EMPLOYMENT TRIBUNALS

Claimant: A Schofield

Respondent: The Fitters Friend Limited

HELD AT: Manchester **ON:** 11th and 12th July 2017

BEFORE: Employment Judge Feeney
Mr BJ McCaughey
Mrs PJ Byrne

REPRESENTATION:

Claimant: Ms L Gould, Counsel
Respondent: Mr C Johnson, Tribunal Advocate

JUDGMENT having been sent to the parties on 14th July 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brings claims of automatically unfair dismissal for asserting a statutory right and sex discrimination in respect of her dismissal. The claimant had provided further and better particulars of what were initially intended to be further claims of maternity related discrimination but Counsel explained that they should be treated as background information and not as separate claims. In addition it was clarified the claimant was not claiming pregnancy discrimination but sex discrimination

Claimant's Submissions

2. The claimant submitted that following her return from maternity leave the respondent dismissed her when she asked for her holidays which had accrued while she was on maternity leave, she asked the Tribunal to draw inferences from various matters to find that the reason for the dismissal was related to her absence on maternity leave and consequently her sex and/or that it was because she had sought

to assert a statutory right, namely take her holidays under the Working Time Regulations.

Respondent's Submissions

3. The respondent submitted that the claimant was dismissed essentially because of redundancy and had no connection with either her holiday request or her absence on maternity leave, neither had they formed any hostile views of the claimant as a result of the maternity leave.

Evidence

4. The Tribunal heard from the claimant herself, for the respondent Mr John Tate Sales Director and Mr Rod Tate Managing Director.

5. The Tribunal's findings of fact are:

6. The claimant began working for the respondent on 1st August 2015. The respondents own a number of business under the heading of "The Fitters Friend". The businesses are run by the 4 of the 5 Tate brothers who are directors of the business.. Mr John Tate is not a director. One of the businesses involves the sale of bi fold doors. The claimant worked for that part of the business in a sales support admin role in particular supporting Stacey Tate and Sarah Tate. She assisted Stacy Tate with actual sales work when she was due to go on maternity leave and during her maternity leave which started in November 2015.

7. In September 2015 the claimant discovered that she was 20 weeks pregnant and informed the respondent. She reported no adverse reaction. On 7th December 2015 she emailed Mr R Tate to ask if she could have a conversation with him about her maternity leave. This stated:-

> "Hi Rod
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> Next time you are in could we have a little chat please regarding my return dates/options after maternity leave. As you will know I will be keen to come back sooner rather than later but have a few questions to help plan what childcare I need to put in place then at least before I do finish we will both know what is happening about my return".

8. The claimant spoke to Mr R Tate a week or so later, she apologised for her news and also said again she would rather come back sooner than later and that she would work right up to her due date which in fact she did do. They discussed that she would be covering Stacy Tate's workload while she was on maternity leave which was sales work. He also was said how Stacey (his daughter) would be off quite a short amount of time on maternity leave as she was keen to come back and earn money and he explained to her what Stacey was earning and how it funded a new car and nursery fees and what opportunities were available within the company for earning more money. We accept that this conversation took place as it is confirmed in a later email from the claimant.

9. Whilst this implies that Mr Tate wanted the claimant to return sooner rather than later this was nothing different from what the claimant was saying herself. The claimant commenced maternity leave in January 2016.

10. In April the claimant visited the respondent's premises to show her baby to her colleagues and friends, whilst she was there she had a conversation again with Mr R Tate who asked her if she could return to the business as soon as possible, he could not recall that conversation however we believe that happened. Mr R Tate was extremely business focussed and as he explained the quarter that they were heading into was their busiest quarter, quarter three and we find he was anxious to make sure they had as many sales reps as possible.

11. Mr Tate told us and although there was no documentary evidence of this we accepted that by May 2016 he knew that the section of the business the claimant worked in would eventually suffer a downturn, this is because the bi fold doors they dealt with which were high end bi fold doors was due to be undermined by an influx of competitors providing doors which although not as good would be more attractive to consumers and therefore he anticipated the work regarding consumers significantly diminishing eventually. He said he had reported this to the board ie his brothers but there were no minutes as they did not keep minutes. However at the time there was a lot of work which he wanted to exploit.

12. On 3rd December the claimant emailed Mr Tate to discuss her return to work. She said:

> "Hi Rod
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> Hope all is well. Just thought I best email you with regards to an update in my return to work. I have arranged to visit a couple of nurseries and childminders over the next couple of weeks to arrange childcare to enable me to come back to work. I will be looking at coming back to work at the beginning of September, does that suit you, as we discussed about my working hours four days in the office and one day from home, is there a certain day you would prefer me to have a home, just so I can plan the childcare around this, I will be completely honest and tell you coming back to work is going to be a struggle, I didn't realise how much little baby can pull at your heartstrings even though I know in the long run it will be so worth it. I want to get my career back and start earning some decent money so I can do the finer things in life as a family. Would there be any negotiating with the hours of my day, I just think that working till 9 till 5 (dropping Bella off at 8 and picking her up at 6.30 due to the commute and traffic) will be really difficult for me. Would it be possible maybe to start my working day earlier or reduce my hours, I was hoping for something along the lines of maybe 8 till 3.30. I would still monitor emails in the evening as I have them set up on my phone and could even divert the phone to me in the evenings, I would stay late where necessary for showroom visits or when needed to help through busy periods".

13. Mr Tate replied on 6th May stating:

> "Hi Amy

I have had time to think about the situation we have here … so this is what's on offer if you want to move from admin sales support to having a go at joining the sales team I will agree to the following but I must say this is a little different to how I thought it was going to be:

* 4 days per week 8 am to 5 pm (as Stacey Tate)

* 1 day per week to work from home other than Friday which is already taken by Stacy Tate.

* Return to work Monday September 5th to achieve £50,000 per month or £600,000 per annum net sales.

* Minimum of 56 leads will be provided per month to achieve the target set.

* Once you are part of the sales team you will be responsible for the minimum conversion rate on new leads of 25%.

* £400 a week or £2800 starting salary.

I must say this is a fantastic opportunity for you and you have two other people and Stacey Tate and Stacy Oxlade who have now become a real success since moving from admin sales support and who are earning much more than their basic by way of quarterly bonus commission so I really hope you can work this into your life such as Stacy Tate has? I am not sure if you are aware but we no longer have the need for sales support as this was proving to be costly and also had a negative impact on the quality of the sales experience."

14. The claimant said she was not aware until this point that her original job was not available, there was no mention of any redundancy but as the claimant had less than two years service she wouldn't have been entitled to a redundancy payment nevertheless making anyone redundant on maternity leave requires adherence to a procedure set out in the Maternity Regulations. No thought to this was given however the issue did not develop any further as the claimant accepted this role, the claimant said she did want to move into a sales role but not quite as early as this given that she was a returning mother. She accepted it nevertheless and did not query any part of it.

15. However, on the 25th August the claimant wrote to Rod Tate saying

"I already regret sending this email but closer to coming back to work the harder it has been. I have been considering asking if I can take my full nine months maternity but did not want to mess you around, I sat down with my partner last night and after serious thought and consideration we have made a decision for me not to return to work to a full time position. The working hours of 8 to 5.30 are too much and will no longer suit my lifestyle. I am so grateful for you offering me the working from home for one day a week but leaving

> Bella at 7 am - gone 6.30 four days a week is not an option. I know we had a very similar discussion regarding my career and money that can be earned in this role but I feel I cannot miss out on these precious times with Bella while she is so young. Thank you for everything you have done for me including supporting opportunities I enjoyed every minute and just wish I would have joined your company in twelve months time as I could really see a great future with UK Bi Fold but understand positions need to be filled so I wish you all the best".

16. Mr Tate responded by asking for the claimant's phone number so that he could talk to her about this. In the end his brother who was the Sales Director John Tate who knew the claimant better contacted her and what followed was a series of texts from 4th September to 26th September about 50 in total which resulted in an agreement for the claimant to work four days a week with one day from home on a two week rolling pattern, 30 hours a week for £300 a week.

17. The claimant returned to work on 11th October. The claimant believed on her return that Alex Davies was undertaking her role as Sales Support however both John Tate and Rod Tate said that Alex Davies was Receptionist. Whilst initially sceptical given the lack of documentary proof of this we accepted John Tate's corroborative evidence as he was a credible witness and also the evidence of Mr Rod Tate that his own daughters had filled this position in the past, therefore it was obviously an ongoing position.

18. A couple of weeks after the claimant's return to work she had a conversation with Rod Tate about her targets and her holiday entitlement which she had accrued during her maternity leave and he advised her to contact Julian Hall (who took responsibility for HR matters) about this which she did on 26th September. She emailed him copying it to Mr Tate and said:

> "Evening Julian. Sorry for the out of office email but I keep forgetting to speak to you in work. I am just after some clarity on my holidays. As it stands I am under the impression that I will have my full 28 days holiday entitlement left (20 standard holidays and 8 bank holidays). Can you please confirm what my outstanding holidays are please and what my options are (whether I need to take them by the end of the year, can carry any over or can take any pay) as I need to sort this out with Rob."

19. We accept that this is corroboration of the claimant's claim that during this conversation Mr Tate had offered to pay the claimant for holidays and at this stage in time she was amenable to that suggestion. The next day Mr Hall replied:

> "From our records your maternity leave started from 26th January therefore you were paid the 1st January as a Bank Holiday, during your maternity leave you have accrued your normal holiday allowance until you returned from maternity on 10th October 2016. Five of your accrued days are to be taken as Christmas leave and there are two Bank Holidays at Christmas therefore you have 20 days left to take this year or if agreed by Rod some or all can be rolled over to 2017".

20. Nothing then happened, it was not clear why the claimant did not raise this again with Rod Tate or he with her regarding whether she was going to be paid or not (whatever the legalities of that) and the matter just drifted along until 10th November when the claimant had a meeting to discuss the next financial year and her targets and we accept her evidence he said it was going to be a big year more leads more sales higher targets and bigger bonus. As to why Mr Rod Tate would have said – given he knew there was to be a downturn in the New Year - this we accept his evidence that he was incentivising the claimant for the rest of the year up to Christmas. He gave evidence that he expected the bi fold market not to continue in the first quarter of 2017, partly because they had stopped their marketing of the bi fold doors in October (again there was no documentary evidence of this but we accepted Mr Tate's evidence).

21. Consequently the pipeline in Leeds from prior to October would be available for the claimant until the end of the year but it was likely there would be few new leads in the new year (because of the termination of the marketing) and that Quarter 1 i.e. the first three months of any year where always the quietest in any event.

22. In this conversation on 10th November the claimant said that Mr Tate stated that she would be able to earn a £3,000 bonus, he denied this but we accept the claimant's evidence again it fitted in with his pattern of incentivising her and we accept his evidence that he provided an interactive spreadsheet so people could work out exactly what bonus they would earn depending on their sales, and he stated that she would have to earn £114,000 in sales to break even i.e, to cover her salary.

23. The claimant said that Mr Tate then stated that her holiday pay would have to come out of her bonus. She did not understand why this should be so understandably as there is no reason why it should be it would probably be an unlawful deduction of wages. The respondent denied that he had said any such thing, the claimant however was very clear, consistent and graphic in how she described this encounter as she said that she put it to him that if she earned her £3,000 bonus but cost the company £900 in taking a three week holiday (£300 a week x 3) then this would be deducted from her bonus, she would only be paid £2,100 and Mr Tate said she would only receive one or the other, her holiday or her full bonus entitlement. We also believed the claimant as it accorded with her email sent the next day. Understandably the claimant thought this was unfair and said she would need time to get back to him.

24. After talking to her partner overnight she decided she would take the holiday in these circumstances and we accept this was the situation as the next day she emailed Mr Hall again and stated:

> "I have spoken with Roger today regarding my holidays, he did agree to pay me my holidays but it would come out of my bonus at the end of the year which I couldn't seem to get my head round so after a long think at home last night and to avoid any confusion I have decided to request to take my full holiday entitlement. I wasn't 100% sure on how to fill the form in with it being over the Christmas period and going in to the New Year so I hope it makes sense. Please let me know if it doesn't".

25. A formal holiday request form was filled in requesting holiday from 17th November to 3rd January 2017. The claimant was almost immediately called into the Mr R Tate's office at 12pm and asked “what was this all about?”. The claimant explained she didn't think it fair that her holiday would be deducted from her bonus so she would rather take the holiday. He asked her what she thought the impact would be on the business and she said she wouldn't be able to sell and meet her bonus but that would be the same for anybody else taking annual leave, she felt she was being singled out and she stated that Mr Tate said to her and he agreed this is not just about you it's always me me me with you and that he said "I will have to let you go", she asked him why and she said he said "I dunno not enough work". She could not understand this as it was only the previous day he had told her how prosperous the New Year was looking. The claimant believed the real reason was because she had taken maternity leave and wished to use her accrued holiday entitlement. Mr R Tate said he wanted her to work the 4th Quarter to ensure the whole team met their targets and by not doing she would be affecting other employees’ bonuses hence his accusations that she was being selfish. We accepted this was his perception.

26. On 11th November she emailed Julian Hall and asked for confirmation of her dismissal in writing and when her holidays would be paid. The reply of the 11th was "I am writing this notice after being advised that due to a severe downturn and the number of leads generated and the subsequent drop in work to administer them and as the Sales Director advised you at 12 today the company is terminating your employment, you are entitled to one week's notice which you are not required to work and will be paid in lieu".

27. On 14th November Mr Hall stated that she would be due her payment for 7th November and for her notice pay to the 14th November which was £282 a week and her holiday pay would be £1,562.20.

28. On 21st November the claimant wrote a long email to the respondent which said as follows:

> "After last Friday's dismissal from the company I have chosen to seek legal advice as I believe this is an unfair dismissal due to discrimination against myself, I believe it all boils down to my holiday entitlement. The initial agreement when I returned from maternity leave was that you would pay me my statutory holiday pay as you didn't want me out of the business as we were too busy, when I approached you on Thursday 10th to discuss this you told me you would pay my holiday pay but it would be deducted from my quarterly bonuses if targets were hit (which we both know I would have come to the hit). I disagreed with this and chose to try and use my holiday entitlement before the end of the year as they would run out on 31st December. On Friday 11th November I simply put in a holiday request to see what the options would be, you called me in to the office and dismissed me, you didn't even have the decency to discuss the matter and come up with other solutions, you simply just said we will have to let you go as there wasn't enough work for me. I believe you dismissed me on the grounds of pregnancy and maternity discrimination and it is nothing to do with the low

> workload. If this was the case surely you wouldn't dismiss your current third highest performer of the month, who only works 30 hours and is on the lowest weekly wage, would it not have made more commercial sense to look a low performer who works more hours and on a higher wage to save costs. I also find it difficult to believe there is a low workload, it was only on the day before my dismissal you told me how prosperous the New Year was looking with higher targets, higher bonuses, good things to come. Did this situation suddenly change over night, if the dismissal was due to low workload this is actually classes as redundancy and procedures must be adhered to. The colleague handbook states that a selection procedure must be made, consultation meetings should take place, it states that everything in the companies power should be done to avoid redundancy. I am not aware of any of the above taking place so this is a breach of contract and leads me to question why was it me that was made redundant. Prior to my return I felt pressurised to come back from my maternity leave early as you were very upfront with me about not having the full nine months away from the business. Also whilst I was on maternity leave you decided to make my previous role of Sales Support redundant (again no procedures were followed in regard to redundancy) but yet when I come back to work you had employed someone to cover that role. I have a written email from yourself confirming the above, this is also another unfair case caused by yourself another breach of contract by making redundancy whilst on maternity leave, via email with no consultations and then filling the redundancy vacancy which clearly doesn't comply with the twelve month period you really have to abide to before employing someone to fill a redundant role. I feel the whole situation has been handled very unprofessionally and in an intimidating manner, you have made me feel victimised, discriminated and humiliated, especially with comments from yourself during my dismissal such as "I know the type of person you are its all about me me me". I therefore want compensated for the way you treated me and unfairly dismissing me in regard to statutory holiday entitlement and pregnancy/maternity discrimination. In conclusion I will ask if you would like to consider a reasonable settlement between ourselves or if you wish to take the matter further and to an Employment Tribunal as advised".

29. The respondents never replied to that letter. The claimant obtained a new role on 6th February with an average weekly gross pay of £345.83, more than she was earning at the respondents.

30. The respondent's evidence was that they expected that they would have to make redundancies in January from the bi fold team and that the claimant would have been the obvious choice due to her limited experience compared to the others. They pointed out that they had never replaced the claimant after she had been dismissed and that now the team only comprised of one person whereas it had once been five. Stacy Oxlade who had left the respondent but then returned in October had left since the claimant had left because there was simply not enough business to make the job viable for her and she had found other employment. We accepted this evidence as Mr J Tate corroborated it and as we have said we found him a credible witness.

31. Although we were disappointed with the lack of documentary evidence to support many of the respondent's contentions which should have been easily available we were however convinced by Mr Rod Tate's evidence in respect of business matters as he seemed very focussed on these matters and Mr John Tate's evidence in total he seemed a straightforward witness and he supported these contentions in his evidence.

The Law

Sex Discrimination

32. The claimant brings a claim of direct sex discrimination. Section 13(1) of the Equality Act provides that direct discrimination occurs when "a person (A) discriminates against another person B if because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others and sex is one of the protected characteristics. Pregnancy discrimination during the protected period of the pregnancy and discrimination based on maternity leave must be brought under Section 18 however a claim for direct discrimination under Section 13 is available for pregnancy and maternity cases that fall outside the scope of the special protection in Section 18 as here.

33. Therefore the claimant relied on Section 13 of the Equality Act 2010. Consequently she has to compare herself to how a male comparator has or would have been treated; the comparator's circumstances must not be materially different to those of the complainant.

Burden of proof under the Sex Discrimination Act section under the law section

34. In a discrimination case of any kind there are specific rules about the burden of proof and claimants benefit from a slightly more favourable burden of proof rule in recognition of the fact that discrimination is frequently covert and can present special problems of proof.

35. Section 136 of the Equality Act 2010 provides that if there are facts from which the court or Tribunal could decide in the absence of any other explanation that a person (A) contravened a provision of the Equality Act the Court must hold the contravention occurred and Section 136(3) provides that Section 136(2) does not apply if A shows that he or she did not contravene the relevant section. It is expected that the case law regarding burden of proof under the previous regime when the discrimination statute was separate still applies. The main guidelines on the burden of proof have been long established in Barton -v- Investec Hanson Crossthwaite Securities Limited 2003 EAT and the Court of Appeal in Igen Limited -v- Wong 2005 Court of Appeal. These state that inter alia:

(i) It is for the claimant to prove on the balance of probabilities facts from which an Employment Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination, if the claimant does not prove such facts the claim will fail.

(ii) In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination.

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(iv) The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inference could be drawn.

(v) In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume there is no adequate explanation for those facts.

(vi) The inferences could include anything that it is just and equitable to draw from an evasive or equivocal reply to the questionnaire (the questionnaire no longer exists). Inferences can be also be drawn from any failure to comply with the relevant code of practice.

(vii) When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground the burden of proof moves to the respondent.

(viii) It is then for the respondent to prove that he did not commit or as the case may be is not to be treated as having committed that act to discharge the burden is necessary for the respondent to prove on the balance of probabilities that his treatment of the claimant was in no sense whatsoever on the protected ground and must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment and cogent evidence will be required as the respondent is generally in possession of the facts necessary to provide an explanation.

36. In **Martin -v- Devonshire Solicitors 2011** the EAT stressed that "whilst the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt it is for the facts necessary to establish discrimination generally that is facts about the respondent's motivation. They have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the employer's motivation and what is in issue is its correct characterisation in law" and in **Laing -v- Manchester City Council EAT 2006** "if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect "there is a nice question as to whether the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race". However Elias P went on to say "the Tribunal cannot ignore damming evidence from the employer as to the explanation for his conduct

simply because the employee has not raised a sufficiently strong case at the first stage, that would be to let form rule over substance".

37. In respect of drawing inferences Tribunals have a wide discretion to draw inferences of discriminations where appropriate, we drew Counsel's attention to two recent cases, **Tudor -v- Costain EAT 2017** and **Geller -v- Yeshiva EAT 2016** where a failure to take into account sex based treatment which was not directly involved in the claimant's complaint led to an error of law and also where a failure to look at the inferences in the round also led to a overturning of a Tribunal. Things that can be looked at are stereotypical assumptions, hostile or unreasonable behaviour, unexplained unreasonable conduct, breach of policy and procedures, breach of the EHRC code of practice, statistical evidence, failure to provide relevant information. Where inferences are drawn and the burden of proof shifts it is then up to the respondent to provide a non-discriminatory reason for that treatment.

Asserting a statutory right

38. Section 104 of the Employment Rights Act 1996 states that a dismissal is automatically unfair if the reason or principle reason for the dismissal was that:-

> (1) the employee brought proceedings against the employer to enforce a relevant statutory right or the employee alleged that the employer had infringed a relevant statutory right;

39. It is irrelevant whether or not the employee actually had the statutory right in question or whether the right had been infringed as long as the claim was made in good faith. It is sufficient the employee made it reasonably clear to the employer what the right claim to have been infringed was and not necessarily actually to specify that right, the no qualifying period applies. The rights under the Working Times Regulations 1998 to annual leave are included in the statutory rights which are relevant.

40. The employee has to establish that the relevant statutory right is the reason or the principle reason for the employee's dismissal and the burden of proof is on the employee to establish the reason for dismissal on the balance of probabilities. Where parties advanced different reasons it is for the Tribunal to decide as a question of fact which reason caused the dismissal.

Conclusions

<u>Asserting a statutory right</u>

41. We find that the claimant was dismissed for asserting a statutory right. By sending the email to Julian Hall on 11th November attaching a holiday request form stating that after consideration of the position and the offer she had been made to be paid for her annual leave she decided she wanted to take it, she was asserting her statutory right to take her Working Time Regulation holidays. She was sacked within the next three hours clearly because of the decision to take those holidays rather

than accept money for the holidays. Although the respondent advances the reason that it was actually redundancy this was not the reason for her dismissal at that point in time. The respondent says that it is likely she would have been made redundant in January so that was not the principle reason. On 11th November the principle reason she was insisting on taking her annual leave which meant she would not earn a bonus, the earning of the bonus was a collateral effect but had she not insisted on her statutory right she would not have been dismissed at that point in time, accordingly we think this is sufficient to bring it within Section 104 of the 1996 Act.

Sex Discrimination

42. The sex discrimination claim was more difficult. The claimant stated that the burden of proof should shift in this case because the respondent had not produced emails he had referred to in evidence, such as the bonus incentive plan, that he had not produced Alex Davies's contract of employment which would settle the question as to what her job role, that he had not produced any documentary evidence to support his contention that work related to bi fold doors was dropping off, or that he had discussed it at a board meeting in May 2016. In addition he had constantly tried to persuade the claimant to return early from maternity leave evidencing he was not happy with her taking maternity leave. He had produced no evidence either that the team of five was now a team of one.

43. On the other hand the claimant's evidence had been compelling and candid, that the claimant's observation of Alex Davies role should be accepted, the respondents had previously denied the claimant the right to return to the job she was occupying before maternity leave without undertaking any redundancy process, that there was unexplained unreasonable conduct in respect of the issue of deducting the holidays from the bonus and not producing any evidence regarding stopping the marketing in October which could easily be evidenced.

44. We accept these are all matters from which we could consider drawing an inference, however we consider these are superseded by the fact that the respondent made strenuous efforts to keep the claimant in August when she had actually resigned, they could have just accepted her resignation and therefore there was no evidence that the actual taking of maternity leave had had a negative effect on the respondent. Further that we have found the reasons he dismissed her were entirely connected with the holidays and were business driven and that the fact that he wanted her back early to do sales was not an objection to her pregnancy but again was business driven so that she could contribute to the respondent's sales targets.

45. Accordingly we have decided that the burden of proof does not shift, however if we are wrong on this we have gone on to consider whether the respondent had provided a non-sex based answer as to why the claimant was dismissed.

46. We find that they have although the respondents failed to provide documentary evidence which must have been available if their contentions were true to support the decline in sales of bi fold doors and the role of Alex Davies. We find this because we accept the evidence of John Tate as being genuine regarding the

role of Alex Davies, the fact that the claimant was not replaced and the fact that there was a decline in sales.

47. Further although Mr Rod Tate's evidence was unsatisfactory in some respects we accept that his decision making process were business driven and there was no hostility to the claimant taking maternity leave, had there been we are sure this would have manifested itself when they discovered that the claimant was pregnant in September and must have been pregnant at the time she applied for the job but there was no hint at all of this throughout, the reasons the respondent wanted the claimant back earlier were for business reasons. We do not accept that unreasonable pressure was put on the claimant to return early.

48. In respect of whether was a taint of sex discrimination because the respondent was annoyed the claimant was taking her holidays after all the effort they put in to keep her in work after she had resigned in August we have rejected this is contention . John Tate did most of this negotiating and he was friendly and amicable towards the claimant, Mr Rod Tate was involved in approving the final agreement and again there was no hint that he was annoyed that the claimant was taking her holiday after they had kept her on after maternity leave. It was simply that she would not be available to contribute to the company meeting its targets and making a profit in the 4th Quarter.

49. In respect of the comment "me me me" this is a similar indication that the respondent felt the claimant was being selfish, after hearing Mr Tate give evidence where he admitted he said this his concern primarily was with the team achieving targets and their bonuses and impact on the company's profit.

50. In respect of considering whether there was unfavourable treatment we considered the hypothetical comparator, i.e. a man with the same sales experience as the claimant who wanted to take four weeks holiday at the end of the fourth quarter, resulting in no bonus and we find that the respondent would have treated the man in the same way. We have considered whether in fact a man would never be in that position and therefore it is sex specific treatment but we think a man would be in that position because certainly following the Ainsworth etc cases someone on sick leave would be entitled to claim their holidays accruing during their sick leave absence which would be a similar scenario to the claimant's. In addition a man could be off work sick returning towards the end of the year with little chance of taking the holiday in that holiday year as in the claimant's case.

51. Having found this we would say that we were mystified as to why nobody suggested that the claimant should rollover her holidays including the claimant herself, as Julian Hall had clearly flagged this up as a possibility. There may have been a viable sex discrimination claim (possibly indirect) if the respondents had refused a rollover request given that the claimant and any women on maternity leave would have accumulated a full or nearly full year's holiday during the course of maternity leave and in some cases it would have been impossible to take that holiday in the year it was accrued, as that situation in reality was more likely to happen in respect of a woman a refusal of a rollover would have been the scenario where indiect sex discrimination could arise.

52. Accordingly the claimant's sex discrimination claim failed

53. The parties agreed the claimant's losses and therefore the tribunal awarded the claimant and ordered the respondent to pay as follows;

Compensatory loss for dismissal	£2291
Tribunal fees	£1200
Total	£3491

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Employment Judge Feeney

Date 28th July 2017

REASONS SENT TO THE PARTIES ON
2 August 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401292/2017

Name of case(s): Miss A Schofield v The Fitter's Friend Ltd

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

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

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

"the relevant decision day" is: 19 July 2017

"the calculation day" is: 20 July 2017

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

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

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

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

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

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

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