EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms M Krolczyk	v	**Ana Clean Limited**

Heard at: **North Shields** **On: 22 to 24 February 2017**

Before:

Employment Judge JM Wade

Ms R Bell

Ms E Jennings

Appearances:

For the Claimant: **Mr Richard Owen – Gateshead CAB**

For the Respondent: **Mr Mohammad S S Larijani – Director**

Interpreters: **Mrs Mrs J Hambly (Polish/English)**

Ms M Mostafoor (Farsi/English)

Note: A summary of the written reasons provided below were provided orally in extempore Judgments delivered on 24 February 2016, the written record of which was sent to the parties 6 March 2016. A written request for written reasons was received from the claimant's representative on 7 March 2016. The delay in providing these reasons has arisen due to a failure in recording, which may mean that the expression of the reasons differs from that provided to the parties.

The written reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues…. For convenience the terms of the Judgment given on 24 February 2016 are repeated below:

JUDGMENT

1 The claimant's complaints of unfair dismissal, also amounting to unfavourable treatment because of pregnancy, succeed.

2 The claimant's other complaints of harassment, direct sex discrimination and unfavourable treatment because of pregnancy are time barred or otherwise dismissed.

3 The respondent shall reimburse to the claimant the sum of £750 in reimbursement of the issue and part remitted hearing fees incurred by her.

4 The respondent shall further pay to her the sum of £7000 by way of compensation in respect of her injured feelings.

REASONS

Introduction

1 The claimant, who is from Poland, was previously employed by the respondent as a cleaner. The respondent is a family owned business and its managers are from Iran. The claimant presented a complaint of unfair dismissal and Equality Act claims. The respondent did not accept there had been a dismissal but said the claimant had resigned. The claims were subject to comprehensive case management orders and the issues were identified and appear as headings to our conclusions.

2 The claimant was represented at this hearing and throughout by Mr Owen. The respondent had been legally represented when submitting its response, but was represented by Mr Larijani before the Tribunal and during previous case management hearings.

3 Interpreters were essential in this case. Neither the claimant nor Mr Larijani were native English speakers. The facts and issues were disputed, and many matters involved communications between them.

4 The Tribunal did its best to put the parties on an equal footing and to ensure justice was done. That included, at times, putting the parties' cases when they would not otherwise have been put.

Evidence and its reliability

5 The reliability of the parties' evidence in this case was essential to deciding the complaints. The claimant's case was very briefly put in English, both in her claim, further information and witness statement. She made allegations of sexual harassment in addition to complaints about the ending of her employment. She and her partner, Mr Clark, gave oral evidence. He had also provided a very short statement in support, having been present at various points.

6 Mr Larijani and Ms Najdi on behalf of the respondent had prepared a lengthy written response to further information annexing text messages, and other documentation. That document was adopted as evidence by Mr Larijani in addition to his shorter witness statement. Ms Najdi's statement was very short and as was to be expected, supportive of her partner. They ran the business together, and together with their children are a close family unit.

7 There were also very short statements (but no attendance) from several employees of the respondent, but not "Marzena", the one employee who was allegedly present for an allegation. We were told her evidence was not available because she did not want to become involved.

8 The claimant had two letters (from her midwife and from a former client, Dr Morrison), which covered some of the ground about which the Tribunal had to make findings of fact. We considered these documents very reliable, given they were contemporaneous.

9 For most of the allegations there were no other witnesses present and the Tribunal had little material to assist us other than assertions by the claimant and denials by Mr Larijani. The first time that the claimant recorded the incidents in her

statement of case was when a solicitor asked her (in the early summer of 2016) to write down a list of all discriminatory acts.

10 Of greatest assistance to the Tribunal in establishing an accurate chronology, the clarity of communication, and the way that the parties related to each other, were smart phone messages, of which we saw many. We did not have such messages for the period March to late August 2015, but we did have a selection of messages from late August 2015 until the claimant's employment ended on 15 April 2016.

11 We also took into account that the respondent put comprehensive written contracts of employment in place for its staff, employing eight or so cleaners; it had written contracts with its customers. It provided payslips to its staff, using an accountant for those, and made payments of wages direct to the claimant's bank account of the net sums. It paid holiday pay as appropriate. The claimant took no advice about treatment by this employer until after her employment had ended.

12 The respondent's evidence as to the way it treated the claimant generally (which it said was well and kindly) included that at some point the claimant had booked flights to Poland from 26 March 2015 returning on 6 April 2015 and 23 April returning on 7 May 2015, or thereabouts. Either the claimant told the respondent her mother had died, or she went along with a fiction suggested by Mr Larijani that her mother had died, in order to take that length of holiday so soon after commencing employment. Neither possibility put the claimant in a good light. Her work was covered by other colleagues who believed her leave was due to bereavement.

13 Even if a fiction was created by Mr Larijani (which he denied), that situation suggests he was well disposed to the claimant and sought to assist her, but was prepared to take part in fiction. The other alternative was that the claimant had deceived both Mr Larijani and her colleagues.

14 We could draw very little from the demeanour of the witnesses, especially given the delays and other effects inherent in the use of interpretation. We identified that the claimant was visibly troubled when discussing the above holiday issue, and had apparently forgotten the reason she had originally given Mr Larijani which was not in dispute; she was, to that extent, caught out by his questions. We considered it inherently unlikely that he would have pursued that line of questions, had he been the architect of a fiction in the first place.

Findings of fact and issues of fact unresolved

When did the claimant begin to work for the respondent?

15 The claimant conceded that her statement of case was wrong as to her start date (she had said July 2014). In fact she started a trial and training in December 2014, with a contract of employment commencing on 5 January 2015, due to expire on 4 January 2016. She was contracted to work as a cleaner working from zero to sixteen hours per week. She had previously worked through an agency with a different employer for three months and had been assisted by the CAB to secure the right payments for her work there.

Allegations about harassment on grounds of sex

16 On 8 May 2015, after she had returned from holiday she was at a customer's house in South Gosforth. She asserted Mr Larijani asked how her holiday was and said he was glad she was back. They then had a friendly hug, it was said, but then the claimant alleged Mr Larijani tried to kiss her. She allegedly pushed him away and a

few days later, whilst in the van, she raised it with him and he told her to forget about it. That was her case.

17 She elaborated in evidence that she had felt his tongue, that she was in the back of the works van when they later had the conversation about it. She did not tell anyone about that incident. She said that she had switched on her smart phone voice recorder when she was in the van, had recorded the conversation, but then deleted it for space later. Mr Larijani denied any physical contact with the claimant at all. The claimant did not tell Mr Clark about this allegation.

18 The claimant then alleged that on a date in June 2015 she was on a step ladder cleaning some windows at a customer's house (a student block of flats in West Jesmond) and Mr Larijani touched her bottom. Mr Larijani denied that allegation. Interior window cleaning was not part of typical contracts and it must have been a one off job; he had checked one off invoices and there was only one in June where the claimant was working with other cleaners. The claimant had alleged in her evidence she had done a cash job in student flats for £6 per hour (rather than the minimum wage of £7.20). Mr Larijani denied that also.

19 On a date in June or July she alleged Mr Larijani had asked her to tell him the Polish for obscene English words and had specifically also asked her to provide the Polish for "suck my penis".

20 Mr Clark's statement (and that of the claimant) said that she always told him about the incidents at work. They were not living together but dating in the summer of 2015. Mr Clark accepted that she had not told him about the 8 May incident. The Tribunal did not accept his subsequent evidence that she had told him about the ladder incident. The Tribunal did accept something was said to Mr Clark about translating words.

<u>Allegations about unfavourable treatment because of first pregnancy</u>

21 In mid-August 2015 the claimant informed Mr Larijani that she was pregnant. Mr Lariani denied that he reacted coldly, was unhappy or said he would inform Ms Najdi that the claimant would not be able to work for him.

22 Mr Larijani and Ms Najdi have small children together, as well as operating a business. We weigh in the mix that absent the allegations made above, Mr Larijani has been a good employer, both in providing a contract, and work, and timely payment, and payslips and that he has, generally been a good historian, whereas the claimant has not. We also take into account later considerate text messages between them from late August 2015 to April 2016, which include such things as: being asked to take the claimant a sandwich when pregnant, giving her time off for appointments without question, helping her make beds for a client, giving her a lift or umbrella in bad weather, adjusting her duties, offering to cancel clients when she could not attend, giving directions to new clients (to which the claimant responded in text with "xxx"), giving time off when the claimant's grandmother died, and so on.

23 Of course it is possible that Mr Larijani said in August that the claimant could not work for him if pregnant, but when we take into account the later events in the chain, on the balance of probabilities and taking into account the general good natured communications between them, the claimant has not proven it was more likely than not that he reacted this way.

24 On the 28 August the claimant had a miscarriage early in the morning at about 4.00 a.m. Later in the morning she called Mr Larijani to tell him she wouldn't be in

work that day. She was in pain and still bleeding (not known to Mr Larijani). She said she had to go back to hospital. He expressed his condolences and asked if she could wait for Ms Najdi to collect keys because he thought Ms Najdi would be a more comforting prospect for the claimant; the claimant agreed; he phoned Ms Najdi straight away and Ms Najdi attended within an hour or so of the initial call.

25 In between times there was a text exchange in which Mr Larijani offered to cancel the client (obviating the need to collect the keys) but the claimant said she would wait. In the context of the communication between them, this cannot be detriment: the claimant has an unjustified sense of grievance about this; she could have said, yes please cancel, I must go; had she said that, the Tribunal considers the key issue would have gone away. This was a relationship of give and take, on our findings. The claimant made no complaint about this incident at the time and nor did Mr Clark. Ms Najdi attended to collect the keys and the claimant was comfortable about that.

26 There were then further exchanges about more time off, which was accommodated of course, and the claimant needed to give further keys back. Mr Larijani attended her flat and she asked Mr Clark to take the keys down to him. Mr Clark considered this was indicative of apprehension on the part of the claimant with Mr Larijani lending credence to the early harassment allegations, but the Tribunal considers it could equally have been simply not wishing to see her boss at that difficult time.

27 The claimant then alleged that on a date in early September 2015 Mr Larijani picked her up in the van for work as normal and said that if she wanted to try for another baby, she couldn't work for his company. Again, for the reasons above, and especially in the context of the give and take relationship, which was apparent from the text exchanges, and Mr Larijani's denial, she has not proven on the balance of probabilities that this was said.

28 The claimant then alleged that on a date in November 2015, at a new customer's house, Mr Larijani said "ladies first" to the client when proceeding upstairs and when the claimant moved to proceed in front of him, he pushed her from behind. She alleges that when the customer left she told Mr Larijani she would inform the police if he touched her again. Mr Clark recalls that the claimant told her about this incident. This incident was alleged in the claim and oral evidence to be a shove or push; in further particulars it was said to be directed at the claimant's bottom.

<u>Events leading up to the ending of the claimant's employment</u>

29 On 23 December 2015 the claimant signed a new contract of employment for a fixed term to from 5 January 2016 to 4 January 2017. In January 2016 she informed Mr Larijani that she was pregnant again. She alleged he reacted negatively and with sarcasm. For the same reasons as are set out above, we do not accept this allegation is proven.

30 On 17 March the claimant had her 26 week antenatal check with the midwife. The midwife told her when she could start her maternity leave, because the claimant was feeling the strain of working and was worried about her pregnancy, especially in light of the previous miscarriage. A client of the respondent, a Dr Morrison, emailed the respondent that day to say that she understood the claimant was soon going on maternity leave. She said that when the claimant left she would like to terminate her contract, and if that happened before 17 April she would accept an alternative cleaner.

31 On or around 17 March 2016 the claimant also told Mr Lariyani either that she could not work after 18 April, or she did not want to work after 18 April, or that she would finish or leave on 18 April. Mr Laryani relayed that to Ms Najdi as the claimant would be leaving, and he asked the claimant to confirm it in writing on her March timesheet.

32 The claimant had worked for the client "Judith" as normal for the first three weeks of March. On Monday 21 March the claimant wrote her leave date of 18 April on the top of her timesheet and gave that to Mr Laryani.

33 On Tuesday 22 March the claimant asked by text for help, because there was extra work to do for client Judith. The claimant later emailed Ms Najdi to confirm that she only wished to work 16 hours per week. At that point the respondent started recruitment for a replacement member of staff, who started on 4 April ("Marzena").

34 The respondent cancelled the claimant for 4 and 5 April and said she could work the rest of that week with Marzena to help her. She then texted Ms Najdi as to why there had been a reduction in hours to 11 hours. She also said that her midwife would provide a letter (about the antenatal appointments) and that she would provide her MatB1 certificate. Ms Najdi simply replied that clients (including Judith) had cancelled work due to school holidays.

35 Mr Laryani was also told by text on 4 April that the claimant would provide her documents when back at work on 6 April, and she would also then confirm how long she would be working and when she would like to take her holiday. Mr Laryani's response to that was simply that she had confirmed notice of 18 April and it did not matter if she did not want to work, he would pay her for her holidays at the end of April.

36 On 6 April 2016 the claimant's midwife wrote to the respondent and confirmed the claimant's expected date of confinement as 25 June 2016, and confirmed the dates on which she had had antenatal appointments. Also on that day the claimant only worked for customer Mrs L, and not customer "Shioban", at the claimant's request. That was again indicative of the strain she was feeling from her pregnancy. She reported to her GP the following week concerns about "issues at work", and feeling faint.

37 On 12 April at Judith's house the claimant worked for several hours alongside Marzena, the replacement member of staff. Introducing Marzena to the customer, the claimant alleged that Mr Larijani said "did you know that Magda [the claimant] is pregnant?" when they answered yes, he added "do you know it's my baby". The claimant became very angry and upset and told them that it was not Mr Larijani's baby. The Tribunal did not accept the claimant has proven the second remark was said. We noted that Marzena could have been compelled as a witness had she been likely to confirm the remark was made (or the contrary). Given the burden is on the claimant, and that she has not been an entirely reliable historian, we do not consider her evidence alone makes it more likely than not that it was said.

38 The claimant saw her GP on Wednesday 13 April and obtained a fit note for pregnancy related illness. Mr Laryani arranged with her by text to meet on Friday morning (the 15th); he understood she could attend work for a new client Emma, that day, but could also hand over keys for the next client; she texted to say she could not work; there was a miscommunication by text and ultimately there was a meeting around lunch time.

39 Mr Clark drove the claimant to meet Mr Laryani and she provided the sick note, and her April timesheet; she had told him again by text she was finishing the following

week. They discussed, alone in the respondent's van, holiday pay and other matters, and Mr Laryani asked Mr Clark to join them while they discussed matters in the van and he confirmed he would provide the claimant's p45 and all pay. Mr Larijani was cross with the claimant and she became upset; he was cross firstly because he had thought she had indicated she could work, ie finish her work that week; and secondly because she appeared to be suggesting a different date to finish work. It was the claimant's upset at his cross words that caused Mr Larijani to invite Mr Clark to join them for the explanation of the claimant's final pay.

40 Shortly after that meeting, from her smart phone, Mr Clark sent Mr Laryani a text to say she was worried because a P45 was mentioned in that conversation, and that she didn't want to end her employment, and was hoping to return to work after the baby was born. She had meant she was to start her maternity leave when she gave a leaving date of 18 April.

41 Mr Laryani replied the same day to say that. "Hi nobody knows about future as leave more than 1 month probably accountant issue the p45 and then when you back you pass the p 45 to me again. Because nobody knows about the future and maybe you won't back so we have to do all office issues thanks." Mr Laryani subsequently instructed the accountant about the payments for the claimant's antenatal appointments, holiday pay and the last working day for her P45.

42 On 6 May the claimant received her pay, payslip and her P45 (p93) dated 29 April, stating a leaving date as 15 April. She sent a grievance letter dated 13 May (p91) and received a letter dated 23 May (p92) stating she had given notice to terminate her employment on 18 May. The reference to 18 May was a mistake, and the respondent meant 18 April.

43 The claimant was very upset about these matters and it affected her maternity leave and emotional state. She cried frequently after her employment ended and considered she was suffering from depression. She and her partner worried about finances and had to ask people to wait for the payment of bills. As a soon to be mother, however, the claimant considered she needed to dust herself off and recover.

44 On 2 August 2016, supported by an Early Conciliation Certificate on which Day A was shown as 15 June 2016 and Day B as 4 July 2016, the claimant presented her claims.

45 At the end of September 2016 the claimant commenced a new job working at the same employer as her partner, Mr Clark; between them they were able to arrange shifts to permit the childcare of their daughter. The claimant's resilience was tested but with the help of Mr Clark she managed. She wanted to spend time off with her daughter but because of her dismissal felt she had to return to some work sooner.

The Law

46 The following legal principles were not delivered to the parties in the extempore decision; they are well known and understood in discrimination cases and are the framework we applied in reaching our conclusions. The complaints were summarised in case management as follows: unfair dismissal pursuant to the Employment Rights Act 1996 ("the 1996 Act"), discrimination because of pregnancy pursuant to sections 18 and 39 of the Equality Act 2010 ("the 2010 Act"), harassment pursuant to sections 11, 26 and 40 or alternatively direct sex discrimination pursuant to sections 11, 13 and 39 of the 2010 Act and a claim for breach of contract in respect of unpaid notice pay.

Establishing dismissal

47 In circumstances such as these, Section 95 of the 1996 Act take the Tribunal no further, because it refers to the giving of notice to terminate by either employer or employee (employee in circumstances where she is entitled to resign without notice because of the conduct of the employer).

48 The Tribunal must apply the common law to decide who in reality, ended the employment. Were the words of dismissal or resignation used ambiguous? If so, it will be for the Tribunal to consider all the circumstances and the nature of the workplace and, if the words are still deemed ambiguous, to consider how a reasonable employer or employee would have understood the words which the Tribunal finds were uttered or the actions which the Tribunal finds occurred.

49 Section 99 of the Employment Rights Act 1996 says this:

> (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,
>
> (ba) ordinary or additional adoption leave,
>
> (c) parental leave,
>
> (ca) ordinary or additional paternity leave, or
>
> (d) time off under section 57A;
>
> and it may also relate to redundancy or other factors.

50 The relevant regulation is Regulation 20(2) of the Maternity and Parental Leave Regulations 1999.

51 The Equality Act 2010 says this at Section 18:

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).

Establishing Discrimination

Section 136 of the 2010 Act states:-

(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.

52 For the Equality Act complaints, the claimant has to prove facts from which the Tribunal could conclude that an act of discrimination has taken place, whereupon the burden to rebut that case shifts to the respondent. That is not a controversial statement of principle: see **Miss Joanna Maximuk v Bar Roma Partnership UKEAT/0017/12**.

53 The Honourable Mr Justice Langstaff concluded in that case that the Tribunal was entitled to consider that the burden of proof should not have passed to the respondent employer. That decision reflected the chain of events and findings of fact in that case, but the principle certainly binds us and we apply the Equality Act burden of proof provision in the ordinary way (see below).

54 The 2010 sets out a two stage process: it is for the claimant to prove facts from which the Tribunal could conclude an act of discrimination has occurred before the respondent is called to provide an explanation. In examining those primary facts, poor treatment is not enough. See in particular **Madarassy v Numora International Plc [2007] IRLR 246 para 56**, per Mummery LJ: "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".

55 The well established relevant principles relating to direct discrimination are as follows:

"(1) *If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in* ***Nagarajan v London Regional Transport [2000] 1AC501*** *House of Lords at 512H to 513B. Significant in this context means not trivial……..*

(3)Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in ***Ladell****: "Where the applicant has proved facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that the tribunal must find that there is discrimination".*

56 Underhill J in the **Martin v Devonshire Solicitors [2011] ICR 352, para 37** said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in **Nagarajan**, namely whether the prescribed ground or protected act had a significant influence on the outcome". In **Igen Limited v Wong [2005] IRLR 258CA** the guidance issued in **Barton** in respect of sex discrimination cases was said to apply and approved in relation to race and disability discrimination:

(1) the first stage involves the claimant establishing such facts from which the Tribunal could conclude that the respondent had committed an act of discrimination in the absence of an adequate explanation from the respondent ("such facts"). If the claimant does not prove such facts he or she will fail.

(2) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves, in some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(3) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

57 The **Barton** guidance goes on to say that in considering the inferences or conclusions that can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation. The guidance mentions twice that evasive or equivocal replies to a questionnaire or indeed inadequate explanations for a failure to deal with code of practice provisions can lead to inferences being drawn where it is just and equitable to do so in such circumstances. At the final stage, the respondent must establish that the treatment is in no sense whatsoever on the grounds of the protected characteristic.

58 In relation to the drawing of inferences, it is important to bear in mind the comments of Mr Justice Underhill at paragraph 38 of **Mr C De Silva v NATFHE** (now known as University & College Union & others) **UKEAT/0384/07/LA** – 12 March 2008:

"Inferences from failures of a respondent in answering a questionnaire or other document can only be drawn in "appropriate cases"; "the drawing of inferences from such failures – as indeed from anything else – is not a tick box exercise. It is necessary in each case to consider whether in the particular circumstances of that case, the failure in question is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged; and if so whether in the light of any explanation supplied, it does in fact, justify that inference. There will be many cases where it should be clear from the start, or soon becomes evident, that any alleged failure of this kind, however reprehensible, can have no bearing on the reason why the respondents did the act complained of, which in cases of direct discrimination is what the tribunal has to decide. In such cases time and money should not be spent pursuing the point.

Limitation.

59 There was no dispute that the claimant's unfair and wrongful dismissal complaints (breach of contract) had been presented within three months (subject to the effects of ACAS conciliation) of the alleged dismissal. In the event, wrongful dismissal was not pursued.

60 As for the Equality Act complaints, Section 123 provides:

(1) 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.

(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.

61 Conduct extending over a period is for the claimant to establish, either by direct evidence, primary facts or inference: the alleged incidents of discrimination must be linked to one another and there must be evidence of a continuing discriminatory state of affairs covered by the concept of "[conduct] extending over a period" (see **Hendricks v NPC [2003] IRLR 96**.)

62 For the factors to be taken into account in extending time, where claims are otherwise out of time, (see **Harvey L (5) [832]**, which reflect the general Limitation Act provisions). These are as follows: "- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the

conduct of the claimant over the same period; the length of time for which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; the extent to which professional advice for making a claim was sought and if it was sought, the content of any advice given".

63 The exercise of discretion in extending time limits is the exception rather than the rule – see **Robertson v Bexley Community Centre [2003] IRLR 434, per Auld LJ**.

Discussion and Conclusions

The harassment and direct sex discrimination complaints and limitation

64 The case management orders said this: 3.2.1The claim was presented on 2 August 2016. Accordingly and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 15 March 2016 is potentially out of time so that the Tribunal may not have jurisdiction to consider the claims.

3.22 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

3.23 If not, was any complaint presented within such other period as the Tribunal considers just and equitable and so sufficient to give the Tribunal jurisdiction to consider such complaint?

65 For the purposes of limitation the Tribunal assumed that the allegations of unwanted conduct of a sexual nature made by the claimant about the conduct of Mr Larijani before 15 March 2016 were true. Paragraphs 16 to 20, and paragraph 28 above (allegations 7 to 9 and 11 of the further information) were allegations of four incidents of unwanted sexual conduct contrary to Sections 26 and Section 40 (May, June, June or July, and November). Such instances were not alleged to have happened again after November. Applying Section 123(3)(a), and **Hendricks,** it cannot be said that such conduct, assuming it occurred, was continuing until 15 March 2016, such that the conduct be treated as occurring at the end of that period and hence was presented in time. It cannot be said that there was a continuing act or state of affairs, of sexual harassment of the claimant, between 8 May 2015 and 15 March 2016 on the facts asserted by the claimant. Those allegations are out of time applying the primary time limit.

66 The allegations are serious, damaging and carry stigma, to be decided in this jurisdiction on the balance of probabilities, but the Tribunal considers they are not necessarily relevant background to a complaint of unfavourable treatment or dismissal because of pregnancy. There is clearly potential prejudice and injustice to both parties in deciding a longer time limit shall apply.

67 We recognise that because the claimant is an unreliable witness on some matters, that is not to say these allegations are not true. We considered Mr Larijani reliable on many matters, but he may not be on these allegations. We were without text message exchanges between the parties for the May to July 2015 period, which might have given some insight into the relationship at that time, and assist with whether the allegations were more likely than not to be true. We were also without the alleged recording of a relevant discussion about one allegation. We would be deciding these allegations without any other contextual or contemporaneous material to assist. We also note that the claimant knew of the assistance the CAB could provide, from her previous job; she did not seek that assistance at the time of these allegations. In the

round we do not consider it just to fix a longer time limit. There were opportunities to complain about these matters in a timely fashion, and the claimant was not unwell or otherwise prevented from doing so. In all the circumstances the Tribunal does not consider it just and equitable to identify a different time limit in accordance with Section 123(1)(b).

68 For completeness, we did consider it just to determine whether the claimant had proven allegation 10 (in early September Mr Larijani said the claimant could not work for his company if she wanted to try for another baby), as a matter of fact, because we considered it was potential relevant background to her complaints of later unfavourable treatment on grounds of pregnancy. It was necessary to determine that factual allegation to do justice to her case concerning her dismissal. In the event we considered she had not proven that allegation as a matter of fact.

69 The complaints of sexual harassment, harassment on grounds of sex and direct sex discrimination are dismissed because they were presented out of time. It was conceded that pregnancy and maternity is not a protected characteristic in Section 26(5) of the 2010 Act, which can found a further harassment complaint, and this complaint is therefore also dismissed (paragraph 12 of the further information).

Claim of unfair dismissal advanced pursuant to the 1996 Act

When did the claimant begin to work for the respondent?

70 The Tribunal has found employment commenced on 5 January 2015.

When and in what circumstances did the claimant's employment with the respondent come to an end? The claimant asserts that she was dismissed by the respondent whereas the respondent asserts the claimant resigned her employment in April 2016.

71 The Tribunal considers that the events at paragraph 30 and 31 do not amount to a resignation by the claimant. It was clear to Mr Larijani that the claimant was pregnant and that one of his clients considered she was to start maternity leave on 18 April, the date she wrote on her time sheet. In those circumstances, and his knowledge of her pregnancy and circumstances, it is inherently implausible that if she used the words "leave" of "finish", that that was reasonably to be considered in context to amount to a resignation, even between two non native speakers. In context, "I want to [finish] or [leave] on 18 April", unless that is further clarified, is reasonably to be understood as starting maternity leave in these circumstances, all the more so when confirmed as the understanding by a client. We do not accept that the respondent would not have engaged a replacement on a contract, had it not genuinely believed the claimant was leaving employment permanently; cover would have been needed whatever was the position. Statutory maternity pay is no net cost to an employer in these circumstances, paid, as it is, from the national insurance fund. We do not accept Mr Larijani's evidence on this that he genuinely believed the claimant wanted to leave her employment: it was his wish, but not his genuine belief, and the respondent was seeking to take advantage of ambiguity.

72 The claimant had not given notice to end her contract of employment in her March timesheet by writing a leave date on it. How then, did it end and who really ended it? It is clear from the "van" conversation and text exchanges on 15 April that Mr Larijani was processing the ending of the claimant's employment. He mentioned the issue of the p45 and all other payments as "office issues"; this was subsequently confirmed. An instruction was given to the accountant that the last working day should appear on the p45, and 15 April was given. The respondent's position in its letter in response to her grievance was wishful thinking: the claimant had not given notice to

terminate her employment on 18 April [in error recorded as 18 May]: she had given that date as her maternity leave commencement date; if there was any ambiguity she had made the position clear in the text exchange, which was ignored by the processing and communication of a P45 with a leaving date of 15 April. In all the circumstances these events amounted to a dismissal of the claimant by the respondent: by its conduct the respondent terminated the contract of employment on 15 April 2015, including in the text reply to the claimant's concerns.

If the claimant was dismissed, was the claimant's pregnancy the reason or the principal reason for the dismissal and so is the dismissal of the claimant automatically unfair pursuant to section 99 of the 1996 Act?

73 There was no other reason for the respondent bringing the claimant's contract of employment to an end, and issuing her with a P45 other than her pregnancy, or more particularly her wish to take maternity leave, on our findings. Mr Larijani said absence might be more than a month and who knew what the future would bring: those are the facts and beliefs which caused him to dismiss, despite the claimant's protestations; they are classically within Regulation 20 (3)(d): the claimant sought to take or avail herself of the benefits of maternity leave, and that was inconvenient to the respondent's business. Her unfair dismissal complaint is well founded and succeeds. For the sake of completeness, there was no conduct on the part of the claimant which was blameworthy and contributed to her dismissal (also included in the issue list during case management).

74 It follows on these facts that the claimant's dismissal also amounts to unfavourable treatment because of pregnancy contrary to Sections 18 and 39 of the 2010 Act.

75 As to the other matters alleged to be unfavourable treatment because of pregnancy, she has not proven her factual case (paragraphs 2 to 6 of the further information). We have not found the allegations of remarks or unfavourable behaviour to have occurred, or to amount to detriment; on our findings Mr Larijani accommodated the claimant's wish to work only her 16 hours during pregnancy, and recruited help to assist her and was otherwise accommodating. Those complaints of unfavourable treatment (aside from dismissal) do not succeed.

Remedy

76 Mr Owen did not pursue damages in respect of the claimant's dismissal without notice, as we have found it, because the claimant would, during the relevant four week notice period, have expected statutory maternity allowance or pay, which are national insurance derived benefits, the entitlement to which is not a matter for this Tribunal but for HMRC.

77 Similarly he did not pursue a Basic Award or Compensatory Award for unfair dismissal, including because the claimant had not completed the required two years' service with the respondent

78 He did pursue an Injury to Feelings award (but not interest or an award for personal injury). He considered the contravention of the Equality Act the Tribunal had found to be indicative of a mid band Vento award and the claimant's schedule of loss contended for an award of £10,000.

79 The Tribunal explained to the parties the principles to be applied in assessing and awarding sums in respect of injury to feelings, including the "Vento" bands as

uprated by Da'Bell. An injury to feelings award is to be compensatory of the injured feelings and not punitive.

80 Having made findings on the impact on the claimant, and having heard from the respondent, the Tribunal assessed the award at £7000. The Tribunal considers this is a mid-band case: losing employment because of an act of discrimination is a serious matter, but in light of our other findings, this is not in the most serious category and we take account of the general goodwill towards the claimant which Mr Larijani exhibited at times during her pregnancy.

81 Given the claimant's resilience and the value of money to her, taking into account her previous earnings and circumstances, we consider an award of £7000 properly compensates her for injured feelings caused by the loss of her job.

82 We also confirm the respondent must pay to her £750 in reimbursement of the unremitted portion of her fees.

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Employment Judge JM Wade

12 April 2017

Reasons sent to the parties on:

13 April 2017

For the Tribunal:

M M Richardson