EMPLOYMENT TRIBUNALS

Claimant: **Miss L Newton**

Respondent: **Whirlow Hall Farm Trust**

Heard at: **Sheffield 10 and 11 July 2018**
In chambers: 19 July 2018

Before: **Employment Judge Brain**
Members: **Mrs E M Burgess**
Mr L Priestley

Representation

Claimant: In person
Respondent: Mr R Lassey of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claimant has permission to amend her claim to include a contention that she gave to the respondent written notice of her pregnancy by way of text message dated 10 July 2017. The Tribunal finds that the claimant gave written notice to the respondent of the fact of her pregnancy for purposes of Regulation 18(1) of the 1999 Regulations by text message on 10 July 207.
2. The claimant's claim that the respondent failed to carry out a general risk assessment pursuant to Regulation 3 of the Management of Health and Safety at Work Regulations 1999 ('the 1999 Regulations') and thus discriminated against her because of the protected characteristics of sex and pregnancy contrary to the Equality Act 2010 ('the 2010 Act') and was subjected to a detriment by reason of that failure contrary to section 47C of the Employment Rights Act 1996 ('the 1996 Act') is dismissed following withdrawal of those complaints by the claimant.
3. The respondent did not unduly delay the carrying out of an individual risk assessment as required by Regulation 16(2) of the 1999 Regulations following the written communication furnished by the claimant on 10 July 2017. The failure do an individual risk assessment did not result in the claimant suffering any detriment. Accordingly, the complaints of discrimination related to the protected characteristic

of pregnancy brought under 2010 Act and detriment brought under the 1996 Act fail and stand dismissed.

4. The complaint of sex discrimination brought under the 2010 Act is dismissed by reason of the application of section 18(7) thereof.

5. The claimant's claims brought under the 2010 Act were presented to the Tribunal within the time limit provided by section 123 of the 2010 Act. Accordingly, the Tribunal has jurisdiction to consider those complaints. In the alternative, it is just and equitable to extend time in order to vest the Tribunal with jurisdiction to consider them.

6. The complaint brought under the 1996 Act was presented to the Tribunal within the time prescribed by section 48 of that Act.

REASONS

1. The Tribunal heard evidence in this case on 10 and 11 July 2018. After hearing evidence from both parties the Tribunal gave directions that the parties should present to the Tribunal and serve upon one another written submissions. The parties complied with that direction. Accordingly, the Tribunal deliberated in chambers on 19 July 2018. As we reserved Judgment, we now give our reasons for the Judgment that we have reached.

2. This case benefited from a preliminary hearing that came before Employment Judge Little on 3 April 2018. It was recorded in the minute prepared following that hearing that by a claim form presented on 5 February 2018 the claimant brought the following complaints:-

   2.1. Sex discrimination.

   2.2. Pregnancy discrimination.

   2.3. Detriment by an act or omission upon the part of the respondent relating to the claimant's pregnancy.

3. The complaints of sex discrimination and pregnancy discrimination were brought under the 2010 Act. The complaint of detriment related to pregnancy was brought under the 1996 Act.

4. By section 18 of the 2010 Act, a person discriminates against a woman if in the protected period in relation to a pregnancy of hers that person treats the complainant unfavourably because of the pregnancy. The protected period in relation to a woman's pregnancy begins when the pregnancy begins and ends *(inter alia)* at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy. There was no dispute that upon the facts of this case all of the events with which we are concerned occurred during the protected period.

5. By section 13 of the 2010 Act a person discriminates against another if because of a protected characteristic (which in this case is the claimant's sex) the complainant is treated less favourably than others were or would be treated.

6. By section 18(7) of the 2010 Act, section 13 so far as relating to sex discrimination does not apply to treatment of a woman in so far as that treatment occurs in the protected period in relation to her and the complaint is of unfavourable treatment because of pregnancy.

7. As Employment Judge Little mentioned (at paragraph 4.4 of his case management summary) that the claimant's cause of action appears to be one of unfavourable treatment because of pregnancy rather than direct sex discrimination as the impugned conduct occurred in the protected period. By reason of section 18(7) of the 2010 Act it is therefore appropriate to dismiss the claimant's complaint of sex discrimination and proceed to adjudicate upon her complaint of unfavourable treatment because of pregnancy only.

8. Regulation 3(1) of the 1999 Regulations sets out the general duty of employers to safeguard the health and safety of their employees and any other persons who may be affected by the employer's work or business. It states that, amongst other things, an employer must make a suitable and sufficient assessment of the risks to the health and safety of its employees to which they are exposed while they are at work. By virtue of Regulation 16(1) of the 1999 Regulations the employer must include in the assessment under Regulation 3(1) an assessment of particular risks to new or expectant mothers and their babies where the persons working in the undertaking include women of child bearing age and 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.

9. The duty to assess risk under Regulation 3(1) and Regulation 16(1) is properly termed a general type of risk assessment. An obligation arises under Regulation 16(1) upon an employer to carry out a general risk assessment not by reason of any particular pregnancy being notified to the employer but simply because the employer employs one or more women of child bearing age in the undertaking. An employer must therefore not wait until an employee is pregnant before making such an assessment. One rationale for this, of course, is that women will not know that they are pregnant for a period of time.

10. An obligation upon an employer to carry out a risk assessment also arises in the circumstances prescribed by Regulation 18 of the 1999 Regulations. This is properly termed an individual risk assessment. An obligation arises to carry out a risk assessment in relation to a particular individual in the circumstances set out in Regulation 18 of the 1999 Regulations: where the employee gives written notification of the employer of the fact that she is pregnant. Upon receipt by the employer of written notification of pregnancy obligations arise to carry out an individual risk assessment under Regulation 16(2): that is to say, the employer is obliged to consider, in relation to the particular individual who has given the notice, whether, even if the relevant statutory provision were complied with, risks of the kind described in Regulation 16(1)(b) would not be avoided. If such risks cannot be avoided then the employer must then comply with other duties under Regulation 16. This will be to take any reasonable measures to avoid the risk identified and the alteration of the employees' working conditions or hours if reasonable to do so and if such measures would avoid the identified risks. Other measures may also be taken (including suspension on maternity grounds).

11. Undue delay in carrying out an individual risk assessment will mean that an employer is in breach of his obligations under Regulation 3(1)(a) and 16. The question of delay must be assessed by reference to the work involved and the presentation of any inherent risk to the employee and her baby during the relevant period by reason of the requirement for her to undertake such work.

12. An employer's failure to carry out an individual or general risk assessment under the 1999 Regulations can, in the case of a pregnant worker, entitle her to bring a complaint of pregnancy discrimination under section 18 of the 2010 Act. This is upon the basis that such a failure could amount to a detriment. In **Hardman v Mallon trading as Orchard Lodge Nursing Home** [2002] IRLR 516, EAT (which was decided before the commencement into force of the 2010 Act) it was held (upon a complaint brought by the complainant in that case of sex discrimination) that the proper approach was to construe the provisions of the Sex Discrimination Act 1975 (which was then in force) by reference to the Equal Treatment Directive (2000/78) and the EU Pregnant Worker's Directive (No 92/85). Consequently, it was not necessary to compare the employer's treatment of the pregnant employee with that of either a comparable male employee or a non-pregnant employee. Where the basis of an employer's treatment is pregnancy, it is unlawful irrespective of the employer's treatment of comparable men or non-pregnant women. It was held that although an employer is obliged to carry out a risk assessment in respect of all workers, a failure to do so has a disparate impact on pregnant workers and thus the employer's failure to carry out a risk assessment in respect of a pregnant worker constituted sex discrimination.

13. Section 18 of the 2010 Act refers to unfavourable treatment of a woman in the protected period in relation to a pregnancy of hers as opposed to less favourable treatment of her in comparison to a comparator (whether a man or a woman who is not pregnant). Thus, it is now the accepted position that a failure to carry out an individual risk assessment in good time and without delay for a pregnant employee will amount to unfavourable treatment because of pregnancy.

14. Unfavourable treatment because of pregnancy constitutes discrimination for the purposes of the 2010 Act. By section 39(2) of the 2010 Act that kind of prohibited conduct (*viz:* of unfavourable treatment of a woman in the protected period in relation to a pregnancy of hers) is made unlawful in the workplace. That being the case, an employer must not so discriminate against an employee by (amongst other things) subjecting that employee to a detriment. The word 'detriment' as used in section 39(2) of the 2010 Act is not defined in the statute. The *Equality and Human Rights Commission's Employment Code* says that *"Generally, a detriment is anything which the individual concerned might reasonably consider a change to their position for the worse or puts them at a disadvantage".* It appears not to be in dispute that a failure to carry a risk assessment for a pregnant employee may constitute a detriment.

15. By section 136 of the 2010 Act, it is for the claimant to raise an arguable case of discrimination on the facts. If successful in discharging that burden, then it is for the respondent to prove on the balance of probabilities that there was a non-discriminatory reason for her treatment.

16. By section 47C of the 1996 Act, an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for a prescribed reason. One of the prescribed reasons for the purposes of section 47C(2) is one which relates to pregnancy. Again, there is no definition of 'detriment' in the 1996 Act. It is the generally accepted position that the word 'detriment' for the purposes of the 1996 Act is to be construed in the same way as is that term in the 2010 Act.

17. By section 123 of the 2010 Act proceedings before the Employment Tribunal may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of that period. Failure to do something is to be treated as occurring when the person in question decided upon it. A person is to be taken to decide on failure to do something when he or she does an act inconsistent with doing it or if there is no inconsistent act upon the expiry of the period in which he or she might reasonably have been expected to do it.

18. As the issue of time limits goes to the question of the Tribunal's jurisdiction, it is incumbent upon the Tribunal to consider whether any of the Claimant's claims are time barred and if so whether it is just and equitable to extend time to enable the Tribunal to consider them. The Tribunal has a wide discretion in determining whether or not it is just and equitable to extend time to consider the complaints brought under the 2010 Act. It is entitled to consider anything that it considers relevant. However time limits are exercised strictly in employment cases. There is no presumption that time should be extended on just and equitable grounds. It is for the claimant to persuade the Tribunal that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.

19. When considering the exercise of discretion the Tribunal should have regard to all of the circumstances of the case and in particular the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay and the promptness with which the complainant acted once he or she knew of the facts giving rise to the cause of action.

20. Complaints brought under the 1996 Act must be presented before the end of the period of three months beginning with the date of the act or failure to act to which the claim relates or where that act or failure is part of a series of similar acts or failures, the last of them or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Where an act extends over a period, the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided upon. Therefore, should the claimant's claim brought under the 1996 Act be deemed to be out of time the question arises as to whether it was reasonably practicable for the claimant to have presented it in time. This is a stricter test than the just and equitable extension of time provisions in section 123 of the 2010 Act.

21. Pursuant to the Tribunal's case management powers under Rule 29 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 a Tribunal may give permission to a party to amend his or her case. The Tribunal has a broad discretion to allow amendments at any stage of the proceedings. Such discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly (set out in Rule 2 to schedule 1 to the 2013 Regulations). In determining whether to grant an application to amend a case the Tribunal must carry out a careful balancing exercise of all of the relevant factors in particular:-

    21.1. The nature of the amendment.

21.2. The applicability of time limits.

21.3. The timing and manner of the application.

22. Where the proposed amendment introduces a new cause of action the Tribunal must consider whether it is likely to involve substantially different areas of enquiry than arose from the extant claim. The greater the difference between the factual and legal issues raised by the new claim and by the extant claim the less likely it is that it will be permitted.

23. Where the amended claims sought to be introduced would be out of time if presented as a fresh claim, this is a factor to be taken into account by the Tribunal. However, the Tribunal retains discretion to allow an amendment. Essential to that enquiry is the issue of prejudice to the other party and the interests of justice. Again, the greater the difference between the factual and legal issues raised by the amended claim in comparison to the extant claim, the less likely the out of time amendment will be permitted.

24. The next key factor is the timing and manner of the application for amendment. An application to amend should not be refused solely because there has been a delay in making it. The Tribunal has a wide and flexible jurisdiction to do justice in the case. Again, issues of hardship to the other party and balancing the interests of justice are paramount.

25. The Tribunal has already referred to the relevant issues set out in paragraph 4 of Employment Judge Little's case management summary. The first of these was whether the respondent failed to carry out a suitable and sufficient risk assessment as required by Regulation 3(1) of the 1999 Regulations (when read in conjunction with Regulation 16(1) by virtue of the fact that the respondent employed women of child bearing age). Following an adjournment during the first morning of the hearing before us and which was allowed to the claimant to enable her to consider her position, she confirmed that she was not wishing to purse a claim that the respondent failed to comply with those duties. The focus of her complaint therefore is upon the question of an alleged failure upon the part of the respondent to carry out an individual risk assessment following the claimant giving written notification to the respondent of the fact of her pregnancy.

26. We can see from Employment Judge Little's case management summary that the claimant's contention was that she furnished written notification to the respondent (for the purposes of Regulation 18) when completing her time off in lieu ('TOIL') records which made reference to her visiting her GP in respect of her pregnancy and in any event when she provided her employer with the form MAT B1 form on 13 July 2017. We shall of course deal with these issues in the course of our factual findings.

27. During the course of her evidence, the claimant mentioned that she had sent a text message to Lucy Hughes. Mrs Hughes, from whom we heard evidence, worked for the respondent at the material time and was the claimant's line manager. The claimant contended that the text message (which was sent on 10 July 2017) constituted written notification for the purposes of Regulation 18 of the 1999 Regulations.

28. The claimant applied for and was granted permission to amend her claim and to add the text message of 10 July 2017 to the two other instances of written notifications referred to in her claim form (and recorded in Employment Judge

Little's case management summary). It is the Employment Tribunal's judgment that that amendment should be allowed because:-

28.1. The notification to Lucy Hughes by text message occurred just three days before the date upon which the respondent accepts it received written notification of the pregnancy from the claimant on 13 July 2017 by way of the form MAT B1. The factual nexus of the text message is therefore closely tied up with the events that occurred around this time (as we shall see).

28.2. The respondent accepted that the text message had been sent and that Lucy Hughes had replied to it. The respondent did not seek to assert that the introduction of the text message as additional notification would set in train a need for further evidence or disclosure. The respondent was therefore able to deal with the issue at the hearing. There was therefore no significant hardship to the respondent. The balance of prejudice therefore favoured the claimant as to refuse the amendment would result in her being driven from the judgment seat upon this issue.

29. While presentation of a fresh claim upon the basis of the text message notification would undoubtedly now be out of time that is but one factor to be taken into account. Again, the balance of prejudice favours the claimant for the same reasons.

30. In the course of the hearing, an issue arose as to two potential other sources of written notification. The first of these was a contention by the claimant that she made a note of her ante-natal appointments in a central diary accessible to Lucy Hughes and others. The second of these was that maternity appointment letters were handed by the claimant to Lucy Hughes and copied by her. The claimant's case was that each of these constituted a written notification. The Tribunal refused to make an order compelling the respondent to give disclosure of the central diary entries in the absence of an application by the claimant to amend her claim to include reference to the central diary entries as written notification. The claimant declined the opportunity to make an application to amend her complaint accordingly. The claimant also said that she was not pursuing a contention that the provision of the hospital appointment cards or letters to the employer constituted written notification.

31. In summary, therefore, the claimant's case (as amended) was that she furnished written notice to the respondent pursuant to Regulation 18 of the 1999 Regulations by way of:-

31.1. The TOIL form.

31.2. The text message to Lucy Hughes of 10 July 2017.

31.3. The service by her upon the respondent of the form MAT B1 on 13 July 2017.

32. As the latter notification is admitted by the respondent, the Tribunal's factual findings must focus upon whether the claimant gave written notification to the respondent for the purposes of Regulation 18 any sooner. Against this summary of the relevant legal principles and issues in the case we now turn to the findings of fact.

33. The claimant commenced work for the respondent on 1 February 2017. Particulars of employment are in the hearing bundle commencing at page 52.

The claimant was employed upon a fixed term contract which expired on 4 March 2018. She was engaged to provide cover for an employee who was on adoption leave. The claimant was employed as a temporary fundraiser and events organiser.

34. The Tribunal was furnished with a copy of the job description for the claimant's post. The respondent is an educational charity based on a working farm on the south west edge of Sheffield. According to the job description, *"each year over 10,000 children visit the farm to have an experience of country life".* Those visits being heavily subsidised, the respondent needs to raise significant sums to support its work. Amongst other things, these sums are raised through fundraising events and hiring out the venue for weddings and private hire. We get a flavour of the type of events organised by those holding the claimant's post from the list set out page 94 of the bundle (being a passage from an email dated 19 July 2017 sent by the claimant to Ben Davies, who is the respondent's chief executive and from whom we also heard evidence). The events there mentioned include a golf day, a 'beer and bangers comedy night', a ladies day and the Sheff's Kitchen contest (being an event based upon the popular television programme *'Masterchef*').

35. Mr Davies told us that that, "on behalf of the trustees, I have made health and safety the Trust's priority since I joined in 2015". He refers (in paragraph 5 of his witness statement) to the respondent having "14 risk assessments which include a seven page site-wide risk assessment and 13 focused risk assessments covering for example pregnancy (as at pages 58 to 62 of the bundle), educational sessions, mini buses, weddings, vulnerable adults, vocational work and pony riding (as at pages 77 and 170 of the bundle).

36. In evidence given in chief (under supplemental questioning from Mr Lassey), Mr Davies informed us that the respondent employs 33 members of staff, 25 of whom are female. This is the equivalent of 20 full time staff members.

37. The general pregnancy risk assessment identifies a number of hazards and the harm that can be caused by them, those at risk (being the pregnant employee and/or the unborn child), the respondent's control measures and the residual risk following those control measures. As we have said, the claimant did not pursue a contention that the respondent failed to carry out a general risk assessment. Were she to have done so, the Tribunal would have had little hesitation in finding that the respondent's general risk assessment was suitable and sufficient for the purposes of Regulation 3(1) and 16(1) of the 1999 Regulations. We are satisfied that the respondent, being aware of course that it employed women of a child bearing age, devised a risk assessment which on any view was suitable and sufficient for the kinds of risks presented by working in the environment from which the respondent operated and control measures to reduce those risks. The claimant, sensibly in our judgment, did not seek to advance a case as to how she says the risk assessment at pages 58 to 62 could be said not to be suitable and sufficient for the purposes of the respondent and the respondent's employees.

38. It is not in dispute that the claimant informed Lucy Hughes of the fact of her pregnancy and that she did this verbally on 19 May 2017. It is also not in issue that the claimant asked Mrs Hughes to keep this news to herself or failing that to keep it as confined within the respondent's organisation as was possible. In evidence given under cross-examination the claimant said that she had asked

Mrs Hughes "to keep it to the necessary people". It is not in dispute that Mrs Hughes informed Mrs Davies that the claimant was pregnant shortly after finding out about it.

39. Mrs Hughes' evidence is that when the claimant verbally informed her that she was pregnant the claimant told Mrs Hughes that the medical appointment that she had attended two days prior on 17 May 2017 had been in connection with the pregnancy and not for kidney stones (as the claimant had earlier led Mrs Hughes to believe).

40. Page 63 of the bundle is the claimant's TOIL form. This shows that the claimant attended medical appointments on 3 April, 3 May and 17 May 2017. For each entry (all of which had been countersigned by Mrs Hughes) the claimant has simply noted that she was attending the *'doctors'* and would not be returning to work that day.

41. There is then an entry dated 12 June 2017. The reason for the claimant's absence that day is recorded as *"after scan am".* It was suggested to the claimant by Mr Lassey that the respondent could not reasonably have been expected to know from that entry that she was attending for a pregnancy related scan. The claimant maintained that the respondent knew full well the purpose of her attendance for a scan that day.

42. The respondent's case upon the issue of the reason why the claimant ws attending medical appointments after 19 May 2017 was undermined somewhat by Mrs Hughes' evidence. Under questioning from the Employment Judge, she accepted that she was aware that all of the claimant's absences after 19 May 2017 were related to her pregnancy. Mrs Hughes said that she was aware that the claimant had a kidney stone condition (as indeed is the case) but she (Mrs Hughes) believed that the appointments after 19 May were related to the claimant being pregnant (even if they also had some connection with the kidney stone condition).

43. As we can see from the TOIL form, the entries dated 13 April, 3 May and 17 May 2017 have all been struck through. The claimant says that she did this upon finding out from ACAS subsequently that she was entitled to ante-natal leave. This therefore rendered the TOIL form irrelevant. The entry dated 12 June 2017 is also struck through. In contrast to the others, it has not been countersigned by Mrs Hughes. We infer therefore that the claimant made the entry on or around 12 June 2017, found out around that time about her entitlement to time off from work to attend ante-natal appointments and therefore struck the entry through and did not trouble Mrs Hughes with it.

44. We are satisfied, in the circumstances, that the reference to the word *"scan"* in the entry of 12 June 2017 would have been sufficient to constitute written notice for the purposes of Regulation 18 of the 1999 Regulations given the respondent's state of knowledge on and after 19 May 2017 provided that the respondent had seen that entry. This therefore takes us to the key issue around the TOIL form which is the respondent's knowledge of the entry upon the TOIL form.

45. The claimant's evidence was that the TOIL form "lives on my desk" (as she put it). Mrs Hughes said that she only saw the TOIL form containing the entry of 12 June 2017 following her return from holiday. Mrs Hughes was on holiday between 15 July and 1 August 2017. She said that the TOIL form was found

upon the claimant's desk following Mrs Hughes' return from holiday. (The claimant did not, as we shall see, in fact undertake any work for the respondent after 24 July 2018). For his part, Mr Davies said that he had not seen the TOIL form at page 63 of the bundle before the Tribunal proceedings and would have no reason to do so, that being a matter for the claimant's line manager.

46. The claimant gave no evidence that she had given the TOIL form to Mrs Hughes or anybody else within the respondent's management on or around 12 June 2017. We agree with Mr Lassey's submission that the absence of Mrs Hughes' signature from 12 June entry (in contrast to the others around that time) is significant evidence supportive of the respondent's case that no one within the respondent's management had seen the TOIL form on or around that date. There was simply no satisfactory evidence to show that the claimant had shown that form to anybody. At paragraph 5 of her final submissions, the claimant says that the form was "in clear view and holiday taken after this date was signed off on the holiday form which accompanied the TOIL form". It is significant, in our judgment that the claimant does not contend in her written submissions that the TOIL form was seen by any particular person within the respondent or that she drew it to anyone's attention or would have come to any particular person's attention. The suggestion that Mrs Hughes had seen the TOIL form in conjunction with the claimant making holiday requests for June and July 2017 was not a point put to Mrs Hughes in cross-examination. It is not sufficient, in our judgment that the form simply sat on the claimant's desk.

47. In all the circumstances therefore, upon this issue we prefer the respondent's account and find that the respondent did not receive written notification of the claimant's pregnancy by way of the TOIL form at page 63 of the bundle on or around 12 June 2017. We now turn to the events of July 2017.

48. On 10 July 2017 the claimant sent a text message to Mrs Hughes. This was sent at 8.34 in the morning. The claimant said "morning, quick reminder, in later this morning as at hospital this am". Mrs Hughes responded, "OK cool, can you make sure you bring appointments in for last week and this".

49. Mrs Hughes fairly accepted that she had texted a reply to the claimant's message in these terms. That being the case, therefore, the question that arises is whether the text from the claimant at 8.34 am constitutes written notice for the purposes of Regulation 18 of the Regulations. The Tribunal holds that that text did constitute written notice. There is nothing in the Regulations which specifies the form of notice that has to be given. The Tribunal can see no reason why a text message should not constitute written notice. Further, as we have already said, Mrs Hughes accepted in evidence that she was aware that the claimant was pregnant and that all of the post 19 May 2017 appointments were related to the claimant's pregnancy. Looking at the text message in isolation, we agree with Mr Lassey that without more Mrs Hughes could not have known from its terms the purpose of the hospital appointment. However, in the context of the course of dealings between the claimant and Mrs Hughes we find that Mrs Hughes, on balance of probability, knew that the appointment was pregnancy related and therefore this is sufficient in our judgment to constitute written notice from the claimant to the respondent for the purposes of Regulation 18.

50. The respondent was permitted to give late disclosure of a document that was numbered page 190 in the bundle. This is an attendance certificate from the

Jessop Wing of the Royal Hallamshire Hospital. This shows that the claimant attended the renal clinic on 10 July 2017 (being the medical appointment the subject of the text message that day). The Tribunal takes judicial notice of the fact that the Jessop Wing is the maternity department of the Royal Hallamshire Hospital in Sheffield. The terms of attendance certificate (and the reference to the renal clinic) does not detract from our finding that the appointment was pregnancy related. To the contrary, it in fact corroborates that finding as the claimant was seen in the maternity department. In any event, what is decisive is Mrs Hughes' evidence given under questioning from the Employment Judge as to her awareness of the purpose of the claimant's post 19 May 2017 medical consultations.

51. There then followed an incident which took place on 11 July 2017. At paragraph 8 of her witness statement the claimant says this:-

> "Issues started to come to a head from 11 July, when my line manager *[Lucy Hughes]* spoke to me in an aggressive manner and inferred again that she was building a case for my dismissal. I had been asked to sweep a barn which is used for livestock for the winter months (which also has a sign on the door warning of risks to health of pregnant women). I did not decline the task and asked if I could address it in a different way. I raised concerns to my line manager after the incident by email, as she had been defensive and abrupt during verbal discussions previously, and I wanted to address and resolve the situation calmly. (see bundle page 92 to 93)."

52. This is a reference to an email sent on 14 July 2017 from the claimant to Mrs Hughes. She refers to having "slept on" what had occurred on Tuesday 11 July. It appears that the lambing barn had been used for an event. Ahead of a forthcoming children's visit, the barn needed to be cleared of broken glass. The claimant complained that she had been made to sweep up the glass notwithstanding that she was suffering from a sore back due to her pregnancy.

53. Mrs Hughes' account is that she was sweeping the barn when the claimant appeared on the scene. Mrs Hughes said that she did not ask the claimant to clean up the barn. However, the claimant took it upon herself to find a leaf blower to assist with the clean up.

54. The claimant's case is that asking her to work around the lambing barn was contrary to the risk assessment. In particular, we can see from page 59 that the respondent apprehended a risk of infection to a pregnant woman and her unborn child by way of infection to be controlled, amongst other things, by the prohibition of access to the lambing barn during lambing time. The Tribunal takes judicial knowledge of the fact that the lambing season had long ceased by 11 July 2017.

55. As we have said, the form MAT B1 was given to the respondent by the claimant on 13 July 2017. The respondent accepts this to be written notification for the purposes of Regulation 18. The claimant was then absent on holiday between Friday 14 and Monday 17 July 2017 inclusive. Mrs Hughes, as we have said, was on holiday between 15 July and 31 July 2017 inclusive, returning to work on 1 August 2017. The claimant's email of 14 July 2017 complaining about the incident of 11 July 2017 was therefore sent while the claimant was on annual leave and the day before Mrs Hughes' departure upon annual leave.

56. On 13 July 2017 Mrs Hughes acknowledged receipt of the claimant's MAT B1 form. Mrs Hughes said, "I'd like to get together for an informal meeting on my return from annual leave to chat about your plans for maternity leave and also to do a workstation/role assessment to ensure we have everything covered". The claimant replied upon the same day "super thank you" accompanied by an 'emoji' smiley face. The Tribunal accepts Mr Lassey's submission that this was indicative of a portrayal by the claimant of the message that she was content with Mrs Hughes' suggestion as to how to progress the issue of risk assessment.

57. On 19 July 2017 (at 11.55) the claimant emailed Mrs Hughes (pages 79 and 80). She acknowledged that this would not be read until Mrs Hughes' return from annual leave. The claimant's email was in response to notice given to her by Mrs Hughes on 13 July 2017 (at page 80) that the claimant was responsible for organising the Sheff's kitchen event. The claimant's email of 19 July 2017 expressed concerns about this and about her workload between August and 1 November 2017 when she would be entering the latter stages of her pregnancy.

58. On 19 July 2017 Mr Davies emailed the claimant. A copy of the email is at page 78. Mr Davies said:-

> "Attached is the Trust's generic risk assessment for pregnant employees. *[This is the document to which we referred earlier at pages 58 to 62]* Since every individual reacts differently, and every role has different demands, it now needs to be customised for you. Could you look through it, highlight the areas where you need support and propose solutions? If there is an issue missing, then please add it. We can then review the result and decide the way ahead".

The claimant replied the same day. She said, "Thanks Ben, I will take a look at this and come back to you". The email was accompanied by a smiley face 'emoji'.

59. It appears from paragraph 20 of his witness statement that Mr Davies was prompted to send to the claimant the generic risk assessment for her to look at consequent upon the claimant raising concerns the same day with Mrs Hughes about her workload. (The email to which have referred at paragraph 57 (at pages 79 and 80) was copied in to Mr Davies).

60. In her evidence before the Tribunal (both in her printed statement and before the Tribunal at the hearing) the claimant expressed unhappiness about Mr Davies' approach. She says in paragraph 16 of her printed statement that Mr Davies' action on 19 July 2017 was "purely a gesture to pacify me once he had digested our previous conversation". This was a reference to previous discussions between the claimant and Mr Davies and Mrs Hughes about her workload. In her evidence given under cross-examination she said that Mr Davies "didn't seem to care". It was suggested to her that the use of the smiley face 'emoji' in her email of 19 July 2017 portrayed that she was not unhappy with the way in which Mr Davies was handling matters. We find this to be the case for the same reason as in paragraph 56. The claimant complained that the risk assessment form that she had been sent by Mr Davies that day "had not been completed by reference to me".

61. The claimant took a further day's annual leave on 21 July 2017. This was a Friday. On Monday 24 July 2017 the claimant sent to Mr Davies a statement of fitness for work. Her email to Mr Davies of 24 July 2017 is at page 99. The statement of fitness for work is at page 98. We can see that the claimant was assessed by her GP at around 11 o'clock am that day. Her GP advised her that she was not fit for work because of work related stress in pregnancy. The claimant's GP signed her off as unfit for work for a period of four months.

62. The form contains a section about halfway down which reads as follows:-

> *"If available, with your employer's agreement, you:*
>
> - *May benefit from a phased return to work.*
> - *May benefit from altered hours.*
> - *May benefit from amended duties.*
> - *May benefit from workplace adaptations."*

63. Should any of these be applicable then the GP may tick the relevant box. None of these were ticked by the claimant's GP indicative of his or her view that the claimant was simply unfit to undertake any work with the respondent even with adaptations or adjustments.

64. In her email of 24 July 2017 the claimant said that she had been "feeling really tense for a couple of weeks and had not been sleeping well recently". She said that after discussing matters with her GP, "it was clear the long hours, upcoming workload, tasks required of me when pregnant and the situation at work have taken its toll on me". She went on to conclude, "please understand that I am incredibly fond of Whirlow as a charity and have brilliant memories over the years *[the claimant had worked for the respondent prior to 1 February 2017],* I care about may position in the fundraising team and I am disappointed to let down the volunteers concerned and other staff members, however I feel that this situation was only getting worse rather than better. We briefly spoke about the wedding this weekend and I am conscious there are other things on the horizon which need preparation, and fielding general enquiries to the events@ email. I will help remotely to make the handover of the information as easy as possible, however you see fit". We can see from an email of 26 July 2017 (page 100) that the claimant did have a discussion with a fellow member of staff about the forthcoming wedding.

65. On 7 August 2017 the claimant emailed Mr Davies (page 101). She said, "My doctor's note is from 24 July for four months, so I make this Friday 10 November – I would like to start SMP from Monday 13 November. My understanding is that this should last for the full term of SMP which takes us past the end of my contract in March". She then raised issues about monies due to her for overtime and untaken holiday. These have been paid to her.

66. In his printed statement, Mr Davies defends his position about not contacting the claimant after 24 July 2017 to suggest workplace adjustments. He said at paragraph 35 that, "I felt it would have been inappropriate for me to contact the claimant to suggest alternatives to that medical advice *[in the sick note at page 98].* I believed that this would exacerbate the claimant's condition and wanted the claimant to get better (as at pages 102 and 103 of the bundle). I reminded the claimant of the respondent's grievance policy (as at pages 168 and 169 of the bundle) and agreed with the claimant that I wished to move forward from

here. I asked the claimant what outcome she was looking for. I also stated it would be best to discuss the matter, asking if the claimant was well enough to do so (as at page 103 of the bundle). I did not receive a response to this email from the claimant."

67. Mr Davies again defended his position when questioned by the claimant about his actions after 24 July 2017 with regard to the issue of workplace adjustments. Mr Davies said that he had been advised not to approach the claimant about a possible return to work (with adjustments) in light of the GP certifying her as unfit for work and not having ticked any of the boxes in the relevant section of the form. It was suggested to Mr Davies by the claimant that this was inconsistent with Mr Davies having contacted her to ask her to arrange a handover of responsibility for the forthcoming wedding. Mr Davies accepted that he had done so. He said that he felt he had little choice given the need to avoid disappointing the wedding party.

68. The Tribunal can see nothing wrong with Mr Davies having contacted the claimant to arrange a handover of responsibility for the wedding arrangements. Indeed in her email of 24 July 2017 at page 99 the claimant drew the issue of the wedding and other forthcoming events to Mr Davies' attention and volunteered to participate in a smooth handover.

69. In our judgment, both the claimant and Mr Davies acted professionally given the difficult circumstances that presented for each party. Mr Davies, in our view, exercised reasonable judgement in the way in which he approached the question of the claimant's absence after 24 July 2017. We agree with Mr Lassey's submissions that it would have been a foolhardy course for the respondent to disregard the advice given by the claimant's GP. It cannot be said to be anything other than a reasonable course of action for an employer to heed the advice of an employee's medical attendant. Indeed, as Mr Lassey says, an employer choosing to disregard such advice runs the risk of inviting upon themselves a different kind of claim.

70. Further, in our judgment, the claimant appears to have accepted her GP's advice. The tenor of her email of 7 August 2017 (page 101) is very much to the effect that she had resigned herself to undertaking no further work for the respondent albeit that her contract of employment would continue until its expiry date. The remainder of the term would, she acknowledged, be occupied by sickness leave and maternity leave and this in fact turned out to be the case.

71. On 11 August 2017 the claimant emailed Mr Davies with a grievance letter which is at pages 113 to 116. In summary, the claimant raised the following issues in her grievance:-

    71.1. That she was required to take TOIL or holiday for maternity appointments and that, notwithstanding that her maternity appointments were recorded in the shared diary, Mr Davies was informed by Mrs Hughes that the claimant was absent without leave.

    71.2. That the respondent had made no adjustments to her working practices or environment. Here, the claimant refers to no adjustments having been made prior to her sick leave commencing on 24 July 2017.

    71.3. That no alternative duties were offered to the claimant. This is a complaint, in essence, about excessive workload.

71.4. That Mrs Hughes had shouted at the claimant and engaged in threatening and intimidating behaviour towards her.

72. Mr Davies investigated matters. After doing so, he wrote to the claimant on 20 September 2017. He did not uphold her grievance. The claimant was given a right of appeal against Mr Davies' conclusion.

73. The claimant exercised her right of appeal. She did so on 3 October 2017. The grievance appeal meeting was held on 18 October 2017. The grievance appeal hearing was chaired by one of the trustees of the respondent. She wrote to the claimant on 9 November 2017 refusing the claimant's appeal.

74. It is not necessary to descend into the details of the claimant's grievance in these factual findings as they are not relevant to any of the issues before the Tribunal. We shall however comment upon that part of the claimant's grievance about her work prior to 24 July 2017. One of the instances where the claimant says that she felt that her work should have been adjusted was in relation to the tasks undertaken in the lambing barn on 11 July 2017. (We refer to paragraphs 52 to 54 above). The claimant also complained about work that she was asked to undertake for a comedy night held on 24 June 2017. The claimant complained that towards the end of the evening she had been expected to deal with a group of individuals some of whom had consumed excessive amounts of alcohol and were behaving unreasonably. The claimant gave evidence that Mrs Hughes was amongst the group (albeit that the claimant accepted that Mrs Hughes was not drunk or behaving unreasonably). The claimant's complaint was that exposure of her to this situation was one of the identified risks set out in the risk assessment (at page 59) and that as a control measure contact with such members of the public should have been kept to a minimum.

75. Mr Davies said, in evidence before the Tribunal, that he was unaware of the incident. Had he been aware he would have investigated matters and taken steps to prevent a repeat occurrence. He also said that the claimant had not reported the episode as a 'near miss' in the accident report book.

76. In addition to the incidents of 24 June and 11 July, the claimant complained of another event which took place on 9 July 2017 at which alcohol was consumed. The claimant also raised generalised complaints about her workload and an expectation upon her to undertake manual handling tasks involving lifting heavy items. The respondent's position was that the claimant was able to call upon a number of volunteers as well as employees to help her and that she was not expected to undertake manual handling tasks on her own.

77. Having made our findings of fact we now turn to our conclusions where we shall apply the relevant law as set out in the opening passages of these reasons to the facts as found. The first issue to be determined, in light of our finding that the claimant gave written notification for the purposes of Regulation 18 of the 1999 regulations on 10 July 2017, is whether the respondent failed to carry out an individual risk assessment of the claimant. By way of reminder, Regulation 18 requires the employer to consider in relation to the particular individual who has given the written notice whether (even if the obligation to carry out a general risk assessment were complied with) risks of the kind set out in Regulation 16(1)(b) (to the health and safety of an expectant mother or that of her baby) would not be avoided. Undue delay in carrying out a risk assessment will mean that an employer is in breach of its obligations under Regulations 3

and 16 of the 1999 regulations. The question of delay has to be considered in the context of the work upon which the pregnant employee is engaged.

78. It is clear by virtue of the general risk assessment that the respondent recognised that the claimant's work exposed her to some risks. Of particular relevance is work that the claimant was expected to undertake on occasions in the lambing barn (during the lambing season) and when attending events that she had organised at which alcohol was consumed.

79. As we have said, the claimant withdrew her complaint that the general risk assessment was not suitable and sufficient. The ambit of her claim relates to the failure upon the part of the respondent to carry out an individual risk assessment after the respondent had received written notification (on, as we have found, 10 July 2017). The claimant therefore has brought no claim before the Tribunal about the events of 24 June and 9 July 2017. The focus of the claimant's claim is upon the respondent's actions on and after 10 July 2017.

80. The only incident which the claimant says exposed her to a risk on or after that date was the occurrence on 11 July 2017. However, in our judgment, that falls outside the ambit of the general risk assessment as the event occurred outside the lambing season. The claimant working in the lambing barn in July was therefore not contra-indicated by the risk assessment. There was no reason why the claimant could not have been asked to assist with sweeping the barn ahead of the children's visit.

81. The claimant was in work for four working days between the date of notification on 10 July 2017 and the day before she went on holiday on 14 July 2017 inclusive. On the second working day following her return from holiday Mr Davies sent to her the generic maternity risk assessment asking the claimant to complete and return it. In other words, the claimant was in work for five working days (being 10, 11, 12, 13 and 18 July 2017) before Mr Davies took action.

82. We reject the claimant's contention that Mr Davies' actions on 19 July 2017 were inadequate. We can see nothing inherently wrong with an employer sending a suitable and sufficient general risk assessment to a pregnant employee and seeking her input by way of consultation leading to an individual risk assessment. Further, the claimant appeared happy with Mr Davies' proposal when she replied on 19 July 2017.

83. In our judgment, there was no undue delay in the respondent intending to carry out the individual risk assessment after 19 July 2017 and before 24 July. Firstly, the claimant had by her conduct accepted Mr Davies' suggestion that she look at the general risk assessment and give feedback to him. The claimant had not done this prior to 24 July 2017 when she went on sick leave. That is of course no criticism of the claimant. She was very busy and was also (as she was entitled to be) on annual leave on 21 July 2017. The fact of the matter however is that prior to her departure on long term sick leave there were only two working days (19 and 20 July) for the claimant to consider the risk assessment that had been sent to her by Mr Davies. It was reasonable for the respondent to wait for her response and by 24 July there was no reason for the respondent to be concerned about any delay on the claimant's part (as there in fact was none).

84. In our judgment, it cannot be said that there was any undue delay upon the part of the respondent in completing the risk assessment on and after 24 July 2017. The simple fact of the matter is that the claimant had been certified as unfit for work and by virtue of her email of 7 August 2017 was clearly of the view that she would not be returning to the workplace in order to undertake her duties. That being the case, there were no risks against which for the respondent to guard. Furthermore, to trouble the claimant to engage in a consultation process to formulate an individual risk assessment in circumstances where it seems that all parties had accepted that she would not be physically returning to the workplace would have been potentially to open the respondent to other kinds of claims for acting contrary to the claimant's medical advice. Thus there was simply no need for an individual risk assessment after 24 July 2017 and no delay in the respondent undertaking one.

85. The nub of the issue therefore is whether there was any undue delay in the respondent commencing the process between 10 and 19 July 2017. In the context of the claimant not being asked or expected to undertake any work contrary to the general risk assessment over those several working days we hold there to be no undue delay upon the part of the respondent. There was no work that she was undertaking on 10, 11, 12, 13, 18 and 19 July 2017 which involved any inherent risk to the claimant and to her unborn child. As we say, the work in the lambing barn on 11 July 2017 was not contra-indicated by the general risk assessment.

86. There was no evidence that any other kind of work that the claimant was expected to undertake over those several days presented such an inherent risk as to require instantaneous action upon the part of the respondent once written notification had been given. In our judgment, the 1999 Regulations cannot require an individual risk assessment to be carried out instantaneously as soon as a pregnant employee gives written notice to the employer for the purposes of Regulation 18. The respondent's actions must be judged and assessed by what is objectively reasonable in the context of the employment concerned. Taking eight working days between 10 and 19 July 2017 to commence the individual risk assessment process is in our judgment reasonable on the facts of this case. This is all the more so in circumstances where the claimant conveyed to the respondent that she was not unhappy with her line manager's suggestion on 13 July 2017 that the risk assessment would be considered following Mrs Hughes' return to work on 1 August 2017 and the claimant being absent on holiday on Friday 14 and Monday 17 July 2017.

87. In different circumstances, the Tribunal may have held there to have been undue delay. If, for example, the claimant's pregnancy had occurred several months earlier and she had been expected to work in the lambing barn in the period shortly after the giving by her of written notification for the purposes of Regulation 18 then (as recognised by the respondent in the general risk assessment) her work would have presented an inherent risk to her and her unborn child. However, given the context and the timing of these events the Tribunal holds there to be no undue delay upon the part of the respondent.

88. That being the case, we hold there to have been no unfavourable treatment of the claimant by the respondent because of pregnancy. To constitute unlawful discrimination in the workplace an employee must show that she has (amongst other things) been subjected to a detriment. The discriminatory act (in this case unfavourable treatment because of pregnancy) must, in order to constitute

unlawful discrimination in the workplace, *(inter alia)* result in detrimental treatment of the claimant.

89. In this case, there has been no detrimental treatment. By application of the meaning of that term by reference to the EHRC *Employment Code*, it cannot be said that the claimant might reasonably consider the respondent to have put her at a disadvantage by reason of such delay as there was in commissioning an individual risk assessment. By reason of the claimant's position after 24 July 2017 and her resignation to the fact that she would not be returning to the workplace (and to the fact that she did not in fact return) it is difficult to see how the respondent's continued failure to complete the risk assessment could reasonably be said to her disadvantage. In respect of the period between 10 July 2017 and 19 July 2017, in the absence of her undertaking any work contra-indicated by the general risk assessment, then similarly the Tribunal's judgment is that objectively the claimant could not reasonably consider the respondent to be putting her at a disadvantage. The claimant therefore is unable to show on the facts of this case that the respondent treated her unfavourably because of her pregnancy and that unfavourable treatment resulted in any detriment to her. It follows therefore that her complaint of pregnancy discrimination must fail.

90. We have already disposed of the complaint of sex discrimination. That is precluded by the provisions of section 18(7) of the 2010 Act given that all of the material events occurred during the protected period. If the Tribunal was wrong to reach that conclusion, then for the same reasons we find against the claimant upon her complaint of sex discrimination. Again, the claimant has not demonstrated that the respondent subjected her to a detriment by treating her less favourably than the respondent has or would treat a male comparator. There was in any event no evidence that the respondent treated male employees or would have treated male employees more favourably in the same or similar circumstances.

91. As the claimant has not demonstrated a detriment to her by reason of the respondent's conduct under the 2010 Act it follows that her complaint under the 1996 Act to have been subjected to a detriment for a reason which relates to her pregnancy must also fail. In summary, that complaint fails because the claimant was not subjected to any detrimental act or omission against her upon the part of the respondent for the same reasons as at paragraphs 76 to 88.

92. We now turn to the question of jurisdiction. It is the respondent's contention that the claimant's complaints have been presented outside the relevant statutory limitation periods.

93. Mr Lassey contends that the last alleged discriminatory act took place on 24 July 2017. The primary three month time limit therefore expired on 23 October 2017. The claimant ought to have commenced mandatory early conciliation prior to that date and then presented her complaint within three months of 24 July 2017 (but with the addition of further time pursuant to the early conciliation procedures).

94. In the Tribunal's judgment, the claimant is correct to say that time started to run when she received her grievance outcome letter on or around 9 November 2017. It was only upon that date that the claimant was aware that the respondent was refusing to carry out an individual risk assessment for her and had decided not to do so. In our judgment there was a continuing course of conduct that extended over the period between 10 July 2017 and 9 November

2017, that being the failure by the respondent to carry out the risk assessment following written notification. There was evidence that the respondent had determined and decided not to undertake the individual risk assessment when rejecting the claimant's grievance appeal on 9 November 2017. The claimant entered early conciliation on 22 November 2017 and ACAS issued the early conciliation certificate on 22 December 2017. It therefore follows that the claimant's claim was presented in time (for the purposes both of the 1996 Act and the 2010 Act).

95. If the respondent's submissions were to be correct then the Tribunal would have held that time should be extended upon just and equitable grounds to vest the Tribunal with jurisdiction to consider the complaints brought under the 2010 Act. This is because the claimant, in our judgment, acted reasonably in pursuing the internal grievance procedure before commencing Employment Tribunal proceedings and that she was waiting for the grievance and grievance appeal outcomes is a reasonable explanation for the delay in submitting her claim. Further, any delay in the submission of her claim did not affect the cogency of the evidence. The respondent did not contend that there was any prejudice caused to it. The respondent was able to produce all relevant documents and witnesses (and indeed was able to obtain the attendance of Mrs Hughes who no longer works for it). The balance of prejudice therefore clearly favours the claimant as to refuse jurisdiction would result in her being driven from the judgment seat whereas the prejudice to the respondent is to answer the complaints which it was able to do successfully with evidence that was not in any way prejudiced by any delay. Therefore in our judgment, were we to be wrong to conclude that the claimant presented her claim in time, we would have held it to be just and equitable to extend time to enable the Tribunal to deal with the claimant's claim.

96. Were the Tribunal to be wrong to determine that the complaint under the 1996 Act was presented in time then we would have held the claim was presented outside the time limit in circumstances in which it was reasonably practicable for the claimant to have done so. The claimant did not seek to argue that there was any good reason why she could not have presented the claim earlier. It was plainly reasonably practicable (in the sense of being reasonably feasible) for her to have done so. Therefore, were the Tribunal to be wrong to say that the claimant presented her complaint under the 1996 Act in time, the Tribunal would have held that complaint to have been presented out of time in circumstances in which it was practicable to have presented it in time.

97. In conclusion therefore the Tribunal has jurisdiction to consider all of the claimant's complaints but they stand dismissed upon their merits.

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Employment Judge Brain

10/08/2018

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