting took place by phone and lasted for around ten minutes. It did not, we find, take the form of a full appeal hearing. The claimant asked Mr Mohammed a series of questions to which he provided answers. He said that five staff had been made redundant and that there were no staff currently employed by the company. We find that was not accurate. Mr Mohammed did not provide an appeal outcome letter despite being asked to do so by the claimant.

128. We find that, contrary to what Mr Mohammed told the claimant at the appeal hearing, the first respondent continued to employ staff in May, June and July 2020. The payslips in the bundle and the rotas show that Jessie and Dan continued to be employed and paid by the first respondent for those months. The rotas also show Ellen continuing to work shifts during that period.

Ante-natal appointments

129. The claimant in her statement said she attended 12 ante natal appointments between 10 April 2019 and 17 October 2019 (para 23). We find that some were when she was on holiday leave (16 May 2019, 16 July 2019 and 28 August 2019). Of the rest, we find that in practice the claimant arranged those appointments on her non-working days or during non-working hours. For the period April to the start of September 2019 (covering 8 of the total appointments) we find that it was the claimant who prepared the draft rotas. We find that in practice she could and did arrange her ante-natal appointments around her working hours. She would mark in the staff diary that she was unable to work on those days/at that time.

130. The claimant suggested she gave Mr Mohammed advance notice of her appointments. We find that is the case to the extent that she gave notice via the staff diary of when she was unable to work. Except in relation to the 25 September 2019 we do not find evidence that she specified that the reason she was unable to work on a particular day/a particular shift was due to having an ante-natal appointment. There was no evidence (in the WhatsApp messages around the time of the antenatal appointments or otherwise) of any specific request for time off to attend an ante-natal appointment during working hours made by the claimant being refused by Mr Mohammed or the first respondent.

131. The one day when it appears to us that the claimant cut short what could have been a normal shift to attend an ante natal appointment was on the 2 May 2019. At that time the claimant was preparing the rotas. Both versions of the rota in the Bundle (pp.1148-1149) show the claimant's shift that day as being 10-11.30 a.m. We find that it was the claimant's decision to allocate herself a short shift that morning. There is no evidence that she asked Mr Mohammed for time off during her shift to attend an appointment either on that occasion or others and was refused it.

132. There were 4 ante-natal appointments which took place after Mr Mohammed took over preparing the rotas form early September 2019. One took place when she was signed off sick (14 September 2019). The antenatal appointment on Thursday 25 September 2019 was on a non-working day-the claimant asked to come back to work on the following day (p.534 at 10.59 a.m.). We find the other two (14 and 17 October 2019) took place outside the claimant's working hours. 17 October 2019 was a working day but the claimant worked her full shift of 12-6 p.m. Again, there was no evidence of the claimant requesting time off during her working hours and being denied it.

Sunday working

133. We found that from the end of January/beginning of February 2019, the claimant was preparing the draft staff rotas (e.g. p.328 at 11:29) for approval by Mr Mohammed.(10:26 p.m. on 7 Feb 2019 (p.336)). Up to the time she went on her extended trip to India, the rotas show the claimant as working 2 Sundays-17 February 2019 and 17 March 2019.

134. In relation to 17 February 2019, on 7 February 2019 (p.336) at 10:23 Mr Mohammed asked whether the claimant was sure that she wanted to work 7 days on the next rota and she confirmed she did. Her clock in card (p.156) confirms that she

worked from 10:13 to 17:35 on that Sunday. In relation to 17 March 2019 the claimant's clock in card (p.157) confirms that she worked from 10:07 to 17:43. We find that it was the claimant who started drafting the rota for that week and her working on a Sunday appears on all the drafts of that rota in the Bundle (pp.1127-1129).

135. We find that in practice the claimant did ask for her shift on the rota to be changed, e.g. to accommodate her gym session (e.g. 8 February 2019 at 12:15 (p.338). There was no evidence of her asking for her shift on the rota to be changed so she did not have to work Sundays.

136. The claimant continued to prepare the rotas after she returned in July 2019 from her trip to India. On 21 August 2019 the claimant sent Mr Mohammed the draft rotas for the two weeks ending 1 September and 8 September 2019. She said "I put myself on that Sunday" (i.e. 8 September 2019) (p. 524). We find that the claimant volunteered to work on that Sunday. On 1 September claimant wrote in a WhatsApp to Mr Mohammed "if you don't need me for Sunday mornings then don't worry about putting me on" (p.528). She was not on the final rota for Sunday 8 September and did not work it.

137. From September 2019 Mr Mohammed prepared the rotas. When the claimant returned to work in the week commencing 14 October 2019 she was on the rota to work a Sunday shift from 2-8 p.m. on Sunday 20 October 2019 and did so. We find that she did not raise any issue with working that Sunday.

138. Mr Mohammed also put the claimant on the rota to work the same shift the following Sunday. We find the claimant initially asked to work an earlier shift (12-6 p.m.) to enable her to attend Temple later on that day. Mr Mohammed agreed to that, but the claimant then sent him a WhatsApp message on the afternoon of Thursday 24 October 2019 (p.536) to say that she could not work at all on that day. She said that "I wouldn't mind doing any other Sunday but [the 27th] is one of the big Hindu festivals….I know i said i would work 12-6 as i thought i would be ok to go to Temple after work but i have been told that it's an all day thing so i will need the full day off please". Mr Mohammed was not happy about this late change of plan, pointing out in his message in response that if it was a big Hindu festival the claimant could be expected to have known in advance she would not be able to work all day. However, he arranged cover so the claimant was not required to work that Sunday (pp.536-537).

Holidays and holiday pay

139. When it comes to the holidays taken by the claimant during her employment prior to her maternity leave we find that the claimant had mentioned to Mr Mohammed some time in advance that she and her husband were going to take an extended trip to India. She raised it again in early May 2019 in the WhatsApp conversation with Mr Mohammed (p.472 at 1:38 p.m.).

140. On 10 June 2019 the claimant confirmed in a WhatsApp message to Mr Mohammed that the dates of the India trip would be "23 June to about the 23 July". (p.495 at 10:11 a.m.). It was agreed that she would put the dates in the work diary (so Mr Mohammed could remember she was away then).(p.495 at 1:08 pm). The

claimant said those were the best dates to get the trip in before the baby was born. (p.496 at 5:36 on 11 June 2019).

141. Based on that and the claimant's clock in cards we find the claimant took as "holidays":

- The whole of the week of 13-19 May 2019
- The 4 weeks from 24 June to 21 July 2019 (p.163)
- Tuesday 27 August to 1 September 2019.

142. Based on the above we find that by 1 September 2019 the claimant had taken 5.6 weeks' annual leave.

Relevant Law

143. In this section we set out the law relating to the claimant's claims. Where relevant we have summarised the parties' submissions about the relevant law is in this section. Where relevant we have set out their submissions on how the law should be applied to the facts of this case in the "Discussion and Conclusion" section below.

The Equality Act claims

144. The claimant brings a number of claims of breach of the Equality Act 2010 ("the EqA"): pregnancy and maternity discrimination, indirect religion or belief discrimination, discrimination arising from disability, a failure to make a reasonable adjustment and victimisation. We set out the law relating to each claim below.

145. The EqA provides for a reversal of the burden of proof. Section 136 so far as material provides 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."**

146. Authoritative guidance on the effect of the burden of proof in the predecessor legislation to the EqA was given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205** and approved (with slight adjustment) by the Court of Appeal in **Igen Ltd v Wong [2005] ICR 931**. Further guidance was given by the EAT in **Laing v Manchester City Council [2006] ICR 1519**, which was approved by the Court of Appeal in **Madarassy v Nomura International plc [2007] ICR 867**. The guidance in **Igen Ltd v Wong** and **Madarassy** was in turn approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**.

147. In **Royal Mail Group v Efobi [2021] UKSC 33**, the Supreme Court confirmed that under the EqA the position remains as it was - the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the

Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. Along with those facts which the claimant proves, the Tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. The initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent. It is well established that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination - they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

148. The **Igen** guidance states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfies some objective standard of reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Efobi** at para 29).

149. In **Hewage v Grampian Health Board 2012 ICR 1054**, SC, Lord Hope endorsed the view of the EAT in **Martin v Devonshires Solicitors 2011 ICR 352, EAT**, that it is important not to make too much of the burden of proof provisions. The burden of proof provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation but they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law.

Time Limits

150. The time limit for bringing a claim under the EqA appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**

> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

Continuing Acts

151. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding this question:

'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

152. In considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

153. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

Just and equitable extension of time

154. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

155. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

156. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and

whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

157. In **Lupetti v Wrens Old House [1984] I.C.R. 348** the EAT held that where the 'act complained of' is a dismissal, the date from which the time limit runs is the date on which the dismissal takes effect and not the date when notice of termination is given.

Pregnancy and maternity discrimination

158. S.18 of the Equality Act 2010 ("the EqA") provides that:

> **"(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).**
>
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
>
> **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
>
> **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**

159. The Equality and Human Rights Commission's Statutory Code of Practice on Employment ("The EHRC Code") at para 8.22 gives examples of unfavourable treatment:

- failure to consult a woman on maternity leave about changes to her work or about possible redundancy
- disciplining a woman for refusing to carry out tasks due to pregnancy-related risks

- assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result

- depriving a woman of her right to an annual assessment of her performance because she was on maternity leave, and

- excluding a pregnant woman from business trips.

160. S.18 does not require the claimant to show that she has been less favourably treated than a comparator in similar circumstances. However, for a claim of pregnancy or maternity discrimination to succeed, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave.

161. In **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33** the EAT held that the protected characteristic need not even be the main reason for the treatment, as long as it was an 'effective cause'. The House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, held that where a protected characteristic has had a 'significant influence on the outcome, discrimination is made out'.

162. The EHRC Code (at para 3.11) says that 'the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'.

163. In **Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14** the EAT said that when it comes to what constitutes the grounds for a discriminatory act, that will vary according to the type of case: "the paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind… so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice."

164. Unless the case is one involving the application of an inherently discriminatory criterion, the question for the Tribunal is why did the alleged discriminatory act as he did – what consciously or unconsciously was his reason (**Nagarajan at para 29**). In answering that "reason why" question a simple "but for" test is insufficient (**B v A [2007] I.R.L.R. 576**). For example, the fact that maternity leave is the context in which the unfavourable treatment complained of occurred does not inevitably mean that it was "because of it" (**Sefton Borough Council v Wainwright 2015 ICR 652, EAT).**

165. A finding of a failure to offer suitable alternative employment within the terms of Reg 10 of the Maternity and Parental Leave Regulations 1999 cannot automatically be conflated with an act of unfavourable treatment because of pregnancy/maternity leave in breach of S.18 (**Sefton**).

166. When it comes to the obligation on an employer to carry out a risk assessment in relation to a pregnant worker, the EAT in **O'Neill v Buckinghamshire County Council [2010] I.R.L.R. 384** held that the obligation is triggered in certain circumstances namely:

a. the employee notifies the employer that she is pregnant in writing (clearly satisfied in this case)

b. the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her baby,

c. the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-exhaustive list at Annexes I and II of The Pregnant Workers Directive (92/85/EEC).

167. If the obligation to carry out a risk assessment arises but there is a failure to do so then "automatic unlawful discrimination" results (**Hardman v Mallon [2002 IRLR 516, EAT]** approved at para 133 of **Madarassy v Nomura International Plc [2007] ICR 756, CA**).

Indirect religion or belief discrimination

168. S.19(1) of the EqA provides that:

> **A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

169. S.19(2) of the EqA sets out the four elements of an indirect discrimination complaint:

> "**(2) …a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> (a) **A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> (b) **it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> (c) **it puts, or would put, B at that disadvantage, and**
>
> (d) **A cannot show it to be a proportionate means of achieving a legitimate aim."**

170. In this case, the relevant protected characteristic is religion or belief. In light of the decision in **Eweida v UK [2013] IRLR 231 CJEU**, the EAT has confirmed that when considering cases involving religion or belief, it is not a requirement that the Tribunal determine - whether considering group or individual disadvantage - whether the particular manifestation of the religion or belief itself is a mandatory duty or requirement of that religion or belief; there need only be a " sufficiently close and

direct nexus between the act and the underlying belief " (**Pendleton v Derbyshire CC [2016] I.R.L.R. 580**, EAT).

171. Case law sets out the following further relevant principles:

a. section 136 of the EqA provides for a reversal of the burden of proof, but the onus is still on the claimant to prove facts from which a Tribunal could conclude that discrimination may have occurred. In the context of an indirect discrimination claim, before there can be any reversal of the burden of proof it would have to be established that:

i. There was a PCP;

ii. That it disadvantaged [those sharing the claimant's religion or belief] generally; and

iii. That what was a disadvantage to the general created a particular disadvantage to the individual who is claiming. Only then is the employer required to justify the PCP (**Dziedziak v Future Electronics Limited [2012] Eq LR 543**).

b. When it comes to proving particular disadvantage it is not necessary for the claimant to prove their case by provision of relevant statistics. Those, if they exist, will be important material but the claimant's own evidence or evidence of others sharing his relevant protected characteristic, or both, might suffice (**Games v University of Kent [2015] IRLR 202, paragraph 41**).

c. In assessing whether a PCP puts a relevant group at a particular disadvantage it is important to select the correct pool. The pool should be that which suitably tests the particular discrimination complained of and is a matter of logic. In general the pool should consist of the group which the PCP affects, or would affect either positively or negatively, while excluding workers not affected by it (**Essop & Others v Home Office, UK Border Agency & Others [2017] IRLR 558**, citing Sedley LJ's remarks in **Grundy v British Airways [2008] IRLR 74** and **paragraph 4.18 of the Equality and Human Rights Commission's Code of Practice on Employment**).

d. It is clear from section 19(2)(c) that the particular disadvantage to the relevant group must be shared by the individual bringing the claim. That is clear from the reference in that subsection to "that" disadvantage.

e. There cannot be a claim where there is only a hypothetical disadvantage e.g. where a claimant is applying for a job with no intention of taking it (**Keane v Investigo & Others UKEAT/0389/09/SM**).

Discrimination arising from disability ("s.15 claim")

172. Section 15 of the EqA states that:

> **(1) A person (A) discriminates against a disabled person (B) if--**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability**.

173. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, i.e. (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in the EqA (**Gallop v Newport City Council [2014] I.R.L.R. 211**).

174. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

a. the disability had the consequence of 'something';

b. the claimant was treated unfavourably because of that 'something'.

175. In **Basildon** the EAT said it does not matter in which order the Tribunal approaches these two steps.

176. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

a. First, the Tribunal has to identify whether the claimant was treated unfavourably and by whom.

b. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

c. The Tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

177. "Unfavourable treatment" is not defined in the EqA. Paragraph 5.7 of the EHRC Code explains that it means "the disabled person must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

178. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**).

179. A claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. In **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT** the EAT confirmed that a s.15 claim can succeed where the disability has a significant influence on, or was an effective cause of, the unfavourable treatment.

180. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

181. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code"). sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

182. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

183. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

a. that he or she has been subjected to unfavourable treatment

b. that he or she is disabled and that the employer had actual or constructive knowledge of this

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment

d. some evidence from which it could be inferred that the 'something' was the reason for the treatment.

184. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

185. Failure to make reasonable adjustments

186. Section 39(5) of the EqA provides that a duty to make reasonable adjustments applies to an employer. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

187. Section 20(3) provides as follows:-

> **"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

188. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

a. the provision, criterion or practice applied by or on behalf of an employer, or

b. the physical feature of premises occupied by the employer,

c. the identity of non-disabled comparators (where appropriate) and

d. the nature and extent of the substantial disadvantage suffered by the claimant.

189. The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

190. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the EHRC Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

191. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the EqA defines "substantial" as being "more than minor or trivial".

192. The duty does not apply if the respondent did not (nor could reasonably be expected to know) both that the disabled person has a disability and that they are likely to be placed at a substantial disadvantage by the provision, criterion or practice (Schedule 9 Para 20 of the EqA).

Victimisation

193. S.27 of the EqA makes victimisation unlawful. It provides that:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

194. This means that for a discrimination claim to succeed, the claimant has to show two things. First, that they did a protected act and, second, that they were subjected to a detriment because of it.

195. S.27(1)(a) refers to detriment because of a protected act but does not refer to "less favourable treatment". There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para

9.11 states: 'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'.

196. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. In **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] UKHL 16** the House of Lords stressed that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. Accordingly, the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. This means the employee's own perception of having suffered a 'detriment' may not always be sufficient to found a victimisation claim.

Unenforceable contract terms

197. S.142 of the EqA provides that

> **(1) A term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act.**

Unlawful deduction from wages

198. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

> **"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**
>
> > **(a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or**
> >
> > (b)**the worker has previously signified in writing his agreement or consent to the making of the deduction."**

199. S.27(1) of ERA says:

> **"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-**
>
> > **(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"**

200. S.13(3) of ERA says:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be**

> **treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

201. in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

Failure to provide written particulars of employment

202. At the time relevant to the claimant's claim, section 1 of the ERA required an employer to give an employee a written statement of particulars of employment not later than 2 months after the start of the employment. Where an employer fails to comply with that requirement, s.38 of the Employment Act 2002 states:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5….**
>
> **(3) If in the case of proceedings to which this section applies—**
>
> > **(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and**
> >
> > **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)—**
>
> > **(a) references to the minimum amount are to an amount equal to two weeks' pay, and**
> >
> > **(b) references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."**

203. The right to compensation under s.38 is not a free-standing right and compensation can only be granted if the claimant succeeds with a claim of the kind listed in Schedule 5. The power to make an award does not arise if the particulars have been provided prior to the commencement of proceedings.

Automatic Unfair Dismissal under s.99 ERA and the MPLR

204. It is accepted that the claimant cannot claim "Ordinary" unfair dismissal because she did not have 2 years continuous service with the first respondent when her dismissal took effect. However, she claims that her dismissal was "automatically"

unfair under s.99 of the ERA. There is no continuous service requirement for such a claim.

205. S.99 of the ERA provides (so far as material) that:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if -**
>
> **(a) the reason or principal reason for the dismissal is of a prescribed kind, or**
>
> **(b) the dismissal takes place in prescribed circumstances.**
>
> **(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.**
>
> **(3) A reason or set of circumstances prescribed under this section must relate to -**
>
> **(a) pregnancy, childbirth or maternity,**
>
> **(b) ordinary, compulsory or additional maternity leave.**

206. Regulations 20 of the Maternity and Parental Leave Regulations 1999 provides as follows:

> **Regulation 20 - Unfair dismissal**
>
> **(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if -**
>
> **(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or**
>
> (b) **the reason or principal reason for the dismissal is that the employer is redundant, and regulation 10 has not been complied with."**

207. Regulation 10 of those regulations provides that:

> **Regulation 10 - Redundancy during maternity leave**
>
> **(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.**
>
> **(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).**
>
> **(3) The new contract of employment must be such that -**

> **(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and**
>
> **(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract."**

208. In **Simpson v Endsleigh Insurance Services Ltd [2011] ICR 75 the EAT** said that both limbs of reg.10(3) need to be satisfied before the obligation to offer the vacancy arises.

209. The suitability of a job is a question of fact to be decided in the light of the individual employee's circumstances. However, **Endsleigh** confirms that the suitability of the vacancy should be assessed form the point of view of the objective employer.

Notice Pay

210. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

211. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 of the ERA) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation. An employee employed for less than two years is entitled to one weeks' notice under s.86 ERA.

212. Ss.88 and 89 of ERA provide that an employee is entitled to notice pay for the minimum notice period if they are absent from work wholly or partly because of pregnancy or childbirth.

Holiday Pay

213. The Working Time Regulations ("the WTR") provide a minimum entitlement of 5.6 weeks annual leave. Reg.13(9) provides that it cannot be carried over in to the next holiday year. Unless the contract provides for a different holiday year, the holiday year will start on the date of employment and then start of the anniversary of that date.

214. Under WTR Regulation 14 a worker is entitled to be paid for any holiday untaken at the end of their employment. The formula used to calculate that is (A x B) - C where A is the leave to which the worker is entitled, B is the proportion of the leave year which expired before the termination date and C is the leave already taken in that holiday year.

215. In terms of the pay used to calculate holiday pay, the starting point is ss.221-224 ERA. However, in **Bear Scotland and ors v Fulton and ors 2015 ICR 221** the EAT held that holiday pay should reflect an employee's normal remuneration in order to comply with EU Law. That means that discretionary overtime should count for Holiday Pay if it sufficiently regular to be normal remuneration, and therefore intrinsically linked. That only applies to the 4 weeks holiday in regulations 13 WTR, however, since that is required for compliance with EU law. The same rules does not apply to reg.13A of the WTR, i.e. the additional 1.6 weeks not required by EU law. For that additional leave, Holiday Pay is calculated by reference to ss.221-224 ERA. For workers with normal working hours overtime will not be included in the calculation unless it is contractual.

Discussion and Conclusions

First Claim

216. In relation to this claim, we reminded ourselves of our decision on the limited extent to which the two respondents should be allowed to participate in the hearing of the claim. Specifically, neither was permitted to participate on the issue of liability in relation to the First Claim. The exception to that had been the second respondent being able to participate in relation to the issue of his being the claimant's employer but that this issue did not arise because of the claimant's acceptance on the first day of the hearing that she was employed by the first respondent.

217. In terms of the effect of those limitations on our decision, we concluded that this meant that the claimant's Equality Act claims would succeed if the burden of proof passed in relation to any of those claims. That was on the basis that the limited nature of the respondents' participation meant they were not able to assert a non-discriminatory reason for any treatment if the burden had passed.

Disability

The claimant relies on the following disability for the purposes of her claim: word dyslexia.

The respondents concede that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 (see record of the Preliminary Hearing dated 1 September 2020, point 14).

Did the respondents have knowledge, or could it reasonably have been expected to have knowledge, of the claimant's disability at the relevant time? (Issues 1-3)

218. We have found as a fact that the claimant told the second respondent about her word dyslexia and its impact on her at her initial interview on 24 September 2018. We find, therefore, that the second respondent and, through him, the first respondent did have the requisite knowledge of the claimant's disability at all relevant times.

Discrimination – Time / Jurisdiction (pursuant to s. 123 Equality Act 2010 – "EA 2010")

219. We have found it more convenient to deal with these issues after first reaching our conclusions on the other issues. We set out our conclusions on the time limit issues on the First and Second Claims at paras 266-269 and para 302 below respectively.

Pregnancy Discrimination (pursuant to s. 18 Equality Act 2010)

Was the claimant treated unfavourably by the respondents because of her pregnancy, during the protected period and in respect of the following acts:

a. *demotion (reduction in hours and removal of managerial tasks) on or around July / August 2019; (Issue 7a).*

220. As recorded in paragraph 80 above, we find that on 10 September 2019 Mr Mohammed confirmed that the claimant was demoted from her role as manager to a "regular team member". We do not find that the demotion took place at an earlier date. Mr Mohammed at the end of August 2019 reaffirmed the claimant's role as manager (see para 71).

221. We are satisfied that that demotion amounted to "unfavourable treatment". It resulted both in a loss of status and a loss of pay for the claimant. Her hourly rate from October 2019 was reduced by 50p per hour directly because of the demotion. That unfavourable treatment took place during the protected period starting with the claimant's pregnancy.

222. We find that the claimant's pregnancy was an effective cause of the demotion. The reasons given by Mr Mohammed for the demotion were that the claimant was not able to fulfil all the duties required of a manager including late working, weekend working, placing deliveries away, due to her saying that she unable to lift items. We find that the claimant's inability to fulfil those duties arose directly from her pregnancy. It was an effective cause of the demotion.

223. In those circumstances we are satisfied that we can make a positive finding that the claimant's pregnancy was an effective cause of her demotion. We do not therefore need to rely on the burden of proof provisions in relation to this allegation. This allegation therefore succeeds.

224. When it comes to the allegation that there was also a reduction in the claimant's hours from this point we find that there was no reduction before September 2019. The agreed summary of the claimant's hours (pp.169-170) do not show such a reduction. The position from September onwards is more difficult to assess because the claimant was off sick then "suspended" and only returned to work on a fully rota'd basis from the week commencing 14 October 2019. We found (para 105) that there was a significant reduction in her rota'd working hours from then until her maternity leave started. Mr Mohammed's WhatsApp message on 10 September 2019 told the claimant she would no longer be guaranteed hours and his subsequent message on 23 September confirmed she would not be offered shifts. We find therefore that the claimant's hours were reduced from 10 September 2019. From 10 October 2019 the reduction was recorded in writing in her "zero hours contract" which we find (as we explain in relation to the next allegation) was not a

zero hours contract but reduced her hours to 18 hours a week from her previous 36 hours per week.

225. We find that reduction took place during the protected period and was unfavourable treatment. We find that the reduction in hours was part and parcel of her demotion and that her pregnancy was an effective cause of both.

226. Were we required to apply the burden of proof approach, we would have found that the claimant had established facts from which we could conclude that discrimination had occurred. Specifically, the reduction in hours did not occur until the claimant had raised her inability to carry out certain tasks because of her pregnancy. As we recorded above, we are also satisfied that the demotion was triggered by the claimant being unable to fulfil certain tasks which was intrinsically linked to her pregnancy.

227. We find that the claimant was demoted from 10 September 2019 and that her hours were reduced from 10 October 2019. These allegations of pregnancy discrimination succeed against the first and second respondents.

> b. *purportedly changing her contract to a zero hours contract on or around September / October 2019;*

228. In relation to this allegation, we find that the first respondent (by Mr Morris and the second respondent) did on 10 October 2019 purport to change the claimant's contract to a “shop assistant” contract. We do not find, however, that the contract was a zero hours contract. In fact, although it was in some places referred to as a zero hours contract it included a guarantee of 18 hours minimum hours per week (paragraph 7 on page 1214). We accept that there was a reduction in the claimant’s hours. The specific allegation that her contract was changed to a zero hours contract is therefore not made out. We upheld the allegation that her hours were reduced under the previous allegation.

229. This allegation does not succeed - there was not a reduction to a zero hours contract.

> c. *failure to provide a risk assessment until 11th October 2019 and consequent failure to ensure that the claimant was not carrying out tasks that placed her health and wellbeing at risk (tasks as described at paragraphs 11 of the claimant’s ET1);*

230. We find that the respondent did not carry out a risk assessment until 11 October 2019. We find that there were circumstances which triggered the requirement to review the risk assessment applicable to employees in the claimant’s position. Specifically, her role required her to be on her feet for long periods of time, required her to lift sometimes heavy items and to stretch and reach. The claimant specifically raised with Mr Mohammed the difficulties she would have in moving the tables in the shop to clean in July 2019 when she returned from India (see paras 59-61). She chased him up about the risk assessment from then on (e.g. On 5 September 2019). We find that the obligation to carry out a pregnancy risk assessment had arisen at the latest by 23 July 2019. Applying **Hardman v Mallon** we are satisfied that the failure to provide a risk assessment until 11 October 2019

was an act of pregnancy discrimination. We do accept that there is evidence that the respondent's employees would help the claimant to a certain extent with tasks in the shop such as lifting. However, we do find that the respondent did not take steps to ensure that the claimant was not carrying out tasks that placed her health and wellbeing at risk until 11 October 2019. This allegation succeeds in relation to both respondents.

d. *failure to provide the claimant with the respondent's maternity policy;*

231. By this, we take this to be a reference to be a reference to the first respondent's maternity policy. Mr Morris at the grievance meeting on 27 September agreed to provide the maternity policy but failed to do so. We find the first respondent had a maternity policy (otherwise Mr Morris would not have agreed to provide it). We find it probable it was incorporated into the Employee Handbook. There was a section on maternity in the Employee Handbook in the Bundle (p.120) but we accept the claimant's evidence that she did not see that prior to her dismissal. We found that the claimant had asked Mr Mohammed for the policy (at the latest in her grievance). It is accepted that the policy was not provided. We find that the failure to provide that policy was unfavourable treatment and that it took place during the protected period.

232. The question for us is whether this was because of the claimant's pregnancy. In relation to this allegation we find that we need to apply the burden of proof approach. We have found that the claimant was otherwise treated unfavourably because of her pregnancy by being demoted and (below) by being subjected to discriminatory comments from colleagues. We are satisfied that those findings taken together are sufficient to pass the burden of proof to the respondents. Because of the restrictions on their participation they are not able to discharge that burden.

233. This allegation therefore succeeds in relation to both respondents.

e. *discriminatory comments. Specifically, the claimant complains of the comments made by the claimant's colleague Adil and by her manager Faisal as described in paragraph 12-13 of the claimant's ET1. The comments were made on or around 20 August 2019, and they are referred to in subsequent messages that the claimant exchanged with Mr Mohammed on 21 August 2019;*

234. We find (see para 64) that the claimant's colleague, Adil, made the alleged comments. We find that they were unfavourable treatment and occurred during the protected period. Adil's comments explicitly related to the claimant's pregnancy and we find that they were made because of her pregnancy. We find that Adil's remarks were acts of pregnancy discrimination.

235. When it comes to the second respondent, the specific allegation is that his message to the claimant saying that if she was unable to do the work needed of her she would need to look for another job was an act of pregnancy discrimination. We found that comment was made (paras 66-67) albeit on 20 August 2019 not on the 21 August. It was made during the protected period and we find it was unfavourable treatment. Although it does not explicitly refer to the claimant's pregnancy we find that the claimant's pregnancy was an effective cause of the comment. The reason

she was “unable to do the work needed” was her pregnancy. The comment is part of a longer message in which Mr Mohammed makes that link clear.

236. In summary what we find is that the claimant’s pregnancy was an effective cause of the comments made both by Adil and by Mr Mohammed. This allegation succeeds. The first respondent is liable for the comments by Adil as his employer. The second respondent is also personally liable for his own comment but not for Adil’s because he was not his employer.

f. *failure to stop the discriminatory comments referred to under (e) above by the respondents’ members of staff;*

237. As we recorded at para 72 we found that Mr Mohammed did speak to Adil’s uncle about his behaviour although there was no evidence he spoke directly to Adil. However, we also found that Mr Mohammed posted a strong message on the staff WhatsApp group on 20 August 2019 telling staff to respect the claimant in her role as manager. We found Adil did not repeat his comments after 20 August 2019. Once reported, therefore, we found that steps were taken to prevent further comments. This allegation fails.

g. *failure to provide the claimant with a copy of the respondents’ policy for antenatal appointments and failure to allow the claimant to attend ante-natal appointments during work hours;*

238. In relation to the failure to provide the respondent’s policy for antenatal appointments, we find that there was no such standalone antenatal appointments policy. It was not provided because it did not exist rather than because of the claimant's pregnancy. To the extent that there was any policy relating to maternity, we have already dealt with that in relation to allegation (e) above.

239. When it comes to attendance at ante-natal appointments, we found that there was no failure to allow the claimant to attend antenatal appointments during working hours. As we record at paras 126-129, we found that the claimant chose to arrange her ante-natal appointments either during holiday leave or outside her allocated shifts. For the majority of the relevant period, it was the claimant herself who prepared the shift rotas. We found no evidence that the claimant asked for time off during her working hours and was refused it. We find that the claimant was not treated unfavourably by not being allowed to attend ante-natal appointments during working hours.

h. *suspension without pay between 25 September and 12 October 2019.*

240. As we record at paragraphs 89 above, we found that the claimant was not given work or paid between 25 September and 12 October 2019. She was ready and willing to work during that period. She even attended the shop to pick up her keys only to be told that she could not have them. We found that the claimant’s contract at this time entitled to 36 hours work per week and she was not provided with that. Although the respondent’s case was that this was not a “suspension”, we find that the claimant was told by Mr Mohammed there were no shifts for her. We find that there was a de facto suspension even if it was not labelled as such.

241. We find that the suspension without pay is unfavourable treatment and that it happened during the protected period. We have to decide whether the claimant's pregnancy was an effective cause of that suspension. We find that the suspension happened after the claimant raised her grievance. The context for that grievance was the claimant's demotion which we have found was pregnancy related. Her grievance was itself about her pregnancy and the respondents' failures in relation to it. The key question it seems to us is whether, based on our other findings, the claimant has established facts from which we could conclude that her pregnancy was an effective cause of her suspension. We find that she has. The burden in this case passes to the respondents. Because of the restrictions on their involvement they are unable to put forward an adequate explanation to discharge the burden and this allegation succeeds in relation to both respondents.

Indirect Religion or Belief Discrimination (pursuant to s. 19 Equality Act 2010)

> *Did the respondents apply a provision, criterion or practice that all staff must work on a Sunday in accordance with the respondents' rota system?*

242. We find that the respondents did not apply this provision, criterion or practice. We found that from January/February 2019 to September 2019 the claimant herself was in charge of preparing the draft staff rotas. We find that the second respondent was aware that the claimant could not usually work Sundays and that this was not something to which he objected. On one occasion he queried whether the claimant did want to work Sunday (para 131) We find that the evidence supports the finding that it was the claimant who on occasion volunteered to work Sundays.

243. We found that there one occasion (27 October) when the claimant had agreed to work for part of a Sunday but then found she could not because her religion required attendance at an all-day festival. Mr Mohammed arranged cover so she was not required to work that day.

244. We therefore find the respondents did not apply the PCP contended for.

> *If so, does this requirement put those who share the claimant's religion or belief (Hindu) at a particular disadvantage when compared with persons with whom the claimant does not share it?*

245. In case we are wrong about the application of the PCP contended for we have gone on to consider the other issues in relation to this claim. The claimant did not put forward any evidence about the requirement of the Hindu religion in terms of working on a Sunday. There was nothing to suggest that that religion prohibited working on a Sunday (the claimant volunteered to do so on more than one occasion). Were we required to do so, we would have found there was insufficient evidence to find that the PCP contended for put those sharing the claimant's religion at a particular disadvantage.

> *Did this requirement put the claimant at a disadvantage because she was not able to attend Temple?*

246. Had we found that the PCP did apply and group disadvantage was made out we would have found that the PCP did not put the claimant at the particular

disadvantage. We find that was because on our findings of fact she was able to balance attending Temple and her working hours. In fact, as we have said, there were a number of occasions on which the claimant volunteered to work on a Sunday. This was not a case where her religion meant that she could not work on Sundays at all – what she was seeking was flexibility so that she could attend Temple and that flexibility was afforded her. On the one day when she was required to attend an all-day festival she was allowed to.

> *Can the respondents show it was a proportionate means of achieving a legitimate aim?*

247. Had we found that the respondents imposed the PCP contended for and that it had group and individual disadvantage then the claimant's claim would have succeeded because the respondents are not allowed to put forward a positive case asserting objective justification for the requirement. As we have said, however, our conclusion is that the PCP was not applied.

Discrimination Arising from Disability (pursuant to s. 15 Equality Act 2010)

> *Was the claimant's need for additional time to read and understand documents "something arising in consequence of" the claimant's disability?*

248. We find that the need for additional time to read and understanding documents was something arising in consequence of the claimant's disability, namely her dyslexia.

> *Did the respondents treat the claimant unfavourably by requiring her to sign her contract of employment at the grievance meeting held on 10 October 2019 and by refusing to allow her time to properly consider the contract before signing it?*

249. We do find that requiring the claimant to sign her contract at the meeting was unfavourable treatment.

> *Was such unfavourable treatment because of something arising in consequence of the claimant's disability, namely, her need for additional time to read and understand documents?*

250. We do not find that the unfavourable treatment in this case was "because of" the claimant's need for additional time. The case does not seem to us to make sense when put on that footing. The claimant's evidence did not provide the basis for a finding that she was required to sign her contract of employment and not given extra time because of her need for additional time. It seems to us this claim is properly characterised as a reasonable adjustment claim.

> *If so, can the respondents show that such treatment was a proportionate means to achieving a legitimate aim?*

251. If we are wrong and the unfavourable treatment was because of the claimant's need to have extra time to read and understand documents, then the

claim would have succeeded since the respondents were prohibited from asserting the positive defence to the claim by showing that it was objectively justified.

Failure to Make Reasonable Adjustments (pursuant to s. 20 and s. 21 Equality Act 2010

> *Did the respondents impose a provision, criterion or practice of requiring the claimant to immediately sign the document on 10 October 2019?*

252. We find that the respondents did impose a provision, criterion or practice of requiring the claimant to sign her contract of employment on 10 October 2019. We accept her evidence that she was told that she needed to sign the contract during that meeting.

> *If so, did this requirement put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she needed more time to read the document and understand the terms and because by not affording her that time she signed a document on less favourable terms?*

253. We do find that the requirement did put the claimant at a substantial disadvantage. The respondents concede the claimant is a disabled person by reason of dyslexia. We accepted the claimant's evidence about the impact of her dyslexia on her ability to take in complex documents (para 103). The Tribunal's own experience of hearing the claimant give evidence supported the view that she on occasion struggles with the meaning of words and needs additional time to read. We have found that although the meeting was good-natured the claimant did find it intimidating and felt pressured to sign the documentation. We find our finding is supported by the fact that when she had had an opportunity to further consider the documents in a less pressurised environment the claimant raised objections to them via the REC's letter of 15 October 2019.

254. When it comes to a legal document like a contract, we accept that requiring her to sign the contract at the meeting on 10 October 2019 would place the claimant at a substantial disadvantage.

> *If so, would allowing the claimant more time to consider the contract before signing it have avoided the disadvantage?*

255. The claimant was given time to read through the contract at the meeting on 10 October 2019. By allowing the claimant more time we understand that the claimant is saying an adjustment would be to allow her to have time beyond the length of the meeting itself, i.e. to take the document home. We do think that would have alleviated the disadvantage. The claimant's evidence was that she finds reading more difficult when in a pressured situation. There was no suggestion from the CCTV footage that we saw that either Mr Morris or the second respondent intimidated the claimant in any way at that meeting. However, we do find that it was to some extent a pressurised situation involving the claimant's line manager (against whom she had raised a grievance) and Mr Morris who was from Head Office.

256. We do therefore find that allowing the claimant to take the contract home would have been a reasonable adjustment which the respondents failed to make.

We have considered the respondents' submission that Mr Mohammed should not be liable for that failure given that it was Mr Morris who led the meeting. We take into account that a failure to make a reasonable adjustment is an act of omission. Mr Mohammed was the claimant's manager. He was aware of her dyslexia. On that basis we do find he is jointly liable with the first respondent for the failure to make the reasonable adjustment contended for.

Unlawful Deduction from Wages (pursuant to s. 13 Employment Rights Act 1996)

What wages were properly payable to the claimant from 2 October 2019 and between 25 September 2019 and 12 October 2019?

257. There are two elements to this claim. The first is the alleged deduction arising from the reduction of the claimant's hourly rate to £8.21 which we find took effect from the claimant's October 2019 pay. The second is the alleged deduction by failing to pay her when she was "suspended" between 25 September 2019 to 12 October 2019.

258. We deal with the first element first because we need to decide the claimant's entitlement to pay in October 2019 before we can decide whether there was an unlawful deduction (and if so to what extent) during the "suspension".

Did the claimant suffer a deduction from wages from 2 October 2019?

259. The first question is what wages the claimant was entitled to by law in October 2019. We found that as from April 2019 it was agreed that the claimant's contracted hours would be 36 hours per week paid at the store manager's rate of £8.71. The claimant's case is that those contractual terms were never subsequently lawfully varied and that her pay from October 2019 should have been based on those terms. The respondent's case is that at the latest from 10 October 2019 the claimant's terms were lawfully varied by the contract she signed at the meeting on that day. It says that by reason of the contract she signed on that date her entitlement in law was to be paid at £8.21 per hour with a guaranteed minimum 18 hours per week.

260. The claimant's case is that the claimant never truly consented to the variation embodied in that 10 October 2019 contract. It was submitted that she signed under duress and in circumstances where, because of her dyslexia, she had not had an opportunity to take in the contents of what she was signing. Those points were made clear in the letter sent on her behalf by the REC on 15 October 2019. For the respondent it was submitted that the circumstances in which the contract was signed did not meet the requirement for "duress" in common law.

261. We have found that the claimant's demotion to Shop Assistant and the reduction in her hours were acts of pregnancy discrimination. We have also found that the requirement for the claimant to sign the contract at the meeting put the claimant at a substantial disadvantage and that the respondents failed to make a reasonable adjustment by failing to allow her more time to consider the contract before signing.

262. Given those findings we have decided that the 10 October 2019 contract did not lawfully vary the claimant's terms of employment. We find that she could not

have validly consented to the variation given our finding that the circumstances in which she signed it caused her a substantial disadvantage. We find there is no issue of having subsequently affirmed the contract given the REC's letter on her behalf on 15 October 2019. If we are wrong about the issue of consent, then we would have found that the terms of the contract relating to wages, job description and hours were unenforceable under s.142 of the EqA since they constitute treatment prohibited by the Act, i.e. they embodied the unlawful demotion of the claimant and reduction in her hours.

263. We find, therefore, that in October 2019 the claimant was entitled to be paid in accordance with her pre-demotion hours and pay, i.e. 36 hours per week at £8.71 per hour.

264. We deal with the suspension period below. We find that from the point the claimant returned to work in the week commencing 14 October 2019 until she started maternity leave there were deductions from her wages being the difference between the hourly rate of £8.71 to which she was entitled and the £8.21 she was actually paid for hours worked. The claimant worked 106 hours and we find that there was a deduction from her wages for those hours of £53.00. We also found (para 105) that the claimant's hours were reduced from 14 October 2019 onwards. We have found the claimant was entitled to 36 hours per week. In fact, for the weeks commencing 14 and 21 October she was allocated only 18 hours in each week. We find there was a deduction equivalent to 36 hours x £8.71, i.e. £313.56 in relation to those weeks.

Did the claimant suffer a deduction from wages from 25 September 2019 – 12 October 2019?

265. We find the claimant did suffer a deduction from wages in this period. We found that she would not have worked on 25 and 26 September but would have returned to work on 27 September 2019 and worked 3 days of that week and the first two weeks of October 2019. That amounts to a total of 15 days' work, 6 hours per day at £8.71 per hour. That gives a total entitlement to wages for that period of £783.90. We do not accept, as suggested by the claimant, that the wages for that period should be calculated by reference to the claimant's "usual working hours" which it calculated as 39 hours per week. The pay the claimant was legally entitled to was the amount due under her contract, i.e. 36 hours per week. In addition, the claimant's hours at the point of suspension did not in practice exceed 36 hours per week.

Were the deductions unlawful?

266. For the reasons given at para 259 above we find that the deductions were unlawful. The figures set out are the gross figures.

267. If we are wrong and the 10 October 2019 did validly vary the claimant's hours so that there were no unlawful deduction we would have awarded the amounts deducted as compensation for pregnancy discrimination on the basis that the deductions flowed from the claimant's unlawful demotion and reduction in hours.

<u>Failure to Provide Written Particulars of Employment (pursuant to s. 38 Employment Act 2002)</u>

Did the respondents fail to provide the claimant with written particulars of employment?

268. We accept Miss Amartey's submission that the claimant was provided with particulars of employment via the 10 October 2019 so the power to make an award under s.38 of the Employment Act 2002 does not arise in this case.

Discrimination – Time / Jurisdiction (pursuant to s. 123 Equality Act 2010 – "EA 2010")

Are any of the complaints out of time?

Has there been a continuing act of discrimination bringing any such complaint within time?

If not, would it be just and equitable to extend the time limit for the submission of these claims?

269. We find (taking into account the extension of time resulting from Early Conciliation) that events from 13 August 2019 (in relation to the first respondent) and 15 August 2020 (in relation to the second respondent) would be in time.

270. Of the allegations of discrimination we have upheld, we find that the demotion, the reduction in hours and the suspension were in time, occurring in September/October 2019. In relation to the failures to carry out a risk assessment or provide the maternity policy we find that these were continuing acts up to and including the grievance meeting on 27 September 2019 and therefore also in time. We find the failure to make a reasonable adjustment at the meeting on 20 October 2019 was also in time.

271. When it comes to the discriminatory comments by Adil, we found that they were made on (or continued up to) the 20 August 2019 when the claimant reported them to Mr Mohammed. We find they were made in time as was Mr Mohammed's comment by WhatsApp message made on 20 August 2019.

272. If we are wrong about Adil's comments being made in time we would have considered it just and equitable to allow the claim out of time given that there is limited prejudice to the respondents. That is because it is accepted that the remarks were made and they were brought to the respondents' attention very shortly after they were made and recorded in contemporaneous WhatsApp message exchanges. Given that any extension of time could be at most 3-4 weeks (given that the remarks were made after the claimant returned from India at the end of July) the prejudice to the claimant of not being able to proceed with that allegation outweighs any prejudice to the respondents of allowing it to proceed.

The Second Claim

Claimant's Status (pursuant to s. 230 Employment Rights Act 1996 – "ERA 1996" – and s. 83 EA 2010)

Was the claimant engaged as an employee or worker pursuant to section 230 ERA 1996 and/or employed under a contract of employment, a contract of apprenticeship or a contract personally to do work pursuant to s. 83 EA 2010?

273. During the hearing the respondents accepted that the claimant was an employee of the first respondent so we did not need to decide this issue.

Pregnancy Discrimination (pursuant to s. 18 Equality Act 2010)

Was the claimant treated unfavourably by the respondents because of her pregnancy, during the protected period and in respect of the following acts:

a. *failure to keep in contact with the claimant while she was on maternity leave and consequent failure to invite her to attend consultation over redundancy;*

274. We have found on the facts that the respondent did keep in contact with the claimant while she was on maternity leave and did invite her to attend consultation over redundancy. Although the claimant gave evidence that she did not remember receiving the initial invite email from Mr Mohammed dated 13 April 2020, we found that that email was sent and so, even if it was not read by the claimant at the time, we are satisfied that the first respondent did invite her to attend consultation. It seems to us that the claimant's real allegation is that the respondent failed to consult and undergo a due process when selecting her for redundancy. We deal with that allegation under heading 5(c) below. This allegation fails.

b. delays and failures to pay the claimant's statutory maternity pay and failure to provide the claimant with a breakdown of the amounts owed to her;

275. On the facts we find that the first respondent did fail to pay the claimant statutory maternity pay on time and that there were delays in providing her with payslips and/or breakdowns of the amounts owed to her. That unfavourable treatment happened during the protected period, namely during the claimant's maternity leave. We have considered whether the claimant's pregnancy and or maternity leave was an effective cause of the delays and failures. We find that throughout the claimant's employment there were delays in payslips being provided and queries about tax codes and holiday pay being resolved (e.g. p.414, p.429, p.500). That was because Mr Mohammed's accountant dealt with the production of pay slips and any queries about pay, including holiday pay and maternity pay. We do not find that those delays were specific to maternity pay. We also found that the COVID lockdown had a significant impact on the first respondent's ability to pay its employees.

276. Given our findings about the unfavourable treatment the claimant experienced because of her pregnancy in relation to the First Claim we accept the burden of proof passed in relation to this allegation. However, the respondent has provided an adequate non-discriminatory explanation for the delays and failures relating to the claimant's maternity pay. We remind ourselves that by "adequate" the law does not require a "good" explanation. We are satisfied that delays and failure were because of the accountant's failings and the impact of COVID on the first respondent's cashflow rather than because of pregnancy or maternity.

c. selecting the claimant for redundancy (by notice dated 28 May 2020, effective date of termination 8 June 2020) in the protected period without consultation and due process?

277. It is accepted that the claimant was selected for redundancy. We find that was unfavourable treatment which happened during the protected period.

278. When it comes to the lack of consultation and due process, we find that although the first respondent via Mr Mohammed initially did invite the claimant to have a consultation meeting by phone, that meeting never happened. Mr Mohammed then gave the claimant a very limited window of opportunity to have a follow-up call and did not respond to the claimant's subsequent attempts to set up a consultation call. In contrast, staff working in the shop were given an opportunity to state their case face to face with Mr Mohammed. That was the case for the 3 staff retained, Dan, Jessie and Ellen. We find the claimant was treated unfavourably by not being given the same opportunity for a consultation meeting with Mr Mohammed (whether by phone or face to face).

279. We bear in mind what **Sefton** says about the context of maternity leave not being sufficient in itself to mean that a decision to select an employee for redundancy was because of her pregnancy and/or maternity leave. In this case, however, we are satisfied that the claimant has proved facts from which we could conclude that her absence on maternity leave was an effective cause of the failure to consult with her to the same extent as her colleagues. What the evidence shows is that other employees, such as Jessie and Dan, were given the opportunity to make further representations which the claimant was not. Mr Mohammed stopped responding to the claimant's efforts to speak to him. The respondents have provided no explanation as to why that was. On that basis we find that the claimant's maternity leave was an effective cause of that failure to arrange further consultation and that it was an act of pregnancy and maternity discrimination.

280. By extension, we also find that the claimant's absence on maternity leave was an effective cause of her selection for redundancy. It meant that the claimant was denied the opportunity given to others to change Mr Mohammed's mind about selecting her for redundancy. We find that was important in this case because we also find that Mr Mohammed had formed the view that the claimant would not work evenings and/or late shifts up to close of the shop and would not be as flexible as other staff. We find that was a view formed by the claimant's inability (as Mr Mohammed saw it) to fulfil her duties while pregnant which had led him to demote her. We find that demotion arose out of his exasperation at the impact of her pregnancy on the needs of the business. We accept Miss Cornaglia's submission that from August 2019 the relationship between Mr Mohammed and the claimant had deteriorated because of the impact of her pregnancy. That is clearly reflected in the WhatsApp exchanges in late August and early September 2019. Looking at the redundancy selection in the context of that history, we find that the claimant has proved facts from which we could conclude that her pregnancy was an effective cause of the decision to select her for redundancy. The burden passes to the respondents to provide an adequate non-discriminatory explanation for her selection.

281. We find they have failed to do so. There were no objective selection criteria nor any kind of scoring matrix as might be expected in a redundancy exercise.

Although there was an appeal hearing we found that that took place over the phone by way of a ten-minute conversation. There was no appeal outcome decision nor any real attempt by the first respondent or Mr Mohammed to reconsider the decision to make the claimant redundant. We also found that Mr Mohammed inaccurately told the claimant that there were no staff working at the shop which was not the case. Although Mr Mohammed gave explanations for retaining Jessie, Dan and Ellen at this hearing, they were not put forward to the claimant as an explanation for her selection during the appeal hearing or in any appeal outcome letter. We do not find the explanation an adequate one to discharge the burden on the respondents.

282. This allegation therefore succeeds in relation to both respondents.

Was the claimant subject to this treatment because of her pregnancy?

283. We have dealt with this issue in setting out our conclusions in relation to each of the allegations above.

Unlawful Deduction from Wages (pursuant to s. 13 Employment Rights Act 1996)

Did the claimant suffer a deduction from wages in respect of unpaid notice pay, holiday pay and arrears of pay?

284. The first respondent accepted that the claimant was entitled to one weeks' notice which was not paid. We find the claimant's normal working hours were 36 hours payable at £8.71 and find the notice pay due was £313.56.

285. The claimant did not in her Schedule of Loss nor via Miss Corngalia's submissions indicate what "arrears of pay" it was said she was entitled to. To the extent that this related to SMP it was accepted that has now been paid in full by HMRC.

286. When it comes to holiday pay, Miss Amartey submitted that the claimant's claim should be dismissed because she had provided no evidence to substantiate that claim. She relied on **Timbulas v Construction Workers Guild Ltd EAT 0325/13.** However, in that case, the claimant was unable to pinpoint on which days he had taken leave and how much leave he had taken. In this case we find the evidence (the claimant's and the documentary evidence including the rotas and payslips) does provide enough evidence so we are not "guessing" as the Tribunal found it would have had to do in **Timbulas**.

287. In terms of the claimant's leave year, the 10 October 2019 contract says her holiday year runs from January to December. However we found (paras 256-260 above) that that contract was void. Instead we apply regulation 13(b)(ii) of WTR. We find that that leave year ran from 24 September each year. Based on our findings of fact we find that the claimant had used up her full entitlement of 5.6 weeks' leave for the annual leave year 2018-2019. She would have accrued holiday entitlement for 2019-2020 from 24 September 2019 onwards.

288. We accept Miss Amartey's submissions that her accrued holiday entitlement at the date of dismissal would be based on 257 days or 70.41% of her annual leave entitlement for the whole leave year or 3.94 weeks. We round that up to 4 weeks.

289. We asked the parties to provide written submissions on how the claimant's holiday pay should be calculated. The parties were agreed that the document at p.169 provided an accurate summary of the weekly hours worked by the claimant. Based on those the claimant submitted her average weekly hours for the purposes of calculating holiday pay should be 36.3 hours. The respondents submitted it should be 34.68 hours per week. The difference was accounted for by the claimant excluding form the averaging exercise the weeks worked from September 2019 onwards. That was on the basis that it was from that point on that the claimant's hours were reduced and that she was suspended without pay. We have found that the reduction in hours and the suspension were acts of pregnancy discrimination.

290. Miss Amartey submitted that there was no scope in the ERA provisions dealing with calculation of holiday pay to exclude weeks because they were in effect "tainted" by discrimination. We remind ourselves that all the leave under consideration would be leave under regulation 13, i.e. Working Time Directive leave. We find that to reflect "normal remuneration" we should disregard the impact of any unlawful discrimination on that normal remuneration. We find that the relevant average working hours to be used is 36.3 or, rounding down to the nearest whole hour, 36. For the same reason we prefer the claimant's submission that the relevant hourly rate is £8.71 rather than £8.21.

291. Based on those figures, we find that the claimant's accrued holiday pay entitlement for the whole year would be 36 hours x £8.71 x 5.6 weeks, which makes a total of £1755.94. 70.41% of that is £1236.36.

292. We accept Miss Amartey's submission that the claimant must give credit for the holiday pay she did received in the year 2019-20 namely £582.91 paid on 31 October 2019. That leaves a deduction of £653.45 at termination of employment.

293. If we are wrong, and the calculation of holiday pay has, as the respondents submit, to be based on weeks "tainted" by discrimination, we would have awarded the difference by way of an increase in the compensation awarded for pregnancy discrimination.

Were the deductions unlawful?

294. Yes. There was no lawful basis for deducting/failing to pay the accrued holiday pay due at the termination of employment.

Victimisation (pursuant to s. 27 Equality Act 2010)

Did the claimant do a protected act for the purposes of s. 27(2)(d) by (1) raising a grievance complaining of discriminatory treatment by the respondent on 13 September 2019 and (2) submitting her first case (Case no: 2400185/2020) on 10 January 2020?

Did the respondents believe that the claimant did a protected act for the purposes of s. 27(1)(b)?

295. In her submission, Miss Amartey confirmed that the respondents accepted that the claimant's grievance and her First Claim were protected acts.

Did the respondents subject the claimant to a detriment because the claimant did that protected act or because the respondents believed that the claimant did a protected act by dismissing the claimant by notice dated 28 May 2020 (effective date of termination 8 June 2020)?

296. We accept that Mr Mohammed reacted angrily to the claimant raising her grievance including by removing her from the staff WhatsApp group and effectively suspending her without pay. We also accept that he found the issuing of the First Claim a cause of stress. We accept Miss Amartey's submission that there was a significant period of time between the grievance and the decision to dismiss. There was a shorter period (some 4 months) between the First Claim and the decision to dismiss. We find that the passage of time does not necessarily mean that the protected act(s) is not a significant influence or the effective cause of (in this case) the dismissal.

297. We accept Miss Cornaglia's submission that there are other facts which support the claimant's claim that the grievance (and perhaps more significantly the First Claim) had a significant influence on the decision to dismiss the claimant. They include the hostile nature of Mr Mohammed's correspondence with the REC (e.g. p.1258) and his and Mr Morris' allegations that the REC were harassing them. We find that the First Claim was a source of hostility towards the claimant. We find that the claimant has proved facts form which we could conclude that the protected acts were an effective cause of the claimant's dismissal. We do not think they were as significant an influence as the claimant's pregnancy but do find that it was a significant influence. We find the respondents have not discharged the burden of showing that the protected acts were not a significant influence on the decision to dismiss.

Automatic Unfair Dismissal (pursuant to Reg. 10 of the Maternity and Parental Leave Regulations 1999 and s. 99 of the Employment Rights Act 1996)

Was it no longer practicable, during the claimant's maternity leave, by reason of redundancy for the respondents to continue to employ the claimant?

298. We accept Miss Amartey's submission that there was a redundancy situation in the s.139 ERA sense. There clearly was a reduced need for employees to carry out work of a particular kind at the shop. We find that applies to both the managers role and the shop assistant roles but for different reasons. In relation to the managerial role previously carried out by the claimant, that role was now being carried out by Mr Burnham who we have found was not employed by the first respondent. In relation to the shop assistant roles there was a reduction in the need for their roles because of the impact of COVID on the shop. It limited the opening hours and limited the shop to takeaway and deliveries.

Was there a suitable available vacancy that the respondents could have offered the claimant by way of suitable alternative employment?

299. For the reasons given above we find there was no manager vacancy. We do find that there were 3 shop assistant vacancies, which were filled by Dan, Jessie and Ellen.

Was the available vacancy suitable in that:

a. the work to be done under it was of a kind which was suitable in relation to the claimant and appropriate for her to do in the circumstances, and

b. the capacity and place in which she would be employed and the other terms and conditions of her employment would not be substantially less favourable to her than if she had continued to be employed under the previous contract?

300. The claimant's case was either the manager's role or a shop assistant role was a suitable alternative vacancy for her. We have found that there were 3 shop assistant roles. As to whether it was suitable the claimant had been carrying out the shop assistant role since her demotion. To that extent it was clearly, viewed form the point of view of an objective employer, suitable in terms of the kind of work it involved. There was no issue about the suitability of the place where the vacancy arose because it was where the claimant had previously worked. This was not a case where re-location was required.

301. For the respondent, Miss Amartey submitted that the role was not suitable because it was completely flexible in terms of hours and required working until 1 a.m. She also submitted it was not suitable because there were no guaranteed minimum hours. It was not submitted by the respondent that the vacancy was not suitable because it was on substantially less favourable terms as to pay terms.

302. When it comes to hours. we found that Jessie did not regularly work until close but instead, based on the rotas, had regular 4-8 p.m. shifts. Even if it is correct that in practice Jessie worked until close on occasion, we accept Miss Cornaglia's submission that the claimant would have been available to do the same as she had done prior to her pregnancy. In terms of the number of hours worked, Jessie's payslips show total hours worked in June and July of 236 hours worked.

303. When assessing what an objective employer would consider suitable, we take the view that such an employer would be one free of any preconceived or discriminatory views about the claimant's flexibility based on her recent pregnancy and current maternity leave. Adopting that approach, we find that the shop assistant role (in particular that filled by Jessie which did not regularly require attendance at close of shop) was a suitable alternative vacancy for the claimant.

If so, did the respondents fail to offer the claimant such a suitable available vacancy and was the claimant's dismissal therefore automatically unfair?

304. We find the first respondent did fail to offer the claimant a suitable alternative vacancy so the dismissal was automatically unfair.

<u>Discrimination – Time / Jurisdiction (pursuant to s. 123 Equality Act 2010 – "EA 2010")</u>

Are any of the complaints out of time?

Has there been a continuing act of discrimination bringing any such complaint within time?

If not, would it be just and equitable to extend the time limit for the submission of these claims?

305. We find that the correct way to view the redundancy consultation and selection procedure which culminated in the claimant's dismissal is as a continuing act. Mr Mohammed's involvement throughout provides an element of continuity but we also find it would be denying the reality of the situation to divide up that process into discrete acts of discrimination. We find the final act complained of was the claimant's dismissal which took effect from 7 June 2020. Following **Lupetti** we find that the time limit ran from that date. The Second Claim was filed on the 2 September 2020. It was therefore filed in time as being within three months of the effective date of termination.

REASONS ON REMEDY

306. We have decided for the reasons set out above that the following claims made by the claimant succeed:

The First Claim

307. That the first and/or second respondent (as indicated below) treated the claimant unfavourably because of her pregnancy, during the protected period in respect of the following acts:

a. demotion (reduction in hours and removal of managerial tasks); (first and second respondents) (Issue 7(a)).

b. failure to provide a risk assessment until 11th October 2019 and consequent failure to ensure that the claimant was not carrying out tasks that placed her health and wellbeing at risk (tasks as described at paragraphs 11 of the claimant's ET1); (first and second respondents), (Issue 7(c)).

c. failure to provide the claimant with the respondent's maternity policy; (first and second respondents) (Issue 7(d)).

d. discriminatory comments. Specifically, the claimant complains of the comments made by the claimant's colleague Adil and by her manager Faisal as described in paragraph 12-13 of the claimant's ET1. The comments were made on or around 20 August 2019, and they are referred to in subsequent messages that the claimant exchanged with Mr Mohammed on 20 August 2019; (first and second respondents jointly and severally liable). (Issue 7(e)).

e. suspension without pay between 25 September and 12 October 2019. (first and second respondents) (Issue 7(h)).

308. That the first and second respondents failed to make a reasonable adjustment by not allowing the claimant more time to consider the contract she signed 10 October 2019 (Issues 16-18)

309. That the first respondent made unlawful deductions from the claimant's wages (Issues 19-22):

a. from 2 October 2019

b. from 25 September 2019 – 12 October 2019

The Second Claim

310. That the first and second respondents treated the claimant unfavourably because of her pregnancy, during the protected period and in respect of the following acts:

a. selecting the claimant for redundancy (by notice dated 28 May 2020, effective date of termination 8 June 2020) in the protected period without consultation and due process? (Issue 5(c))

311. That the first and second respondents victimised the claimant in breach of s.27 of the EqA.

312. That the first respondent made unlawful deductions in relation to:

a. unpaid notice pay,

b. accrued holiday pay

313. That the first respondent unfairly dismissed the claimant in breach of s.99 of the ERA in circumstances where there was a suitable available vacancy that the first respondent should have offered the claimant by way of suitable alternative employment

Issues on Remedy

314. The issues on remedy identified in the Lists of Issues (modified in light of those claims which failed and have been dismissed) were as follows:

The First Claim

315. If the claimant succeeds in her discrimination claims, what is the appropriate award?

316. Is the claimant entitled to reimbursement of wages deducted?

317. Is the claimant entitled to an award for injury to feelings and what is the appropriate award?

318. What is the appropriate calculation of interest on any award made by the Tribunal?

The Second Claim

319. Is the claimant entitled to an award for injury to feelings and what is the appropriate award?

320. In the event that the claimant is successful in her claim for unfair dismissal, what is the appropriate award?

321. In respect of any pecuniary loss, what is the appropriate measure of damages for lost earnings?

322. Has the claimant contributed to her dismissal and/or would she have been dismissed fairly in any event?

323. Is the claimant entitled to any other financial losses? (Such as holiday pay, notice pay, pension losses and/or other financial losses)

324. Is the claimant entitled to reimbursement of wages deducted?

325. What is the appropriate calculation of interest on any award made by the Tribunal?

326. In addition, we needed to decide the extent to which the second respondent is liable for any award made in relation to the First and/or Second Claim.

Findings of Fact related to Remedy

327. We first set out our findings of fact relating to the claimant's financial losses. We then set out our findings of fact relevant to injury to feelings. We have already set out our findings of fact in relation to the unlawful deductions claims in our reasons on liability.

Financial Loss

328. We have found that the claimant's selection for redundancy and dismissal was an act of unlawful pregnancy and maternity discrimination and an act of victimisation. The claimant's case is that were it not for that unlawful act she would have returned to work for the first respondent when her maternity leave came to an end. We accept the claimant's evidence that her intention was to return to work on 1 August 2020. She would by then have taken 9 months' maternity leave.

329. The claimant broke her ankle in July 2020 and said in evidence that this meant she would not have been fit to return to work at the shop until 3 September 2020. The claimant suggested that she would have been paid SSP for those 4 weeks. Given the work in the shop would have required her to be on her feet all day we think it would have taken longer for the claimant's ankle to have healed sufficiently for her to be fit for work. On the balance of probabilities we find it would have taken 6 weeks for her to be fit enough to return. For those 6 weeks she would have been paid SSP.

330. In terms of the job to which the claimant would have returned, we found that was to a shop assistant role. There were no manager vacancies. We find that she would have been paid at the relevant National Minimum Wage rate which from April 2020 was £8.72 per hour. We find it most probable that the claimant would have worked shifts equivalent to those worked by Jessie rather than the regular late shifts worked by Dan and Ellen. There was no evidence about the hours they worked from September 2020 onwards. For June Jessie worked 66 hours and in July 170 hours. In the absence of evidence as to the hours actually worked from September 2020 we must do our best with the evidence available and our knowledge of circumstances at the time. We find that the shop continued to trade during the first lockdown. We find it probable it would have continued to trade as a takeaway and delivery service during subsequent lockdowns. We find it would probably have benefitted from schemes to encourage people to eat out when restrictions were relaxed but then suffered when subsequent lockdowns prevented potential customers from eating out. Jessie's payslips suggest increasing hours from June to July. However, we accept that there might have been a dip in hours later in the year given the seasonal nature of the shop's trade. We think taking those factors into account that it is realistic to base the claimant's earnings had she returned to a shop assistant role on an average of 31 hours per week. That would result in weekly earnings of £270.32 per week. We base our award of compensation for financial loss on that.

331. It was put to the claimant by Miss Amartey that she would not return to the shop if the hours were reduced from the 36 hours she worked pre maternity leave. The claimant had made it clear that had the job at the shop been offered to her originally on a zero hours basis she would not have accepted it. We accept her evidence that this did not mean that she would have not returned to the shop after maternity leave if the hours were anything less than full time. We accept her evidence that she would have been more likely to look for a second job to supplement her income rather than give up the job at the shop than reject the job. We find that plausible given the uncertainty caused by COVID and the claimant's family situation in Autumn 2020 (her husband having lost his job).

332. From November 2020 the claimant and her husband were in receipt of Universal Credit. We asked the parties for submissions on how we should apportion the sums received between the claimant and her husband in calculating the financial loss resulting from her dismissal. We adopt the approach suggested by Miss Amartey, i.e. attributing to the claimant half the "standard allowance" in the benefits documents provided. Doing so, we calculate the total amount attributable to the claimant for the period up to July 2021 to be £2703.09.

Findings of fact relevant to injury to feelings

333. Our findings of fact on liability include findings about the impact of the acts of discrimination on the claimant.

334. There is ample evidence in the WhatsApp exchanges with Mr Mohammed of the claimant being anxious about her position and upset at the treatment she was experiencing. When it comes to the discriminatory remarks by Adil, we have referred in our liability findings to her messages to Mr Mohammed about those comments. She reported that "I have Adil speaking to me like I am rubbish". She said she did not

know if she wanted to come in for the rest of the week and that she "has no support whatsoever". She said "its just so stressful and I feel I am on my own no support from anyone and the one person who is here that I should get support I am not getting it from [Tee]"(p.520).

335. In terms of the impact of the claimant's demotion on 10 September 2019, we found that she was signed off sick by her GP with stress. On the balance of probabilities we find that was a direct response to her demotion.

336. At that time the claimant also wrote to Mr Mohammed (pp.533-534) to say she had been worried and stressed about getting everything in place for when she started maternity leave. She had not been provided with basic information about her maternity pay nor had a risk assessment been carried out.

337. When it comes the impact of the failure to make a reasonable adjustment at the meeting on 10 October 2019 we found that the claimant found the meeting intimidating and felt pressurised to sign the contract and other documents.

The Law

Compensation for unfair dismissal

338. S.118(1) ERA says that:

> "Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—
>
> (a) a basic award (calculated in accordance with sections 119 to 122 and 126, and
>
> (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

339. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

340. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

341. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been fairly dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd [1988] ICR 142** .

342. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

343. Where the Tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was

such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Compensation for breach of the Equality Act 2010

344. Section 124 of the Equality Act 2010 provides that where a Tribunal finds there has been a contravention of a relevant provision the Tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

345. In assessing financial loss, the aim is to put the claimant in the position that he would have been in but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

Compensation for Unfair Dismissal where there is a breach of the Equality Act 2010

346. Section 126 of the Employment Rights Act 1996 applies where compensation falls to be awarded in respect of any act both under the Equality Act 2010 and under the Employment Rights Act relating to unfair dismissal. Section 126(2) states that a Tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the Tribunal in awarding compensation on the same or another complaint in respect of that Act.

Injury to feelings

347. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference to purchasing power or earnings.

348. There are three bands of award for injury to feelings following **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA** and uprated in **Da'Bell v NSPCC [2010] IRLR 19 EAT:**

i) The top band: sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment

ii) The middle band: this should be used for serious cases, which do not merit an award in the highest band.

iii) the lower band: where the act of discrimination is an isolated or one-off occurrence.

There is within each band considerable flexibility, allowing a Tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

349. Presidential Guidance was issued on the **Vento** bands on 5 September 2017. A second addendum was issued in respect of claims presented on or after 6 April 2019, which applies to the First Claim. It says the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

350. A third addendum was issued in respect of claims presented on or after 6 April 2020, which includes the Second Claim. It says the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

351. For the respondents, Miss Amartey submitted that the claimant had not adduced evidence to substantiate anything more than minor injury to feelings.

352. In making an award for injury to feelings the task of a Tribunal is to consider what degree of hurt feelings has been sustained and to award damages accordingly, **Murray v Powertech (Scotland) Ltd [1992] IRLR 257 EAT.**

353. In **Ministry of Defence v Cannock [1994] I.C.R. 918** the EAT said that an award for injury to feelings is not automatically to be made whenever unlawful discrimination is proved or admitted. Injury must be proved. However, it went on to say that it will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the applicant's feelings. But it is not invariably so.

Joint and Several Liability and apportionment

354. In **London Borough of Hackney v Sivanandan and ors 2011 ICR 1374, EAT**, Underhill P said that joint and several liability should be the norm when a claimant has suffered discrimination from multiple respondents and the damage caused by that discrimination is indivisible.

Mitigation

355. Employees are under a duty to mitigate loss. The burden of proving a failure to mitigate lies with the respondent. They must show any failure was unreasonable. We must consider what steps the claimant should have taken to mitigate her loss, whether it was unreasonable for her to have failed to take any such steps and if so, the date from which alternative income would have been received.

Interest

356. The Tribunal are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations [1996] SI 2803 (as amended). For injury to feelings awards interest is awarded for the period beginning

on the date of the act of discrimination and ending on the day the amount of interest is calculated. For other awards interest commences at a midpoint.

Taxation

357. In relation to taxation, the Court of Appeal in **Moorthy v HMRC [2018] EWCA Civ 847** held that awards for injury to feelings were to be treated as tax free whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in subsection (1) includes psychiatric injury it does not include injured feelings. This amendment has effect for the tax year 2018-19 and subsequent tax years. Section 406 which deals with the tax exemption provides:

> "(1) This chapter does not apply to a payment or other benefit provided –
>
> (a) in connection with the termination of employment by the death of an employee, or
>
> (b) on account of injury to, or disability of, an employee.
>
> (2) Although 'injury' in subsection (1) includes psychiatric injury, it does not include injured feelings."

358. This means that an award of compensation for psychiatric injury falls within the tax exemption but an award compensating for injury to feelings does not if it is "in connection with termination of employment". Therefore, an award for injury to feelings is taxable to the extent that it exceeds £30,000 if made in connection with termination of employment.

359. To avoid any disadvantage to the claimant we should gross up any award to her over £30,000. It requires us to estimate the tax he will have to pay on receipt of the compensatory award and add that sum back into the award to cancel out the tax burden on her. The purpose is to place in the claimant's hand the amount she would have received had she not been discriminated against.

Discussion and Conclusions

360. Applying the law to the facts as we have found them, we now set out our conclusions on the issues we need to decide.

Compensation for unlawful deduction from wages (First Claim)

361. In relation to the unlawful deductions for the claimant's unpaid "suspension" from 25 September to 12 October 2019 we award the gross sum of £783.90. We award the gross sum of £53.00 in relation to the unlawful deductions arising for the change in hourly rate of pay from the 14 October 2019 and £313.56 in relation to the hours not allocated. That gives a total gross figure of £1150.46.

Compensation for unlawful deduction from wages (Second Claim)

362. In relation to the unlawful deduction for the claimant's unpaid notice pay we found that was £313.56. The compensation for unlawful deduction of holiday pay we find to be £653.45. That gives a total gross figure of £966.99.

What basic award should be awarded to the claimant under s.118(1)(a) of the Employment Rights Act 1996 ("the ERA")

363. The claimant was 27 when she was dismissed. We have found that her gross weekly pay under her contract of employment was £313.56. (36 hours at £8.71). She had completed 1 year's service when she was dismissed. Her basic award as calculated in accordance with s.119 ERA is therefore 1 x £313.56 giving a total basic award of £313.56.

What compensation for financial loss should the claimant be awarded for the pregnancy discrimination and/or victimisation and/or unfair dismissal

364. Before deciding what compensation we should award for financial loss we decided whether that compensation should be awarded as a compensatory award for unfair dismissal under the ERA or as compensation for the breaches of the EqA 2010. S.126 of the ERA means we cannot take into account under either of those Acts any loss or other matter which is or has been taken into account under the other by the Tribunal.

365. In this case we have decided that the appropriate approach is to award compensation for the claimant's financial loss including that arising from her discriminatory dismissal under the Equality Act 2010. That recognises both the central part the claimant's pregnancy played in events and Mr Mohammed's part in those events by making him jointly and severally liable for paying that compensation.

366. In terms of the financial loss arising from the discriminatory acts, that takes the form of the income the claimant lost because she was dismissed before she could return to work at the shop. We have compensated for the impact of her demotion and reduced hours in the compensation awarded for unlawful deductions from wages above.

367. We found that the claimant would have ended her maternity leave on 1 August 2020 but not been in a position to return to work for a further six weeks because of her broken ankle. For those six weeks we find she would have earned SSP totalling £575.10. We found that she would then have returned to a shop assistant role working an average 31 hours payable at £8.72. That gives a weekly income of £270.32 gross or 254.28 net.

368. In terms of the period for which compensation should be given, the claimant's schedule of loss claimed for 48 weeks to the date of the Tribunal. We find that compensating for a total period of 52 weeks from the date when she would have returned to work is appropriate. The claimant had not found other employment by the time of the Tribunal hearing. The respondents did not seek to argue that there had been a failure to mitigate on her part. However, we do not find there was evidence to substantiate a finding that the claimant's future job prospects had been harmed as a result of the unlawful discrimination she was subjected to.

369. In terms of financial losses, we therefore find the income lost by the claimant as a result of her discriminatory dismissal was 46 weeks at £254.28, i.e. £11,696.88 plus £575.10 SSP. That gives a total of £12,271.98.

370. Because we are awarding compensation for lost earnings under the Equality Act 2010, rather than making a compensatory award for unfair dismissal, the recoupment provisions do not apply to this part of our award. We therefore need to offset the Universal Credit the claimant actually received during the period for which we are awarding compensation for financial loss. We found the claimant received £2703.09 Universal Credit in that period. We deduct that amount from £12,271.98 to ensure that the claimant does not double recover. That gives a figure for lost income from dismissal to 26 July 2021 of £9,568.89.

371. The claimant also claimed £500 for loss of statutory rights which we think is appropriate in this case. Although she had not reached the two years' continuous service for "ordinary" unfair dismissal protection when she was dismissed she was within a few months of doing so. She will need to start from scratch in building up that continuous service with a new employer. We make a compensatory award for unfair dismissal in that amount.

What injury to feelings has the unlawful discrimination and victimisation caused the claimant and how much (if any) compensation should be awarded for that injury?

372. For the claimant Miss Cornaglia submitted that the acts of pregnancy discrimination in this case fell into the Upper middle **Vento** band and we should award £18000 for injury to feelings. Miss Amartey submitted that the claimant had failed to prove injury to feelings and that we should award £1500.

373. Miss Cornaglia provided examples of injury to feelings awards made in cases involving pregnancy and maternity discrimination. They involved awards of £30,000 (**Manning v Safetell** an unreported ET case); £25,000 (**Miles v Gilbank [2006] ICR 1297**) and £18,000 **(Stone v Ramsey Health Care Operations Ltd (EqLR 93)**). We only had summaries of the cases and are conscious of the risks involved in using cases on different facts as the basis for our decision. There are some features of the cases which we found useful in reaching our decision, however. In **Manning** the Tribunal noted the impact on the claimant was more severe because she was particularly vulnerable as a pregnant woman. We find that was a relevant feature of the claimant's case. Not only was she a pregnant woman but she was having her first child. We find that the respondents' failures to provide her with its maternity policy and to carry out a risk assessment did add to her anxiety at a time when she felt vulnerable in her job. Similarly, in **Manning** there was a demotion. Although it is not entirely clear, it seems to us that the events in Manning took place over a longer period of time than in the claimant's case, spanning two pregnancies. In **Miles** there was "a catalogue of behaviour which went beyond malicious and amounted to downright vicious" which was "targeted, deliberate, repeated and consciously inflicted". We do not find there was such a "vicious" campaign in the claimant's case. In **Stone** there was also a campaign to destroy the claimant's reputation including the raising of a "spiteful" grievance.

374. We remind ourselves that an injury to feelings award is intended to be compensatory. In this case we find evidence that the comments made by Adil and Mr

Mohammed in August 2019 caused the claimant to feel worthless and distressed. We find that her demotion led to a period of stress-related ill health. We find that Mr Mohammed at times reacted with anger towards her and questioned her ability to do her job while pregnant in exasperated terms, asking what he was paying the claimant for. We find that the claimant found Mr Mohammed's reaction to her raising Adil's comment, his demotion of her and his selection of her for redundancy particularly distressing because he had been supportive of her in the past. We find it easy to accept that being selected for redundancy was particularly distressing and anxiety inducing having just had her first child and with issues of financial security for her family a priority.

375. Taking all those factors in the round we find that the claimant's case is one falling in the upper middle Vento band and that the appropriate award is of £18000 compensation for injury to feelings. We do not award a separate amount for the victimisation claim as the impact of that is covered in our award.

376. We have considered whether we can divide that injury to feeling award and attribute it to specific acts. We find we cannot. The harm is indivisible. That applies to incident 7(e) which involves both comments made by Adil and by Mr Mohammed. As the harm is indivisible we find Mr Mohammed jointly and severally liable for the whole of the compensation under the Equality Act 2010.

377. When it comes to the failure to make reasonable adjustments, Miss Cornaglia submitted this was within the lower Vento band. We agree. We think the appropriate figure is £2000. That recognises that the situation in which the claimant found herself at the meeting on 10 October 2019 was an intimidating one but that it was a one off failure.

<u>Should any of the compensation be reduced because the claimant contributed to her own dismissal (s.123(6) ERA):</u>

378. We do not find that this is a case where the claimant contributed to her own dismissal. In fairness, the respondents did not suggest it was.

<u>The total award of compensation before interest and any grossing up</u>

379. The total award before interest and any grossing up is therefore as follows:

For unfair dismissal under the ERA:

a. A basic award: £313.56

b. A compensatory award (loss of statutory rights): £500.00

For unlawful discrimination under the Equality Act 2010:

c. Financial loss to 26 July 2021: £9,568.89

d. Injury to feelings (pregnancy discrimination and victimisation): £18,000.00

e. Injury to feelings (failure to make reasonable adjustments): £2000.00

For unlawful deduction of wages (First Claim): £1150.46.

For unlawful deduction of wages (Second Claim): £966.99

That gives a total award (before interest and adjustments for taxation) of £32,499.90. Of that, £27,568.89 is an award under the EqA for which the respondents are jointly and severally liable. The first respondent is solely responsible for the balance as deductions from wages and compensation for unfair dismissal.

What interest, if any, is payable on that compensation?

380. When it comes to interest, we decided that it was appropriate to apply interest in this case on those awards made under the EqA to the date of the calculation i.e. our second chambers day on 1 November 2021. As required by the Employment Tribunals (Interest on Discrimination Awards) Regulations we calculate interest on the injury to feelings for the whole of the relevant period and for other past loss on the mid point basis.

381. As to the date when it should start, the earliest incident in this case when it comes to the pregnancy and maternity discrimination was in August 2018 (Adil's comment). There is no date specified for that and in fairness to the respondent we find that the equitable approach is to calculate interest from 20 August 2018 when the claimant raised the comments with Mr Mohammed. The period of calculation from 20 August 2018 to 1 November 2021 is 1169 days.

382. For the injury to feelings award relating to the failure to make a reasonable adjustment we use 10 October 2019 as the starting date. The period of calculation from 10 October 2019 to 1 November 2021 is 753 days.

383. For the pregnancy and maternity injury to feelings award, the sum upon which we calculate interest is £18,000. The rate is 8% per annum. The daily rate is £3.95. The interest on the pregnancy and maternity injury to feelings award is therefore £3.95 x 1169 days = £4617.55.

384. For the reasonable adjustment injury to feelings award, the sum upon which we calculate interest is £2,000. The rate is 8% per annum. The daily rate is £0.44. The interest on the pregnancy and maternity injury to feelings award is therefore £0.44 x 753 days = £331.32.

385. Interest on financial losses arises from the pregnancy and maternity discrimination is based on the midpoint therefore 1169/2 = 585 days. At a rate of 8% per annum on £9,568.89 that equates to a daily rate of £2.10. The interest on this award is therefore £2.10 x 585 days = £1,228.50.

386. The total interest on the EqA award is therefore £6177.37.

387. The total award is therefore £38,677.27.

Should any part of the award be "grossed up" to take into account the impact of taxation?

388. We have awarded the unlawful deduction compensation gross on the basis that it will be taxable in the hands of the claimant so she will end up with the net amount she would have received and be fully compensated for those deductions.

389. We do not gross up the injury to feelings award relating to the reasonable adjustment nor the interest relating to it (£2331.32) on the basis that it is not taxable as it is compensation in relation to pre-termination acts of discrimination.

390. We have found the pregnancy and maternity discrimination injury to feelings to be indivisible. That means it includes compensation related to pre-termination acts and compensation related to termination of employment. We proceed on the basis that that means it is all taxable as being in connection with termination of employment. The total amount including interest is £33,414.94. The basic award and the compensatory award for loss of statutory rights is also taxable. That gives a total taxable amount relating to termination of employment of £34,228.50

391. However, the first £30,000 is tax exempt as a payment in connection with termination of employment.

392. That means £4,228.50. We work on the assumption that that whole amount will fall within the claimant's personal allowance and will not actually be taxed. Based on those assumption we find we do not need to gross up any part of the award.

Do the recoupment provision apply?

393. The recoupment provisions do not apply because we have not made a compensatory award for unfair dismissal consisting of immediate loss of income.

Conclusions

394. The total award to the claimant is the sum of £38,677.27. consisting of the following elements:

c. Compensation under the EqA for which both respondents are jointly and severally liable: £35,743.72

d. Compensation for unfair dismissal and unlawful deductions from wages for which the first respondent is solely liable: £2933.55

Employment Judge McDonald

Date____3 March 2022_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 March 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX
List of Issues
First Claim

Disability

1. The claimant relies on the following disability for the purposes of her claim: word dyslexia.

2. The respondents concede that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 (see record of the Preliminary Hearing dated 1 September 2020, point 14).

3. Did the respondents have knowledge, or could it reasonably have been expected to have knowledge, of the claimant's disability at the relevant time?

Discrimination – Time / Jurisdiction (pursuant to s. 123 Equality Act 2010 – "EA 2010")

4. Are any of the complaints out of time?

5. Has there been a continuing act of discrimination bringing any such complaint within time?

6. If not, would it be just and equitable to extend the time limit for the submission of these claims?

Pregnancy Discrimination (pursuant to s. 18 Equality Act 2010)

7. Was the claimant treated unfavourably by the respondents because of her pregnancy, during the protected period and in respect of the following acts:

a. demotion (reduction in hours and removal of managerial tasks) on or around July / August 2019;

b. purportedly changing her contract to a zero hours contract on or around September / October 2019;

c. failure to provide a risk assessment until 11th October 2019 and consequent failure to ensure that the claimant was not carrying out tasks that placed her health and wellbeing at risk (tasks as described at paragraphs 11 of the claimant's ET1);

d. failure to provide the claimant with the respondent's maternity policy;

e. discriminatory comments. Specifically, the claimant complains of the comments made by the claimant's colleague Adil and by her manager Faisal as described in paragraph 12-13 of the claimant's ET1. The comments were made on or around 20 August 2019, and they are referred to in subsequent messages that the claimant exchanged with Mr Mohammed on 21 August 2019;

f. failure to stop the discriminatory comments referred to under (e) above by the respondents' members of staff;

g. failure to provide the claimant with a copy of the respondents' policy for antenatal appointments and failure to allow the claimant to attend ante-natal appointments during work hours;

h. suspension without pay between 25 September and 12 October 2019.

Indirect Religion or Belief Discrimination (pursuant to s. 19 Equality Act 2010)

8. Did the respondents apply a provision, criterion or practice that all staff must work on a Sunday in accordance with the respondents' rota system?

9. If so, does this requirement put those who share the claimant's religion or belief (Hindu) at a particular disadvantage when compared with persons with whom the claimant does not share it?

10. Did this requirement put the claimant at a disadvantage because she was not able to attend Temple?

11. Can the respondents show it was a proportionate means of achieving a legitimate aim?

Discrimination Arising from Disability (pursuant to s. 15 Equality Act 2010)

12. Was the claimant's need for additional time to read and understand documents "something arising in consequence of" the claimant's disability?

13. Did the respondents treat the claimant unfavourably by requiring her to sign her contract of employment at the grievance meeting held on 10 October 2019 and by refusing to allow her time to properly consider the contract before signing it?

14. Was such unfavourable treatment because of something arising in consequence of the claimant's disability, namely, her need for additional time to read and understand documents?

15. If so, can the respondents show that such treatment was a proportionate means to achieving a legitimate aim?

Failure to Make Reasonable Adjustments (pursuant to s. 20 and s. 21 Equality Act 2010

16. Did the respondents impose a provision, criterion or practice of requiring the claimant to immediately sign the document on 10 October 2019?

17. If so, did this requirement put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she needed more time to read the document and understand the terms and because by not affording her that time she signed a document on less favourable terms?

18. If so, would allowing the claimant more time to consider the contract before signing it have avoided the disadvantage?

Unlawful Deduction from Wages (pursuant to s. 13 Employment Rights Act 1996)

19. What wages were properly payable to the claimant from 2 October 2019 and between 25 September 2019 and 12 October 2019?

20. Did the claimant suffer a deduction from wages from 2 October 2019?

21. Did the claimant suffer a deduction from wages from 25 September 2019 – 12 October 2019?

22. Were the deductions unlawful?

Failure to Provide Written Particulars of Employment (pursuant to s. 38 Employment Act 2002)

23. Did the respondents fail to provide the claimant with written particulars of employment?

Remedy

24. If the claimant succeeds in her discrimination claims, what is the appropriate award?

25. Is the claimant entitled to reimbursement of wages deducted?

26. Is the claimant entitled to an award for injury to feelings and what is the appropriate award?

27. What is the appropriate award to be made under s. 38 of the Employment Rights Act 2002?

28. What is the appropriate calculation of interest on any award made by the Tribunal?

ANNEX
List of Issues
Second Claim

Discrimination – Time/Jurisdiction

1. Are any of the complaints out of time?

2. Has there been a continuing act of discrimination bringing any such complaint within time?

3. If not, would it be just and equitable to extend the time limit for the submission of these claims?

Claimant's Status (pursuant to s. 230 Employment Rights Act 1996 – "ERA 1996" – and s. 83 EA 2010)

4. Was the claimant engaged as an employee or worker pursuant to section 230 ERA 1996 and/or employed under a contract of employment, a contract of apprenticeship or a contract personally to do work pursuant to s. 83 EA 2010?

Pregnancy Discrimination (pursuant to s. 18 Equality Act 2010)

5. Was the claimant treated unfavourably by the respondents because of her pregnancy, during the protected period and in respect of the following acts:

a. failure to keep in contact with the claimant while she was on maternity leave and consequent failure to invite her to attend consultation over redundancy;

b. delays and failures to pay the claimant's statutory maternity pay and failure to provide the claimant with a breakdown of the amounts owed to her;

c. selecting the claimant for redundancy (by notice dated 28 May 2020, effective date of termination 8 June 2020) in the protected period without consultation and due process?

6. Was the claimant subject to this treatment because of her pregnancy?

Unlawful Deduction from Wages (pursuant to s. 13 Employment Rights Act 1996)

7. Did the claimant suffer a deduction from wages in respect of unpaid notice pay, holiday pay and arrears of pay?

8. Were the deductions unlawful?

Victimisation (pursuant to s. 27 Equality Act 2010)

9. Did the claimant do a protected act for the purposes of s. 27(2)(d) by (1) raising a grievance complaining of discriminatory treatment by the respondent on 13 September 2019 and (2) submitting her first case (Case no: 2400185/2020) on 10 January 2020?

10. Did the respondents believe that the claimant did a protected act for the purposes of s. 27(1)(b)?

11. Did the respondents subject the claimant to a detriment because the claimant did that protected act or because the respondents believed that the claimant did a protected act by dismissing the claimant by notice dated 28 May 2020 (effective date of termination 8 June 2020)?

Automatic Unfair Dismissal (pursuant to Reg. 10 of the Maternity and Parental Leave Regulations 1999 and s. 99 of the Employment Rights Act 1996)

12. Was it no longer practicable, during the claimant's maternity leave, by reason of redundancy for the respondents to continue to employ the claimant?

13. Was there a suitable available vacancy that the respondents could have offered the claimant by way of suitable alternative employment?

14. Was the available vacancy suitable in that:

a. the work to be done under it was of a kind which was suitable in relation to the claimant and appropriate for her to do in the circumstances, and

b. the capacity and place in which she would be employed and the other terms and conditions of her employment would not be substantially less favourable to her than if she had continued to be employed under the previous contract?

15. If so, did the respondents fail to offer the claimant such a suitable available vacancy and was the claimant's dismissal therefore automatically unfair?

Remedy

16. Is the claimant entitled to an award for injury to feelings and what is the appropriate award?

17. In the event that the claimant is successful in her claim for unfair dismissal, what is the appropriate award?

a. In respect of any pecuniary loss, what is the appropriate measure of damages for lost earnings?

b. Has the claimant contributed to her dismissal and/or would she have been dismissed fairly in any event?

c. Is the claimant entitled to any other financial losses? (Such as holiday pay, notice pay, pension losses and/or other financial losses)

18. Is the claimant entitled to reimbursement of wages deducted?

19. What is the appropriate award to be made under s. 38 of the Employment Rights Act 2002?

20. What is the appropriate calculation of interest on any award made by the Tribunal?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case numbers: **2400185/2020 & 2413552/2020**

Name of case: **Mrs A Gannapureddy** v **1. Chester Desserts Ltd**
2. Faisal Mohammed

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 4 March 2022

"the calculation day" is: 5 March 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.