Case Number: 3201265/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Da Costa**

Respondent: **Wessex Limited**

Heard at: **East London Hearing Centre**

On: **17-20 July 2018**

Before: **Employment Judge O'Brien**

Members: **Ms Conwell-Tillotson**
Mr M Wood

Representation:

Claimant: In person

Respondent: Ms Beattie, litigation manager

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's claim for unpaid holiday pay succeeds. The respondent shall pay to the claimant the sum of £98.10 gross.**

2. **The claimant's complaint of unlawful discrimination on the grounds of her sex fails and is dismissed.**

3. **The claimant's complaint of unlawful discrimination on the grounds of pregnancy/maternity fails and is dismissed.**

REASONS

1 On 2 October 2017, the claimant presented complaints of sex discrimination, pregnancy/maternity discrimination and a failure to pay holiday pay. The respondent resists the claims.

2 At a preliminary hearing on 11 January 2018, Employment Judge Jones identified the issues of fact and law to be decided at this hearing. The parties confirm today that that

was an agreed list. It is set out in full at paragraph 8 of Judge Jones's note of the preliminary hearing and need not be reproduced here.

EVIDENCE

3 The tribunal heard evidence from the claimant herself and on the respondent's behalf from Robert Keable (100% owner and managing director of the respondent), Ian Rothwell (general manager of the site at which the claimant worked), Tracey Bryenton (production manager at that site) and Melesha Kerr (the claimant's supervisor). The tribunal was provided with a bundle of approximately 130 pages.

FINDINGS OF FACT

4 The respondent is a company involved in the selection, packaging and distribution of health, beauty and fashion products. The respondent employs approximately 240 permanent employees and employs around 30 casual workers at any one time. The respondent is based in the south-east of England at three sites: Bromley-by-Bow, Sevenoaks and Harlow.

5 Around 80% of the employees at the Bromley-by-Bow site are women, with generally one or two on maternity leave or about to go on maternity leave at any one time.

6 The claimant started working for the respondent in October 2016 at the Bromley-by-Bow site as a warehouse operative in production through the First Call employment agency. She was considered a good, reliable worker.

7 In or around February 2017, with the approval of Mr Rothwell, Ms Bryenton offered the claimant a trial for permanent employment as team leader of the Bamford Clothing account to start soon after the claimant's return from planned holiday. The respondent understood from First Call that the claimant's holiday was to last two weeks and covered the post for that period. However, when the claimant did not return on the date expected, the respondent had to fill the post with another full-time member of staff.

8 Nevertheless, the respondent wanted the claimant to join its team and, when she did return, Ms Bryenton offered the claimant casual employment directly with the respondent. The contractual documentation signed on 20 March expressly provides that the respondent had no obligation to offer work and that the claimant had no obligation to accept work. The contract also provides for the entitlement to 20 days' annual leave as well as 8 bank holidays, including Good Friday, Easter Monday and the two May bank holidays.

9 The respondent's employee handbook also details the employees' entitlements to statutory maternity rights, including the right to paid time off for antenatal appointments (which accurately summarises the provisions of ss55 & 56 of the Employment Rights Act 1996).

10 The handbook also details the respondent's "positive work environment policy" which states in particular, "the company is committed to creating a harmonious working environment, which is free from harassment and bullying and in which every employee is treated with respect and dignity." In effect, the respondent operated a "zero tolerance policy" to disrespectful behaviour in the workplace.

11 The needs of the respondent's business and the claimant's competence resulted in her effectively working full-time, Monday to Friday, 40 hours a week.

12 At the time of agreeing this contract, we find that Ms Bryenton was likely to have said to the claimant words to the effect that, if the claimant worked hard and was reliable, then there was a good chance she would be made a permanent full-time employee. This was consistent with the company's practice; the tribunal was told that the respondent typically took on 1 to 3 casual employees every year on to permanent contracts. This was Mr Rothwell's decision to make. Miss Bryenton would be expected to advise him on suitable candidates, but she did not have the authority to offer anyone a permanent contract. In fact, Miss Bryenton had never concluded such a contract even in Mr Rothwell's absence.

13 In the circumstances, we find that Ms Bryenton did not offer or otherwise promise that the claimant's casual position would become permanent after three months. Rather we find that the claimant misunderstood that to be the case.

14 The claimant continued to be a good worker regarding whom the respondent had no problems until the events to which this claim relates.

15 In June 2017, the claimant told Ms Bryenton that she was pregnant. The claimant did not want anyone else to know; however, Ms Bryenton told the claimant that her managers and supervisors needed to know so that appropriate workplace adjustments could be made. Ms Bryenton gave the claimant an opportunity to tell Ms Kerr herself, but went with her and would have told Ms Kerr had the claimant not. Ms Bryenton did, however, tell Mr Rothwell, and the claimant told the other supervisor (Matty).

16 We find that both Ms Bryenton and Ms Kerr congratulated the claimant on hearing the news and we are not persuaded that they took a negative attitude.

17 The claimant initially suggested that little provision was made, that it took a week or more for a chair to be provided at her workstation, and that she continued to undertake normal duties. The respondent's witnesses insisted that a chair was provided immediately and that the claimant was told not to lift heavy boxes.

18 Throughout the hearing, the respondent's witnesses gave evidence which was internally and externally consistent, whereas the claimant's oral evidence was not always consistent in itself or with her written witness statement. Therefore, we prefer the evidence of the respondent over that of the claimant, who appeared to accept in any event that Andy (a warehouseman) often assisted in lifting and was available when needed. We would observe, however, how well the claimant conducted her case and do not suggest she was acting in bad faith.

19 The respondent accepts that no pregnancy risk assessment was, prior to the events in question, ever undertaken in respect of any pregnant employee. It considered that the adjustments it normally undertook, and did undertake for the claimant, would meet any risk assessment anyway. However, since these events, the respondent now has a process where a formal risk assessment is undertaken for newly pregnant workers.

20 We find that the adjustments made by the respondent for the claimant would have made it visibly obvious to her colleagues that she was either injured or pregnant.

Therefore, we find that Jurgita and Diana guessed for themselves that the claimant was pregnant.

21 On 27 June 2017, the claimant returned home to find that an antenatal appointment had been made for her for 9am the following morning. She texted Ms Kerr who replied, "OK Mona no problem". It appears that the claimant did not attend work after the antenatal appointment because she did not feel very well. The claimant was not required to take annual leave for the antenatal appointment and was fully paid for the whole day.

22 On 3 July, the claimant had made a labelling mistake and was asked by Ms Kerr words to the effect of "are you asleep?" This was a gentle admonition by Ms Kerr, which the claimant appears after some reflection to have understood to have been an accusation of laziness. However, the claimant made no reference in her text of 4 July to being called lazy and we find that she never was.

23 We find that, on this and on other occasions, the claimant has misunderstood what has been said by her employers, and occasionally vice versa. Similarly, we do not accept that Ms Bryenton or Ms Kerr ever told claimant to "watch herself".

24 The claimant's next antenatal appointment was on 14 July 2017. On this occasion, the claimant filled out an annual leave form requesting a half day's annual leave. She did not indicate that the leave was required to attend an antenatal appointment. This is regrettable because she was entitled under ss56 & 56 of the Employment Rights Act 1996, and in accordance with the respondent's employee handbook, to have paid time off for this appointment. Had the respondent known of the reason for the absence, we have no doubt that they would have paid her, as they had done previously.

25 On 31 July, the claimant went to speak to Ms Bryenton in her office, in an open plan mezzanine above the warehouse, about a pay issue. She enquired also about maternity pay and whether she would be getting a permanent contract. Ms Bryenton told the claimant that there had never been a promise of a permanent contract but that it remained a possibility, if a post became available.

26 The claimant became upset at this. She claims nevertheless that she did not shout; however, her evidence of what was said has been inconsistent. In her witness statement, the claimant says that Ms Bryenton said "do you think we will give you a permanent contract when you are pregnant" to which she did not reply. Conversely, in oral evidence, the claimant accepted that she had said "I knew you would do this", a phrase that Ms Bryenton has consistently maintained the claimant said. It is agreed that Ms Bryenton took the claimant to a closed room (the tea room) to continue the conversation. In the circumstances, we find that the claimant did become very agitated, angry and started shouting at Ms Bryenton.

27 The claimant continued to shout at Miss Bryenton on the way to and in the tearoom. It was this commotion, we find, that caused Ms Kerr to join them in the tearoom to find out what the problem was.

28 Hitherto, the claimant had been a well-behaved and good worker, and so Ms Bryenton was not expecting such a reaction from her. The claimant appeared to have accepted Ms Bryenton's response to her pay queries without a problem. We accept Ms Bryenton's evidence that therefore she was shocked rather than angry at the

claimant's subsequent reaction to the contract issue and did not shout back. Ms Bryenton did however try to calm the claimant down, which might have been misinterpreted by the claimant as being told to "shut up".

29 Ms Kerr's appearance in the tearoom added fuel to the fire and we accept that some cross words were exchanged between the two. Ms Kerr said that she did not want the claimant on her team any more. Ms Kerr left the tea room, with the claimant and Ms Bryenton leaving immediately or shortly afterwards because other workers began entering the tea room for their break. The claimant shouted to Ms Kerr words to the effect that she could take it easy because the claimant worked so hard.

30 Upon reaching production, Ms Bryenton called Mr Rothwell for help regarding the claimant's maternity pay issue. On his way over, Mr Rothwell heard the claimant's raised voice. Mr Rothwell told the claimant that he wasn't sure of the details of her maternity pay position and said he would contact Carol in accounts at Sevenoaks. Carol was not there, and Mr Rothwell was told that she would call him back when available. When Mr Rothwell conveyed this to the claimant, it provoked a further outburst because she did not see (as she maintained at this hearing) why Mr Rothwell could not answer her query immediately. We accept that Mr Rothwell reasonably needed further information and/or advice and was acting prudently in seeking an accurate reply from accounts.

31 The claimant raised the issue of a permanent contract, saying that Ms Bryenton had promised one. Mr Rothwell told the claimant that Ms Bryenton could not have done so because she did not have the authority and also said that there were no vacancies at the time. Indeed, the tribunal was told that the respondent engaged no permanent staff from 31 July 2017 until at least 1 November 2017, and has no reason to believe to the contrary. Mr Rothwell suggested to the claimant that she return to work, either in production or in the clean room. The claimant refused to do either and said, "I'm leaving". Mr Rothwell replied that that was the claimant's decision.

32 The claimant accepts that, contrary to her witness statement, she did not expressly tell Mr Rothwell that she was leaving because she felt unwell. Instead, she expected him to realise that that was the case from her demeanour. In fact, Mr Rothwell did not understand the claimant to be feeling unwell but instead believed that the claimant had resigned.

33 The claimant did not attend work on 1 August 2017 and has still provided no explanation. Instead, the claimant texted Ms Bryenton at 1222pm on 1 August, saying, "Hello. It's me Mouna I would like to back to the job tomorrow. But to work in production. Let me know something please. Thank you".

34 We find that the claimant was thereby seeking to withdraw her resignation and seeking redeployment from Ms Kerr's team to production.

35 Ms Bryenton did not respond because she wanted to seek advice and direction from Mr Rothwell beforehand. Ms Bryenton was unable to speak immediately to Mr Rothwell, as he was engaged in meetings. They eventually agreed to attend work early on 3 August to discuss the claimant's case.

36 As it happened, as they were meeting, the claimant appeared at the premises. She found Ms Bryenton with Mr Rothwell. Mr Rothwell told the claimant that she was not allowed on the premises because she had resigned. The claimant replied that she had not

signed anything; we find that this was further recognition by the claimant that she had resigned verbally.

37 The claimant became agitated again and refused to leave until Mr Rothwell had written a letter explaining the reasons for terminating her employment. Mr Rothwell left to draft a letter, which he believed the claimant intended to use to claim benefits. He therefore drafted the letter to reflect what had happened. In his eyes, the claimant had not been dismissed but had left voluntarily. He expected, therefore, the claimant to become even more agitated when she read the letter's contents because, we find, it would have effectively disbarred the claimant from immediately claiming benefits.

38 Consequentially, Mr Rothwell asked the claimant to walk with him to the gate, accompanied by a security guard (Arlando). Mr Rothwell then gave the letter to Arlando to give to the claimant and returned to his office.

39 Upon reading the letter, the claimant returned and was told by Arlando to go to reception. Reception refused to let her onto the premises and Mr Rothwell refused to meet or speak with her. The tribunal asked the claimant why she wanted the letter and what she wants the contents to say. The claimant said that she wanted the respondent to say that it had wanted her to leave because she was pregnant. She said that she wanted to use the letter for the purposes of seeking advice on bringing claim. Clearly, the letter fell far short of what she expected.

40 When the claimant went back to her car, she saw Mr Rothwell and, in her own words, "called out to him". We find this to be a tacit acceptance that the claimant was then (as she had on previous occasions) shouting at Mr Rothwell in a loud and aggressive manner, because of her disappointment about the letter.

41 The claimant raised a written grievance addressed to Mr Keable on 7 August 2017. The account set out in the grievance is by and large the same as that in the claimant's statement case to the Employment Tribunal.

42 Mr Keable undertook an investigation which comprised taking written statements from Mr Rothwell and Ms Bryenton with follow-up interviews and oral statements from Ms Kerr and Arlando (for which no separate notes have been provided).

43 Mr Keable met with the claimant on 22 August 2017. He had set aside one hour for the meeting; however, after approximately 30 minutes, the claimant was becoming agitated and so the meeting was wrapped up after approximately 40 minutes. Mr Keable accepted, however, the claimant did not shout at him.

44 The claimant's stance in her grievance was that CCTV footage would have shown that she had not acted as claimed. Mr Keable did not mention the CCTV footage in the grievance outcome. This was, we accept, because he knew that the CCTV cameras in question were dummies, installed to deter pilfering, and he did not want this to become common knowledge. In any event, footage from the live cameras on site were overwritten after seven days and so no CCTV footage of 31 July 2017 would have been available from any of the cameras by the time of the claimant's written grievance.

45 By letter dated 24 August, Mr Keable dismissed the claimant's grievance in its entirety. The claimant underwent early conciliation from 23 August to 23 September.

46 By 31 July 2018, the claimant had worked for the respondent for 4 ½ months and so had accrued 7 ½ days' holiday as well as specified bank holidays. She had taken off and been paid for Good Friday, Easter Monday and the two May bank holidays. She had in addition taken holiday on 9 June (half a day), 16 June and 19 June. The claimant had also been absent for half a day on 14 July to attend an antenatal clinic. The respondents have never asked for proof of that appointment but were shown it at the tribunal hearing.

THE LAW

47 An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment (ss39(2)(c)&(d) of the Equality Act 2010 (EA)).

48 Pursuant to s18(2)(a) EA, a person discriminates against a woman if, in the protected period, he treats her unfavourably because of her pregnancy. The protected period begins with the start of the pregnancy and ends at the end of her additional maternity leave or when she returns to work (if earlier), or at the end of two weeks after the end of the pregnancy (if the woman does not have the right to ordinary and additional maternity leave).

49 A person also discriminates against a woman if he treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave (s18(4) EA).

50 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 EA). Sex and pregnancy/maternity are such protected characteristics. However, s13 does not apply, for the purposes of alleging sex discrimination, to treatment of a woman of the kind prohibited by s18(2) and s18(4) EA (s18(7) EA).

51 Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

52 Section 136 EA provides that, if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person has contravened a provision of the Act, it must hold that the contravention occurred unless that person proves to the contrary.

53 It is insufficient for the claimant to show merely that she was pregnant and that she was treated unfavourably; there must be 'something more' for the burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246**). Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

54 A claim to the employment tribunal in respect of a breach of the Equality Act 2010 must be brought within the 3-month period (extended as appropriate for early conciliation) beginning with the date of the breach in question. The Tribunal may extend time when it considers it to be just and equitable to do so.

55 Pursuant to s33 of the Limitation Act 1980 (power to extend time in personal injury actions), a court is required to consider the prejudice which each party would suffer as a

result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

56 In **British Coal Corpn v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**). The burden lies on C to persuade the Tribunal that it should exercise its discretion.

Leave for Antenatal Care

57 Pursuant to s55 ERA, an employee who is pregnant and who, on the advice of a relevant healthcare professional (such as doctor or midwife), has made an appointment for the purposes of receiving antenatal care is entitled to time off during working hours to attend that appointment, unless it is her second or later appointment, her employer asks for certification of pregnancy and proof of the appointment, and the employee fails to provide the proof. The employee is entitled to be paid for such time off at her normal hourly rate (s56 ERA).

CONCLUSIONS

58 Pursuant to ss55 & 56 ERA, the claimant was entitled to take off 14 July for an antenatal appointment and to be paid. We accept that the respondent did not know at the time that that was the reason for the absence but it has now been made aware and has been provided with documentary proof. Therefore, the tribunal accepts the claimant was entitled to be paid for that period of time off and not to have it deducted from her annual leave allowance.

59 Given our findings of fact above, we conclude that the claimant had accrued an entitlement to 7 ½ days by the date of termination of employment of which she had taken 2 ½ days holiday, leaving an untaken entitlement of five days. It is agreed that the respondent subsequently paid 3 ½ days of this entitlement, leaving a balance unpaid of 1 ½ days (12 hours) at a rate of £7.55 per hour, making a total remaining to be paid of £98.10.

60 In consequence of our findings above, we reached following conclusions in respect of the remaining issues identified in the preliminary hearing Judge Jones in respect of the claimant's complaints of unlawful discrimination. Although we have necessarily had to make findings on each discrete allegation, we have considered the situation holistically in order to avoid taking a fragmented approach, drawing such inferences as was appropriate.

61 Issue 8.6. Although the claimant might have understood that she would get a permanent contract if she worked well, she was never in fact promised that it would

happen after three months or indeed over a given period. It was dependent on there being a vacancy and Mr Rothwell's decision as to her suitability.

62 Issues 8.7 and 8.8. The claimant told Ms Bryenton who then went with her to Ms Kerr. The claimant told Ms Kerr and also Matty. Ms Bryenton told Mr Rothwell; however, she had already told the claimant that Mr Rothwell needed to know. Neither Ms Bryenton nor Ms Kerr displayed any negative reaction to the news.

63 Ms Bryenton did not tell Diana or Jurgita that the claimant was pregnant. For the reasons given above, they guessed for themselves.

64 8.10 to 8.13. Ms Bryenton did not make the comments alleged.

65 8.14. The claimant was paid for her antenatal appointment on 28 June. The claimant was paid annual leave for the morning of 14 July. As found above, the claimant ought to have been paid for that time without loss of annual leave entitlement and we have ordered the necessary compensation. This failure was because the claimant had not made it clear at the time that she requested time off for an antenatal appointment, and not for any unlawful reason. It is correct that the claimant asked Ms Bryenton on 31 July about a permanent contract.

66 8.15 and 8.16. However, Ms Bryenton did not make the comments alleged. Indeed, she explained that it had never been a promise but remained a possibility, as found above.

67 8.17. For the reasons above, we find that it was the claimant in her distressed state who was shouting. Ms Bryenton did not shout back, but did attempt to calm the claimant down. The claimant probably misunderstood her to have been telling the claimant to "shut up".

68 8.18 and 8.19. The claimant was not spoken to disrespectfully or shouted at by Ms Bryenton or Mr Rothwell. The claimant's pregnancy had nothing to do with the way in which they dealt with her. Instead, Mr Rothwell and Ms Bryenton acted as they did in response to, and because of, the claimant's behaviour. They would, we find, have treated any employee acting way in a similar manner.

69 8.22. The claimant was given a chair and instructed not to undertake heavy work. We accept that, if Ms Kerr had seen her undertaking heavy work, she would have reminded the claimant not to.

70 8.23. The claimant was offered the opportunity to work in the cleanroom on 31 July because it would diffuse the situation which had arisen and, usefully, involved lighter work. It was an unlikely to have been a permanent change because the parties agree that the cleanroom was only used on average for three days every week.

71 8.24 and 8.25. It was correct that Ms Bryenton did not respond to the claimant's text of 1 August. It was unrelated to any unlawful reason but for the reason we find above: a reluctance to respond until she had been advised and instructed by Mr Rothwell.

72 8.26. We find that it was the claimant who became agitated again on 3 August. Mr Rothwell and Ms Bryenton reacted in an appropriate manner in the circumstances and did not act unlawfully. Their reaction was a result of the claimant's behaviour, and was unrelated to any protected characteristic.

73 8.27 and 8.28. The claimant' s behaviour on 31 July, the fact that she stated simply that she was "leaving" without qualification and her failure to attend work the following day all entitled the respondent to conclude that she had resigned. Therefore, the respondent's refusal to permit her back to work on 3 August was a refusal to allow the claimant to withdraw her resignation rather than a dismissal.

74 8.29. Even if the respondent had dismissed the claimant, it was because of her conduct and not for an unlawful reason.

75 8.30 and 8.31. Mr Keable did not review the CCTV. However, we accept that this was because there was no CCTV footage of the incidents in question.

76 8.32 and 8.33. Mr Keable did conclude that the claimant had resigned. This was a reasonable conclusion and unrelated to the claimant's pregnancy, maternity or sex. The tribunal is satisfied that respondent undertook a reasonable investigation in all the circumstances.

77 8.34 Mr Keable's confirmation of termination was on the grounds of resignation and/or conduct but not related to pregnancy, maternity or other any other unlawful reason.

78 8.35 The Tribunal's conclusions are set out above and need not be repeated.

79 8.36 For the reasons given above, we find that none of the incidents which we accept happened were related to pregnancy, maternity or sex.

80 Because we found that there had been no unlawful acts, it was not strictly necessary to consider the issue of time. As it is, the claimant commenced early conciliation on 23 August and brought her claim within one month of receiving her certificate on 23 September. All of the acts complained about occurred less than three months before commencement of early conciliation; therefore, the complaints would, if well-founded, have been brought in time.

Employment Judge O'Brien

13 August 2018