Appeal No. UKEAT/0537/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 April 2014

Before

MR RECORDER LUBA QC

MR D J JENKINS OBE

MR J R RIVERS CBE

HOLDEN & CO LLP — APPELLANT

MISS K RUSSELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBERT DENMAN (of Counsel) Messrs Holden & Co Solicitors Liberty Buildings 32-33 Robertson Street The America Ground Hastings East Sussex TN34 1HT
For the Respondent	MR PAUL TAPSELL (Direct Public Access)

SUMMARY

SEX DISCRIMINATION – Pregnancy and discrimination

Legal secretary on maternity leave dismissed by solicitor's firm for 'redundancy'.

Employment Tribunal finds that the real reason for dismissal was because the employee had sought to return to work on reduced hours. (Not appealed).

Employment Tribunal also upheld two sex discrimination claims:

(1) Not accepting a properly notified return date at the end of the maternity leave and

(2) Taking into account pregnancy-related illnesses in determining an attendance record. Employer's appeal from judgment and compensation of the discrimination claims dismissed because:

(a) The ET had been entitled to determine both matters, in the sense that the complaints and claims had been before them.

(b) The conclusions reached were on issues of fact and were based on material in evidence before the Tribunal.

MR RECORDER LUBA QC

Introduction

1. By a Judgment sent to the parties with written Reasons on 24th June 2013 the Employment Tribunal sitting at Ashford (Employment Judge Harrington and Members) awarded Miss Kerrie Russell, the Claimant before them, £5,625.23 in respect of her claims of unfair dismissal and sex discrimination arising from the termination of her employment by the Respondent to her claims, Holden & Co, a firm of solicitors. Mr Holden is the managing partner of that firm. We shall refer to the parties as Claimant and Respondent. Pursuant to leave to amend given by HHJ Peter Clark the Respondent presses this appeal on the grounds set out in Amended Grounds of Appeal filed with the Employment Appeal Tribunal on 17th December 2013. It is those grounds of appeal which we must consider. Before coming to them, it is necessary to give a short summary of the facts and of the Employment Tribunal's findings.

The Facts

2. The Claimant worked for the Respondent part-time from January 2010. She was a legal secretary. Her agreed hours became 20 per week. In May 2011 she informed the Respondent that she was pregnant. On 15th September 2011 she gave notice that she wished to commence her maternity leave on 28th November 2011 and to return on 27th August 2012. She invited the Respondent to agree that date but she received no response. In the event, she started maternity leave a week earlier than she had anticipated and on 16th November 2011 notified the Respondent of a revised return date of 20th August 2012. She again invited the Respondent to agree that date and again she received no response. Her last date in the office was 17th November 2011 and her child was born on 29th December 2011.

3. In due course, on 7th August 2012 she wrote to the Respondent and reiterated that her proposed return date would be two weeks later, that is to say on 20th August 2012. That letter also asked if she could, at least initially, return to work on the basis of working 15 hours per week rather than 20. Mr Holden, seemingly unaware of the Claimant's September and November 2011 communications, responded on 10th August 2012 that her return date should in fact be 1st October 2012 and that the return would be on a mutually agreed working pattern to be determined later. The Claimant said in her response that she would accept the return to work date of 1st October 2012.

4. Before that date arrived, the Respondent firm decided to downsize its operation in light of prospective changes to legal aid scheduled to take effect in April 2013. Legal aid was a major funding stream for its field of work. It decided to close one of its three offices and to reduce the workforce by one-third. Among the group of workers to experience redundancies would be legal secretaries. Two of those had less than 12 months service and they were immediately dismissed. That left a smaller pool of three, which included the Claimant. She was notified of the redundancy situation and was later interviewed by Mr David Nessling of the Respondent who was involved in the information - gathering for the redundancy selection exercise.

5. In the interview with Mr Nessling, she said she would wish to remain employed by the Respondent and that she preferred to return to work at the end of her maternity leave on the basis of 15 or 16 hours per week. Mr Nessling told her, as the Employment Tribunal, found that:

> **"As she was unlikely to be able to work her contracted hours she was likely to be selected for redundancy."**

6. Mr Nessling explained to the Tribunal that he had told the Claimant that Mr Holden had said this. The Claimant was demonstrably upset by that news, given to her early in the

interview. At the same meeting, Mr Nessling also completed a scoring record form setting out the criteria to be applied in the redundancy selection exercise. He scored the Claimant three points out of a possible four points for each of the five criteria being measured in the scoring process. She scored 15 points in total. The other two employees in the pool, Mr Vaisey and Ms Drury, each scored 16 points. It was agreed that the period of maternity leave should be extended until the redundancy process was completed.

The ultimate decision as to who was to be dismissed fell to Mr Holden and Ms Walsh. They decided on 4th October 2012 that only one junior secretarial position could be maintained, that Ms Drury should have that position and that Mr Vaisey and the Claimant should be dismissed. In the event, neither Mr Holden nor Ms Walsh gave evidence to the Employment Tribunal.

7. Before the decision made by those two persons could be notified, Ms Drury resigned her post by notice given on 8th October 2012. Notwithstanding receipt of that, the Respondent decided not to change its decision. Accordingly, on 9th October 2012 the Claimant received notice, issued late on the previous day, that she was being dismissed by reason of redundancy.

The Tribunal's Findings

8. Against the background of those facts, of which we have only given a short summary, and having directed itself to the relevant statutory provisions, the Employment Tribunal reached a series of conclusions on the issues which it had identified as arising from the Claimant's claims. First, it determined the Claimant's complaint that the Respondent had not properly dealt with her request for flexible working. That claim it rejected because her request had not met the statutorily - prescribed formal conditions for such a request to be validly made; see the two paragraphs numbered 61 in the Tribunal's Written Reasons.

9. Second, on the Claimant's complaint of unfair dismissal, the Employment Tribunal rejected the Respondent's case that the reason for dismissal was redundancy; see paragraph 62 of the Reasons. It likewise rejected the Claimant's case that she had been selected for dismissal because she was on maternity leave; see paragraphs 67 and 68. It found that the real reason for dismissal was because the Claimant had a request for flexible working and that she had wanted to return at fewer than 20 hours per week; see paragraphs 63 to 65. The Tribunal accordingly found that the dismissal was an automatically unfair dismissal by operation of section 104(c) of the **Employment Relations Act 1996**.

Whilst still on unfair dismissal, the Employment Tribunal rejected an alternative claim that the dismissal was automatically unfair because they had been dismissed at the end of her maternity leave without being offered the suitable alternative vacancy arising from Ms Drury's resignation; see paragraph 69.

For good measure, the Employment Tribunal went onto consider whether, if it had accepted the reason tendered by the Respondent (redundancy), it would have found the dismissal to have been a fair one; see paragraph 70. It held that it would not have found a fair dismissal. It placed particular reliance on three features: the absence of a criteria for scoring "attendance", the absence of criteria for scoring "disciplinary record" and the failure to reconsider the decisions made once the notice of Ms Drury's resignation had been received.

10. Thirdly, the Employment Tribunal turned to the claims based on sex discrimination. It rejected a claim that the Respondent had discriminated against the Claimant by dismissing her because she was on maternity leave; see paragraphs 71 to 72. It then considered whether she had been a victim of discrimination on one of two other. First, grounds; first in being prevented from returning on her selected date for the end of her maternity leave, 20th August 2012.

Second, by virtue of the fact that she had had her flexible working claim rejected. It was satisfied that the claim was made out in respect of the first rather than the second of those; see paragraphs 73 to 76.

11. Fourthly, the Tribunal considered whether the Respondent had discriminated against the Claimant by treating her unfavourably because of her pregnancy and/or her maternity leave. The Employment Tribunal decided that she had been unfairly treated because her pregnancy - related sickness absences had been taken into account in scoring her for her "attendance" in the redundancy selection process; see paragraph 77.

12. Finally, the Employment Tribunal decided that the Claimant's claim in relation to the provision of written reasons for her dismissal succeeded, because the notice of dismissal given did not contain a truthful statement of the real reason for her dismissal; see paragraph 78.

13. In the result, therefore, it upheld the unfair dismissal claim and the 'failure to give reasons for dismissal' claim. It awarded some £300-odd in relation to each. It additionally upheld two aspects of the sex discrimination claim which we shall call respectively the *return date claim* and the *absences claim*. It awarded injury to feelings for those, quantified at £5,000 in total plus interest.

The Appeal

14. The Claimant brings no appeal from the rejection by the Employment Tribunal of those parts of her claim that we have mentioned as having failed and she now pursues no cross-appeal. The Respondent, for its part, brings no appeal from the findings or awards in relation to the unfair dismissal claim or the claim for failure to provide proper reasons for the dismissal. The Respondent puts in issue only the two adverse findings of sex discrimination; that is to say

the *return date claim* and the *absences claim* and it disputes the awards made consequent upon them.

15. The Respondent's Notice of Appeal on those points was considered on a paper sift by HHJ Birtles. Judge Birtles considered that it disclosed no reasonable grounds. The Respondent exercised its right to an oral reconsideration before another judge. That took place on 5th December 2013 before HHJ Peter Clark. It is plain that HHJ Clark, having let the matter through to a Full Hearing, anticipated that - as a result of exchanges at that hearing - the Respondent would seek leave to amend its grounds. That application was duly made and the amendment was allowed. Accordingly, it is those Amended Grounds received on 17th December 2013 which we are called upon to determine.

16. The several Amended Grounds of Appeal essentially raised three issues on the Employment Tribunal's handling of the sex discrimination claims. We shall deal with each of those three broad issues in turn, having received helpful Skeleton Arguments from both parties and oral submissions from Mr Denman for the Respondent and Mr Tapsell for the Claimant

1. The Procedural Issue

17. The gravamen of the Respondent's first set of grounds at paragraphs b and c of the grounds of appeal is breach one of natural justice. The Respondent asserts that neither of the two successful sex discrimination claims was put forward or foreshadowed prior to the hearing at the Employment Tribunal. Further, that when these points were raised at the hearing, for the first time, the Employment Tribunal wrongly permitted them to be pursued there and then rather than either refusing to hear them or granting the Respondent an adjournment and an opportunity to put a positive case in response to them. Mr Denman submitted that this was a

particularly matter in the context of a sex discrimination claim because of the possible application of the special burden of proof provisions in section 136 of the **Equality Act 2010**.

18. As to the nature of the sex discrimination claims that they believed they were considering the Employment Tribunal said this in their Reasons at paragraphs 10 and 11:

> **"10. In respect of the discrimination claim it was agreed by the parties that the Claimant was within the protected period as defined in section 18(2) of the Equality Act 2010. It was the Claimant's case that she was subjected to unfavourable treatment in two respects. Firstly, by being chosen for redundancy as she was on maternity leave and secondly, by being subjected to a detriment by not being allowed to return to work sooner after the birth of her second child. It was the Claimant's case that, but for her absence on maternity leave, her flexible working request would have been agreed.**
>
> **11. At this stage in the Tribunal hearing, the Respondent objected to the second part of the Claimant's discrimination claim being put before the Tribunal. It was the Respondent's case that this was an amendment to the Claimant's claim. After hearing submissions from the parties on this issue, the Tribunal was content to include this as part of the claim to be determined. It was the Tribunal's judgment that the relevant factual background to this claim was sufficiently pleaded as part of the claim within the ET1, which included discrimination. Taking account of this and applying the overriding objective, it was the Tribunal's decision that the claim should be heard."**

19. It is plain that of the two matters on which the Claimant ultimately succeeded on sex discrimination that is to say the *return date* claim and the *absences claim*, only the *return date claim* was being addressed in paragraphs 10 to 11. In those paragraphs the Employment Tribunal says nothing at all about the *absences claim*.

20. As to the content of paragraphs 10 and 11, and in particular the Tribunal's reliance upon the ET1, Mr Denman took us into the detail of that document. He acknowledged, very properly that the terms of paragraph 5.1 had been completed by ticking both "unfair dismissal" and "sex discrimination", but what then followed at paragraph 5.2, and in the attachment to it, was a narrative of facts. Mr Denman acknowledged that in the first paragraph of text under 5.2, the exchange of letters in August 2012 was set out. Moreover in the extension text to section 5.2 Mr Denman fairly drew our attention to the following text:

> **"Secondly, Mr Nessling only scored me a 3 out of 4 for attendance when I rarely ever took time off sick and I stayed late on a regular basis due to the volume of work… I therefore wonder why I did not score 4 on these points?"**

21. However, Mr Denman submitted, that neither the *return date claim* nor the *absences claim* was sufficiently raised from the ET1 to amount to a sex discrimination claim as opposed to an unfair dismissal claim. Mr Denman further submitted that, in the earlier history of the claim, the Claimant had instructed solicitors. The Respondent promptly wrote to those solicitors inviting them to spell out the basis of the Claimant's claim. That not having produced a sufficiently specific response, the Respondent had applied to the Employment Tribunal to adjourn the hearing and direct the production by the Claimant of a list of the specific claims she was advancing. That application to the Tribunal had been opposed and was ultimately refused by an Employment Judge, prior to the commencement of the hearing. That Employment Judge explained in the Notice of Reasons for refusal of the postponement that, "the claims and issues can be clarified at the start of the hearing". It is evident that that is what then happened, as the Tribunal say in paragraph 4 of their Written Reasons:

> **"At the start of the hearing some time was spent with both parties clarifying the exact nature of the Claimant's claims and the issues to be determined by the Tribunal."**

22. Mr Denman submitted that whatever the Tribunal may have said at paragraphs 10 and 11 about the *return date claim* there was no reference at all in this discussion of the claims to the *absences claim*.

23. Mr Denman's underlying submission on these grounds of appeal was that the absence of particularisation or identification of the sex discrimination claims went not only to natural justice but to the Tribunal's jurisdiction as a matter of law. He took us to section 120 of the **Equality Act 2010** which provides for the jurisdiction of employment tribunals to determine, "a complaint" relating to a contravention of the provisions of art 5 of that Act which deal with rights at work. Mr Denman invited us to take the same approach to those provisions as the

Court of Appeal had taken in the well known case of **Chapman v Simon** 1994 IRLR 124 to the equivalent provision in the **Race Relations Act 1976** i.e. section 54. That had been a race discrimination case in which the complainant had made particular complaints. The Employment Tribunal, having rejected one of those complaints, then went on to find for itself a further complaint and to uphold that complaint. This Employment Appeal Tribunal, and subsequently the Court of Appeal, found that the Employment Tribunal had acted beyond its jurisdiction in taking and determining a matter which had been the subject of no complaint by the Claimant herself; see in particular paragraphs 33(1) and 45 of the Court of Appeal's Judgment.

24. In particular, in the latter of those passages, Peter Gibson LJ said:

> **"If the act of which complaint is made is found to be not proven it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act."**

25. Mr Denman accepted that **Chapman v Simon** was a case in which the Tribunal had rejected the specific complaint advanced by the Claimant but then on a frolic of its own identified and upheld another. Mr Denman submitted that this case was of the same class; that is to say that the points ultimately upheld on sex discrimination had not been taken by the Claimant herself.

26. We heard Mr Tapsell in brief reply for the Claimant and in support of an earlier prepared Skeleton Argument. In that Skeleton Argument it was contended that, once the Respondent had failed in its prior application to postpone the hearing, it should have brought all available witnesses to the Tribunal to deal with the claim as advanced. It was not her fault, the Claimant asserted, that the Respondent had only brought Mr Nessling to give evidence rather than Mr Holden and/or Ms Walsh who had made the decision to dismiss.

27. These written submissions were developed by Mr Tapsell, who submitted to us: that the ET1 form gave sufficient material to sustain both of the successful claims: that there had been no objection made in the ET3 to any insufficiency in understanding the nature of the claims; and that after the issues had emerged at the Employment Tribunal hearing no further application to adjourn had been pursued.

28. Dealing with this first head of the appeal we will address separately the *return date* and *the absences claim* and give our judgment on each in turn. First the return date point.

29. As we have noted, the ET1 form advanced complaints of both unfair dismissal and sex discrimination. Among the matters outlined in the narrative, and in particular in the first paragraph under section 5.2 of the form, was an account of the exchanges about the return date. In our judgment, that text must be understood to be potentially (at least) referring to both the unfair dismissal and the sex discrimination claims. In the circumstances, there was nothing improper at all in the Employment Tribunal using the first part of the hearing before them to distil more precisely what the issues were. There is no doubt that amongst those issues (see paragraphs 10 and 11) they distilled - out the *return date claim*. It is therefore obvious that the point was before the Employment Tribunal. It determined the objections raised by the Respondent to its consideration of the *return date claim*. In paragraph 11, the Employment Tribunal found that there had been sufficient in the ET1 to sustain pursuit of that point and for good measure indicated that even if it might be said to have been introduced belatedly nevertheless the overriding objective required it to be admitted and determined.

30. We can identify no error in that reasoning or decision. It is not suggested that, when the Tribunal decided that it would proceed with the *return date claim* that the Respondent made any further objection or applied to adjourn or sought permission to call extra or additional

witnesses. No application or objection of that sort was made. In those circumstances it seems to us that the Tribunal was entitled to proceed to determine the issue it had identified, having resolved the Respondent's objections to its doing so. Accordingly, under this first head of the grounds of appeal we reject the grounds insofar as they relate to the *return date point*. We turn then to the *absences claim*.

31. Here Mr Denman was on stronger ground. The *absences claim* was not addressed at all in the Tribunal's identification of the list of issues, culminating in paragraphs 10 or 11 of its reasoning. It is clear, however, that the Employment Tribunal ultimately determined the *absences claim*. At the outset of its Written Reasons it had identified the "attendance" issue as a dimension of the unfair dismissal claim rather than relating to discrimination; see for example paragraph 9.2. It is fair to say that in the ET1 the Claimant had not specifically identified the *absences claim* as an issue of sex discrimination but from the passages that we have already read it is plain that she had asked herself rhetorically and, by implication, invited the Tribunal to determine why she had not scored the full four points in respect of her attendance record.

32. What is clear, however, is that before the conclusion of the hearing before the Tribunal the sex discrimination dimension of this particular claim had materialised. Moreover, Mr Nessling had given direct evidence about what he had and had not considered as part of the scoring on attendances and he had been cross-examined and no doubt re-examined on that. The material before us now shows that, in her closing submissions, the Claimant's representative specifically framed the complaint as one of sex discrimination contrary to section 18 of the **Equality Act 2010**. To that effect we have the benefit of a subsequent note prepared by the Employment Judge who says at paragraph 7.8:

> **"In closing submissions Miss Wheeler [the Claimant's advocate] addressed the issue of pregnancy related absences having been taken into account by Mr Nessling when he carried out his scoring. Her short submission on this point is contained within my notes as follows**

> **"Pregnancy related sickness absence was taken into account by Mr Nessling, he accepts this. This is an act of direct sex discrimination'"**

33. That the point had arisen in this way, at some point during the hearing, is further confirmed by the terms of a letter that Ms Wheeler wrote to the Employment Tribunal shortly after the hearing. She wrote:

> **"At the end of the hearing…there was a discussion as to whether section 18(2) of the *Equality Act 2010* was an issue to be determined by the Tribunal. My recollection is that this ground was agreed at the beginning of the hearing."**

34. Whether it was at the beginning or at the end, this material from the Judge and from the Claimant's representative demonstrates that the matter was in play during the hearing itself. This is not a case like **Chapman** in which the Employment Tribunal was on a frolic of its own, taking a point that no party had developed. The crucial question in our Judgment is how the Employment Tribunal, and thereafter the Respondent, addressed this development in the course of the hearing. The Employment Judge, and indeed the Employment Tribunal as a whole, might have been criticised if immediate objection had been taken by the representative appearing for the Respondent and there had been no reasponse. None of the material before us suggests that that is what occurred. Indeed, the relevant note by the Employment Judge is in these terms:

> **"Mr Pettit [the Respondent's representative] came back on this point after Miss Wheeler had concluded her submissions and submitted that the Claimant had not been marked down for pregnancy related sickness absence, she had been a scored a three which was an average mark."**

35. The Judge continues:

> **"Accordingly, the issue had been canvassed fully in evidence and also referred to in closing submissions from both parties."**

36. In those circumstances, Mr Denman faced an uphill struggle in demonstrating to us that the Tribunal had behaved irregularly or improperly in taking account of this matter. There is no suggestion that Mr Pettit objected to the Tribunal acceding to Miss Wheeler's submission in this way. He does not appear to have invited the Tribunal to give him additional time or to

adjourn to have an opportunity to call any other evidence. There is before us no evidence from Mr Pettit. In those circumstances we are satisfied that this *absences claim* or aspect of the sex discrimination claim was before the Employment Tribunal, that the parties had an opportunity to deal with that, and that there was no impropriety by the Tribunal in entertaining it. It follows that we reject this second aspect of the first tranche of the grounds of appeal.

37. The next two elements of the grounds of appeal relate to the substance of the Employment Tribunal's findings and the awards of compensation that they made in respect of the findings of sex discrimination. Both of the Tribunal's findings on sex discrimination arise from the application of section 18 of the **Equality Act 2010**. As Mr Denman rightly reminded us, ordinarily discrimination in the employment context is dealt with by section 13 of the 2010 Act but in the employment context, in relation to pregnancy and maternity discrimination, specific provision is made by section 18. Indeed section 18(7) specifically disapplies the provisions of section 13, and for good measure, section 13(8) makes section 13 subject to section 18(7). The terms of section 18 are as follows;

> **"(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 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."**

2. The Return Date Claim

38. At paragraphs D to J of the Amended Grounds of Appeal the Respondent contends that the Employment Tribunal went wrong in its approach to the question of whether the Respondent's failure, by letter of 10th August 2012, to accept the Claimant's proposed return date (and to suggest a much later one) amounted to unfavourable treatment within the Act. Further, it is put into contention whether if it did so it actually caused any injury to feelings on

the part of the Claimant. Mr Denman took us to the terms of the letters exchanged between the Claimant and the Respondent in August 2012.

39. In part of his letter of 10th August 2012 Mr Holden wrote:

> **"As you aware you are entitled to take a total of 52 weeks maternity leave. If it was the case that you wanted to take the full 52 weeks you do not need to give us notice that you are coming back to work at the end of your 52 weeks. If, however, you wish to return any earlier than 52 weeks you are obliged to give the firm at least 8 weeks notice. I am more than happy to treat your email of 7th August 2012 as required as your notice to return to work at the firm earlier, in which case I calculate your return date would Monday 1st October 2012 …"**

40. The reply to that from the Claimant is in these terms:

> **"I apologise for the misunderstanding on my part regarding my return date and would be grateful if you therefore please treat my email of 7th August 2012 as my 8 weeks notice. I therefore confirm that I do propose to return to work on 1st October 2012 as stated in your letter."**

41. Mr Denman's first submission was that the Tribunal had erred in finding liability in relation to sex discrimination arising from this exchange. By reference to the provisions of section 18, which we have already read, Mr Denman submitted that this could not be a case of a breach of section 18(2) because the Claimant was no longer pregnant. Further, he submitted, that this could not be a contravention of section 18(3) because the Claimant was at the material dates no longer on compulsory maternity leave. Finally, he submitted, that it could not be within the terms of section 18(4) because the confusion, muddle or mistake about the return date could not constitute unfavourable treatment in relation to the right to maternity leave.

42. We can deal with this point relatively shortly. We accept Mr Tapsell's submission that the identification and agreement of a return date is part and parcel of the exercise of the right to additional or ordinary maternity leave for the purposes of section 18(4). Neither party put before us any authority on the meaning of the words in section 18(4), We therefore addressed ourselves to the literal language and the policy of the Act. It is plain to us that the terms of the

provision protect a woman not only at the point in time when she exercises or seeks to exercise her right but also in respect of the necessary consequences of that right.

43. It seems to us that the return date is a necessary or essential ingredient of the right to maternity leave and, accordingly any unfavourable treatment in relation to it falls within the purview of section 18(4). That deals with the question of liability on the *return date claim*.

44. Mr Denman's next submission was that, even if the Tribunal had been correct as to liability, there had been no causal connection between the issue of the return date and any injury to feelings on the part of the Claimant. His case was that the exchange of letters may, by reason of the Respondent's mistake in overlooking her earlier notifications, have resulted in the Claimant being treated "unfavourably" in that she was not given the date she had earlier expressed as being the date on which she wished to return to work. Nevertheless, he submitted, what occurred in August 2012 was a friendly exchange of letters. There was no hostility in the letters exchanged and no objection taken by the Claimant to what Mr Holden had written. So, submits Mr Denman, this cannot be a case in which any injury to feelings followed from whatever unfavourable treatment had occurred. To put it in lawyer-speak this was not a case of any actionable loss. Further, Mr Denman submitted, that any loss she did experience as a result of a deferred return date in fact flowed from her agreement to Mr Holden's proposal rather than from his act.

45. In response to the case put in that way, the Claimant's Skeleton Argument suggested that the mistake made by Mr Holden was of a piece with the general mishandling by the Respondent of maternity leave matters. The point was further developed by Mr Tapsell in his oral submissions. He submitted that it was plain that the return date issue had caused upset and distress. Most obviously, the Claimant had been working towards a return to work on 20th

August 2012. She was frustrated in not having been able to achieve that. Mr Tapsell showed us passages in the witness statement prepared for the Tribunal hearing by the Claimant dealing with her reaction to the exchange of letters in August 2012. She says in paragraph 23 of the witness statement:

> **"I was therefore upset at the response I had received from the Respondent telling me that I could not in fact return to work when I anticipated. I suddenly felt quite unsettled."**

46. Further, in the same witness statement at paragraph 25, she indicates that as soon as early September 2012 she was "feeling" down as a result of what had occurred and went to see her general practitioner. Mr Tap sell took us to the general practitioner's letter confirming the appointment the Claimant had sought with him on 4th September 2012.

47. On this question of what, if any, loss followed from the *return date claim* point the Tribunal said this at paragraph 81 of their Reasons:

> **"The Tribunal took into account the fact that the acts of discrimination caused the Claimant distress at a time at which she was already suffering some psychological difficulties as set out in the letter from her GP … Further, the Claimant was disappointed not to be able to return to work on her chosen date of 20th August 2012. She was delayed in her return to work despite attempts being made by her to agree the date on earlier occasions and the delay caused some financial difficulties for her and anxiety and worry at a challenging time with a new baby."**

48. Having heard the submissions of both parties on this question of causation we can again take this issue quite shortly. The issue of whether delaying the return date caused injury to feelings on the part of the Claimant was an issue of fact for the Employment Tribunal. We have just read the factual findings that it made. As we have demonstrated, the materials put before us by Mr Tap sell established that there was evidence before the Employment Tribunal capable of sustaining the conclusion that it had reached. We do not accept Mr Denman's submission that the unwillingness of the employee to dispute her employer's account of what he believed was her return date debars her from recovering that loss, more particularly, as the

communication was sent from the principal in a firm of a solicitors to one of its legal secretaries.

3. The Absences Claim

49. This is the claim that Mr Nestling wrongly took into account pregnancy - related illnesses in scoring the Claimant for "attendance". This is addressed by the Amended Grounds of Appeal at paragraphs K to N. It is accepted by Mr Denman that this particular matter could fall, and did fall, within section 18 of the 2010 Act. More particularly, this was unfavourable treatment arising in relation to a matter connected to pregnancy and therefore within section 18(2). The essential question for the Employment Tribunal therefore was what, if any, loss did this unlawful discrimination cause.

50. The Respondent's short point is that the Employment Tribunal had rejected the Respondent's case that the Claimant had been dismissed because she had been selected for redundancy. As we have noted, the Employment Tribunal decided that she was dismissed not for redundancy but for asking for reduced hours. Against that background the Respondent's submission is that nothing in the selection or scoring exercise could have caused any loss. It was not operative on the ultimate dismissal. Further, and as developed in oral submissions by Mr Denman, the Respondent's case is that there could have been no loss following from this particular act of discrimination because the Claimant was not even aware of it until it came out in the course of the hearing. He submitted that, in those circumstances, it could have caused no injury to feelings. Mr Denman submitted that the Employment Tribunal had made no findings of fact as to when the Claimant knew of the discriminatory act or how she came to know that it was motivated by a matter which was discriminatory.

51. For her part, in her Skeleton Argument, the Claimant contended that she had throughout had a feeling that she had not been correctly scored and that she had been vindicated in that respect by the findings of the Employment Tribunal. Mr Tapsell, in order to establish that the *absences claim* had been a source of injury to feelings took us once again to her Witness Statement and in particular to paragraph 37. Therein, and also in paragraph 38, she asserted that her attendance record had been a good one and that she was, to put it at its lowest, surprised by the reduced scoring given by Mr Nessling. It is right, however, that the references to being "tearful and upset" in paragraph 37 of the witness statement should be understood as referable to the consequences of being told that, if she insisted on shorter hours, she would be made redundant.

52. What the Employment Tribunal said about this question of injury to feelings arising from the *absences claim* is dealt with in paragraph 81 of their reasons in the following terms:

> **"In addition, distress was caused by the low marking of the attendance category with no attempt being made by Mr Nessling to identify with the Claimant which sickness absences were related to her pregnancies."**

53. We asked rhetorically whether there was material before the Employment Tribunal which would be necessary to sustain that conclusion. It is clear that the Claimant did put in dispute Mr Nessling's assessment of her attendance. Further, that she was upset by obtaining less than a full scoring. She raised the matter not least in her form ET1. She raised it in her witness statement. The Employment Tribunal found her concern to have been genuine and indeed, as she correctly put it, is vindicated her.

The fact that it was only at the Employment Tribunal hearing that she discovered that the reason for the marking was the result of unlawful discrimination rather than innocent error is nought to the point. The wrong marking had caused her concern and upset. The Employment Tribunal were rightly looking at what, if any, effect the discrimination had had. The Claimant had been

injured by the act itself. Her loss flowed from that act even if she did not know the reason for it until later. Accordingly, it follows that we are satisfied that there is no irregularity in the Tribunal's judgment in respect of this head of the grounds of appeal either.

54. Having therefore worked our way through each of the three elements of the grounds of appeal and having rejected each in turn it follows that the result is that this appeal is dismissed. This is the unanimous judgment of us all.