EMPLOYMENT TRIBUNALS

Claimant: Ms K Hodgson

Respondent: CityBlock Lettings Limited

HELD AT: Manchester **ON:** 18, 19, 20 and 26 July 2017, and in chambers on 16 August 2017

BEFORE: Employment Judge Franey
Mrs P A Corless
Mrs S J Ensell

REPRESENTATION:

Claimant: Mr J Jenkins, Counsel
Respondent: Mr S Brochwicz-Lewinski, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of pregnancy and maternity discrimination fails and is dismissed.

2. The complaint of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. Following a period of early conciliation between 28 September and 11 November 2016, the claimant presented her claim form on 23 December 2016. She complained of unfair dismissal and of pregnancy discrimination arising out of the termination of her employment as a Brand and Marketing Manager for the respondent at the end of September 2016. She alleged that the attitude of her manager Mrs Bargh towards her had changed after she reported her pregnancy in

June 2016, and that what had been presented as a redundancy dismissal was in truth a dismissal because of her pregnancy.

2. The claim form also contained a complaint of harassment contrary to section 26 Equality Act 2010 but this was subsequently withdrawn and dismissed.

3. By its response form of 31 January 2017 the respondent resisted the complaints on their merits. It denied that the claimant's pregnancy had any influence on how she was treated or the decision to terminate her employment.

4. On 7 March 2017 Employment Judge Aspden conducted a preliminary hearing. The claimant was required to file further particulars of the matters other than dismissal which were said to constitute pregnancy discrimination. The issues were identified.

5. The further particulars were provided by the claimant on 21 March 2017. However, they took the form of further narrative and did not identify those matters within the narrative for which the claimant sought a remedy. Accordingly on 24 March 2017 Employment Judge Slater ordered the claimant to file a table of allegations. That table was provided on 7 April 2017 and subsequently numbered by the respondent so as to identify 22 allegations. The respondent filed a document summarising its response to each of those allegations on 5 May 2017.

6. At the outset of our hearing we confirmed with the representatives that the issues remained as identified by Employment Judge Aspden as amplified by the 22 matters set out in the table. Allegation 1 was withdrawn during the hearing.

Issues to be determined

7. It followed that the issues to be determined by the Tribunal were as follows:

Unfair Dismissal

1. Was the reason or principal reason for dismissal connected with pregnancy so as to render dismissal automatically unfair under section 99 Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave Etc Regulations 1999?

Pregnancy Discrimination

2. Can the claimant prove facts from which the Tribunal could conclude that in any or all of the following alleged respects the respondent treated the claimant unfavourably because of her pregnancy or because of illness suffered by her as a result of it?

(1) [withdrawn]**.**

(2) On 10 June 2016 Alison Bargh made comments about it being so early in the pregnancy that it was only a bunch of cells, and comments about the claimant's age.

(3) On 13 July 2016 Alison Bargh ignored the claimant when asked to pass on the claimant's congratulations to Ms Bargh's son for his graduation.

(4) In July 2016 Alison Bargh asked other members of staff if they had enjoyed their weekend off but failed to ask the claimant.

(5) On 13 July 2016 Alison Bargh ignored the claimant when she mentioned her son's name.

(6) Between July and August 2016 Alison Bargh would not speak to the claimant even though she interacted and socialised with other members of staff.

(7) On 22 July 2016 the claimant tried to arrange meetings with Alison Bargh on two separate occasions but Alison Bargh cancelled both.

(8) On 18 July 2016 Alison Bargh questioned the claimant's commitment to the company by asking her "How can you do your job properly when you are away from your desk being sick?".

(9) On 18 July 2016 Alison Bargh questioned the claimant's commitment due to antenatal appointments which she had to attend.

(10) On 18 July 2016 Alison Bargh questioned the claimant about how long she would take for maternity leave, asking "What are we going to do? You are supposed to be here until April, how long are you going to take off, I only took two weeks off with my boys." She also questioned the claimant about leaving on time at the end of the day and not working unpaid overtime, questioning the claimant's commitment and her ability to do the job.

(11) On 18 July 2016 Alison Bargh said the claimant was contracted to work 40 hours a week in order to ensure the job was done and questioned her ability to do it if not in the office at least 40 hours each week. She expected the claimant to work overtime to make up to 40 hours. She was consistently cold towards the claimant and failed to attend weekly meetings. The claimant asked on several occasions for a catch up but Alison Bargh continued to avoid her and failed to acknowledge her most days in the office.

(12) On 21 July 2016 Alison Bargh sent an email saying she would rather discuss issues in person than by email.

(13) From 21 July 2016 the claimant made a conscious effort on a number of occasions to arrange a meeting with Alison Bargh as she felt something was going on in the background and she was being kept in the dark.

(14) During July and August 2016 Alison Bargh made it hard for the claimant to try and book a meeting with her and avoided conversations with the claimant.

(15) On 22 July 2016 Alison Bargh asked the claimant verbally and in writing not to email her regarding issues and concerns but to speak with her in person, but did not reply to attempts by the claimant to meet with her, or cancelled or failed to turn up for meetings.

(16) On 19 August 2016 the claimant was omitted from the invitation list for a sponsorship day at the Vale of Lune Rugby Club.

(17) In August 2016 Alison Bargh asked the claimant to start logging her workload on a spreadsheet.

(18) On 2 September 2016 in dismissing the claimant Alison Bargh did not tell the claimant of any other potential opportunities within the business. The claimant's work email was blocked within hours of that meeting despite the fact she had four weeks' notice to work. The claimant was told that it was no longer appropriate for her to return to the office because of her reaction and outburst to being dismissed.

(19) On 4 September 2016 Alison Bargh explained in an email that she had been unable to explain potential opportunities to the claimant but had made no attempt to calm her distressed state. She asked the claimant to post her belongings back to the office.

(20) On 28 August 2016 Alison Bargh failed to provide a monitor stand for the claimant even though one was provided to others.

(21) Alison Bargh failed to carry out a risk assessment once being informed that the claimant was pregnant on 10 June despite being aware of mobility issues due to arthritis.

(22) Between July and October 2016 Alison Bargh's attitude towards the claimant changed and she failed to ask how the claimant was even though she asked other members of staff how they were generally.

(23) On 2 September 2016 the respondent decided to dismiss the claimant.

3. If so, can the respondent nevertheless show that it did not contravene section 18?

4. In so far as any of the matters for which the claimant seeks a remedy occurred prior to a date three months before the presentation of the claim form, allowing for the effect of early conciliation, can the claimant show that it was part of an act extending over a period ending after that date?

Evidence

8. The Tribunal had an agreed bundle of documents running to almost 500 pages. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

9. The claimant gave evidence herself and also called her partner, Jordan Dorrington, and his mother, Lisa Dorrington.

10. The respondent called Alison Bargh, the Operations Director of the respondent who was the claimant's line manager and Ralph Whitehead, the Group Finance Manager who dealt with some payment matters.

11. In addition written statements were tendered from Suzanne Parker, the employee whose maternity leave was covered by the claimant; Martin Crews, the Development Director who dealt with the appeal against dismissal, and Vilayte Essa, the Chief Executive Officer of SearchQuest Europe Limited which provided services to the respondent. Ms Parker was not called because she had refused to attend voluntarily. We attached less weight to her statement than if she had given evidence in person. Mr Essa and Mr Crews were not called because Mr Jenkins did not have any questions to put to them. We accepted the factual content of their statements.

Relevant Legal Principles

Unfair Dismissal

12. The right not to be unfairly dismissed arises under Part X of the Employment Rights Act 1996. An employee must have been continuously employed for two years in order to acquire that right, save where the reason or principal reason for dismissal is one of a small number of prescribed reasons including pregnancy (section 108(3)(b)).

13. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

14. If the reason or principal reason is pregnancy dismissal is automatically unfair by virtue of section 99 which so far as material reads as follows:

> **"(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."**

15. Those regulations are the Maternity and Parental Leave etc Regulations 1999 ("MAPLE") of which regulation 20 provides so far as material:

> **"(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if —**
>
> **(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), ……..**
>
> **(2) ……..**
>
> **(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with —**
>
> **(a) the pregnancy of the employee…"**

Pregnancy Discrimination – section 18 Equality Act 2010

16. Discrimination by way of dismissing an employee or subjecting her to any other detriment is rendered unlawful by Section 39(2)(c) and (d) of the Equality Act 2010.

17. Discrimination in this context is defined by Section 18(2)(a), which is headed "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."**

18. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see for example the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

19. Equality Act complaints must be approached in accordance with the burden of proof provision in section 136:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

20. Section 136 goes on to provide that an Employment Tribunal is treated as a Court for these purposes.

21. Guidance as to the application of the burden of proof in direct discrimination cases was given by the Court of Appeal in **Igen Limited v Wong [2005] IRLR 258**, and in **Madarassy v Nomura International PLC [2007] ICR 867**, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. The guidance to be derived from these decisions was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37.** Although section 18 does not formally require any comparison of cases, the facts must still present a *prima facie* case on causation before the burden shifts to the respondent to show a different reason for the treatment. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Time limits

22. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**

> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

23. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis [2003] IRLR 96.**

Risk Assessments

24. The obligation to conduct a risk assessment for a pregnant worker is found in regulation 16(1) of the Management of Health and Safety at Work Regulations 1999:

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

25. That regulation seeks to implement the provisions of the Pregnant Workers Directive (PWD 92/85/EEC). The recitals make clear that the Directive is required because

> **"some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives…"**

Accordingly Article 4 requires a risk assessment not for every pregnant worker but

> **"For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I**…."

26. These provisions were considered by the Court of Appeal in **Madarassy** (see above). The Court approved the finding of the EAT that this provision did not create

an obligation to perform a risk assessment every time an employee became pregnant. A finding that the work involved potential risk to health and safety was necessary before there was an obligation under Regulation 16 to carry out a risk assessment (paragraph 138). The EAT (Nelson J) had said that lack of comfort is itself not a risk to health and safety, and that the fact there was pain did not necessarily mean there was evidence of risk.

27. The matter came before the EAT again in **O'Neill v Buckinghamshire County Council [2010] IRLR 384**. The EAT agreed with a suggestion from Counsel that three preconditions would have to be met before the obligation to assess the risk would arise (paragraph 30):

> **"(a) that the employee notifies the employer that she is pregnant in writing (clearly satisfied in this case), (b) the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her baby, (c) the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-exhaustive list at Annexes I and II of Directive 92/85/EEC."**

28. It was common ground in this case that if a risk assessment was required by regulation 16(1), failure to conduct one would amount to unfavourable treatment because of pregnancy contrary to section 18 Equality Act 2010 irrespective of the mental processes of the decision-maker: **Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516.** This is because of the special protection afforded to pregnancy under PWD 92/85/EEC.

Relevant Facts

29. This section of our reasons sets out the broad chronology of events so that our decisions on the allegations can be put into context. Any disputes of fact which are central to resolution of the legal issues will be addressed in the discussion and conclusions section.

The Respondent

30. The respondent company specialises in student lettings. Its shareholders are Alison and Trevor Bargh. They are both directors too. Mr Bargh is the Chief Executive Officer. Mrs Bargh is the Operations Director responsible for running the day-to-day business of all operational sites. She was was primarily responsible for lettings, facilities and maintenance. Mr and Mrs Bargh formed the senior management team with Mr Crews and Mr Whitehead.

31. The respondent has in the past employed a Brand and Marketing Manager to work to a job description which appeared in the bundle at pages 250-251. Suzanne Parker filled this role on a full-time basis from June 2012.

32. The company had a maternity policy which dated from December 2014. It appeared at pages 139-147. It made provision for paid time off for ante-natal appointments. Clause 19.9 (page 141) read as follows:

> **"We have a general duty to take care of the health and safety of all employees. We are also required to carry out a risk assessment to assess the workplace risks to women who are pregnant…"**

Recruitment of the Claimant

33. Following IVF treatment Ms Parker informed the respondent in January 2016 that she was pregnant and would be starting 52 weeks of maternity leave on 2 May 2016. Efforts were made to recruit maternity cover. Mrs Bargh learned from a friend, Lisa Dorrington, that her son Jordan's partner (the claimant) was looking for a marketing position. The claimant was offered the job by a letter of 11 April at pages 110-111. The offer letter made clear that the claimant would be required to notify the office by 9.00am if she was going to be absent from work due to illness.

34. The claimant started work on 19 April 2016. She had two weeks working with Ms Parker before Ms Parker went on maternity leave.

35. On a work visit to Leicester in late April 2016 with Elu Drago and the claimant Mrs Bargh said in passing conversation that she had only taken two weeks off when her sons had been born.

36. During those first few weeks Mrs Bargh was giving consideration to redefining roles on the operations side. A draft job description for an Operations Manager role was provided to her by a colleague on 22 April 2016 (page 113), and a job description for her own role emailed by another colleague on 13 May 2016 (page 114). However, there was no move to reorganise roles at that stage.

Pregnancy Notification 10 June 2016

37. On 9 June 2016 the claimant found out that she was pregnant with her first child. That was very good news but there were serious concerns about the pregnancy. The claimant had been prescribed weekly methotrexate injections to help manage her arthritis. Methotrexate was known to have seriously harmful effects on unborn babies. It was unclear whether the pregnancy would be viable. Only her partner Jordan and their respective parents knew of the pregnancy at that stage

38. On 10 June 2016 the claimant told Mrs Bargh at work that she was pregnant. The terms of this discussion formed **allegation 2** and we will return to it in our conclusions. The claimant alleged that Mrs Bargh said she may as well stay at work otherwise she would "just wallow in it". She also alleged that Mrs Bargh spoke of the possibility of termination and said, "It's just a bunch of cells". Mrs Bargh denied having made these comments and said that she had suggested that the claimant go home to discuss the situation with her partner and family.

39. **Allegation 1** was about a delay in providing a maternity policy following this meeting but in her oral evidence to our hearing the claimant accepted that she had not asked for the policy at this meeting. That allegation was later withdrawn.

40. After the meeting the claimant did return to work. Mrs Bargh left the office at lunchtime. Later that afternoon one of the other people in the office said the claimant ought to go home and she did.

41. After the meeting the claimant exchanged text messages with her friend and colleague, Sammy, who was employed in a finance role. In a text at page 367 she said of Mrs Bargh[1]:

> **"She was like well there's no point wallowing at home…I literally just want to wallow..."**

42. In her subsequent grievance letter of 8 September 2016, however, (page 239) the claimant said that at that meeting Mrs Bargh had been supportive of her.

Mid – June 2016

43. On 13 June 2016 the claimant had her first scan at hospital. She texted Mrs Bargh in the morning to remind her (page 407). Mrs Bargh replied:

> **"Ok, no worries, thinking of you xx"**

44. Later that day the claimant updated Mrs Bargh. It was still unclear whether the pregnancy would be viable and she was going to have another scan in ten days. The claimant said she felt awful for not being in work.

45. On 21 June 2016 the claimant emailed Mrs Bargh (page 428) to say that her next scan was on Thursday 23 June 2016. She said she had been coming in earlier and staying later to make up the hours and asked if it was ok for her to go to the appointment. Mrs Bargh replied briefly by saying that was fine.

46. On 23 June 2016 (page 408) the claimant sent a text saying that she had been given another appointment that afternoon so would have to take the full day. She asked how things were going. Mrs Bargh replied saying that Karen was checking the leads (new lettings enquiries which would be accessible on the claimant's office PC first thing each morning) and that she was thinking of the claimant.

47. On Thursday 24 June 2016 there was a social event in the evening to raise funds for a local school. It was not a work function but Mrs Bargh had arranged it. The claimant and her partner attended with their families, and Mrs Bargh and her family were present too. In the course of the evening there was a discussion between Mrs Dorrington and Mrs Bargh about the claimant's pregnancy. It was still something which the rest of the family did not know about. The claimant's case was that Mrs Dorrington informed Mrs Bargh that the claimant would be keeping the baby, and that this came as a surprise to Mrs Bargh. Mrs Bargh said that she was told that things were looking more positive but that there was still a long way to go. It was not necessary for us to resolve the fine difference between the parties as to what was said but it we found that after this conversation Mrs Bargh knew that the pregnancy was more likely to be viable. **Allegation 22** was that as a consequence Mrs Bargh's attitude towards the claimant changed.

Early July 2016

48. The claimant had started to suffer from severe morning sickness. On 29 June and 4 July 2016 (pages 399 and 400) she texted her colleague, Sammy, to say that

[1] The original spelling and punctuation of the messages will be retained throughout.

she would be in late. Sammy sat next to the claimant in the office and although she did a different job she could arrange for a colleague to check the leads on the claimant's PC. Leads generated by marketing efforts would come in by email to the claimant's email address each morning. It was vital to the respondent that it secured 100% lettings of the properties it managed for Empiric. Ordinarily the lettings would be completed by Easter but this year (the first year of the management contract) they were still at only 75%. Experience had taught the respondent that students wanted an immediate reply if the lead was not to be lost. It was hugely important that those leads were followed up without any delay at all.

49. The claimant did not contact Mrs Bargh directly on these occasions.

50. On 5 July 2016 the claimant received an appointment to see a doctor that afternoon. She texted Mrs Dorrington (page 384) to say that she was scared to ask Mrs Bargh for the time off. In a later text on the same page she told Mrs Dorrington that Mrs Bargh had not been happy because the claimant had to cancel a meeting for the appointment.

51. Concerns about having time off were mentioned by the claimant to her midwife at an appointment on 6 July 2016. The midwife suggested that she contact the Citizens Advice Bureau for assistance. This was recorded in the maternity booklet at page 118. The claimant spoke to Mrs Bargh that same day and in a text recorded at page 393 to her partner she said the following:

> **"Was ok, came out with a list as [**long**] as my arm of things to do. Also, she was like 'what are we going to do when you have the baby? How long will you be off…two weeks? – is she fucking mental – two weeks?!!! xx"**

52. Mrs Bargh accepted that she had told the claimant in casual conversation on the trip to Leicester in late April that when she had had her children she only had two weeks off, but denied having mentioned it once she knew of the claimant's own pregnancy. The claimant accepted that Mrs Bargh was not instructing her to do the same or suggesting that she do so. However, she felt that Mrs Bargh was trying to influence her to have as little time off as possible.

53. The claimant was off work on 7 July 2016. She texted Mrs Bargh at just before 8.30am (page 408). Her text said:

> **"Feeling really lightheaded and had to pull over to be sick. Didn't manage to keep a single thing down yesterday so I'm just exhausted and blood pressure is low too. I'll be in as soon as I am feeling up to it…"**

54. Later that day she texted Mrs Bargh again to say she was still not well and the midwife had advised her to stay off until Monday 11 July 2016. She gave the midwife's number so Mrs Bargh could call her if she wanted, and said she had got some anti sickness tablets from the doctor so hopefully would be feeling better soon. Mrs Bargh replied briefly to say:

> **"Thanks for letting me know x"**

55. This was the only record of the claimant informing Mrs Bargh that she was suffering from sickness. She maintained in oral evidence that she had told Mrs Bargh of her general morning sickness but could not identify any record of when that was.

56. The claimant did in fact come into work on Friday 8 July 2016. She texted Mrs Dorrington to say that she was stressing too much about work (page 409).

13 July 2016

57. The claimant was in the office on Wednesday 13 July 2016. **Allegation 3** and **Allegation 5** (which the claimant confirmed were the same allegation) were that Mrs Bargh ignored her when she congratulated her on her son's graduation. Mrs Bargh's case was that she simply did not hear the claimant. She had been suffering from vertigo issues and associated hearing loss since April 2016, resulting in a diagnosis of Meniere's Disease. That left her profoundly deaf in her left ear, which was the ear towards the office when sitting at her desk. She had not yet been supplied with a hearing aid. Her case was that she simply did not hear the claimant speak to her in the open plan office across two desks. We will return to this issue in our conclusions.

58. It was around this time that **allegation 4** was said to have occurred. The claimant and a colleague had been away for the weekend. The claimant alleged that Mrs Bargh asked the colleague how her weekend had been but did not ask the claimant. Mrs Bargh denied that. We will return to it in our conclusions.

59. The claimant had an exchange of texts with her colleague, Sammy, on the morning of 13 July 2016. The claimant said in a text (page 402):

> **"I actually feel like crying – that place is making me miserable. Alison has barely spoken to me."**

60. Sammy replied by saying that Mrs Bargh was a "grumpy cow" and that she might be the unhappiest person she had ever worked with.

14 July 2016

61. On 14 July 2016 the claimant texted Sammy to say:

> **"…If she thinks I'm only taking two weeks' maternity to go back to that she can think again."**

Empiric Contract 18 July 2016

62. On 18 July some bad news was received by the respondent. Prior to the summer of 2015 the company had owned and managed its own student properties. That summer those properties had been sold but the company had entered into a management contract with the purchaser, Empiric. On 18 July 2016 Empiric's owner, Mr Bartman, informed Mrs Bargh by telephone that the management contract would not be renewed for the academic year 2017/2018. It would therefore end in June 2017. He confirmed this by email that evening at pages 133-134. Attached to the email was the marketing budget for the year (page 134a) which set out all the activities in which the respondent or its external digital marketing supplier, SearchQuest, would engage, with details of costings. Mr Bartman had crossed out a number of activities which would no longer be required as the accommodation was not to be marketed as CityBlock accommodation for the academic year to follow.

Meeting 18 July 2016

63. Mrs Bargh spoke to the claimant at work on 18 July 2016. There was no one else present. No notes were taken, but Mrs Bargh made a file note a couple of days later (page 126).

64. The claimant accepted that much of the file note recorded what had been said. In broad terms it was not in dispute that Mrs Bargh called the meeting because she had been made aware that the claimant was coming into work late and that the claimant had not been contacting her about that. The claimant said she had been making the time up by working through her lunch. There was a discussion of the morning sickness. Mrs Bargh told our hearing that she had not been aware of ongoing morning sickness; the claimant disputed this but could not identify any record of a discussion save for the single text of 7 July at page 408. The claimant told Mrs Bargh that when late into the office she texted the Finance Assistant, Sammy.

65. The disagreement about this meeting was encapsulated in **allegations 8, 9, 10 and 11**. The claimant alleged that Mrs Bargh said, "How can you do your job properly when you are away from your desk being sick?". She alleged that her commitment was questioned because of antenatal appointments. She said that as well as questioning her commitment Mrs Bargh said she had only taken two weeks of maternity leave, trying to influence to have so short a period herself. She alleged that Mrs Bargh said she expected 40 hours per week from the claimant. Mrs Bargh denied that these comments were made in the way alleged or that she treated the claimant in any way unfavourably during the meeting. We will return to that in our conclusions.

66. The claimant had a brief exchange of messages with Sammy shortly after the meeting (page 404). Sammy asked her what that had all been about. The claimant said that she wanted to cry and said:

> **"For being late apparently making it up over lunch is not ok. She's 'trying to run a business'."**

67. The claimant also sent some messages to her partner, Jordan. They appeared at pages 391-395. Her first message said:

> **"Alison just pulled me into the boardroom for a chat. She was such a fucking dick. I need to get clued up on what my rights are…I don't even know where to begin over text."**

68. Jordan texted her some information about employment rights and she responded:

> **"The fact they have to pay me maternity pay explains why she's basically just asked me to leave."**

69. Jordan asked her what Mrs Bargh had said and the response was as follows (page 392):

> **"Loads of shit. But I stood my ground and really defended myself. She said I shouldn't be taking time for appointments and I was like, 'well…I can't just not go? It's a baby for**

> **fuck sake you heartless cow' and she was like, 'well you have to see it from my point of view, I'm trying to run a business..." I said 'well I haven't fallen behind on anything and I've made up most of the time'."**

70. After further text exchanges the claimant sent the following to Jordan (page 395):

> **"She said if I'm going to be off who will do the job? And if I'm sick I need to think of the business and decide what I want to do. Can I cope etc? I was like 'why do you think that? I've done everything as normal. If I've been late by 10 mins I've made it up at lunch or after work'. She was just making me feel uncomfortable."**

71. Later on in that text exchange the claimant referred to the respondent "going through an Employment Tribunal at the moment".

72. As well as the text messages, the claimant made a note in her maternity booklet (page 118) in the following terms:

> **"Meeting with AB. Asked to consider position in the company, also about maternity leave. Concern due to morning sickness not at desk all the time so could not commit 100%. Feeling distressed and upset this evening and made to feel uncomfortable in the workplace."**

Tuesday 19 July 2016

73. Just after 10.00pm the following evening the claimant sent an email to Mrs Bargh about their discussion (page 127). It said in its entirety:

> **"Hi Alison,**
>
> **I have been worrying and stressed since our conversation yesterday. From what I understand you are not concerned regarding my work, however, you mentioned me arriving late and time away from my desk as an issue. As you are fully aware, I am ten weeks pregnant and have been suffering with severe morning sickness for which I have now been prescribed anti sickness tablets and been given advice from my midwife.**
>
> **I have kept you informed about my situation and when I have been late or attended an appointment I have always made up the time or taken it unpaid. I have ensured that I have kept on top of my workload and have made a conscious effort to not let my situation affect my work.**
>
> **Please could you help and guide me in this difficult situation as I want you to know I am fully committed to my position at CityBlock and do not want to let such an exciting moment in my life become negative for feeling uncomfortable at work. I would really value your support at this time.**
>
> **Kind regards,**
>
> **Katie."**

74. Mrs Bargh received the email that evening but did not reply.

Wednesday 20 July 2016

75. The claimant was late in on Wednesday 20 and Thursday 21 July, and on each occasion she texted Mrs Bargh to let her know (page 218).

76. On 20 July the claimant texted Sammy (page 405) complaining that Mrs Bargh had not taken two minutes to speak to her or reply to the email. In the exchange that followed Sammy mentioned that a health assessment should have been done, and told the claimant that if she pursued an Employment Tribunal claim she wouldn't have to stay in work and would get "loads". In her reply the claimant said she had already spoken to a friend for some legal advice, and said:

> **"I've done my part now by emailing her and addressing the situation. She should think wisely about her next move because if she continues to make me feel uncomfortable and ignores me I'll be taking them for a lot more than six weeks' maternity pay."**

77. On 20 July 2016 the claimant emailed her partner to say that Mrs Bargh had not even acknowledged her that morning or replied to the email and it was making her uncomfortable.

Thursday 21 July 2016

78. Even without the news from Empiric this was a very busy week for Mrs Bargh as she was away on leave after 22 July 2016. The monthly payments out had to be dealt with, and it was a very busy time of year in any event for student lettings as they had only met 75% of target whereas in previous years lettings had been 100% by Easter.

79. She replied to the claimant just before 9.00am on Thursday 21 July 2016 in the following terms (page 128):

> **"Dear Katie,**
>
> **Thank you for your email of 19 July following our discussion on Monday.**
>
> **I was surprised to receive your email so late on Tuesday evening. My preference would always be to deal with issues of this nature in person where reasonably possible.**
>
> **I note that you have mentioned that you have been worrying, you really have no need to be.**
>
> **As you have pointed out in your email, you have informed us of your pregnancy. I have and continue to support you and I think it would be a good idea to give you some clarification of the processes to follow.**
>
> **As time is short before my holiday (my last day in work is Friday 22 July), unfortunately I only have very limited time available. This being the case, I will send you a note before I go which I trust will provide you with some guidance. We can then meet when I get back from holiday if you have any further queries.**
>
> **Alison."**

80. This email formed the basis of **allegation 12** and we will return to it in our conclusions.

81. About ten minutes later Mrs Bargh emailed the claimant (page 129) asking her to diarise a catch up for the following day before she went away. Her email said it would be useful to go through priorities and anything the claimant needed from her. The meeting was intended to be about work matters. In her response the claimant said:

> **"Do we not have a catch up today at one?"**

82. Mrs Bargh responded to say that she had payment runs to do which had to be done that day and that she had not accepted the meeting in her electronic diary. This formed the basis of **allegation 7** and **allegation 13** and we will return to it in our conclusions.

83. Later that day the claimant texted Mrs Dorrington. She referred to the mortgage for which she and her partner were applying and then said that she had bad stomach ache and:

> **"Alison still hasn't acknowledged me. We were supposed to have a meeting today which she's cancelled and she's piling loads of extra work on me. Hasn't replied or even mentioned my email. I'm so fed up of her. Very tense in the office and also she's not approved my holidays which are for appointments and to sort mortgage on Monday."**

84. The claimant also texted Jordan to say that Mrs Bargh had cancelled their meeting (page 357).

Friday 22 July

85. On Friday 22 July there was no meeting but Mrs Bargh sent the claimant a letter which appeared at pages 137-138. She said that from the email of 19 July it appeared there may be some confusion about the issues she was trying to address on Monday 18 July. The letter went on as follows:

> **"Firstly I would ask you to note that I have an absolute preference for dealing with concerns in person and promptly. I acknowledge that I am in fact writing to you now, however this is purely as it won't be possible for us to meet before I go and I wanted to make sure that I had addressed the situation. For future reference I would ask that wherever possible you do not send emails to me late at night when I cannot respond and that you approach me in person instead.**
>
> **Just for clarity I initially spoke to you on Monday as it was becoming apparent, if you were going to be late, you were not communicating this directly with me. This had been causing concern for me on a couple levels – both regarding your welfare and also in terms of operational difficulties (e.g. work reallocation).**
>
> **Regarding the late arrivals I do understand that your morning sickness may impact on your ability to get into work absolutely on time everyday. I will however, need you, in accordance with the sickness absence policy, to inform me (as your line manager) directly. This should preferably be by phone (or, as an absolutely last resort, by text). I will also need you to do this as soon as possible and by no later than 09.00am.**
>
> **This requirement is simply because: firstly, we want to know you are safe; secondly, so we can reallocate any work which may need urgent attention (especially leads which go directly to your email address); and thirdly, that we are compliant with the right procedures.**
>
> **I also want to discuss the issue of making up time when you are late. You explained at our meeting on Monday that you have been doing this by, for example, working through your lunch break. I was previously unaware that you have worked through lunch breaks. As a responsible employer we cannot permit this practice to continue. I know that you will not to make up time for lateness – for which I am grateful – but I must insist that you do not work through your full lunch break. In the interests of your**

> **welfare you must take a break and going forward we will not be in a position to credit time which deducts more than ten minutes off your 30 minute lunch break.**
>
> **In your email of 19 July you started by stating that you were worried and stressed following our conversation (on Monday 18) and I want to be absolutely clear that you do not need to be. Issues have come to my attention in terms of you not phoning me when late. This being the case it would have been remiss of me not to discuss it with you, to make you aware of the requirements and to give you the opportunity to comply with them. It is my hope that having clarified the situation, there won't be any confusion going forward.**
>
> **In your email you also mentioned that you would like some guidance.**
>
> **I have assumed that you mean with reference to the maternity policy. I enclose a copy of the policy for your information and propose that we have a conversation about it when I return from leave. I would also specifically confirm that you are entitled to paid time off for antenatal appointments – I will just need to have sight of the appointment cards and we can make the necessary arrangements.**
>
> **I trust that this letter serves to clarify the situation and allay any worries you may have, however, if you have any queries regarding the content, please do not hesitate top let me know."**

86. The letter was accompanied by extracts from the maternity policy which appeared in our bundle at pages 139-147. The contents of this letter formed **allegation 15** and we will return to it in our conclusions.

87. There was also a management meeting on 22 July 2016 (pages 135 – 136). When formal meetings were held minutes were taken but there were frequently informal discussions between two or more of that senior management team which were not minuted. As owners Mr and Mrs Bargh retained the right to make the final decision on anything which had been discussed.

88. Following 22 July 2016 Mrs Bargh went on annual leave until 3 August 2016. In that period the claimant attended an obstetrics appointment for which she had paid time off. She was on holiday herself for a few days in the middle of August (page 439).

<u>Parker Resignation and emails 22 August 2016</u>

89. Suzanne Parker resigned by letter of 12 August 2016 at page 151. Her letter said she was giving as much advance notice as possible but did not say when she intended her employment to end. Mrs Bargh asked her to keep her resignation quiet because there were staff on holiday, but news spread by social media. By email of 22 August 2016 (page 167) Ms Parker informed Mrs Bargh that her resignation took effect immediately.

90. The loss of the Empiric contract and Ms Parker's resignation caused Mrs Bargh to send two emails on 22 August 2016. The first was sent to Louise Hoole (page 165) who worked in the development side of the business. Her email said:

> **"…As discussed previously and in the light of [**Suzanne Parker's**] resignation and [**Clint Bartman's**] email before we went on holiday, we discussed reviewing this role in light of the business challenges we will be facing. If you could have a look at it and discuss with Trevor [**Bargh**] and Martin** [Clews**] your future needs from a development point of**

> **view then we can get together to review along with my input of requirements for lettings moving forward."**

91. The second was an email sent to Mr Bargh (page 166) which said:

> **"We were due to have a management meeting a couple of weeks ago when you were in London. I can't see where this has been reorganised.**
>
> **I would like to have the opportunity of discussing the Brand and Marketing Manager's role in light of [**Suzanne Parker's**] resignation – we are desperately in need of someone to carry out business development for new lettings contracts, especially in light of [**Clint Bartman's**] email before we went on holiday.**
>
> **Have you rescheduled this with Louise or shall I mention it to her?"**

92. Mr Bargh forwarded that email to Louise Hoole asking her to arrange the management meeting as soon as possible because it was critical that the issue was addressed.

Rugby Club Event

93. On 19 August 2016 there was a corporate sponsorship event at a local rugby club. The respondent was sponsoring the match and inviting guests. The guest list appeared at page 478. The claimant organised the day in her role as Brand and Marketing Manager. The fact she was not on the guest list herself formed **allegation 16** and we will return to it in our conclusions.

Marketing Log

94. Around this time Mrs Bargh asked the claimant to keep a log of the marketing tasks with the date by which they had to be completed. This formed **allegation 17.** The claimant sent it to Mrs Bargh by email of 17 August 2016 at page 152. The log itself appeared at page 473. It was updated as tasks were addressed.

95. On 23 August 2016 the claimant texted her partner (page 360) saying:

> **"She's making me create a table with all my jobs on with the date I receive them and the date completed…I feel like they're tracking me for a reason."**

96. In reply Mr Dorrington suggested that the claimant speak to Mrs Bargh about it but she responded:

> **"I'm literally so scared to ask her for a word."**

97. That same day Mrs Bargh emailed the claimant about handover of work when she was not in the office. The email appeared at page 172. It said:

> **"I hope your hospital appointments went well.**
>
> **As mentioned previously please can you handover to someone if you are absent from the office for prolonged periods. Yours is the only machine to receive leads and we need access to them – especially Lancaster, as we are still trying to fill rooms.**
>
> **Making sure that this process is seamless needs to be your responsibility."**

Monitor Stand 28 August 2016

98. On 28 August 2016 Mrs Bargh was asked to sign a purchase order for a monitor stand for a new member of staff who was six feet seven inches tall. She stood up to reach for the purchase order and noticed that another person, Elu Drago, was using an upturned letter tray as a monitor stand. She asked Elu whether she needed a monitor stand and Elu declined.

99. **Allegation 20** was that Mrs Bargh deliberately did not ask the claimant if she wanted a monitor stand on this occasion, and we will return to that in our conclusions.

1 September 2016

100. On 1 September 2016 the claimant emailed Mrs Bargh (page 437) asking if she was free that morning for a catch up. The response was as follows:

> **"Just need to get this proposal done first – will let you know."**

101. In fact a decision had already been taken that the claimant would be dismissed. Mrs Bargh told us that the decision had been discussed at a meeting of the senior management team. No formal minutes of any such meeting were produced. Mr Whitehead said it must have been discussed at an informal meeting. The claimant's case was that the absence of any record of this decision showed that the true reason was in fact her pregnancy or something connected to it. This was at the heart of **allegation 23** and we will return to that issue in our conclusions.

102. The claimant engaged in an exchange of text messages with Mrs Dorrington that morning. Mrs Dorrington suggested that the claimant ask what the plans were for replacing Suzanne Parker. It was clear that the claimant no longer wanted to stay by that time but was going to take a different position. Later on in that exchange the claimant made clear that she had not spoken to Mrs Bargh. A text said:

> **"I've literally been nervous all day. Horrible – just keep thinking of the money and it's not forever."**

2 September 2016 Dismissal

103. On Friday 2 September 2016 Mrs Bargh called the claimant in for a meeting and told her that she was being dismissed on four weeks' notice. A file note prepared by Mrs Bargh appeared at page 174. The claimant was given a letter confirming the position (page 173) which she did not read in the meeting. It was common ground that the claimant said that the real reason was her pregnancy and that the meeting ended abruptly. The claimant accepted she was upset but denied shouting during the meeting or as she left the office. The respondent's case was that the claimant became very agitated, raised her voice and marched out of the office shouting at members of staff in the main office. Mr Whitehead later signed a file note (page 237) saying that the claimant had been shouting, although Ms McKevitt signed a note (page 235) which made no mention of shouting. Mrs Bargh called the staff into a meeting and explained what had happened.

104. The letter provided to the claimant said that because Suzanne Parker had resigned there was no longer a requirement for her maternity leave to be covered and therefore four weeks' notice was given. The letter said:

> **"I would also like to make you aware that we are currently assessing and reviewing the business needs and whilst this has not finalised, we intend to recruit for a new permanent full-time position of Operations Manager. A full job description for this role is currently being compiled and you will have the option to apply for this position, if it is of interest to you. I will arrange to provide you with a copy of the job description once finalised."**

105. That evening the claimant went onto her emails on her mobile phone and received notification that the password for her work emails was no longer valid (page 176). She texted Mrs Bargh (page 175) asking whether she was expected back in work on Monday. She queried how she could work for the next four weeks without access to her email.

106. Mrs Bargh replied on Sunday with an email at page 177 which read as follows:

> **"Hi Katie,**
>
> **Thank you for your text and I am sorry that I was unable to take your call on Friday evening.**
>
> **As a result of your reaction and outburst on Friday I do not consider it appropriate for you to return to the office.**
>
> **As a result we will pay your four weeks' notice plus any accrued holiday pay as usual at the end of the month, but we do not expect you to work your notice.**
>
> **It is a pity that I was unable to conclude the meeting and explain the potential opportunities for you.**
>
> **I would also be grateful if you could make arrangements to post back your fob and any other items belonging to CityBlock.**
>
> **On behalf of everyone at CityBlock we wish you well for the future and thank you for your work to date covering Suzanne's maternity leave.**
>
> **Kind regards**
>
> **Alison"**

107. The changing of the password for the claimant's email account and the decision not to require her to come into work for her notice period formed the basis of **allegation 18** and we will return to it in our conclusions. The contents of this email also formed the basis of **allegation 19** and again we will return to that in our conclusions.

108. By the time the claimant left employment no pregnancy risk assessment had been carried out. The failure to conduct a risk assessment formed **allegation 21** and we will return to it in our conclusions.

Letter 8 September 2016

109. In a four page letter on 8 September 2016 the claimant set out her perspective on matters and why she thought the reason for her dismissal was her pregnancy. She said that Mrs Bargh had been supportive when first informed of the pregnancy on 10 June 2016 (page 239) but she then said she noticed a change in attitude towards her which led to the meeting of 18 July 2016. She gave an account of that meeting on page 240 and then addressed the exchange of emails after it. She alleged that Mrs Bargh had cancelled two meetings and avoided speaking to her. She mentioned the lack of any response when she offered congratulations to her son for his graduation on 13 July 2016. She said that Suzanne Parker's resignation had been kept a secret and that she had not been told on 2 September 2016 that there were other opportunities in the company, which would have helped calm her down (page 241). She said that Mrs Bargh had never asked how she was or how appointments had gone and that there had been no risk assessment. She referred to the monitor stand issue, the changing of her work password and the decision that she should not return to the office during her notice period.

Appeal

110. The letter did not say whether it was intended to be a grievance or an appeal. By email of 16 September 2016 (page 243) Mr Bargh said he would treat it as an appeal against the decision to dismiss the claimant. Mr Crews was appointed to deal with the appeal.

111. On 29 September 2016 Mr Bargh emailed the claimant attaching a copy of the job description for the new Operations Manager role and inviting the claimant to say if she wanted to be considered.

112. Mr Crews met the claimant on 5 October 2016 to discuss her appeal. The minutes from that meeting were sent to the claimant and she replied with some amendments on 18 October 2016 (pages 197-198). The amended minutes appeared at pages 199-203.

113. After the meeting Mr Crews interviewed Ms McKevitt (page 258) and Mrs Bargh (pages 259-267). He answered some queries about the process from the claimant by a letter of 20 October 2016 (pages 204-205).

114. On 24 October 2016 Mr Bargh wrote to the claimant about the Operations Manager role. The letter appeared at pages 207-208. It recorded that the claimant had told Mr Crews on 5 October 2016 that she had no interest in the role and confirmed that the respondent was going to progress with recruitment to that role. The claimant was invited to contact Mr Bargh if she had any queries but did not do so. That role was subsequently filled by an external recruitment.

115. On 10 November 2016 Mr Crews wrote to the claimant inviting her to a further meeting about her appeal on 14 November 2016 (page 211). He asked the claimant for a copy of the note she told him she had made of the discussion on 18 July 2016 with Mrs Bargh. The claimant did not respond, but it was apparent to our hearing that the note in question was the brief note in her maternity booklet (page 118).

116. The claimant responded through solicitors on 11 November 2016 saying she would not attend any further meeting (page 268). Mr Crews set out his decision on the appeal in a letter of 18 November 2016 addressed to the claimant's solicitor (pages 270-281). He went through the points raised in her letter of 8 September 2016 in detail and rejected the appeal against dismissal.

117. On 28 November 2016 the position of Operation Manager was filled. The starting salary was £22,000 per annum (page 484). The successful candidate had a CV showing operational experience (page 479).

Submissions

118. At the conclusion of the evidence each party made an oral submission. Mr Brochwicz-Lewinski had helpfully prepared a written submission running to 93 paragraphs over 24 pages, and the Tribunal read that document before oral submissions commenced.

Respondent's Submission

119. Reference should be made to the written submission for full details, but it is convenient to record the main points raised on behalf of the respondent.

120. In broad terms it was suggested that on a vast number of points the claimant's case was demonstrably wrong or misconceived and did not match what the contemporaneous documentation showed. Examples given included the genuine nature of the new Operations Manager role and the claimant's acceptance that the tone of Mrs Bargh's emails towards her had not changed following notification of pregnancy. We were invited to treat with caution the text messages sent by the claimant after the various meetings because they did not purport to be an accurate record of those meetings: instead they were expressing the claimant's interpretation of events. Importantly, Mr Brochwicz-Lewinski submitted that the claimant had had a negative mindset from an early stage resulting from her own fears about the impact of her pregnancy on her job and the pressure she put upon herself, and as time went on she increasingly saw everything that Mrs Bargh did in a negative light. That subjective perception did not match the reality of what was happening. It affected not only her interpretation of events but also how she recorded them later on. Entirely innocent matters (such as the monitor stand) were misconstrued.

121. As to dismissal, Mr Brochwicz-Lewinski submitted that the respondent's case made perfect sense in the real world. Although as a matter of cold logic there might not be a causal link between the resignation of Ms Parker and the position of the claimant, in reality a small employer was bound to give thought to the way forward when a person who had been on maternity leave resigned with immediate effect. The termination of the Empiric contract also affected the marketing activities of the claimant's role around the same time, although the timing was coincidental. The absence of any documentation of the management review and the decision to make the role redundant reflected the reality of the way in which this small employer was run. Had the redundancy been contrived to conceal a pregnancy dismissal the respondent would have created a paper trail. He said that the fact it had not done so was evidentially neutral.

122. On the question of the risk assessment he relied on **O'Neill v Buckinghamshire County Council** and argued that the obligation to carry out a risk assessment under regulation 16(1) of the Management of Health and Safety at Work Regulations 1999 did not arise in this case. He disputed that the claimant's arthritis was relevant. As to whether the respondent treated the claimant unfavourably by not undertaking a risk assessment in accordance with its own policy, he submitted firstly that the policy did not promise a risk assessment come what may but was an inaccurate statement of the law, and secondly in the alternative that outside the statutory framework the question for the Tribunal was one relating to the mental processes of the decision maker (as it ordinarily would be under section 18) and that Mrs Bargh had not decided against a risk assessment because the claimant was pregnant. He therefore submitted that this allegation should fail as well.

123. In relation to time limits Mr Brochwicz-Lewinski submitted that the claimant had adduced no evidence that could give rise to a just and equitable extension, so that it would therefore simply be a question of whether there was an act extending over a period if any of the complaints were well-founded.

Claimant's Submission

124. Mr Jenkins chose to deal with his submissions orally rather than in writing and therefore it is right to summarise these submissions in a little more detail.

125. He began by confirming that allegation 1 was withdrawn. The claimant accepted she had not asked for the maternity policy on 10 June 2016.

126. As to the risk assessment he did not dispute the respondent's analysis of the legal framework based on the **O'Neill** decision, but suggested that the claimant's arthritis meant that there was a risk which required an assessment to be undertaken. Alternatively he relied not solely on the statutory obligation but also on the respondent's own policy. He submitted that not providing a benefit promised by the policy was unfavourable treatment, and that by analogy with the statutory framework a failure to do so was automatically sex discrimination irrespective of the mental processes of the employer. He submitted that this was an example of an act extending over a period.

127. Mr Jenkins then addressed the remainder of the allegations under three broad headings. The first was those allegations about a change in attitude on the part of Mrs Bargh or that she ignored the claimant or avoided meetings. The second was the events of 10 June and 18 July where there was a direct dispute of fact between the claimant and Mrs Bargh. The third was dismissal. He emphasised, however, that the Tribunal should take a holistic approach and that our conclusions on other matters should inform conclusions on the allegations overall.

128. In terms of general credibility Mr Jenkins submitted that the claimant had been a credible witness who was prepared to make concessions in the course of cross examination, whereas he suggested Mrs Bargh had given lengthy answers to questions where short answers were needed and that her tendency to do so became more pronounced as cross examination proceeded. He also suggested there were some respects in which her evidence had shifted and brought her closer to what the

claimant was saying. He invited us to prefer the evidence of the claimant in general terms.

129. On those allegations relating to the attitude of Mrs Bargh Mr Jenkins suggested that the Tribunal should look at matters in context and not just look at the individual emails and messages themselves. He reminded us of the text at page 367 sent by the claimant after the discussion on 10 June and suggested that Mrs Bargh cannot have told the claimant to go home because the claimant would have done so rather than returning to work. When asked about the absence of any reference to the "bunch of cells" comment in the appeal letter of 8 September 2016, he suggested that the comment was consistent with Mrs Bargh trying to be supportive, although failing.

130. In relation to events on 18 July he invited us to consider the messages sent by the claimant after that meeting which he asserted supported what the claimant said about the meeting. The volume and variety of these communications created a problem for the respondent.

131. Moving to dismissal he suggested that the respondent's case had two significant difficulties. The first was that the explanations did not add up. Neither the loss of the Empiric contract nor the resignation of Ms Parker affected the need for a Brand and Marketing Manager. The consideration of an Operations Manager role had been underway in April and had nothing to do with the need for a Brand and Marketing Manager. Although Empiric would not be requiring some marketing activities once notice that the contract would end had been given, it remained the fact that there was plenty to do and the claimant was very busy during August.

132. The second significant problem for the respondent, he submitted, was the complete absence of any documentation about the "internal review" which had led to the decision to make the claimant redundant. There were no records of any management discussions or even of the documents considered. Documents which were known to exist (the financial analysis by Mr Whitehead) had not been disclosed. He suggested this complete lack of documentation showed that the true reason was pregnancy. It was right to say that digital marketing activities had been outsourced to SearchQuest since the claimant was made redundant but that was not part of the reasoning in advance.

133. In relation to time limits Mr Jenkins suggested that there were reasons why the claimant would not have pursued a claim any further, although he recognised the claimant had not given any evidence about this. He relied primarily on the course of conduct argument.

134. There were other points of detail raised by both advocates in their submissions but we will refer to those as appropriate in considering the individual allegations.

Discussion and Conclusions – Pregnancy Discrimination

Self-Direction

135. In accordance with the suggestion made by Mr Jenkins the Tribunal considered matters overall as part of making findings in relation to each of the individual allegations. What is set out below is the product of that process.

136. We reminded ourselves of the legal framework under section 18 of the Equality Act 2010. Save for allegation 21 about the risk assessment, the key question on each allegation was whether the respondent had subjected the claimant to a detriment by treating her unfavourably because of pregnancy or an illness suffered as a result of it, in the sense that pregnancy or such an illness played any part in the decision. That required consideration of the mental processes, conscious or subconscious, of the decision maker (generally Mrs Bargh) in each instance. If the Tribunal concluded that pregnancy or illness suffered as a result of it had no material influence over the reason for the treatment of the claimant, the complaint would fail even if that treatment was otherwise unreasonable or inappropriate. It is well established that unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

137. We were mindful of the provisions of The Equality and Human Rights Commission Code of Practice on Employment 2011, but neither advocate drew our attention to any particular provisions of relevance and it is not necessary to refer to the Code to explain our decision.

138. In considering each of the allegations we bore in mind that we had first to resolve any disputed facts, then decide on the facts whether the treatment in question could reasonably be seen by the claimant as a detriment, and finally deal with the question of causation in the mind of the decision maker(s). However, that exercise had to be approached in accordance with the burden of proof. If after considering the evidence as a whole we found facts from which the Tribunal could reasonably conclude that pregnancy or illness suffered as a result of it had a material influence on detrimental treatment, the claimant would succeed unless the respondent could establish a non-discriminatory reason for that treatment.

Credibility

139. We also took into account the submissions made by the representatives about credibility. Having considered the case overall, the Tribunal found both the claimant and Mrs Bargh to be essentially truthful witnesses who did not deliberately seek to mislead the Tribunal. However, we considered that the claimant's perception of events had been coloured by her strong belief that there was an adverse reaction to her pregnancy. That affected her perception of later events as they happened, but also how she viewed earlier events in hindsight.

140. As far as Mrs Bargh was concerned it was clear that her priority was the running of the business, and on occasion this was reflected in her answers to questions from Mr Jenkins where she restated the business case rather than directly answer his question. That was not, however, an indication that she was being evasive or untruthful. It simply reflected her genuine priority.

141. We rejected Mr Jenkins' suggestion that in general terms the claimant's evidence should be preferred to that of Mrs Bargh wherever there was a direct conflict. In broad terms we thought Mrs Bargh's recollection was more likely to be reliable as, unlike the claimant, her perception was not affected by an ongoing sense of injustice.

142. For convenience each allegation from the list of issues will be reproduced before we deal with it.

Allegation 1

143. This allegation related to a failure to provide a copy of the maternity policy but was withdrawn during submissions.

Allegation 2

2. On 10 June 2016 Alison Bargh made comments about it being so early in the pregnancy that it was only a bunch of cells, and comments about the claimant's age.

144. The claimant's case on this discussion contained three elements[2].

145. The first element was that a comment was made about her age. This was mentioned in the table of allegations but did not appear in her witness statement. The Tribunal asked Mr Jenkins to put the comment to Mrs Bargh in cross–examination and he put to her that she had said that the claimant was still young and would have plenty of opportunity to have children in future. Mrs Bargh denied having made that comment. We found it was not made.

146. The second element was that Mrs Bargh made a comment about there being no point in the claimant "wallowing at home". This was not part of the pleaded allegation, although it did appear in the text which the claimant sent to Sammy after the meeting at page 367. Our conclusion is set out in paragraph 150 below.

147. The third element was the most significant. It was that Mrs Bargh referred to the unborn baby as a "bunch of cells" in a way which offended and upset the claimant. If this comment was made it could potentially amount to unfavourable treatment.

148. We considered carefully how this allegation developed. It was made for the first time in the further particulars provided by the claimant on 21 March 2017 (page 47) and the table of allegations. It did form part of her witness statement. But there was no reference in any of the text messages to this phrase having been used. Nor did the claimant mention it when she wrote her grievance/appeal letter of 8 September at page 239. Indeed, she described Mrs Bargh as having been supportive of her at that meeting. That was repeated in the claim form itself at page 17 of our bundle. The claim form made clear that the claimant was not saying there had been any change in Mrs Bargh's attitude towards her until after the discussion at the fundraising dinner later that month.

[2] The table of allegations also included a reference to the delay in paying the claimant for antenatal appointments but this was not pursued by Mr Jenkins during submissions.

149. This was all very difficult to reconcile with the suggestion that in fact Mrs Bargh had made a hurtful and upsetting comment about a "bunch of cells". It tended to support Mrs Bargh's evidence that she did not use such a phrase. We rejected the submission of Mr Jenkins that the claimant thought that this was intended to be a supportive comment. That was not the explanation she gave in her evidence for the omission from the grievance/appeal letter. In response to a question from the Tribunal the claimant said she did not want to aggravate the situation by bringing that comment up, but of course she had already been dismissed by then. She also told us that she did not want to include every single point in her letter, but some less striking allegations were made. Overall we could not reconcile the allegation about this comment with the lack of any mention of it in the texts at the time and in the grievance/appeal letter.

150. Putting these matters together, and bearing in mind our views on credibility summarised above, we were satisfied that there was no unfavourable treatment of the claimant on 10 June 2016. As the claimant said in her grievance letter, Mrs Bargh was supportive of her at this meeting. That was the impression which the claimant gave to Mrs Dorrington too: she thought that Mrs Bargh had been supportive at this initial stage. The Tribunal found as a fact that there was no comment about a "bunch of cells". There was no negative comment about the claimant's age and the claimant's assertion that Mrs Bargh said there was "no point wallowing at home" represented her interpretation of their discussion rather than what Mrs Bargh actually said. Mrs Bargh was understandably keen for the claimant to remain in work if possible, but that was not in any sense unfavourable treatment. This allegation failed.

Allegations 3 and 5

3. On 13 July 2016 Alison Bargh ignored the claimant when asked to pass on the claimant's congratulations to Ms Bargh's son for his graduation.

5. On 13 July 2016 Alison Bargh ignored the claimant when she mentioned her son's name.

151. These two allegations concerned the same event. The claimant's case was that having learned that the pregnancy was more likely to be viable at the fundraising event in late June, Mrs Bargh's attitude towards the claimant changed. The first specific manifestation of this was an incident on 13 July 2016 when Mrs Bargh ignored the claimant when the claimant offered her congratulations for Mrs Bargh's son's graduation. Her case was that Mr Bargh deliberately ignored her because of the news that the pregnancy was likely to be viable and that this amounted to unfavourable treatment because of pregnancy.

152. In contrast Mrs Bargh's case was that she simply had not heard the claimant. She relied on the medical issues which had recently been diagnosed and which had left her with significant hearing impairment in her left ear. She had not yet been supplied with a hearing aid. Her explanation was that she must not have heard the claimant across two desks in the open plan office.

153. We noted that in the run up to this incident the claimant was already feeling that her pregnancy had not gone down well and the previous Friday she had texted Mrs Dorrington to say that she was stressing too much about work (page 409). We concluded that this was an innocent event which had been misconstrued by the

claimant. The medical evidence about Mrs Bargh and her hearing was not challenged and we found as a fact that Mrs Bargh simply had not heard the claimant make the remark about her son's graduation. The claimant was wrong in her perception that this had any link to her pregnancy. These two allegations failed.

Allegations 4 and 6

4. In July 2016 Alison Bargh asked other members of staff if they had enjoyed their weekend off but failed to ask the claimant.

6. Between July and August 2016 Alison Bargh would not speak to the claimant even though she interacted and socialised with other members of staff.

154. These two allegations essentially related to the same thing, although there was a lack of specifics in the claimant's case. The essence was that Mrs Bargh had started to ignore the claimant because of the pregnancy.

155. As in relation to allegations 3 and 5, we were satisfied that the claimant's perception was negatively influenced by her feeling that her pregnancy had not gone down well. Her view of how she was being treated was also fuelled by her exchanges with her colleague, Sammy. Indeed, we noted that at page 402 Sammy referred to Mrs Bargh as a "grumpy cow", suggesting that Mrs Bargh was not singling anyone out because of pregnancy but was generally regarded in a similar light. We were satisfied that Mrs Bargh as a manager sought to maintain some distance from her staff, and was focussed on the needs of the business. She was also dealing with her own health issues at that time. We found as a fact that she did not deliberately exclude the claimant from any conversations because of pregnancy, and the claimant's perception that this had happened was oversensitivity on her part because of her own feelings of concern about her position. These allegations failed on the facts.

Allegations 8, 9, 10 and 11(part one)

8. On 18 July 2016 Alison Bargh questioned the claimant's commitment to the company by asking her "How can you do your job properly when you are away from your desk being sick?".

9. On 18 July 2016 Alison Bargh questioned the claimant's commitment due to antenatal appointments which she had to attend.

10. On 18 July 2016 Alison Bargh questioned the claimant about how long she would take for maternity leave, asking "What are we going to do? You are supposed to be here until April, how long are you going to take off, I only took two weeks off with my boys." She also questioned the claimant about leaving on time at the end of the day and not working unpaid overtime, questioning the claimant's commitment and her ability to do the job.

11. On 18 July 2016 Alison Bargh said the claimant was contracted to work 40 hours a week in order to ensure the job was done and questioned her ability to do it if not in the office at least 40 hours each week. She expected the claimant to work overtime to make up to 40 hours…

156. We decided to deal with these allegations next because they concerned the discussion on 18 July 2016. Allegation 7 was concerned with events after that meeting and we will address it below in conjunction with allegation 13. The second

part of allegation 11 relating to failure to attend meetings after 18 July will also be addressed below.

157. The evidence available about the meeting on 18 July was as follows. There were no notes taken at the time. The first written record was contained in the text messages sent by the claimant after the meeting to her colleague Sammy (page 404) and to her partner Jordan (pages 391-395). The claimant also made the entry in her maternity booklet at page 118.

158. The following evening the claimant sent her email of 19 July at page 127. Receipt of that email prompted Mrs Bargh to prepare her file note which appeared at page 126. Mrs Bargh also covered some of what had been discussed in her letter of 22 July 2017 at pages 137 and 138. We then had the written and oral witness evidence of both participants.

159. To a large extent there was agreement about the purpose and content of the discussion. The claimant accepted that the first four paragraphs of Mrs Bargh's file note at page 126 were accurate. Where the accounts diverged was on the question of whether Mrs Bargh made a number of alleged comments which questioned the commitment of the claimant, including questioning how she could do her job when away from her desk being sick, questioning her about the length of maternity leave and saying that she had only taken two weeks herself, making clear that she expected the claimant to work 40 hours per week, and referring to the antenatal appointments as an issue about commitment to the business.

160. We considered carefully what the claimant put in her messages after the meeting and in the maternity booklet, but we considered that these represented her perception of how Mrs Bargh was approaching the matter rather than what had actually been said. Contrary to the claimant's case, we were satisfied Mrs Bargh did not know that there was a general ongoing problem with morning sickness which was the reason for lateness. All she knew from the exchange of text messages on 7 July (page 408) was that the claimant had been sick but was getting some anti sickness tablets. In any event her concern was more with the failure of the claimant to report lateness in the proper way. The problem had been drawn to her attention by senior colleagues. Mrs Bargh was focussed on the needs of the business. That was understandable and appropriate. She was concerned to hear that the claimant was trying to make up the time by working through lunch. She did not think that was appropriate as having a proper break was important. We concluded that the file note and letter prepared by Mrs Bargh and the email from the claimant of 19 July were factually correct in recording what Mrs Bargh had actually said. As the claimant put it, there was mention of her arriving late and having time away from her desk. That was not raised to question of her commitment or to be a means of getting her to consider leaving. However, the mindset of the claimant by this stage was such that she interpreted matters in a negative light, and that interpretation explained the impression she gave Sammy and her partner in the subsequent messages. It also explained why her email of 19 July sought to assure Mrs Bargh of her commitment.

161. In summary, we were satisfied that this was an appropriate and reasonable management discussion over an issue of genuine concern to the business. It was not an attempt to question the claimant's commitment or to pressure her to leave, and the claimant was wrong to see it that way. She was under the mistaken

impression Mrs Bargh expected her to have 2 weeks' maternity leave because the discussion in April on the way to Leicester had stuck in her mind. It was not actually said by Mrs Bargh on this occasion. There was no unfavourable treatment because of pregnancy.

Allegation 12

12. On 21 July 2016 Alison Bargh sent an email saying she would rather discuss issues in person than by email.

162. This allegation centred upon the response of Mrs Bargh in her email of 21 July 2016 to the claimant's email of 19 July about their meeting. The second paragraph of Mrs Bargh's email said:

> **"I was surprised to receive your email so late on Tuesday evening. My preference would always be to deal with issues of this nature in person where reasonably possible."**

163. In the table of allegations the claimant explained that she felt this was an attempt by Mrs Bargh to dissuade her from having her concerns and the response put in writing and that this was unfavourable treatment which only began after she became pregnant. We were satisfied that this was simply not the case. The claimant accepted in cross examination that it is sensible to deal with such matters in person where possible but took issue with how it was said. We did not accept that the email of 21 July 2016 was in any way worded detrimentally or unfavourably to the claimant. Indeed, Mrs Bargh went on to provide information in writing to the claimant before she went on annual leave. The preference of Mrs Bargh to discuss matters in person was not only sensible and appropriate but it was also a reflection of her approach generally. There was no evidence to support the contention that prior to this she would always seek to deal with matters in writing rather than by way of a face to dace discussion. Accordingly we found as a fact that there was no less favourable treatment of the claimant because of pregnancy in this email. The allegation failed.

Allegations 7, 11 (part two), 13, 14 and 15

7. On 22 July 2016 the claimant tried to arrange meetings with Alison Bargh on two separate occasions but Alison Bargh cancelled both.

11. …She was consistently cold towards the claimant and failed to attend weekly meetings. The claimant asked on several occasions for a catch up but Alison Bargh continued to avoid her and failed to acknowledge her most days in the office.

13. From 21 July 2016 the claimant made a conscious effort on a number of occasions to arrange a meeting with Alison Bargh as she felt something was going on in the background and she was being kept in the dark.

14. During July and August 2016 Alison Bargh made it hard for the claimant to try and book a meeting with her and avoided conversations with the claimant.

15. On 22 July 2016 Alison Bargh asked the claimant verbally and in writing not to email her regarding issues and concerns but to speak with her in person, but did not reply to attempts by the claimant to meet with her, or cancelled or failed to turn up for meetings.

164. It was convenient to deal with these allegations together because they all related to the same core point: an alleged reluctance on the part of Mrs Bargh to meet with the claimant in the period after their discussion on 18 July 2016.

165. The concern that Mrs Bargh was not meeting her was first raised by the claimant in a text to Sammy (page 405) on 20 July. She had not had a reply to her email of late the previous evening. She expressed a similar concern in an email to her partner the same day.

166. Mrs Bargh did reply to the email just before 9.00am on Thursday 21 July. That email made clear that Mrs Bargh had very limited time available. She was going on leave at the end of the week and it was a very busy period as the payroll needed to be sorted out before she left. It was clear from the email that Mrs Bargh intended to meet the claimant after her return from leave if there were any queries arising out of the written information about maternity rights. However, Mrs Bargh also emailed the claimant a few minutes later (page 129) asking for a catch up meeting the following day to be diarised about work matters. The claimant responded by asking whether there was a catch up meeting arranged that day at 1.00pm, but Mrs Bargh responded to say that she had payment runs to do which had to be completed that day, and queried whether she had actually accepted the meeting. In any event there was no catch up meeting about work matters on either day. Mrs Bargh was then away on leave until 3 August 2016. When she was back the claimant was on leave herself on 11, 12 and 15 August (page 439).

167. The written information about maternity rights which Mrs Bargh issued on 22 July appeared at pages 137-138. She asked the claimant to deal with concerns in person and promptly rather than sending emails late at night. She emphasised her concerns about late arrivals without notification, particularly given the importance of making sure that leads were dealt with promptly each morning. She gave further information about what had been discussed on 18 July. The letter made clear that the claimant should contact Mrs Bargh if she had any queries having considered the letter and the attached extract from the maternity policy.

168. Putting these matters together, we were satisfied that in the week ending on Friday 22 July there was no unfavourable treatment because of pregnancy. That would have been an extremely busy week for Mrs Bargh even without the news on Monday 18 July that Empiric would be ending its contract. The fact that there was no meeting after the claimant's email of 19 July was due to pressure of work and not unfavourable treatment because of pregnancy. Mrs Bargh had still been trying to arrange a catch up meeting about work matters but could not find the time to do even that.

169. As far as the position once she returned from leave was concerned, it was for the claimant to request a further meeting if she needed one. She had time to consider the letter of 22 July and attached information while Mrs Bargh was away, and that letter and the email of 21 July from Mrs Bargh made clear that it was for the claimant to seek a further meeting if she wanted one. There was no evidence in our bundle of the claimant requesting a further meeting and Mrs Bargh was entitled to think that the claimant's queries had been answered and her concerns assuaged unless she heard otherwise from the claimant.

170. Accordingly we were satisfied that the claimant's case that Mrs Bargh was deliberately avoiding a meeting with her because of pregnancy was misconceived and based on a misinterpretation of events by the claimant. These allegations failed on their merits.

Allegation 16

16. On 19 August 2016 the claimant was omitted from the invitation list for a sponsorship day at the Vale of Lune Rugby Club.

171. It was common ground that the claimant had been asked to put the date of this event in her diary. Mrs Bargh said that was because the claimant was organising the invitation list and was also expected to set up the marketing material for display on the day (although in the event this was done by Mr and Mrs Bargh instead). Her case was that it was never intended that the claimant would be a guest at the dinner.

172. The claimant maintained that she was not invited because of pregnancy. She relied on two matters in particular: Suzanne Parker had been invited in the pervious year, and the Chief Executive's personal assistant, Louise Hoole, who organised the event in conjunction with the claimant, attended too.

173. We were satisfied that Mrs Bargh had provided an explanation which showed that there was no unfavourable treatment because of pregnancy. In general invitations were limited to senior management to maximise the number of guests who could be invited. Suzanne Parker had been invited on one occasion, having been with the company for six years, because her husband was involved with one of the sponsors of the event. Louise Hoole had been invited in 2016 because Mr Bargh asked her to attend as his personal assistant. The intention had never been for the claimant or other members of staff below senior management to attend, and we were satisfied that this was another occasion when the claimant misconstrued an innocent occurrence as pregnancy discrimination. This allegation failed on its merits.

Allegation 17

17. In August 2016 Alison Bargh asked the claimant to start logging her workload on a spreadsheet.

174. It was understandable that the claimant thought that there might be a link between her pregnancy and the request made in mid August for her to complete a log of all her tasks because she had not previously been asked to do one. She accepted that in principle such a log was a proper management tool. An explanation was given by Mrs Bargh when she was interviewed on 13 October for the purposes of the claimant's appeal. The note of that interview at page 264 recorded that she asked the claimant to keep a log because it had become apparent that some of the activities for which the claimant was responsible had been missed.

175. Further, we noted that there were examples in the bundle of similar documents being kept by other members of staff. That included a log of operations meeting activities at page 449, and a spreadsheet kept by Elu Drago at pages 453-454. It was evident that this was a method of managing performance which was used elsewhere in the business.

176. Putting these matters together we were satisfied that this was not related to the claimant's pregnancy. It was a management tool which Mrs Bargh decided to use because of some concerns about missed tasks. There was no unfavourable treatment because of pregnancy.

Allegation 20

20. On 28 August 2016 Alison Bargh failed to provide a monitor stand for the claimant even though one was provided to others.

177. There was no dispute about the facts. The claimant accepted that a monitor stand was needed for a new member of staff who was six foot seven inches tall. She heard Mrs Bargh ask Elu Drago whether she wanted a monitor stand. She also accepted in cross examination that she had not asked for one herself. Her case was that Mrs Bargh should have asked her.

178. We were satisfied that Mrs Bargh's actions were unaffected by the claimant's pregnancy in any way. She asked Elu Drago if she needed a monitor stand because she could see that Ms Drago was using something else to raise her monitor screen. The question was posed more generally in the open plan office but the claimant did not hear it. Had the claimant asked for one it would have been provided. This allegation failed.

Allegation 23

23. On 2 September 2016 the respondent decided to dismiss the claimant.

179. We addressed the dismissal next because it came next in chronological terms.

180. The respondent's case was that this was a decision made because of business needs unrelated to the claimant's pregnancy. According to the respondent there were four broad factors driving its thinking in late August 2016.

181. The first was the possibility raised earlier in the year of creating an Operations Manager role. The benefit of creating such a role would primarily have been to have freed up some of Mrs Bargh's time to enable her to concentrate on finding new work for the business. The matter was not pursued at that time. However, that underlying rationale remained valid. It would have the additional benefit of reducing her own workload, which had been very heavy.

182. The second was news in mid July that Empiric would be ending its contract at the end of the next academic year. This came as a significant blow. The marketing spreadsheet returned by Empiric indicated that a number of activities would no longer be needed. In broad terms much of the work for the impending academic year had already been done, but there was still some work required which would tail off as the months progressed.

183. The third was that Suzanne Parker resigned in August and confirmed on 22 August that her resignation took effect immediately. It was evident from the emails Mrs Bargh sent to Louise Hoole and to Mr Bargh (pages 165 and 166) the same day that this created a significant pressure to restructure.

184. The fourth was a general sense that the marketing of student accommodation was increasingly done through digital marketing, and would be better carried out by the external specialist provider, SearchQuest.

185. The respondent argued that as a result removing the claimant's role by outsourcing some of it to SearchQuest and saving that salary would help reduce the cost of creating the new Operations Manager role, which in turn would enable Mrs Bargh to look for new work to replace the lost Empiric contract.

186. The claimant maintained that this explanation was a sham and that the real reason for her dismissal was her pregnancy. She relied on three broad lines of argument to undermine the respondent's case and we considered each in turn.

187. The first line of argument was that there was no logical connection between the developments in the summer and the loss of her role. The resignation of Suzanne Parker made no difference to the need for a Brand and Marketing Manager, since it was the departure of an individual when the role was still required. Further, submitted Mr Jenkins, the loss of the Empiric contract made no significant difference to the amount of work required of the claimant because most of the marketing for the impending academic year had been completed. There was still plenty of work for the claimant to do. Thirdly, he argued that the creation of the Operations Manager role had no effect on the Brand and Marketing Manager as it was essentially taking some elements of what Mrs Bargh did and creating a new role out of them so that she could concentrate on other matters.

188. Persuasively as Mr Jenkins pursued these points, we rejected them. We were satisfied that there was a link in the mind of Mrs Bargh between the loss of the Empiric contract, the resignation of Suzanne Parker and the decision to make the claimant redundant. That link was explained by the underlying feeling that the emphasis in marketing was moving to digital marketing, and that this would be carried out better and more cost effectively by SearchQuest. The redundancy of the claimant would provide a salary saving which would in turn help defray the cost of the new Operations Manager post. Accordingly although there was no direct connection, we accepted Mrs Bargh's evidence that in her mind the loss of the Empiric contract and the resignation of Suzanne Parker combined to form a catalyst for the respondent to look more closely at how it was structured and to reach the decision it did about the role held by the claimant.

189. The second broad argument pursued on behalf of the claimant was that the lack of consultation with her showed in truth it was a pregnancy dismissal. We rejected that contention. The respondent was aware that the claimant did not have the right to complain of unfair dismissal until she had been employed for two years. The understanding was that there was no need to pursue a formal consultation process in dismissing by reason of redundancy. We were satisfied that this explained the lack of any consultation with the claimant prior to notification that she would be dismissed.

190. The third broad argument pursued by Mr Jenkins was that the decision could be seen to be a sham because it was simply not documented. There were no minutes of senior management meetings recording these discussions and decisions, and nor were there any financial documents produced that showed the financial

analysis upon which this decision was said to have been based. It appeared to be a decision made almost “out of the blue” following informal discussions between members of the senior management team in late August and early September, such discussions not having been documented. Mr Jenkins submitted that had this been a genuine business decision it would have been properly documented; the fact it was not documented showed that the real reason was pregnancy.

191. The Tribunal was surprised at the fact that the decision to dismiss the claimant was wholly undocumented. There was no reference to it in any management minutes produced to us. Mrs Bargh and Mr Whitehead were both vague as to where and how the decision was actually taken. Mr Whitehead explained that informal discussions over coffee were common amongst the senior management team. He could not recall any formal meeting at which the possible redundancy of the claimant was discussed. He was also clear that ultimately it was the decision for Mr and Mrs Bargh to make as the owners of the business.

192. Further, the respondent did not produce any documents showing specific financial analysis of the consequences of making the claimant's role redundant. Mr Whitehead could only say that the financial information must have been contained in one or more of the numerous financial documents he regularly prepared. It appeared that both the financial analysis and the documentation of the decision making process were addressed with less rigour than one would ordinarily expect. We considered that this shifted the burden of proof to the respondent to show a non-discriminatory reason for the dismissal.

193. However, the Tribunal was satisfied that the respondent had discharged that burden. The paucity of documentation was not attributable to it being influenced by pregnancy but simply a reflection of the way in which this small family business was being run. Key decisions were for Mr and Mrs Bargh to make, and might be made in passing in informal discussion between the two of them, even at home as opposed to formal meetings in the office. We rejected the contention that the lack of documentary evidence of the decision making process warranted an inference that this was a decision taken because of pregnancy or because of illness resulting from it.

194. We took into account an additional question, which was whether concerns about the claimant’s performance held by Mrs Bargh were attributable to illness as a result of the pregnancy and whether those concerns played any part in the decision to dismiss the claimant. We were satisfied that was not the case. Mrs Bargh was concerned that the claimant had been missing certain matters whilst she had been on leave (page 264) but the claimant did not assert that there had been any deficiencies in her performance which were attributable to her pregnancy or to illness resulting from it. In contrast her case was that she had performed to a good standard throughout. We were satisfied that the issues of lateness resulting from morning sickness had been addressed before the resignation of Suzanne Parker, and that the decision of the respondent to dismiss the claimant was not influenced in any material way by those earlier instances of lateness.

195. Putting these matters together we unanimously concluded that the dismissal did not amount to unfavourable treatment because of pregnancy or because of illness as a result of it. It was genuinely the consequence of business considerations.

The timing was explained by the loss of the Empiric contract and the resignation of Suzanne Parker, but the underlying drivers (the move to digital marketing and the need to create a new role to free up time for Mrs Bargh) were matters which were present prior to the claimant becoming pregnant. The reason for the redundancy was that going without a Brand and Marketing Manager post would help free up some financial resources to fund the new Operations Manager role.

196. Allegation 23 was dismissed.

Allegations 18 and 19

18. On 2 September 2016 in dismissing the claimant Alison Bargh did not tell the claimant of any other potential opportunities within the business. The claimant's work email was blocked within hours of that meeting despite the fact she had four weeks' notice to work. The claimant was told that it was no longer appropriate for her to return to the office because of her reaction and outburst to being dismissed.

19. On 4 September 2016 Alison Bargh explained in an email that she had been unable to explain potential opportunities to the claimant but had made no attempt to calm her distressed state. She asked the claimant to post her belongings back to the office.

197. These two allegations concerned the immediate aftermath of communication of the decision that the claimant would be dismissed. It was common ground that the meeting on 2 September ended abruptly and that the claimant was upset. The claimant did not accept that she had been shouting as she left the office although Mr Whitehead said that she had. Ms McKevitt (page 235) made no reference in her note to the claimant having shouted. It was clear, however, that the claimant was protesting that she had been dismissed illegally because of pregnancy.

198. The letter handed to the claimant during the meeting appeared at page 173. The claimant read it later on. It said that she would be able to apply for the position of Operations Manager.

199. The claimant discovered later that evening that the password for her work emails was no longer valid. She texted Mrs Bargh asking whether she was expected back in work on Monday. The email at page 177 in reply said that as a result of the claimant's "reaction and outburst on Friday" it was not appropriate for her to return to the office. She was asked to make arrangements to post back her fob and any other work items.

200. The first allegation of unfavourable treatment because of pregnancy was that Mrs Bargh failed to tell the claimant during the meeting of any other opportunities within the business. It was common ground that this was not discussed, but we were satisfied that the reason was simply that the claimant ended the meeting abruptly because she was upset and walked out without having given Mrs Bargh an opportunity to discuss such matters with her. Mrs Bargh made that point in her email of 4 September 2016 at page 177.

201. The second allegation was that Mrs Bargh had not made any effort to calm down the claimant who was in a distressed state. We found, however, that the claimant terminated the meeting because she was upset and believed that she was being dismissed because of her pregnancy. That was recorded in the file note at page 174. We also took into account the fact that according to the note from Ms

McKevitt at page 235, the claimant refused to accept from colleagues that the reason would not be because she was pregnant. She was described in that note as "very upset". We were satisfied that Mrs Bargh had no opportunity to calm her down because the claimant ended the meeting.

202. The third allegation related to the decision to block the claimant's work email within hours of the meeting. We were satisfied that this was attributable simply to the respondent's perception of how the claimant had behaved upon being told of her dismissal. From Mrs Bargh's perspective the claimant had marched out of the meeting and had raised her concerns about being dismissed by reason of pregnancy with members of staff in the office before leaving the premises. There was a concern that the claimant might repeat these allegations using her work email. It was apparent that following this exchange a decision was taken that the claimant would not be required to work out her notice period and therefore would not need access to her work emails. That was implicit in the email of 4 September 2016 from Mrs Bargh at page 177. The fact of the claimant's pregnancy had no material influence on this decision: it was a consequence of the way the claimant behaved upon the news being broken to her.

203. The final allegation concerned the instruction in the email of 4 September 2016 for the claimant to return her fob and other items by post. In its response to the further particulars (page 72) the respondent denied that any such request had been made, but that was plainly an error. Nevertheless we concluded that this was not a request made because the claimant was pregnant. It was because a decision had been taken that she would not be required to attend the office again during her notice period, which in turn was a consequence of her reaction to the news of her redundancy. This had nothing to do with pregnancy.

204. Accordingly these allegations of unfavourable treatment due to pregnancy failed and were dismissed.

Allegation 22

22. Between July and October 2016 Alison Bargh's attitude towards the claimant changed and she failed to ask how the claimant was even though she asked other members of staff how they were generally.

205. This was a further instance of the allegation of a change in attitude on the party of Mrs Bargh towards the claimant, overlapping with Allegations 4 and 6. For the reasons set out above we rejected this on the facts. The claimant's perception that Mrs Bargh's attitude had changed because of pregnancy was mistaken.

206. As for the specific allegation that Mrs Bargh did not ask how the claimant was in the period between 10 July and 2 September, we rejected that contention. There were a number of supportive references made in written communications such as the email of 21 July 2016 at page 128 and comment about hospital appointments going well in an email of 23 August at page 172. There was no unfavourable treatment because of pregnancy in this respect. The allegation failed.

Allegation 21

21. Alison Bargh failed to carry out a risk assessment once being informed that the claimant was pregnant on 10 June despite being aware of mobility issues due to arthritis.

207. This allegation was pursued in two different ways by the claimant, the first relying on the statutory framework and the second on the respondent's own policy. We addressed each in turn.

Statutory obligation

208. The legal framework summarised in paragraphs 24-28 above shows that there is no automatic obligation to undertake a risk assessment for a pregnant employee. That obligation only arises if it is established that the working conditions involve a risk of harm or danger to the health and safety of the mother or her baby. Mere discomfort is not sufficient to establish that such a risk exists.

209. The job description for the claimant's role appeared at pages 250-251. It was couched in managerial terms. It did not give any indication that the claimant would be expected to undertake activities which might have a risk to her health and safety or that of her baby whilst she was pregnant. There was nothing there which approached the kind of considerations which appear in Annexes I and II of the PWD. However, Mr Jenkins suggested that the claimant's arthritis meant that this case was taken away from the norm. We rejected that. It was clear that the arthritis medication did create a significant risk for the health of the baby, particularly in the early stages of pregnancy, but that had nothing to do with working conditions. The claimant herself did not identify any aspects of her role which created a risk to health and safety once she became pregnant. The closest that the evidence came to such a risk was in the witness statement of Mrs Bargh (paragraph 73) in which she explained that she and her husband put up some banners and marketing material at the rugby club event because they thought it would be "unfair" to expect the claimant to deal with two six foot wing banners as she was pregnant. That fell short, we concluded, of being a recognition that there was any risk to health and safety. It appeared to be a matter of courtesy and consideration only.

210. For those reasons we rejected the contention that the obligation to undertake a risk assessment had arisen under regulation 16 of the 1999 Regulations. The second precondition identified by the EAT in **O'Neill** was not met. The argument that failure to do so automatically amounted to pregnancy discrimination therefore failed.

Respondent's policy

211. Clause 19.9 of the respondent's maternity policy said that:

> **"We are also required to carry out a risk assessment to assess the workplace risks to women who are pregnant…"**

212. We rejected Mr Brochwicz-Lewinski's contention that this was simply an inaccurate statement of the law. The plain meaning of the clause was that the employer regarded itself as required to do a risk assessment in every case where an

employee became pregnant. It was entirely reasonable for that clause to give the claimant the expectation that there would be a risk assessment.

213. The first issue was therefore whether this should result in a finding that there was pregnancy discrimination without considering the mental processes of the decision maker in the same way as it would under the statutory framework. We decided that the same rule could not be applied. The basis for that approach in the statutory context was the provisions of the PWD and the special protection it afforded to pregnant women. In so far as this policy promised a risk assessment for every pregnant woman even if there was no risk to be assessed it went beyond the scope of the PWD. Consequently we concluded that in this case the failure to undertake a risk assessment under the policy had to be approached in the same way as any other allegation of unfavourable treatment under section 18.

214. The first question was whether the failure to undertake a risk assessment amounted to a detriment to the claimant within the meaning of section 39(2)(d) of the Equality Act 2010. Treatment can be regarded as a detriment if a reasonable employee could regard it in that way: **Shamoon v Chief Constable of the RUC [2013] ICR 337 (House of Lords).**

215. We noted that the claimant made no request for a risk assessment even after receiving this information attached to Mrs Bargh's letter of 22 July 2016. The inference to be drawn is that the claimant did not think there were any risks to her health and safety or that of her baby arising from the workplace, and that therefore a risk assessment pursuant to the policy would have been an empty exercise. On the evidence before us she was right: there were no risks to her health and safety resulting from the work in any event. In those circumstances we concluded that the failure to carry out such an assessment could not be regarded as a detriment or as unfavourable treatment It is difficult to see what a risk assessment would have achieved.

216. Even if we were wrong about that, and the failure was both detrimental and unfavourable treatment we were satisfied the failure to carry out the assessment was not because the claimant was pregnant. The issue would not have arisen but for pregnancy, but the fact of the pregnancy (or any illness resulting from it) played no part in Mrs Bargh's mental processes. She simply had not paid enough attention to what the policy said, being content just to provide copies of parts of it to the claimant and invite the claimant to contact her had the claimant had any queries. We were satisfied that had the claimant made a specific request for a risk assessment it would have been carried out.

217. Accordingly this complaint would have failed on causation even if the failure to carry out a risk assessment in these circumstances had amounted to a detriment or unfavourable treatment.

218. For those reasons all the allegations of pregnancy discrimination contrary to section 18 Equality Act 2010 failed and were dismissed.

Discussion and Conclusions – Unfair Dismissal

219. The legal test for unfair dismissal is different from that which applies under the Equality Act 2010. The pregnancy or a reason connected with it must be the sole or principal reason for the dismissal in order for it to be automatically unfair under section 99 of the Employment Rights Act 1996 and regulation 20 of the MAPLE Regulations. In that sense it is a stricter test that under section 18 of the Equality Act.

220. For the reasons set out in paragraphs 179 – 196 above in relation to allegation 23, however, we were satisfied that the principal reason for dismissal was not the pregnancy or anything connected with it. It was the business case for reorganisation resulting from the underlying move towards digital marketing and the internal case for appointing an Operations Manager so as to free up more of Mrs Bargh's time. The timing of that decision was significantly influenced by the loss of the Empiric contract and the resignation of Suzanne Parker, but the decision to make the claimant's role redundant was not solely or principally because of pregnancy or of anything connected to it.

221. Accordingly we rejected the unfair dismissal complaint, since in the absence of a prohibited reason for dismissal the claimant did not have the right to complain of unfair dismissal. That complaint was dismissed too.

Other Matters

222. It followed that it was not necessary for us to make any determination as to time limits or to deal with any remedy issues.

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Employment Judge Franey

22 August 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
25 August 2017

FOR THE TRIBUNAL OFFICE