EMPLOYMENT TRIBUNALS

Claimant: **Miss Gemma Wharton**

Respondents: **Mr. Richard Harrington (R1)**
Dunston Lodge Ltd (R2)

Heard at: **Via Cloud Video Platform**

On: **1st, 2nd & 3rd March 2021**

Before: **Employment Judge Heap**
Members: **Ms. K McLeod**
Mr. C Pittman

Representation
Claimant: **Mr. T Wood - Counsel**
Respondent: **Ms. L Jarvis – Lay Representative**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote via CVP. A face to face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaints of pregnancy and maternity discrimination contrary to Section 18 Equality Act 2010 are all well founded and succeed.

2. The claim will be listed for a Remedy hearing on a date to be determined by the Tribunal.

3. Case Management Orders are attached.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Miss Gemma Wharton (hereinafter referred to as "The Claimant") against her now former employer, Dunston Lodge Ltd (hereinafter referred to as "The Second Respondent") and the Managing Director of the Second Respondent, Mr. Richard Harrington. We will refer to Mr. Harrington as

the First Respondent. The claim was presented by way of a Claim Form received by the Employment Tribunal on 28th October 2019. The Claimant presented the Claim Form herself but has since that time been in receipt of legal advice and assistance from Messrs. Elliot Mather solicitors who have in turn instructed Mr. Wood on her behalf today.

2. The presentation of the Claim Form followed on from a period of early conciliation via ACAS which took place between 29th August and 29th September 2019.

3. The Respondents entered their ET3 Response on 6th December 2019 resisting all of the complaints advanced by the Claimant. That Response was settled by Blacks solicitors who at the time were acting for both Respondents. Blacks ceased to be instructed by the Respondents in March 2020 (although that was for reasons unknown not communicated to the Tribunal until November 2020) and since that time the First Respondent has been dealing with the matter in person. Recently he has had the assistance of Ms. Jarvis, who we understand to be the Second Respondent's accountant, who has acted as the lay representative for both Respondents and has represented their interests at this hearing.

4. The claim came before Employment Judge Dyal on 13th February 2020 at which time it was identified that the Claimant was advancing five complaints of pregnancy or maternity discrimination contrary to the provisions of Section 18 Equality Act 2010. Those five complaints of discrimination are as follows:

    a. Failing to undertake a risk assessment between November 2018 when the First Respondent was notified of the Claimant's pregnancy and 5th May 2019 when the Claimant commenced maternity leave;

    b. Failing to provide the Claimant with a chair to assist her with her grooming duties upon her requesting one on 12th December 2018 until 8th March 2019 when her partner bought her a chair;

    c. Providing the Claimant with a new contract of employment on 3rd May 2019, three days before she was due to commence maternity leave and insisting that she sign it with no opportunity to review it beforehand;

    d. Under the terms of the new contract of employment changing the Claimant's job title from Manager and Head of Grooming to Senior Boarding Kennel Assistant and Groomer and removing duties that she had been undertaking, such as preparation of staff rotas, completion of Human Resources ("HR") records and cashing up which amounted to a demotion; and

    e. Failing to follow the Second Respondent's grievance procedure by failing to respond to the Claimant's grievance raised on 15th May 2019 until almost three months later on 5th August 2019 and then providing an inadequate response.

5. In addition to denying that the events took place as the Claimant contends, it is denied by both Respondents that any such matters amounted to discrimination. The Respondents also contend that some of the complaints made by the Claimant have been presented outside the time limit provided for by Section 123

Equality Act 2010. Unfortunately, the Claimant's witness statement did not deal with the question of jurisdiction but we heard supplemental evidence from her on that point.

THE HEARING

6. The claim was listed for three days of hearing time which took place between 1st and 3rd March 2021. Whilst evidence, submissions and deliberations were able to be concluded within that time, there was insufficient time for the Tribunal to give our decision orally to the parties as had originally been our intention. Indeed, we did not conclude our deliberations until after 5.10 p.m. on the final day of the hearing. That was caused by delays that we experienced during the course of the hearing with connectivity to the CVP link that we were using. Those connectivity issues affected representatives, parties and members of the Tribunal and all in all we lost approximately half a day of hearing time as a result.

7. That notwithstanding, we were able to overcome the number of technological difficulties that we encountered and we are satisfied that those did not affect the fairness of the hearing or compromise the evidence that we received during it.

8. Following Ms. Jarvis being asked to assist the Respondents she made a number of applications to adduce further witness and documentary evidence and to amend the ET3 Response to include an almost wholesale revision to the factual matters on which the Respondents sought to rely. As to the issue of additional witness evidence that application had already been refused by Employment Judge Clark before this hearing and two further applications of essentially the same substance were thereafter refused by Employment Judges Butler and Hutchinson. A further application was then made shortly before the hearing was due to commence which was accompanied by other documents on which the Respondents now sought to rely. It was directed by Employment Judge Jeram that we would consider those applications at the outset of the hearing.

9. We spent much of the first half day of the hearing dealing with those matters and refused all three applications made by the Respondents. We gave our reasons for refusing each of the applications orally at the time. Neither party has requested that those reasons form part of this Judgment and therefore we need say no more about them.

WITNESSES

10. During the course of the hearing, we heard evidence from the Claimant on her own behalf. In addition to her evidence, we also heard from the Claimant's partner, Mr. Chad Sellars.

11. We heard only from the First Respondent as to the position of both Respondents, having of course refused the further renewed applications to admit the very late additional witness evidence to which we have already referred above.

12. We make our observations below in relation to matters of credibility in respect of each of the witnesses from whom we have heard given that that has invariably informed a number of our findings of fact.

13. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the oral submissions made by Mr. Wood on behalf of the Claimant and Ms. Jarvis on behalf of the Respondents.

CREDIBILITY

14. As we have already touched upon above, one issue that has invariably informed our findings of fact in respect of the complaints before us is the matter of credibility. Therefore, we say a word about that matter now.

15. We begin with our assessment of the Claimant. We found her to have given us an honest and credible account. Her evidence was consistent with her witness evidence, her case generally and what contemporaneous documentation we had before us. Indeed, the Claimant's account remained consistent even when asked by Ms. Jarvis about the same issue often multiple times. In short, we did not have any issues with either the reliability or the credibility of the account that the Claimant gave to us.

16. Similarly, we accepted that Mr. Sellars gave an honest and reliable account. Whilst we are alive to the fact that Mr. Sellars is the Claimant's partner and therefore has something of a vested interest in these proceedings and in supporting the Claimant, his evidence was again consistent without giving any suggestion of being rehearsed. His evidence fit with both logic and the other surrounding evidence. Therefore, we had no reason to doubt both the reliability and the credibility of the account that Mr. Sellars gave to us.

17. We turn then to the evidence of the First Respondent. We found him to be a wholly unsatisfactory witness. Despite having impressed upon him the importance of answering the question that he was asked, his evidence was more often than not entirely evasive with Mr. Wood having to resort frequently to press him for an actual answer. Regularly, despite the answer to a question either being "yes or no", the First Respondent would answer "ok, go on" to seek to avoid giving an actual answer to the question. That generally manifested itself where the obvious answer to the question would undermine the case advanced by the Respondents or otherwise place them in difficulties. His account was also frequently contrary either to his own witness or oral evidence or the documentation before us and often made no logical sense. He was not prepared to make concessions even where those would clearly have been sensible and instead sought to divert blame away from himself and instead to others, including the Claimant and his former solicitors.

18. Moreover, in a number of areas it appeared to us that the First Respondent was simply making his evidence up as he went along and we come to some of those issues further below.

19. Whilst the First Respondent told us that he suffers from dyslexia, we have nothing to suggest that that caused any deficiencies in his evidence. Indeed, relevant passages were read out to him by Mr. Wood both of his own volition and also at the First Respondent's request. The First Respondent told us for the first time on the last day of the hearing that he also suffers from ADHD, but we have no medical or other evidence to suggest that any such diagnosis was the reason for his somewhat woeful account during the hearing. We had also made it plain

to the First Respondent that if he felt that he needed breaks during the course of the hearing these could – and indeed were – provided. It was not suggested that anything else was required. We cannot therefore assume that any medical condition caused his evidence to be as it was and it was our view that he was simply not giving a truthful or reliable account. That was particularly acute on the final day of the hearing.

20. Examples of areas of the evidence of the First Respondent which were, at best, entirely unsatisfactory are as follows:

a. That his explanation for text messages clearly indicating that other members of staff had not been provided with contracts of employment were not true and that they were sent to close down the Claimant because staff were "fed up" with her held no scrutiny. There was absolutely no substance to that and the First Respondent's evidence that he had heard about this "on the grapevine" but he was not able to say how that had happened or who he had heard it from was fanciful. His evidence also did not fit with the timeline of the messages in question;

b. His evidence was that he was not good with dates which accounted for him not being able to recollect certain matters but when asked by Mr. Wood as to the above text messages his initial account was that the sender in question, Lewis, had been on annual leave at the time that the message was sent. It is inconceivable that he would have been able to recall, even if he had no problem remembering dates, almost two years later the precise time that a member of staff had taken annual leave. Moreover, his evidence that he recalled that Lewis had signed his contract in June did not tally with later messages between the Claimant and that member of staff that he had still not received a contract of employment in August of the same year. It is inconceivable that Lewis would have been on annual leave for almost three months between the dates of the messages in question and there is no reason to suppose that he was not being truthful with the Claimant;

c. He gave a contradictory account as to why the Claimant and Mr. Sellars were the only members of staff for whom a bespoke contract was drafted (a matter we shall come to further below). This began with an account that he wanted them both on a longer notice period because they were longstanding members of staff but ended with the position that he had wanted bespoke contracts to introduce restrictive covenants;

d. His evidence was that the Claimant had begun employment as a groomer but had never been promoted to Manager and Head of Grooming but could provide no sensible explanation as to why a contract of employment issued to her some time after the commencement of her employment gave that precise job title. His account that that was what the Claimant liked to be referred to made no sense. It is incredible in our view that a member of staff – who as a groomer would be a relatively junior employee – would be allowed to dictate their own job title rather than that be assigned to them by the Second Respondent;

e. His evidence was that he had instructed solicitors to prepare contracts of employment in 2019 but that he could initially give no explanation as to why the Claimant's job title on that contract was radically different to that on her first contract – namely Manager and Head of Grooming. He later gave evidence that this was probably what he had recalled the Claimant's job title to be after earlier making other suggestions that his solicitors had just put this title or got it from some other unidentified paperwork. However, that did not stand up to scrutiny as that job title was Senior Boarding Kennel Assistant and Groomer and his earlier evidence was that the Claimant had not done any kennel assistant work since the very early stages of her employment. It is inconceivable therefore that in 2019 he would have recalled that to be her job title or role or that his solicitors would have just made that up without his instructions;

f. His evidence differed from his witness statement as to how those contracts had come to be prepared. His statement set out that that was as a result of a customer having mentioned in passing that he should put contracts of employment in place. However, on any account he had already issued contracts at an earlier point in time. His evidence then changed to the customer having suggested that he should update his contracts. However, he could not explain how that customer could have known that his contracts needed any form of revision whatsoever and his evidence simply did not stand up to scrutiny; and

g. There was a fundamental change in the position of the Respondents about when a risk assessment was completed in respect of the Claimant's pregnancy. The evidence of the First Respondent was that there had been an informal risk assessment in November 2018 and then further risk assessments conducted in February and April 2019. Those two 2019 risk assessments were not referenced at all in the Respondents' ET3 Response, the First Respondent's witness statement or in a chronology that he had prepared shortly before the hearing. Again, it is inconceivable that the First Respondent would have a better recollection of events over a year after he instructed solicitors to prepare the Response; that he would not have told them about all risk assessments allegedly carried out as that was a central plank of the Claimant's case and that the 2019 risk assessments would be the only matters omitted from the chronology which he prepared. Whilst the evidence of the First Respondent was that he had realised the error and contacted the Tribunal to update the chronology, there was no reasonable explanation as to why such key matters could possibly have been omitted in error. They were of central importance to the claim and the First Respondent knew that.

21. The above are not exhaustive and there was a clear deficiency in much of the evidence that the First Respondent gave to us. In short, we considered him to be neither credible nor reliable in his account.

22. For all of those reasons, we prefer the evidence of the Claimant and Mr. Sellars to that of the Respondent unless we have expressly said otherwise.

THE LAW

23. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Discrimination relying on the protected characteristic of pregnancy or maternity

24. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 18 and 39.

25. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

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

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

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

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

26. Section 18 EqA 2010 provides that:

> ***"18 Pregnancy and maternity discrimination: work cases***
>
> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
>
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
>
> *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*
>
> *(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
>
> *(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*
>
> *(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*
>
> *(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.*
>
> *(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—*
>
> *(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or*
>
> *(b) it is for a reason mentioned in subsection (3) or (4).*

27. Neither the Equality Act generally nor Section 18 itself defines what is meant by unfavourable treatment. The position can, however, be contrasted with the concept of unfavourable treatment for the purposes of Section 15 Equality Act 2010. Although Section 15 does not define unfavourable treatment ether, the Equality and Human Rights Commission Code (on which we say more below) examines what the term means with regard to that section and paragraph 5.7 sets out that this means that the person *"must have been put at a disadvantage".*

28. Discrimination under Section 18 EqA also involves consideration of causation. In this regard, the unfavourable treatment must be "because of" the pregnancy or maternity leave.

29. The initial questions for a Tribunal are therefore what was the relevant treatment and was it unfavourable to the Claimant. Thereafter, it is necessary to consider if the treatment was because of the Claimant's pregnancy. That is to be considered applying section 136(2) EqA and the Tribunal would need to be satisfied that facts had been established from which it could, absent any other explanation, conclude that the Respondent had treated the Claimant unfavourably because of her pregnancy and, if so satisfied, the Tribunal will then need to consider the Respondent's explanation and determine whether that had met the burden of demonstrating the decision in issue was in no way related to the Claimant's pregnancy or maternity.

30. It is therefore for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

31. If the Claimant proves such facts, the burden of proof will therefore shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

32. Also relevant to the facts of this case are the Management of Health and Safety at Work Regulations 1999 and, particularly, Regulations 3, 16 and 18 which provide as follows:

"Risk assessment

3.*—(1) Every employer shall make a suitable and sufficient assessment of—*

(a)the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b)the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997."

Risk assessment in respect of new or expectant mothers

16.*—(1) Where—*

(a) the persons working in an undertaking include women of child-bearing age; and

*(b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC(**1**) on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, the assessment required by regulation 3(1) shall also include an assessment of such risk.*

(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

(3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.

(4) In paragraphs (1) to (3) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace.

Notification by new or expectant mothers

***18.**—(1) Nothing in paragraph (2) or (3) of regulation 16 shall require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding.*

(2) Nothing in paragraph (2) or (3) of regulation 16 or in regulation 17 shall require the employer to maintain action taken in relation to an employee—

(a)in a case—

(i)to which regulation 16(2) or (3) relates; and

(ii)where the employee has notified her employer that she is pregnant, where she has failed, within a reasonable time of being requested to do so in writing by her employer, to produce for the employer's inspection a certificate from a registered medical practitioner or a registered midwife showing that she is pregnant;

(b)once the employer knows that she is no longer a new or expectant mother; or

(c)if the employer cannot establish whether she remains a new or expectant mother."

Jurisdiction

33. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

> *"Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a)the period of 3 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)Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a)the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable.*
>
> *(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.*
>
> *(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a)when P does an act inconsistent with doing it, or*
>
> *(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

34. Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".* That three month time limit is subject to an extension for the period of ACAS Early Conciliation which also "stops the clock" for period that the parties are engaged in that process.

35. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and allow the complaint(s) to proceed out of time.

36. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and will usually have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

37. In considering whether to exercise their discretion, a Tribunal will often consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- 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 had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

38. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. The guidance above should not be used as a steadfast or rigid checklist. Instead, the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay (see **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**).

39. The burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

The EHRC Code

40. As we have already touched upon above, when considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

41. Paragraph 8.5 of the Code provides as follows:

> *"In considering whether there has been pregnancy and maternity discrimination, the employer's motive or intention is not relevant, and neither are the consequences of pregnancy or maternity leave. Such discrimination cannot be justified."*

FINDINGS OF FACT

42. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us and which were before the Tribunal and the witnesses.

43. The Second Respondent operates a dog kennels offering boarding and day care for up to 90 dogs at any one time. As well as the kennel facilities the Second Respondent had expanded to also offer grooming facilities which was an area of

the business that the First Respondent wanted to develop. The First Respondent is the Managing Director of the Second Respondent. Prior to their separation the First Respondent was assisted by his now ex-wife. The First Respondent was more "hands on" with the business and his ex-wife dealt with aspects such as the paperwork and website etc. The First Respondent's ex-wife was still working within the Second Respondent business after the Claimant came to be employed there but had departed before she announced her pregnancy.

44. The Claimant commenced employment on 19th April 2011. She was primarily employed to assist in the development of the grooming side of the business. Although she may have initially undertook some work in the kennels whilst growing the grooming business, that was only for a relatively short time after the commencement of her employment. Her job title at the commencement of her employment was Groomer. In addition to her basic salary, she was also later given commission of 5% on any dogs groomed. We find that that was as an incentive to grow the grooming business rather than the Respondents treating the Claimant any more favourably as is now suggested. Whilst no other member of staff got commission, no other groomers were employed by the Respondent and it was the grooming side of the business that the First and Second Respondents were seeking to develop.

45. We do not accept the evidence of the First Respondent that the Claimant was issued with a contract of employment when she first joined the Second Respondent. That has never been disclosed by the Respondents, even within the late tranche of documentation provided shortly before the hearing which we refused to admit. We prefer the Claimant's evidence that no contract of employment or statement of main terms and conditions of employment was given to her when she first joined the Second Respondent or, indeed, until May 2016.

46. Whilst Ms. Jarvis raises that it is noteworthy that the Claimant did not ask for a contract of employment if she had not been provided with one, this was only her second job from school; she had not had one in her first job and therefore did not think anything of the matter. In all events, the responsibility to provide the Claimant with a statement of main terms and conditions of employment lay with the Respondents and not with the Claimant.

47. We accept the Claimant's evidence that in or around April 2012 she was promoted to Manager and Head of Grooming. Again, we prefer her evidence to that of the First Respondent on that issue. Particularly, that was the precise same job title which was reflected on a contract of employment issued to the Claimant in 2016 (see page 34 of the hearing bundle). Whilst it was possible that it was the First Respondent's now ex-wife issued the Claimant's contract of employment, we do not accept the submission that that contract did not reflect the reality of the Claimant's job title. We particularly do not accept that it was simply what the Claimant wanted to be called. It is also noteworthy that the same job title appeared for the Claimant on the Respondent's website (see page 69 of the hearing bundle) and we accepted Mr. Sellars evidence that the Claimant's promotion caused consternation for another staff with longer service who was upset that the Claimant had been promoted in preference to her.

48. In May 2016 the Claimant was issued with a contract of employment for the first time. That contract gave her job title as Manager and Head of Grooming as we have already touched upon above. The contract included a number of broad

post termination restrictions which were limited to not divulging confidential information; a non-dealing and non-solicitation clause in respect of clients and employees for a period of six months post termination of employment and not to undertake private professional or other work during employment.

49. We accept the Claimant's evidence that she had some concerns about the content of that contract and that she raised those with the First Respondent but that nothing was done about the matter. Consequently, the Claimant did not sign the contract.

50. Attached to that contract was a job description for Manager and Head of Grooming which again reflected the role that the Claimant was undertaking at that time. The duties within that job description included matters such as cashing up; dealing with sickness absence issues and annual leave, dealing with paperwork and customer complaints/issues and preparing staff rotas. Whilst some of those matters such as cashing up might also have been done by the First Respondent, we accept the Claimant's consistent evidence that she regularly undertook all of those tasks. That was in addition to grooming work of five, or on occasions six, dogs per day and dealing with clients at reception.

51. In early November 2018 the Claimant and Mr. Sellars verbally informed the First Respondent that she was pregnant.

52. We accept the evidence of the Claimant and Mr. Sellars that working with dogs comes with not inconsiderable risk. That is not only bites and scratches which might cause infection but also the risk of being pulled or knocked over.

53. The position of Ms. Jarvis during cross examination that the same risks were inherent both before and during pregnancy unfortunately misses the point. Risks which are part and parcel of the job for a woman who is not pregnant are amplified when she does become pregnant. Particularly, it is a matter of common sense that being hit in the stomach or knocked over by a boisterous or aggressive dog or having to lift or restrain a dog that reacts adversely to clippers or a hairdryer gives rise to a risk of miscarriage and also to the mother herself.

54. Ms. Jarvis's point that there could be no risk because the Claimant has never reported an accident within the accident book (which was in all events not disclosed) was not, with respect, a good one. It confuses risk with accident. Simply because the Claimant did not have an accident noteworthy of record within the accident book does not mean that there were no risks in her job nor that they were not amplified once she became pregnant. Indeed, it is common ground that there were a number of entries within the accident book for Mr. Sellars who also dealt with dogs and we accept his evidence that on one occasion he had been attacked by a dog who was particularly protective of its owner as he had taken it's lead which had led to it clamping down on his upper leg and him having to prise it off. We accept that that dog was not banned from use of the Respondent's premises and that banning an aggressive or misbehaving dog was something of a rarity. The Claimant's job therefore came with inherent risk and that risk was amplified when she became pregnant.

55. Particularly, we accept the evidence of the Claimant that she was shaken by an incident during her pregnancy when she was knocked into the window by a Pyrenean Mountain dog as it tried to jump from the table where she was

grooming it. Whilst she was fortunately not injured during that incident and was simply shaken up (and hence why she did not record it in the accident book) it is not difficult to see how that incident might well have ended badly if the dog had jumped onto or caused her to fall onto her stomach.

56. Moreover, the Claimant's role also required a lot of bending, stretching and standing for protracted periods of time. Those are not ideal conditions for many stages of pregnancy. We do not accept the evidence of the First Respondent that there was someone around at all times in the grooming room to help or undertake the manual handling of the dogs for the Claimant. We prefer the Claimant's evidence on that point.

57. We also do not accept the evidence of the First Respondent that any "informal risk assessment" was carried out when the Claimant and Mr. Sellers first advised him of the pregnancy (or indeed at any time after). No details at all were given about that and it is clear that the First Respondent did not turn his mind to the potential risks at all. At most (and we do not accept that evidence) the First Respondent's position was that he had asked the Claimant if everything was alright and whether she needed anything. We prefer the evidence of the Claimant that she informed the First Respondent of her pregnancy along with Mr. Sellars at the end of the working day; that she asked for a risk assessment but that she was told that the First Respondent was too busy but that he would "sort it" and that he then swiftly left the Second Respondent's premises. We accept that he never did "sort it" and, particularly, we do not accept his evidence that there were any further risk assessments in February or April 2019.

58. We also accept the Claimant's account, which was not challenged by Ms. Jarvis in cross examination, that in November 2018 shortly after she had told the First Respondent about her pregnancy, she had overheard a conversation between the First Respondent and a Senior Kennel Assistant, Caroline Saxton, which included reference to the fact that they believed that the Claimant and Mr. Sellars would not be returning to work after their baby was born. As we shall come to below, we are satisfied that the belief that the Claimant was not going to return to work after her maternity leave became a catalyst for much of what was later to come.

59. On or around 12th December 2018 the Claimant provided to the Respondent her MAT B1 form which followed on from an appointment with her midwife on 11th December. The note of that appointment which appears at page 42 of the hearing bundle sets out that the Claimant needed a risk assessment at work which reinforces our view that no "informal risk assessment" had been carried out. Similarly, a further note written in late February 2020 by the Claimant's community midwife set out that she had discussed with the Claimant the need for a risk assessment; that the Claimant had requested a risk assessment regularly and that it had not been performed during her pregnancy (see page 75 of the hearing bundle). We accept that what the community midwife was told in that regard reflected the reality of the situation.

60. We take notice of the fact that a MAT B1 form verifies a pregnancy and confirms the date of the expected week of confinement. It is not in dispute that the Claimant provided that form to the First Respondent who does not appear to have done anything with it other than send it to his accountant to deal with payment of statutory maternity pay.

61. On 12th December 2018 the Claimant asked the First Respondent if she could be provided with a chair so that she could sit down to undertake part of her grooming work. We accept her evidence that this was because her feet would swell up when she was standing up all day. It is common knowledge that pregnancy can cause swelling of the feet and ankles and it is common sense that that would be exacerbated if someone was standing up for significant parts of the working day. In this regard, the Claimant's working day was generally between 7.30 a.m. to 4.30 p.m. with a one hour break for lunch. On occasion the Claimant also had to work additional hours to meet the needs of the business and would not complete her duties until 5.30 p.m. Much of her day would be standing to groom at least five dogs within the Second Respondent's grooming room.

62. Ms. Jarvis is critical of the Claimant for wearing wellington boots at work because it is the position of the Respondents that that would have made the swelling worse. We accept the Claimant's evidence that the grooming room is a wet room and so other types of footwear would not have been suitable as they would have soon become soaked with water.

63. Similarly, criticism is levelled at the Claimant that she went home on her lunch break to let out her own dogs rather than using that time to sit down and rest. We accept the evidence of the Claimant and her partner that they could not neglect their dogs, nor could they bring them into work with them. We further accept that it was not an option for Mr. Sellars to return home because he does not drive and it was too far to work during his lunchbreak and, further, that the First Respondent made it plain that he should not go home with the Claimant because he was needed on site in the event of customers needing to be dealt with.

64. Furthermore, we accept the Claimant's evidence that once she had let the dogs out, she was able to take the rest of her lunchbreak and sit down.

65. In all events, these issues in reality miss the point because wearing different shoes or not going home at lunchtime would not have solved the issue of the Claimant's feet swelling when she was standing to groom five dogs a day. The provision of a suitable chair would have done so.

66. We also do not accept that the Claimant was offered additional breaks or had the opportunity to take breaks as the Respondent contends. Indeed, it is not in dispute that when the Claimant reduced the number of dogs that she was grooming each day to four, the First Respondent instructed her to put that number back up to five because the Second Respondent was losing revenue. That left the Claimant with no time to take any additional breaks as we accept her evidence that dogs are scheduled in and their grooming has to be complete when their owners want to collect them.

67. Moreover, we do not accept that the Claimant had the opportunity to sit down and take a break in reception. At such times she was dealing with customers and whilst she was able to sit down to use the computer she was clearly still working. That therefore does not amount to a break from work nor did it provide what the Claimant needed which was respite from long periods of standing whilst she was undertaking her grooming duties.

68. We do not accept the evidence of the First Respondent that he told the Claimant to purchase the chair and that he would reimburse her when she provided him with the receipt. We accept the representations of Mr. Wood that it simply makes no sense if that was the case for the Claimant to have struggled until late February 2019 before purchasing the chair and then not seek reimbursement for it.

69. Whilst the Claimant had purchased things herself for the business in the past and reclaimed the costs from the Second Respondent, we accept her evidence that on this occasion she was told by the First Respondent to look for a suitable chair, provide him with the details and that he would "sort it".

70. The Claimant obtained details of two chairs that would be suitable for her and left print outs on the First Respondent's desk. We accept the evidence of Mr. Sellars that the First Respondent undertook a cursory glance at the print outs and said that the chairs were not the right height and would not be suitable. We also accept that Mr. Sellars undertook measurements and found that the height of the chairs was not an issue and that they would have been suitable.

71. We accept the Claimant's evidence that she continued to raise the issue of provision of a chair with the First Respondent because it was causing her significant discomfort to stand all day with swollen feet. Indeed, we accept the evidence of Mr. Sellars that he had to help the Claimant remove her wellington boots and raise her feet onto a table at the end of the working day so as to relieve the swelling.

72. However, again all that happened was that the First Respondent delayed matters and continued to tell the Claimant that he would "sort it".

73. By late February 2019 Mr. Sellars had had enough of waiting for the First Respondent to purchase a chair and he therefore he told the Claimant to order one herself and that he would pay for it. The order for the chair, which was very simply sourced, was placed through Amazon on 28th February 2019 (see page 43 of the hearing bundle) and was delivered in early March 2019 at a cost of £45.98 including delivery charges. Whilst Ms. Jarvis was critical of the fact that the order was not placed for next day delivery – the implication as we understand it being that the chair was not as essential as suggested – the order was in fact received within a matter of days.

74. When the First Respondent became aware that a chair had been purchased he asked the Claimant repeatedly for the receipt. Mr. Sellars was by that time angry that the Claimant had had to wait for so long and that the First Respondent had not taken any action and so he refused payment and would not give him the receipt. We accept the evidence of Mr. Sellars that the prime reason that the First Respondent wanted the receipt was because he did not want there to be any "come back" on him. If the First Respondent's account of the arrangement for the chair was correct, there would be no reason for Mr. Sellars to refuse payment and we do not find that he would have done so because he and the Claimant did not have money to waste in light of the impending birth of their baby.

75. It is plain that obtaining the chair would have been a very simple thing for the First Respondent to have done and at a relatively low cost. However, much like the risk assessment that the First Respondent said that he would "sort", he also took no action at all to obtain the chair that the Claimant needed to make her more comfortable whilst at work.

76. The Claimant's last day at work was 5th May 2019 and she was due to commence her maternity leave the following day. On 3rd May 2019 the First Respondent presented both the Claimant and Mr. Sellars with a new contract of employment. There had been no notice given to them that the First Respondent was having new contracts drawn up. As we have already touched upon above, we did not accept the First Respondent's evidence that this had been prompted by a conversation with a customer. Instead, we are satisfied that this was prompted by the fact that the Claimant was due to commence a period of maternity leave and the First Respondent did not believe that she or Mr. Sellars would return to work after the birth of their baby. That is reinforced by the fact that the Claimant and Mr. Sellars were the only staff for whom bespoke contracts were prepared (see page 54 of the hearing bundle). The First Respondent was not able to say why the Claimant and Mr. Sellars could not have been given a standard contract for salaried staff which he had also instructed his solicitors to prepare at the same time (see again page 54 of the hearing bundle).

77. He sought to evade that particular issue by questioning whether the Claimant did receive a salary as opposed to be being hourly paid. When pressed he eventually accepted that the Claimant and Mr. Sellars could have been given one of the standard contracts.

78. It later transpired that the reason for the bespoke contracts was to include greater post termination restrictions should either the Claimant or Mr. Sellars leave employment. Again, we are satisfied that that resulted from the belief of the First Respondent that the Claimant and Mr. Sellars were not going to return to work after the birth of her baby as per his conversation with Caroline Saxton.

79. Whilst Ms. Jarvis suggests that the timing of provision of the contracts of employment related to when they were prepared by the solicitors instructed by the First Respondent, that is clearly not borne out by the documentation. The contracts were sent to the First Respondent in draft on 2nd April 2019 (see page 54 of the hearing bundle). Whilst the First Respondent requested amendments to the contract and those were provided on 1st May 2019, the amendments were only requested at some point after 16th April 2019 (see page 56 of the hearing bundle). We have no email chain disclosed by the Respondents as to what the amendments were or when those were requested.

80. We prefer the evidence of the Claimant that the First Respondent made it plain on 3rd May 2019 that he wanted the contracts signed there and then. We did not accept his evidence that he was not concerned about the Claimant not returning to work. It was clear from his evidence that he was concerned about his clients being taken away and that he believed that the Claimant was doing grooming work at home (although that point was not put to her in cross examination) and we are satisfied that the timing and the reason for giving her the contract was because she was due to commence maternity leave and he did not believe that she would return to work.

81. We do not accept that all other members of staff were issued with contracts of employment at the same or a similar time to the Claimant. Indeed, such is our doubt over the credibility of the First Respondent's evidence we cannot say that any other staff member received one at all. The First Respondent's evidence was that another member of staff by the name of Lewis was one of the last to sign and return his contract and that that had been in June 2019. That, however, is in direct conflict with a text message exchange between the Claimant and Lewis on 7th August 2019 where she asked him if he had received a contract. Lewis had replied as follows:

"Hey I'm good thankyou (sic) *yourself and no I've not received one yet and I don't believe anyone else has xx".*

82. We do not accept at all the First Respondent's explanation for that message that the staff had become "fed up" with the Claimant and had decided not to speak to her about the contracts. If that was the case, they would not doubt have simply not replied. Instead, we accept that the reality was that other members of staff had not been given contracts at that time and the emphasis was on the Claimant and Mr. Sellars for the reasons that we have already given above.

83. The contract that the Respondent wanted the Claimant to sign did not reflect her correct job title. Instead of her role as Manager and Head of Grooming (which in addition to being the role set out in her original contract was also her position on the Second Respondent's website) it gave her title as being Senior Kennel Assistant and Groomer. We accept that the difference in title alone was sufficient to amount to a demotion of the Claimant. However, the contract also contained a job description which removed key duties that the Claimant had previously carried out and which she had been given after she was promoted to a managerial position. That included dealing with rotas; HR duties such as dealing with holiday and sickness absences and cashing up. That too amounted to a demotion.

84. The Claimant commenced her maternity leave on 6th May 2019. During that time the Second Respondent engaged a new member of staff, Sanya, as a groomer to cover the Claimant's maternity leave.

85. We accept the evidence of Mr. Sellars that when Sanya joined the Second Respondent she was taken out by the First Respondent to purchase new equipment for her to use. That was of course in contrast to the Claimant who had not had a chair purchased for her although at the commencement of her employment (when she was not of course pregnant) she had had new equipment provided. We note from the evidence of the First Respondent that Sanya had indicated that the equipment that she sought would benefit the business of the Second Respondent. That had also been the case for the items that the Claimant had previously been authorised to purchase. The chair that the Claimant required was not of course something that would be a benefit to the Second Respondent business but only to the Claimant herself. The First Respondent regrettably concentrated on the business in that regard rather than the specific needs of the staff and any risks posed to them.

86. On 15th May 2019 during her maternity leave the Claimant sent an email to the First Respondent making a complaint about the matter of her demotion and raising queries about some aspects of the contract such as the fact that only one

member of staff could take annual leave at any one time, which would obviously cause her difficulties in going on holiday with Mr. Sellars.

87. The Claimant set out that she had some grievances about the new contract. The relevant part of her email in that regard said this:

"I have been and had the contract looked into and there are parts that aren't easy to understand and contradict each other. I have been advised to give you any grievances I have in writing and are as follows

** Both the contract given and the company hand book says they will prevail over the other if there is any conflict between the two. This is contradictory and I am unsure with* (sic) *is the correct procedures to follow in the event of any conflict.*
**Could you please tell me why my position in the company has been demoted without the proper procedure or explanation as to why? I have always done what you have asked of me even by completing tasks at home such as wages and rotas. This makes me feel degraded as their* (sic) *is no reasoning s* (sic) *to why".*

88. The First Respondent has not suggested that the Claimant's email was not a grievance. Despite that, he did not comply with the Second Respondent's grievance procedure. He did not invite the Claimant to a meeting and there was a significant delay before he reverted to the Claimant at all.

89. We do not accept the evidence of the First Respondent that he discussed the grievance with Mr. Sellars after he returned from paternity leave and asked him to tell the Claimant to call him or come in to discuss her concerns. Moreover, we do not accept that the delay in dealing with the Claimant's concerns was because the First Respondent was leaving the Claimant to enjoy her maternity leave. We instead accept the submissions of Mr. Wood that because the Claimant was on maternity leave it was simply a case of out of sight out of mind. That was clear from a slip during the evidence of the First Respondent.

90. It is not in dispute that the First Respondent made a gift of £200.00 to the Claimant and Mr. Sellars when he returned from his paternity leave and that that was intended as being a gift in respect of their new daughter. We accept that he has made similar gifts to other pregnant employees in the past. However, we do not accept the contention that appears to flow from that position that in doing so he cannot possibly have discriminated against the Claimant with regard to her pregnancy.

91. The Claimant's email of 15th May 2019 also made it plain that she did not agree to the post termination restrictions within the contract and the relevant part of the email said this:

"I don't agree to the post termination restrictions part of the contract. Although I do understand about not soliciting or canvassing the custom from your company. Over the years of me working for you I have brought you custom through family and friends even on the very first day of starting work for you. Without me working for your company they would not be a customer of yours and you cannot keep me from seeing and talking to them".

92. In this regard, the Claimant was under the misapprehension that the restrictive covenants prevented her from speaking to any customers of the Respondent rather than soliciting their custom.

93. The Claimant ended her email by saying that she looked forward to the First Respondent's reply and the steps taken to help resolve her concerns.

94. As we have already referred to above, there was a significant delay in the First Respondent replying to the Claimant. He did not respond at all until 5th August 2019 and has been unable to give any reasonable explanation for that delay.

95. Even then, the response was wholly inadequate and dealt with none of the Claimant's concerns. Particularly, it dealt with none of the concerns about the contract that she had raised nor provided any explanation for the difference in her job title. The First Respondent's short email said this:

"Thank you for your email and apologies for the delay in responding. I am looking into these and discussing with our employment lawyer. For the avoidance of doubt, this contract is not being imposed on you and of course it will reflect our current working arrangement once tidied up, there is no intention to vary our contractual position and you are certainly not being demoted as suggested.

I hope you appreciate it is in everyone's best interests that we have contractual documentation in place and the purpose of introducing the contracts was to simply enshrine the existing position."

96. The First Respondent tells us that that email was drafted by his solicitors but whatever the position it did not "enshrine the existing position" because the Claimant's role was completely wrong and her management duties had been removed under the new job description.

97. On 6th December 2019 the First Respondent again emailed the Claimant. That appears to have been prompted by the fact that by then the Claimant had issued these Employment Tribunal proceedings. The First Respondent's email said this:

"Further to my email below, as stated in August there is no intention to change your fundamental terms with us. The new documents are just to bring everything up to date. There is nothing malicious in my intentions and I think you are looking for something that isn't there. As you haven't signed the contract then of course nothing changes legally. If you want to refuse to sign the document then you can do so. The reason why I have not responded in detail other than my email below[1] is because I want to leave you alone to enjoy your maternity leave. I am slightly shocked to receive the tribunal papers from you and it feels like you have "jumped the gun" somewhat.

I still intend to discuss the contract proposal when you return from maternity leave so we can iron everything out then. If you want to have that meeting sooner, then just let me know".

98. We accept that by that stage the Claimant saw no point in a meeting.

[1] That being the email of 5th August 2019.

99. In January 2020 the Claimant became aware that the Respondent has removed her work from their website and referred to a new groomer, Sanya, as heading the dog grooming service. We accept that that was the last straw for the Claimant and that as a result she resigned. Her resignation email which was sent on 24th January said this:

"I am writing to you to hand in my resignation. I give you the required one week notice ending my employment with Dunston Lodge on 31st January 2020.
It is a very upsetting decision having to leave a job I loved and all the years of training I had to do to get there. I unfortunately feel like I have no other choice as the events that have happened since I told you I was pregnant to date have been very upsetting.
I feel the way I have been treated by not providing me with what I needed during my pregnancy, the delay in responding to my queries about the new contract and not answering any of my questions. I find this very unprofessional and unsympathetic with the vulnerable state I was in after the birth of my daughter. Even when I turned to ACAS for help to help us resolve our issues, they were ignored. This makes me feel like I don't matter as an employee. I also recently saw you removed my work from the website and replaced it with Sanya's, this was the deciding factor for me. Even if this was temporary I feel I should have been represented on the grooming page as well. As still being an employee both our work should be shown even if you mentioned me as being on maternity leave.
Unfortunately I feel like I've lost all trust and confidence in Dunston Lodge and can no longer work for a company that would treat me in this way."

100. The First Respondent replied on 27th January 2020 and his email said this:

"I write to confirm receipt of your resignation from employment, with effect from 31 January 2020. You will appreciate that I have a different view and I do not agree that you have been treated any differently/badly as you suggest because of your pregnancy.

I clearly explained to you at the beginning of December why I hadn't responded to your queries – it was with good intention as I wanted you to enjoy your maternity leave and as I am sure you can appreciate, as a parent myself, I didn't want to put you under any pressure. As I made clear to you the contracts were to bring everything up to date and you didn't have to sign it if you didn't want to. I respected that I made it clear that there was no issue. I made it clear that I wanted to speak to you again when you returned to work but the door was open to have a chat if you wanted before then – you haven't done this and have simply resigned.

……[2]

In terms of the website your picture remain (sic) *on it (on the homepage) and we refer to you as the Head Groomer. In terms of the part regarding your work we updated the website and removed the reference to you as you have been on maternity leave. Upon your return to work we would have then changed it back.*

I am sorry that you have chosen to take this course of action but wish you every success in the future."

[2] This part of the reply has been redacted.

101. The Claimant entered into early conciliation via ACAS on 29th September 2019 and subsequently issued this claim to the Tribunal on 28th October 2019.

102. We should note that the Claimant had in fact contacted ACAS previously and asked them to assist her with regard to the issues that she was having with regard to being issued with the revised contract of employment. We also accept that she was told by ACAS that they had tried to speak to the First Respondent and had sent him emails but that he had not responded. We accept that the Claimant followed the advice that she was given by ACAS and we remind ourselves that the role with the Respondent was only her second job from leaving education. She had not issued proceedings earlier as she had been trying to resolve matters with the Respondents and she was also concerned about the ramifications of doing so because she was pregnant, and she was worried that she might lose her job as a result. The Claimant was not challenged in cross examination by Ms. Jarvis on those matters.

CONCLUSIONS

103. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the complaints made by the Claimant.

104. The first complaint that the Claimant brings in these proceedings is about the failure to undertake a risk assessment when she told the First Respondent that she was pregnant. There are two forms of risk assessment relating to pregnancy (see **Page v Gala Leisure and others EAT 1398/99)**.

105. The first is the general duty to assess risk under Regulation 3(1), taken together with what is now Regulation 16(1) of the Managing Health & Safety at Work Regulations 1999. The need for this general type of assessment arises not by reason of any particular pregnancy being notified to the employer, but simply because the employer employs one or more women of childbearing age in the undertaking.

106. The second type of assessment identified by the Employment Appeal Tribunal in **Page** arises when an employee gives notice under Regulation 18 to the employer in writing of being pregnant, of having given birth within the last six months or of breastfeeding. This second kind of assessment requires the employer to consider, in relation to the particular individual who has given the notice, whether, even if the relevant statutory provisions were complied with, risk of the kind described in Regulation 16(1)(b) would not be avoided. If such risks cannot be avoided, the employer must then comply with the other duties under Regulation 16.

107. Mr. Wood confirmed at the outset that the Claimant relies on the contention that the Respondents should have undertaken the second type of assessment – that is a specific risk assessment when they were notified of the Claimant's pregnancy. We would observe, however, that we have not been taken to anything to suggest that the Respondents had carried out any generic risk assessment either.

108. However, we need to firstly consider to determined whether the duty to undertake a specific risk assessment was triggered whether the Claimant had notified the Respondent in writing of her pregnancy. We accept the submissions of Mr. Wood that in handing her MAT B1 form to the First Respondent that was sufficient to notify him of her pregnancy under Regulation 18(1). There is no specified manner under Regulation 18(1) by which such written notification must be given. It is sufficient in our view to have provided that by way of the MAT B1 form which clearly sets out that the bearer of that form – in this case the Claimant – is pregnant (see also **Day v T Pickles Farms Ltd [1999] IRLR 217**).

109. The next question, therefore, was whether the Respondents were under a duty to undertake a specific risk assessment when they were provided with that written notification in December 2018. Regulation 16(1)(b) provides that the duty is triggered where the work undertaken by the worker in question is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents.

110. We have little hesitation in concluding that the duty to undertake a specific risk assessment was triggered in this case. As we have already found above, there were numerous risks to the Claimant and her unborn child arising from her grooming work. Those included not only manual handling of dogs but also the risk of the animals jumping on or at the Claimant whilst she was grooming them or handling them generally, of slips or trips or being knocked over by a boisterous, aggressive or excitable dog.

111. We do not accept the evidence of the First Respondent that any risk assessment – either informal or otherwise - was ever carried out in respect of the Claimant's pregnancy for the reasons that we have already given above.

112. It goes without saying that it was a detriment to the Claimant to not have had the risk assessment undertaken. She was concerned enough to raise that matter with the Respondent but was essentially fobbed off and as a result was placed at potential risk to the health and safety of herself and her baby for the whole of the time before she commenced her maternity leave. The lack of a proper risk assessment caused the Claimant to be exposed to risk and, indeed, it is fortunate that there were no serious repercussions from the incident with the mountain dog to which we have referred above.

113. Whilst we do not find that there was anything malicious in the First Respondent's failure to undertake the risk assessment, that does not mean that it cannot amount to discrimination for him to have failed to have done so. The First Respondent described himself in his evidence as a "doer" and we have no doubt that that is the case. However, that mindset has in our view unfortunately resulted in an expectation that people will simply get on with the job as he does and without any real thought for the need to conduct risk assessments and the like and the hazards that come with pregnancy.

114. It is of some concern to us in that regard that tells us that he has had a number of pregnant staff after taking on the Second Respondent business but there is no evidence that he has undertaken even a general risk assessment let alone an individual assessment which was clearly necessary in the Claimant's case. Nor did either the First Respondent or Ms. Jarvis appear to be alive to the fact that

pregnancy carries a particular sort of risk to both mother and baby which might mean that risks which are taken as occupational hazards in "normal" circumstances become heightened for expectant mothers.

115. Moreover, the First Respondent clearly focuses on the practical elements of the business and left what might best be described as the employee relations side of matters to his former spouse. She had left the Second Respondent business by the time that the Claimant's pregnancy was announced. By simply saying that he would "sort it" with regard to the risk assessment, the First Respondent put off dealing with such matters, no doubt in the hope that they would go away with the passage of time and concentrated on more practical matters of running the Second Respondent business. The Claimant's pregnancy was not something that would advance the business and as such it was not a matter that the First Respondent prioritised.

116. It appears to us that that could well be comparable with the way in which these proceedings have been dealt with, with no attempt to undertake any preparation until the hearing was almost upon him.

117. It was therefore clearly unfavourable treatment to the Claimant for the Respondents to have failed to undertake a risk assessment given the nature of her duties and the risk that those posed to her pregnancy. It is well established that a failure to carry out a risk assessment in accordance with the Regulations can amount to sex or pregnancy discrimination (see, for example, **Hardman v Mallon t/a Orchard Lodge Nursing Home 2002 IRLR 516, EAT**).

118. Similarly, at European level, the European Court of Justice has determined that a failure to carry out a risk assessment that complies with Article 4(1) of the EU Pregnant Workers Directive (No.92/85) must be regarded as less favourable treatment related to pregnancy or maternity leave and as such constitutes direct sex discrimination within the meaning of Article 2(2)(c) of the recast EU Equal Treatment Directive (No.2006/54) (see **Otero Ramos v Servicio Galego de Saude and anor 2018 ICR 965, ECJ**).

119. We are therefore satisfied that the Respondents were obliged to conduct a specific risk assessment, that they failed to do so, that the failure to conduct the risk assessment amounted to unfavourable treatment and that that unfavourable treatment was because of the Claimant's pregnancy. This part of the claim is therefore well founded and succeeds.

120. We should note, for completeness, given the focus of much of Ms. Jarvis's cross examination that it is not open to the Respondents to excuse their failure to carry out a risk assessment by contending that the Claimant was fully aware of all relevant risks and was either coping with them or could have chosen to take additional breaks to minimise the impact on her. It was for the Respondents to review their practices and consider the impact and risks to the Claimant and her unborn baby. It was not for the Claimant to have to manage those risks herself. To suggest otherwise rides a coach and horses through the requirements of Regulations 3 and 16 of the Managing Health & Safety at Work Regulations.

121. This aspect of the claim is therefore well founded and succeeds.

122. The second complaint is the failure of the Respondents to provide the Claimant with a chair to assist her with her grooming duties upon her requesting one on 12th December 2018 until 8th March 2019 when her partner bought her a chair. As we have already found above, we do not accept the account of the First Respondent that he had left the purchase of a suitable chair with the Claimant with the confirmation that he would reimburse her once it had been acquired. We prefer the evidence of the Claimant and Mr. Sellars on that point for the reasons that we have already given.

123. We are also satisfied that that failure did cause the Claimant detriment and it amounted to unfavourable treatment. The failure to obtain the chair meant that for the vast majority of her working time the Claimant was grooming dogs on her feet. It is not disputed by the Respondents that a common effect of pregnancy is for the expectant mothers' feet and ankles to swell and that that is exacerbated by long periods of standing. We have accepted the Claimant's evidence and that of Mr. Sellars that this caused her considerable discomfort, particularly at the end of the working day. It is no answer for the Respondents to say that the Claimant could sit down at times when she was working on reception; that she should have chosen different footwear or not gone home at lunchtime to let her own dogs out. The Claimant would have been considerably assisted by the provision of a chair and it was a simple thing for the First Respondent to have arranged for her, particularly where she had already done the groundwork for him by printing out details of two suitable chairs.

124. Given the background of the First Respondent having failed to undertake a risk assessment and the fact that that amounted to pregnancy discrimination and the fact that we do not consider that the First Respondent was truthful in his evidence about the arrangements for the chair, we are satisfied that this is sufficient to reverse the burden of proof and that we must look to the Respondents for a non-discriminatory explanation. The Respondents have not advanced any explanation for that position other than the suggestion that the failure to purchase the chair was down to the Claimant. That is of course a position that we do not accept for the reasons that we have already given. It follows that the Respondents have failed to discharge the burden on them then this aspect of the claim is well founded and it also succeeds.

125. In all likelihood, on the evidence before us it appears that the provision of the chair was not of benefit to the Second Respondent business and by continuing to delay matters towards the Claimant's maternity leave, its provision could be avoided and the issue would go away. The First Respondent did of course think that the Claimant was not going to return from her maternity leave. It is for that reason that the First Respondent was so keen to obtain the receipt from Mr. Sellars and reimburse him for the chair so that there was no "come back" on him.

126. The third complaint with which we are concerned in these proceedings is the provision to the Claimant with a new contract of employment on 3rd May 2019, three days before she was due to commence maternity leave and insisting that she sign it with no opportunity to review it beforehand. We are satisfied for the reasons that we have already given that all of those matters are factually made out and that the Claimant and Mr. Sellars were placed under pressure by the First Respondent to sign their contracts immediately and without the opportunity to properly consider them.

127. We are satisfied that that did amount to a detriment to the Claimant and unfavourable treatment because she was being pressed in a very blunt way to sign new terms and conditions of employment without explanation and which, had she bowed to that pressure, would have seen significant changes to her role as we shall come to further below.

128. We then consider if there are facts proven by the Claimant from which we can draw an inference that the treatment was because of pregnancy or maternity. Aside from the background which we have already described above with regard to the failure to conduct a risk assessment, we have also taken into account in this regard the timing of the provision of the contracts which was only a matter of days before the Claimant was due to commence maternity leave; the pressure placed on the Claimant to sign it there and then; the fact that not all other staff were given revised contracts which flies in the face of the First Respondent's evidence that he was updating all contracts and the fact that the only members of staff who had a bespoke contract were the Claimant and Mr. Sellars. As Mr. Wood points out, they were the only members of staff who were having a baby.

129. We are therefore satisfied that there are facts which we have found from which we can infer that the treatment complained of was because of the Claimant's pregnancy. We therefore look to the Respondents for a non-discriminatory explanation. None has been forthcoming. For the reasons that we have already given we do not accept the Respondent's evidence that it was a coincidence as to the timing of the provision of the contracts arising from when his solicitors provided them to him or that he was simply updating all staff contracts as recommended by a client of the Second Respondent.

130. It therefore follows that we are satisfied that this part of the claim is well founded and succeeds. Moreover, it appears to us from the evidence that we have heard that the "reason why" the Claimant was provided with a new contract at the time that she was, was because the First Respondent believed that she would not be returning to work after her maternity leave. That was evidenced by his conversation with Caroline Saxton to which we have referred above and his determination to enhance the post termination restrictions within the Claimant's revised contract of employment. We did not accept his evidence to the contrary and we are satisfied that the timing and insistence on the Claimant signing her new contract before her maternity leave was because he believed that she would or might not return. The First Respondent had formed that view based on the fact that the Claimant was departing on maternity leave and we are therefore satisfied that the unfavourable treatment in question was because of the fact that the Claimant was pregnant and/or because she would soon be availing herself of the right to take her maternity leave.

131. The next act that we have to consider is the terms of the proposed updated contract of employment issued to the Claimant. As we have found above, that did change the Claimant's job title from Manager and Head of Grooming to Senior Boarding Kennel Assistant and Groomer. It also removed a number of duties that she had been undertaking, such as preparation of staff rotas, completion of HR records such as sickness and holiday records and cashing up. The Claimant contends that those changes amounted to a demotion. We agree. The change in the Claimant's job title alone was enough to do that. She had gone from essentially been the person directly underneath the company directors

in terms of the hierarchy to having a job title that was essentially similar to that which she had prior to her promotion.

132. Moreover, when contrasting the duties that the Claimant had in her original contract of employment with the job description in the revised contract it is plain as a pikestaff that they were significantly reduced in terms of her responsibilities.

133. Those responsibilities which would have amounted to management duties such as dealing with the rotas and staff leave had been removed and all that were left were very junior duties relating generally to kennel assistants. That was a role that the Claimant had not undertaken since the very start of her employment with the Respondent.

134. We are therefore satisfied that the revised contract terms did amount to a demotion of the Claimant and that that was both detrimental and unfavourable treatment of her. Given the background that we have already rehearsed above and, particularly, the timing of the provision of the revised contract to the Claimant shortly before her maternity leave was due to commence, we are satisfied that the burden passes over to the Respondents to show a non-discriminatory explanation for the treatment. Again, the Respondents have failed to discharge that burden. We do not accept any of the changing evidence of the First Respondent as to how the revised contract came to have a different job title or role and responsibilities nor that it did not amount to a demotion. It follows that we have concluded from that failure and all of the surrounding circumstances that the actions of the First Respondent were on account of the Claimant's pregnancy and the fact that she was about to avail herself of the right to take her maternity leave.

135. Finally, we consider the last act of discrimination regarding the failure to follow the Second Respondent's grievance procedure by failing to respond to the Claimant's grievance of 15th May 2019 until almost three months later and providing an inadequate response at that point.

136. We are satisfied that there was a clear failure to deal with the Claimant's grievance. The First Respondent did not suggest that he had not considered her email to be a grievance but he nevertheless completely failed to follow the Second Respondent's grievance procedure. We do not accept his evidence that he talked to Mr. Sellars about that and asked him to encourage the Claimant to make contact to discuss her grievance.

137. The failure to deal properly with the grievance was both to the Claimant's detriment and amounted to unfavourable treatment. The issues that the Claimant had raised were serious concerns to her which she wanted to be resolved at an early stage. It placed uncertainty on her position when she returned to work after maternity leave and even when the First Respondent did finally reply, he failed to properly address any of the issues that she had raised.

138. Given the history of inaction of the First Respondent in dealing with any issue since the Claimant announced her pregnancy; the failure to deal with her concerns under the grievance procedure despite recognising it as a grievance and the protracted delay in even acknowledging matters, we are satisfied that there are facts from which we can draw an inference that those matters were on account of the Claimant being on maternity leave.

139. The burden therefore passes to the Respondents to provide a non-discriminatory explanation. The only explanation that we have from the First Respondent is that he was leaving the Claimant alone to enjoy her maternity leave. We do not accept that evidence but, in all events, whatever the intentions of the First Respondent it was not his decision to make to fail to deal with the grievance on account of the Claimant being on maternity leave. The Claimant had made it plain that she wanted the matter to be dealt with and given the fact that, even on the First Respondent's own account, the reason for not dealing with the grievance sooner was because the Claimant was on maternity leave that would be sufficient to see this aspect of the claim succeed.

140. However, we are in fact satisfied from the evidence before us during cross examination of the First Respondent that this was a situation, as Mr. Wood contends, of the Claimant being "out of sight out of mind" and the reason for that was because she was on maternity leave. It follows that the failure to deal with the grievance was an act of unfavourable treatment because she had exercised her right to maternity leave and this aspect of the claim is therefore also well founded and succeeds.

JURISDICTION

141. We are satisfied that all of the acts of discrimination which we have found to have been made out are part of a course of conduct extending over a period within the meaning of Section 123(3)(a) EqA 2010. The acts of discrimination which we have found to be made out in this regard were all perpetrated by the same Respondent (that is the First Respondent) over a period of time relating to the same pregnancy of the Claimant's. We are satisfied that there was therefore a course of conduct which ended with the last act of discrimination being the delay and way in which the Claimant's grievance was dealt with. The Claimant initiated early conciliation within three months of that incident and so it follows that the Claim Form was presented in time.

142. However, even if we had found any part of the claim to have been presented out of time then we would have determined that it was just and equitable to have extended time to hear it. The Claimant had not issued proceedings before she did on account of trying to resolve matters with the Respondents via ACAS but the First Respondent failed to engage. She had followed the advice that she was given by ACAS and she had been concerned to enter into litigation because of her pregnancy and worry that she might lose her job. Those are in our view good reasons why the Claimant did not commence proceedings earlier.

143. The delay in her doing so was not substantial and there can be no reasonable suggestion that the cogency of the evidence has been compromised by that delay.

144. Moreover, the prejudice clearly lies with the Claimant if an extension of time was not granted in these circumstances given that she would otherwise be prevented from advancing meritorious complaints and having those determined. Other than having to defend the matter, which is not a relevant factor, there is no prejudice to either Respondent in an extension of time being granted had that ultimately been necessary.

145. With all that in mind, all complaints advanced by the Claimant are well founded and succeed and the claim will now be listed for a Remedy hearing. Case Management Orders – which both parties must comply with – to prepare for that hearing are attached.

146. The parties are, however, encouraged to seek to reach agreement as to remedy so as to avoid the time and cost to both of them of a further hearing.

Employment Judge Heap

Date: 22nd March 2021

JUDGMENT SENT TO THE PARTIES ON

23rd March 2021

.....

C. Hamilton

.....

FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

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