EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs L Rigney	**v**	Larchmount Limited; t/a Cunningham Estate Agents

Heard at: Cambridge **On:** 4 – 7 February 2019
In Chambers: 8 & 28 February 2019

Before: Employment Judge Tynan

Members: Miss L Feavearyear and Ms S Timoney

Appearances
For the Claimant: Mr N Bidnell-Edwards, Counsel
For the Respondent: Mr Aston, Solicitor

RESERVED JUDGMENT

1. The claimant's complaint that she was unfairly dismissed by the respondent, specifically that she was dismissed for a reason relating to her pregnancy, the birth of her child, and the taking or availing herself of the benefits of, ordinary and additional maternity leave, is well founded.

2. The claimant's various complaints that the respondent discriminated against her contrary to Section 18 of the Equality Act 2010, are not well founded and are dismissed.

3. The claimant's complaints that she was victimised by the respondent:

   (a) by reason of its failure to invite her to a grievance meeting to discuss the merits of her allegations; and

   (b) by reason of its letter to her dated 28 December 2016, informing her that the respondent did not identify any merit in her allegations;

   are well founded.

4. The claimant's remaining complaints that she was victimised by the respondent are not well founded and are dismissed.

RESERVED REASONS

1. The claimant brings claims of unfair dismissal (including automatically unfair dismissal), pregnancy and maternity discrimination (contrary to Section 18 of the Equality Act 2010) and victimisation (contrary to Section 27 of the Equality Act 2010). The claims are denied in their entirety by the respondent.

2. The claimant gave evidence in support of her claims and, on behalf of the respondent, we heard evidence from Samantha Fulton, Team Leader, Maria Farrow, the respondent's Office Manager, and Timothy Cunningham, a director and owner of the respondent. Each of them had made written witness statements. In the case of Mr Cunningham, there was a supplemental witness statement which addressed certain accountancy fees which had been incurred by the respondent and which statement the Tribunal was content to admit into evidence.

3. At the conclusion of the witness evidence, both parties' representatives made closing submissions in each case supported by a written skeleton argument / written submission.

4. There was a single agreed hearing bundle the contents of which are referred to in this Judgment.

Findings

5. The respondent is a small firm of estate agents based in Corby in Northamptonshire. The claimant commenced employment with the respondent on 2 March 2009. She was originally employed as an accountant though in the course of her employment, we were not told when, her job title changed to Accountant / Accounts Team Leader. This reflected that the Accounts function had expanded with the recruitment of two colleagues and the claimant's seniority within the team. We find that the change in job title did not reflect that the claimant had specific managerial responsibilities. We return below to what her job function entailed.

6. The claimant had a young child when she joined the respondent and within a few months of joining the company she was pregnant with her second child who was subsequently born on 19 March 2010. The Tribunal was not told when the claimant went off on maternity leave or the date she returned to work. However, the claimant has not sought to suggest in these proceedings that she experienced any issues with the respondent in relation to this pregnancy and maternity leave or subsequently in 2015 when her third child was born. On the contrary, the undisputed evidence was that the

respondent was supportive of the claimant through what we were told were two difficult pregnancies and also when the claimant had suffered a miscarriage between those two pregnancies. The hearing bundle includes text messages from Mr Cunningham to the claimant which evidence very clearly his concern for the claimant, including concern for herself and her husband when they had received upsetting news. Mr Cunningham's evidence that he had visited the claimant in hospital and also that he had held the claimant's children on his knee was not challenged.

7. It is evident to the Tribunal that for most of the time the claimant was employed by the respondent, she and Mr Cunningham had a close and successful working relationship that extended beyond the workplace. We observed from their evidence at Tribunal that there are significant unresolved emotions on both sides as to how and why their relationship broke down. Regrettably, the length of time it has taken for this case to come before the Tribunal has resulted in both the claimant and Mr Cunningham ruminating on events and become increasingly entrenched in their respective views and recollections.

8. For the reasons set out below, neither the claimant nor Mr Cunningham has put forward an entirely reliable account of the critical events in this case. Each, in their respective way, was dogmatic in their evidence and more concerned to make statements to the Tribunal than to answer the questions they were asked. Each of them has made the task of the Tribunal more difficult by sticking rigidly to their version of the truth even when the available documentation did not at times support what they were saying. Two years on from the claimant's dismissal, both she and Mr Cunningham remain significantly emotionally invested in the matter.

9. It is apparent from text messages in the hearing bundle that the claimant is, or was, in contact with certain unidentified individuals who are not well disposed to the respondent or, at least, who seem to have encouraged the claimant in a negative view of the respondent and in her sense of grievance against the respondent.

10. Until her second period of maternity leave in 2015, the claimant was managed by a lady called Fiona. Fiona left the respondent's employment by agreement with a settlement agreement at some point during the claimant's maternity leave. We believe that the claimant did not welcome Fiona's departure, certainly in so far as it resulted in Mrs Farrow becoming the claimant's line manager on her return from maternity leave in April 2016.

11. The claimant's third child was born on 9 April 2015. Text messages between herself and Mr Cunningham prior to and following the birth continue to evidence a very positive relationship between them and indeed it appears from one text message that the claimant's husband may have helped Mr Cunningham in sourcing vehicles for the business.

6 April 2016

12. On Wednesday 6 April 2016, the claimant returned to work at the end of what was then her second period of maternity leave at the respondent. There was no evidence before the Tribunal of any communications between the parties in the period prior to her return though no suggestion by the claimant that any issues or concerns had then arisen. Mr Cunningham was away from the office on holiday in Ireland. As might be expected, there was some general 'chit chat' when the claimant arrived at the office. Within a short time of arriving at the office the claimant asked to speak with Mrs Farrow. They went to Mr Cunningham's office and the claimant handed Mrs Farrow an envelope. As Mrs Farrow began to open the envelope, the claimant informed her that she was pregnant. Mrs Farrow put the envelope down. By her own admission Mrs Farrow was shocked and initially did not know what to say as she was not expecting this news. The Tribunal considers that she was caught off guard and may have felt slightly out of her depth in dealing with the situation. It was, of course, her first day as the claimant's line manager. We find that the claimant came to the office that morning needing a degree of reassurance that her pregnancy was not an issue for the respondent and we consider that Mrs Farrow's initial reaction would not have provided that reassurance. We do not find that Mrs Farrow reacted negatively to the news of the pregnancy, she simply was not expecting it. However, we think the claimant would have perceived her reaction as negative and that she contrasted this with how she believed Fiona would have responded to her news. It was evident from the claimant's evidence during the hearing that she compared Mrs Farrow with Fiona and viewed Mrs Farrow unfavourably by comparison.

13. The claimant's evidence is that Mrs Farrow responded to the news of her pregnancy by saying, *"Where does this leave the company?"* Mrs Farrow's evidence is that her first words were, *"Oh, ok"*, and that she began to talk about the fact that the company had just let the claimant's maternity leave cover go. Whether or not she had observed, *"Where does this leave the company?"*, Mrs Farrow accepted that in the course of her conversation with the claimant she had said something similar, albeit this was in the context of discussing the arrangements that would fairly soon need to be made to secure replacement cover, something the claimant had previously arranged herself.

14. In her witness statement the claimant states that Mrs Farrow, *"appeared to be disappointed with me straight away".* She did not elaborate as to how that disappointment manifested itself. She goes on to allege in her statement that Mrs Farrow looked put out when the claimant advised her that, due to complications and the fact her pregnancy was high risk, she would be looking to leave within 15 weeks. Again, she did not elaborate as to how that alleged disappointment had manifested itself. We accept the claimant's evidence that she and Mrs Farrow discussed when the claimant might be commencing her maternity leave and whether she intended to work from home during her maternity leave as she had done during her recent

and indeed her previous period of maternity leave. We also accept that they discussed the claimant's likely return to work date. However, we do not accept that the claimant was 'questioned' by Mrs Farrow about these matters, rather we find they were part of a natural and entirely friendly and professional conversation that flowed from the claimant imparting to Mrs Farrow that she was experiencing complications and would be stopping work earlier than she might otherwise have done. The conversation was not unwelcomed at the time. However, we find that the claimant later formed a very different view of this conversation.

15. The claimant alleges that she was instructed by Mrs Farrow in the course of their conversation on 6 April 2016 to keep her pregnancy quiet from the respondent's other staff and claims that this left her feeling upset. She was vocal about this in her evidence at Tribunal, expressing the view that her pregnancy was not, *"a dirty secret"*. We prefer Mrs Farrow's evidence, namely that the claimant told her that she did not want anyone to know about her pregnancy. We do, of course, note that the claimant was by then 16 weeks pregnant and accordingly that her pregnancy would not remain a secret very much longer.

16. Putting aside the claimant's tendency in the course of giving her evidence, to present events and issues in absolute terms, we prefer Mrs Farrow's evidence for a number of reasons. Firstly, we were struck by the measured way in which she gave her evidence at tribunal and, on this particular issue, that she was able to support her account with small points of detail, including that the claimant had initially told her that only her mother and father knew of her pregnancy, only to go on to disclose firstly that an aunt also knew and then that Claire Rush from the accounts team also knew. Mrs Farrow's description of that conversation resonated with the Tribunal, having itself observed the claimant's tendency to express herself in absolute terms only to then contradict herself. Furthermore, the Tribunal notes that the claimant had kept the news of her previous pregnancy from her colleagues; only Mr Cunningham and Fiona had known that she was pregnant with her third child and it had remained this way until after the child had been born. We further note that the claimant's account of her conversation with Mrs Farrow in her witness statement is not consistent with what she claims was a contemporaneous diary note of the conversation, at page 106 of the hearing bundle.

17. We think it inherently unlikely that Mrs Farrow would have instructed the claimant to keep her pregnancy a secret if, as we find, she also asked the claimant whether she could let Ms Fulton know that she was pregnant. Mrs Farrow was not challenged during cross examination on her evidence in this regard. We conclude that she sought the claimant's agreement to disclose the news to Ms Fulton because she understood it was the claimant's preference that the news should not be widely shared, or at least that the claimant wished, as is natural, to decide who should be told her news and when. We find, in particular, that the claimant was not then ready to share her news with a work colleague called Michael, someone with whom she had previously had a disagreement.

18. We find that this particular issue has assumed a significance in the claimant's thinking that it never had in the course of the discussion itself. We conclude that the claimant's preference was to let people know that she was pregnant at a time and in a manner of her choosing and that she and Mrs Farrow agreed that Mr Cunningham should be informed of her pregnancy before there was any announcement to the wider office, albeit the news was to be shared with Ms Fulton.

19. Whilst we have doubts as to whether Ms Fulton would, as she suggests, have recalled over two years after the event, when she made her witness statement in these proceedings, that the claimant and Mrs Farrow emerged from their meeting on 6 April 2016 chatting and laughing, we accept that she does recall being called at home by Mrs Farrow on 6 April 2016 with the news that the claimant was pregnant and that the claimant did not want other staff to know at that stage. We are satisfied that is something she would recall being told.

20. We also accept Mrs Farrow's evidence that during her meeting with the claimant on 6 April 2016, she and the claimant had gone on to talk about what had happened whilst the claimant was away, that they gossiped in a light-hearted manner and that the claimant was laughing so that Mrs Farrow would have had no reason to believe anything was amiss. We also find that towards the end of their meeting, Mrs Farrow had offered words of reassurance. We do find that Mrs Farrow did not offer a spontaneous and unqualified expression of congratulations to the claimant on hearing her news and that her failure to do so served, after the event, to feed the claimant's insecurities and anxieties.

21. In this latter regard we note that the claimant had enclosed with the letter that she had handed to Mrs Farrow on 6 April 2016, a print out of information from the Acas website regarding the rights of women who return to work pregnant following a period of maternity leave. She was evidently anxious and, we find, defensive in advance of her return to work about her situation even though the respondent had not been other than entirely supportive and concerned for her during her previous pregnancies and periods of maternity leave.

22. During their meeting on 6 April 2016, Mrs Farrow had asked the claimant whether she wanted her to inform Mr Cunningham and the claimant had said yes. Accordingly, that same day Mrs Farrow telephoned Mr Cunningham on holiday. In her witness statement she volunteered that her opening words to Mr Cunningham had been along the lines, *"Are you ready for this one?"* and that when she informed him of the claimant's news he was shocked as she had been. Whether, as Mr Cunningham said, it was a pleasant shock, we do not consider that he received the news as unpleasant or unwelcome. At the time Mr Cunningham was loading shopping into his car in a supermarket car park in Ireland. He believes that it may have been raining. It was a brief conversation. Mr Cunningham expressed surprise that the claimant had not called him herself with the news. As he explained

at Tribunal, she had entrusted the news of her previous pregnancy to just himself and Fiona. From his reaction on 6 April 2016, Mrs Farrow understood that Mr Cunningham was hurt. We find that to be the case. It is not clear to us why the claimant did not contact Mr Cunningham given that they had been communicating affectionately by text earlier in her maternity leave. Mr Cunningham agreed that Mrs Farrow should contact the claimant's maternity cover, Kerry, to see if she might be available for the claimant's next maternity leave. Kerry had proved a competent temporary replacement. We think it unexceptional, given that she had just left the respondent a few days earlier, that Mrs Farrow would suggest contacting her to gauge whether she would be interested to return to the role. It was a practical response to the situation. It certainly did not indicate that the claimant's pregnancy was perceived to be a problem.

23. Given that he was in a car park loading his car and was on holiday, Mr Cunningham did not have time to speak with Mrs Farrow. She asked him whether she should report back to the claimant. His response was along the lines, *"Leave it for now"* and that he would speak with the claimant on his return to the office the following week. Mrs Farrow either took it upon herself or interpreted that as an instruction from Mr Cunningham that the claimant was not to be told that they had spoken. It was an error of judgment on her part. The following day, when asked by the claimant what Mr Cunningham's reaction had been, she said she had not told Mr Cunningham because he was on holiday. Mr Bidnell-Edwards made much of this in the course of cross examining Mrs Farrow and relies upon it in his submissions. The statement was plainly not true, but Mrs Farrow did not, as Mr Bidnell-Edwards suggested to her, *"have form"* when it came to lying. We found Mrs Farrow to be a fundamentally honest witness. Unlike the claimant and Mr Cunningham, she did not have an absolute view of events, and in particular, has not sought to put forward an account of events that seeks to cast herself in a purely positive light.

24. As regards Mr Cunningham, we find that he was a put out that the claimant had not told him her news personally. He admitted in evidence that he was, *"disappointed".* But we do not consider that whatever emotional response he then experienced was about the pregnancy itself or the fact that the claimant would be going on maternity leave. Instead it was about their personal relationship.

7 April 2016

25. The claimant was late into work on 7 April 2016 as she had a maternity appointment. She was eager to speak with Mrs Farrow. Her evidence was that Mrs Farrow had made her believe that Mr Cunningham would be upset. In fact, we believe that she came to that conclusion herself as she was stressed and anxious. We find it was already her mindset before she returned to work. The claimant's evidence is that Mrs Farrow told her on 7 April 2016 that she felt that she could not inform Mr Cunningham of her pregnancy for fear of his reaction and that she did not want to upset him

whilst he was on annual leave. However, we note that differs from the notes kept by the claimant around that time, at page 106 of the hearing bundle. We prefer Mrs Farrow's evidence that she simply said she had not told Mr Cunningham because he was on holiday. When the claimant appeared unhappy at this news, Mrs Farrow promised to call him over the weekend when he was back from Ireland and it was agreed that she would contact the claimant to let her know when she had done so. In the circumstances we have particular difficulty with the claimant's evidence when she described this as, *"a big drama"* and that Mrs Farrow had called her on the Sunday, *"much to my annoyance"* and interrupted her weekend. In fact, Mrs Farrow called the claimant because, as the claimant herself says, she was anxious that Mr Cunningham should know her news and because it had been agreed that Mrs Farrow would let her know as soon as the conversation had taken place. The claimant's own notes confirm that she was expecting to hear from Mrs Farrow over the weekend and yet she was vocal at Tribunal that it was an imposition for Mrs Farrow to contact her and that Mrs Farrow was creating a big drama. It is a feature of this case that the claimant's perception of various conversations and events changed after the event.

26. For all the reasons above we do not accept the claimant's evidence that Mrs Farrow advised (or instructed) her to continue to keep her pregnancy secret until Mr Cunningham returned to work the following week. In particular we do not accept that Mrs Farrow asked her to keep her coat on or wear loose clothing, or that she said she should stay behind her desk. The only conversation about her clothing took place the following day as we set out below. The claimant's evidence is that by 7 April 2016 she felt unsupported in regard to her pregnancy and the complications she was experiencing, and that it was clear to her that returning pregnant was a real problem and that she was no longer going to be a valued and cared for employee. We consider that there was no reason for that view to have taken hold, and certainly that Mrs Farrow's interactions with her could not have caused this. If it was the claimant's perception it may well explain her ongoing negative perception of the respondent's actions over the following weeks and months.

8 April 2016

27. The claimant alleges that on Friday 8 April 2016, she was approached by Mrs Farrow and advised to keep her jacket on and stay behind her desk as her *"bump"* looked massive that day. Again, we prefer Mrs Farrow's account. The claimant's pregnancy was being openly discussed as only they and Claire Rush were in the office. The claimant was standing by a filing cabinet and said she did not know how she was going to hide her bump. When she said that the shirt that she was wearing was not helping, Mrs Farrow had replied, *"Stripes always make you look bigger, you should wear black like me, it covers a multitude of sins".* They had both laughed. Mrs Farrow then saw Michael crossing the road back to the office. She was aware that he had not been told of the claimant's pregnancy. Continuing in

a light-hearted way she encouraged the claimant to go into her office and put her jacket on. She said that if the claimant needed anything, *"I will wait on you"*.

28. We find that it was a light-hearted exchange, but that the claimant subsequently changed her view of it and came to regard it negatively. We accept Mrs Farrow's evidence that a short time later, when the claimant left the office for the weekend, she and the claimant gave the thumbs up to one another (Mrs Farrow was on the phone at the time) and that the claimant appeared happy and was smiling. Again, we find Mrs Farrow's account to be a credible one, not just in terms of minor but specific details, but also because she demonstrated an awareness of the claimant's various states of emotion during their various interactions. For example, that there was some need to reassure the claimant towards the end of their first discussion on 6 April 2016, that the claimant was unhappy on 7 April 2016 that Mr Cunningham had apparently not been informed of her pregnancy, and that she was seemingly happy and smiling on 8 April 2016 as she left the office. Mr Farrow was also able to describe where the claimant had been standing on 8 April and her account overall was measured and detailed.

The weekend of 9/10 April and week commencing 11 April 2016

29. Mrs Farrow spoke with Mr Cunningham on 9 or 10 April 2016 and phoned the claimant to let her know that he had been told her news. The claimant's evidence is that Mrs Farrow said the news was *"shock horror"* to him. We prefer Mrs Farrow's evidence that in fact the claimant had asked her whether his reaction was *"shock horror?"* and that Mrs Farrow had laughed in response and said, *"something like that".* The claimant says in her witness statement that she was caused extreme upset and that the comment was *"outrageous"*. The claimant mentions neither the alleged comment nor her feelings of outrage in text messages from this time at pages 117 – 128 of the hearing bundle. We approach the claimant's account of this telephone conversation in the context that she has come to regard the call itself as a big drama and an intrusion into her weekend, when in fact, for the reasons already set out, it was neither. The claimant's evidence on this matter at tribunal was unhelpfully dramatic and lacked credibility.

30. By 12 April 2016 the claimant was of the view that she had a legal case against the respondent. She had been in touch with Acas and began to compile a log. In which case it seems likely that her notes of events on 6 to 8 April 2016 were prepared by her some days after the event and in the context, that by 12 April she had in mind potential litigation. The claimant texted a friend on 12 April to say that she had a case; this was the evening before her first meeting with Mr Cunningham following his return from holiday and her return from maternity leave. It is in that context that we approach the parties' conflicting accounts as to what transpired on 13 April.

31. The tribunal notes that one of the first things that Mr Cunningham did when he came into the office on Wednesday 13 April 2016, was to make time to speak with the claimant. He evidently prioritised this. The claimant refers to being *"called in to see him"* and the meeting being *"unplanned"*. In our judgment it was an unexceptional meeting, indeed it would have been odd had Mr Cunningham not prioritised the matter given the claimant's anxiety that he should be aware of her news. However, the claimant's evidence evidences that she was starting to be critical of the respondent whatever it did. As we say, the context here is that the claimant believed she had a legal case and had begun to compile a log. Mr Cunningham started their meeting on 13 April 2016 by saying that he believed congratulations were in order. The claimant's account of the meeting at paragraph 20 of her witness statement is fairly brief and is limited to the fact she had complained to Mr Cunningham about Mrs Farrow's handling of the situation the previous week. The claimant does state that she advised Mr Cunningham she could not cope with any more stress given she was undergoing immense worry in relation to her pregnancy. In a grievance submitted some months later, she referred to having a high-risk pregnancy. Mr Cunningham's evidence is that the claimant did not acknowledge his congratulations on 13 April 2016 and that there was an awkward pause in their conversation before the claimant had said, *"I am not doing any management accounts and I don't want any contact from the office during this maternity leave."* In the course of giving evidence at tribunal, Mr Cunningham referred to this meeting as a *"Princess Diana moment"* and that it was seared on his memory and on his forehead. He also referenced the assassination of John F Kennedy. His comments were unhelpfully dramatic. As with the claimant, a settled account has taken hold in his recollection of this meeting and other interactions. Throughout his evidence at tribunal he regularly responded to questions with *"absolutely not"* or *"one hundred percent absolutely not"*. As with the claimant, it has made the task of the tribunal more difficult in a case where the parties' accounts in respect of certain matters are diametrically opposed.

32. Mr Cunningham's evidence is that the claimant looked at him directly on 13 April 2016 and said, *"I am having a very dangerous pregnancy"*, placing particular emphasis on the words *"very dangerous"*. He alleges that she went on to say, *"… and by the way I am logging everything…"*. It is very difficult for the tribunal to reach a settled view as to whether the claimant described her pregnancy to Mr Cunningham as very dangerous. She certainly believed it was high risk and we find that she communicated this fact to Mr Cunningham as well as that her pregnancy carried complications. Mr Cunningham was not challenged during cross examination as to the words used, and when the claimant was asked if these were the words used she did not say either way. We are satisfied that whatever words were used, Mr Cunningham came away from the meeting understanding that the pregnancy was potentially dangerous and that he relayed this to Mrs Farrow. We also conclude that the claimant did say to Mr Cunningham that she was, *"logging everything"* but did not elaborate further and that he did not ask her precisely what she was logging. We are in no doubt it was not the conversation that Mr Cunningham was expecting to have with the claimant. In spite of his somewhat dramatic retelling of the conversation at

tribunal, he seems to have handled the conversation appropriately enough at the time and that he took care to reassure the claimant that she would not be subjected to stress. In terms of next steps, his hands were tied in so far as the claimant was saying she did not want her concerns in relation to Mrs Farrow taken further, albeit she was happy for him to speak with Mrs Farrow. That indicates to us that in so far as concerns had by then formed in the claimant's mind, they were not at the level described by the claimant in her witness statement or in her evidence at tribunal, rather that she had become upset but considered the matter could be dealt with by Mr Cunningham speaking informally with Mrs Farrow.

33. Mr Cunningham alleges that during their meeting on 13 April 2016 the claimant said she did not want any contact with the office during her forthcoming maternity leave. We do not accept that she said that. We note that some months later, in his written response to the claimant's grievance, Mr Cunningham wrote, *"…before you began a period of sick leave prior to your maternity leave you made it very clear to me that you did not want to be involved with work during your maternity leave because you wanted to spend more time with your husband Alan."* That is very different from saying she did not want any contact whatever.

34. When the claimant's concerns were relayed to Mrs Farrow she was very upset. She refers in her witness statement to a sense of shock and disbelief. She immediately offered to speak with the claimant. We find that her paramount concern was the claimant and whether she may have inadvertently offended her. She was shocked as she genuinely did not know how offence might have been caused, particularly given the seemingly happy frame of mind in which the claimant had left the office the previous Friday.

April/May 2016

35. It is clear to the tribunal that Mrs Farrow was then wary of the claimant. We calculate they were in the office together on no more than a further 12 working days during the period 13 April to 25 May 2016 when the claimant was signed off work (and after which she never returned to work). We find that the claimant and Mrs Farrow had few, if any, social interactions but continued to conduct themselves entirely professionally and in a civil manner towards one another. We accept that Mrs Farrow continued to include the claimant if she offered to get a drink for staff in the office. We note in particular that after the claimant went sick in May 2016, Mrs Farrow arranged for her to be sent flowers from the office. The two were perhaps more distant with one another but this was a mutual state of affairs rather than Mrs Farrow ostracising or excluding the claimant. We can see from the claimant's text messages at this time that she was expressing a degree of animosity towards Mrs Farrow. In her witness statement Ms Fulton says she detected a slight atmosphere, albeit nothing significant. Mr Cunningham's evidence was that nothing had changed. There are a couple of diary entries by the claimant over this period to the effect that Mr

Cunningham was *"off"* with her, but no further details are given and we cannot conclude, nor do we infer, that this evidences that Mr Cunningham harboured some ongoing resentment or anger towards the claimant either as a result of the fact that she had complained about Mrs Farrow or because she was pregnant again and would be taking a third period of maternity leave. Nor do we consider that whatever hurt or disappointment he may have experienced on 6 April 2016 continued to be a factor in his thinking. On the contrary there is evidence that the pregnancy and impending maternity leave was being dealt with as it had before in so far as the claimant was being tasked with identifying suitable temporary cover. Her diary notes confirm that she had begun to interview potential candidates. This is relevant because it evidences that the respondent expected that the claimant would return in due course from her maternity leave.

36. On 20 May 2016 the claimant had her 20-week scan. Following a meeting with her obstetric consultant the claimant was diagnosed with placenta accrete, a potentially life threatening condition for herself and her unborn child. On the same day as the 20 week scan, the respondent received the claimant's MATB1 certificate with a covering letter from the claimant that she intended to take annual leave from 13 July to 12 August 2016 and commence her maternity leave on 17 August 2016. In the event she was certified unfit by her doctor on or around 26 May 2016 and never returned to work after this date.

The claimant's maternity leave

37. The claimant was subsequently admitted to hospital where she remained for the remainder of her pregnancy. Her son Leo was delivered six weeks prematurely on 12 August 2016. The tribunal was not told when Mr Cunningham first learned of the birth, there are no text messages in the bundle either from the claimant or her husband to Mr Cunningham advising him of the birth (as was the case when her previous child had been born – see page 104 of the hearing bundle) or from Mr Cunningham to the claimant congratulating her on the birth. However, if no such messages were exchanged that would represent a marked change in their friendship/working relationship. Although flowers and a card were sent to the claimant following Leo's birth, it seems that on this occasion there was a sense of hurt or disappointment on the claimant's part. It was the claimant's fortieth birthday on 21 September 2016 and her husband arranged a surprise party for her. Two of the claimant's work colleagues were invited to the party but Mr Cunningham was not. Given that Mr Rigney had had dealings with Mr Cunningham, we do not think that Mr Cunningham's omission from the party was entirely coincidental.

38. We have referred to the sudden circumstances in which the claimant went sick ahead of her planned last day and with the search for her maternity cover outstanding. Mr Cunningham immediately got in touch with the respondent's accountants, Marray and McIntyre as he needed to ensure the payroll and other accountancy tasks requiring immediate attention were

dealt with. This was how he had dealt with the claimant's unexpected early leave during her previous pregnancy (see page 91 of the hearing bundle).

39. However, on this occasion, though it is not entirely clear when, the accountants took the opportunity to pitch for the work so that maternity cover was not required. No doubt this was a convenient immediate solution. We do not consider that it evidences any thinking on Mr Cunningham's part that it was an opportunity to replace the claimant in the longer term. A letter from the accountants at page 240 of the hearing bundle confirms that Marray and McIntyre's records from the time indicate that they were first contacted by Mr Cunningham on 27 May 2016. Their letter also evidences that any additional support to be provided by them was only envisaged to continue during the claimant's period of maternity leave.

The potential redundancy of the claimant's role

40. Mr Cunningham's thinking on the issue then evolved. On 26 October 2016 Mr Cunningham met with the solicitors to discuss the potential redundancy of the claimant's role. We find that it had by then become apparent to Mr Cunningham that if the arrangements with the accountants continued there would be a considerable cost saving to the business. The evidence is that the accountants were charging the respondent approximately £372.75 per month inclusive of VAT for the additional accountancy and payroll work they had taken on in addition to their normal work, with the remainder of the claimant's work either being picked up, essentially at no or limited extra cost, by Ms Rush and Sheli Beri or having simply fallen away. We heard an amount of evidence as to whether the accountants had assumed 20% of the claimant's duties (as she alleges) or 80% of her duties (as the respondent alleges). As with other aspects of the case we think the reality lies somewhere in between and is more nuanced. Had the claimant's role been outsourced to Marray and McIntrye she might have transferred to them under the TUPE regulations. It is equally difficult to see how Ms Rush could have taken on 80% of the claimant's role, i.e. approximately 14 hours of her contracted weekly hours, given Ms Rush already worked full-time and required a part-time assistant. We find that the accountants and Ms Rush each assumed part of the claimant's responsibilities, that certain matters simply fell away altogether and, in the case of ad hoc property viewings, answering the telephone and the like, the claimant's responsibilities were picked up by other staff in the office. In our judgment nothing turns on the precise figures.

41. Although the background to the proposed redundancy of the claimant's role was subsequently stated by Mr Cunningham to include uncertainty over Brexit, the abolition of administration fees for letting agencies and a reduction in the respondent's portfolio of properties to let, we find, and indeed it was accepted by Mr Cunningham during cross-examination, that the redundancy came about solely because of the arrangements in place during the claimant's pregnancy-related absence and subsequent maternity leave were considered by him to offer a significant cost saving, namely in

the region of £10,000 per annum. There was an additional benefit to the respondent in that continuity of service would be maintained regardless of holiday, sickness or family related absence at Marray and McIntyre. We are clear in finding that Mr Cunningham had not been considering the redundancy of the claimant's role prior to her absence from the business, but instead the proposal derived solely from the temporary arrangements that had been put in place as a result of her pregnancy and subsequent maternity leave.

The written contract of employment

42. On 3 December 2016 Mr Cunningham wrote to the claimant with a contract of employment. Until then neither she nor the respondent's other staff had written contracts. Mr Cunningham had been advised by the respondent's solicitors that there was a legal requirement to provide staff with a written statement of particulars of employment. Mr Cunningham did not warn the claimant that the letter and contract were on their way, though nor did he warn the respondent's other staff, who all received identical letters. There was some suggestion by the claimant that the respondent's other staff may have been consulted about the contracts and had individual one to one meetings. However, we find that this was not the case. Mr Cunningham believed that the contracts did not involve any changes to staff terms and conditions of employment and as such he approached the matter on the basis it was a formality, albeit he did ask staff in his covering letter to them that they let him know if their contract did not accurately reflect their existing arrangements. We do not accept Mr Bidnell-Edwards suggestion that this exercise was designed and undertaken with a view to making the claimant redundant. However, consistent with her ongoing anxiety and gradual loss of trust in the organisation the claimant was suspicious of Mr Cunningham's motives. The contract recorded the claimant's job title as accountant and reduced the minimum notice she (and other employees) were required to give to the respondent to one week. In a grievance lodged two weeks later the claimant complained that the contract was *"littered"* with negative provisions, but in the tribunal's judgment, it was a standard form contract of employment with no unusual features. The claimant was seeing issues where there were none. The job title was corrected immediately that the claimant brought this to Mr Cunningham's attention. In the same way this misunderstanding might have been avoided if Mr Cunningham had telephoned the claimant to let her know the contract was on its way, she also communicated her issues by text. It adds further to the overall picture of two previously close friends and work colleagues who seemed to be retreating into communicating by text or in writing. Inevitably, it seems to us, the potential for misunderstanding increased. Pressed by Mr Aston, the claimant ultimately conceded, as we think she was bound to, that the job title was a genuine mistake on Mr Cunningham's part and that he was not, as she had previously alleged, been acting in a hostile or vindictive way towards her.

The Christmas Bonus

43. On 16 December 2016 the claimant received her wages. The amount was lower than she was expecting and she concluded from this that, unlike the respondent's other staff, she had not been paid a Christmas bonus. In fact, as was conceded by Mr Bidnell-Edwards in his closing submissions, the accountants had made an error in the claimant's maternity pay; a bonus had been paid to her as instructed by Mr Cunningham. Three days later on 19 December 2016 the claimant filed a written grievance in which, amongst other things, she complained that she had been discriminated against by not being paid a bonus. She filed a grievance without first querying her pay with Mr Cunningham or with the accountants. It further evidences that the claimant assumed the worst in relation to the respondent. Notwithstanding that the accountant's error was clearly evidenced in the respondent's disclosure, the matter was only finally conceded towards the conclusion of the hearing in the course of Mr Bidnell-Edwards' closing submissions.

The grievance

44. The claimant's grievance is at pages 147 – 149 of the hearing bundle. In summary she reiterated her concerns in relation to Mrs Farrow and complained that Mrs Farrow had not spoken to her again after she had raised concerns in April 2016. She also complained about the lack of a pregnancy risk assessment, though this does not form part of her Claim to the tribunal. She further complained about a lack of care and support during her pregnancy and a lack of any contact from the respondent following the birth of her son. She raised the issue of her contract of employment, a general lack of being kept up to date on work related issues during her maternity leave and the respondent's alleged failure to pay her a Christmas bonus. The contract and bonus issues are specifically labelled as acts of discrimination. Her letter concludes,

"I feel completely ostracised from the team and feel like you have penalised and punished me for having my son".

45. Mr Cunningham wrote to the claimant on 28 December 2016 with his response to her grievance. It is a detailed letter which addresses each of her concerns. However, he did not meet the claimant before arriving at his conclusions, nor did he offer to do so. There are no documents in the hearing bundle to evidence how he investigated the issues raised by her. In so far as he did not meet with the claimant that was in contravention of paragraphs 33 and 34 of the Acas Code of Practice on Disciplinary and Grievance Procedures. The letter itself is emotive in places, albeit this is not a matter in respect of which the claimant makes a formal complaint in her Claim. We find that Mr Cunningham was personally affronted by the claimant's grievance. His letter to the claimant concluded that she could appeal against the decision if she was dissatisfied with it.

The redundancy consultation

46. The following day, 29 December 2016, Mr Cunningham wrote to the claimant to inform her that she was at risk of redundancy. The tribunal was entirely unpersuaded by Mr Cunningham's evidence as to the timing of this letter. In the course of the hearing the tribunal reminded Mr Cunningham a number of times that he was not obliged to disclose what advice he had been given by his solicitors and warned him as to the potential consequences if he waived legal privilege. Notwithstanding his witness statement went perhaps further than may have been advisable, Mr Bidnell-Edwards did not seek to argue that privilege had been waived. In the absence of further information, we do not speculate what was discussed between Mr Cunningham and his solicitors. However, we reject Mr Cunningham's evidence that he delayed putting the claimant at risk until after Christmas and that 29 December 2016 was *"back to work"*. His evidence in this regard was simply not credible. In the tribunal's experience, the week between Christmas and the New Year is widely recognised as a holiday period, even if some business open during that period. Either Mr Cunningham intended to put the claimant at risk earlier in December but felt obliged to delay the matter in light of her grievance or he intended to put her at risk in the New Year but brought this forward. Doing the best we can on the very limited information available to us in circumstances where we reject Mr Cunningham's evidence and account, we find on the balance of probabilities that he intended to put the claimant at risk in the New Year but was sufficiently piqued by her grievance that he brought the redundancy forward.

47. The claimant was invited to a consultation meeting on 6 January 2017. In his letter to the claimant dated 29 December 2016, Mr Cunningham said that the purpose of the meeting was,

"…to allow you to comment on the proposal and to put forward any proposal that you may have which can result in you continuing in our employment in the event that we were to abolish your current role".

48. On 3 January 2016, Mr Cunningham informed the claimant that Mrs Farrow would attend the meeting. The claimant raised no objection to this notwithstanding her December grievance had reiterated and expanded upon her concerns in relation to Mrs Farrow. Nevertheless, whilst the claimant did not actively object to Mrs Farrow's attendance at the consultation meeting on 6 January, we think Mr Cunningham showed poor judgment in arranging for Mrs Farrow to attend to take notes at that meeting.

49. The claimant prepared a list of questions for the meeting on 6 January 2017. These are at pages 187 – 189 of the hearing bundle. The tribunal finds that the claimant engaged with the process on the basis that there was a potentially genuine redundancy situation, albeit she raised entirely legitimate questions as to why her role was being put at risk and pursued a range of enquiries as to how this might be avoided. We agree with the claimant's criticisms of the meeting of 6 January in so far as Mr Cunningham

failed to engage with her. We conclude that by then Mr Cunningham was so wary of any criticism that he concluded the safest course was to say nothing and not to commit to any position but instead to entrust any response to his solicitors. The tribunals allow a degree of latitude in such matters to smaller organisations, particularly those without a Human Resources function. On the other hand, Mr Cunningham has sought in his witness statement to highlight his trade union background and that he went into business believing that he could do things differently. He placed particular emphasis upon his conflict resolution skills more than once. Yet the reality is that he failed to engage with the claimant in any meaningful way during the meeting on 6 January 2016. The tribunal is not surprised that the claimant came away from the meeting confused and believing that Mr Cunningham was not interested in what she had to say. He was fearful as to what to say so he said nothing meaningful at all and relied upon his solicitors to script his response for him. We find that that the claimant would have felt deeply frustrated following the meeting on 6 January and that she was not being listened to. We note that the meeting itself only lasted approximately five minutes.

50. Following the meeting, and as requested by Mr Cunningham, the claimant confirmed four key issues she had raised during their meeting. She emailed these to Mr Cunningham on 8 January 2017. The claimant was highly critical of the respondent at tribunal for asking her to confirm these matters in writing, but in reality, it would have taken her only a few moments to email her points to Mr Cunningham. Nothing turns on this. Of greater relevance is Mr Cunningham's response on 10 January 2017 in which he addressed the first of the claimant's four points, but not the remaining three. He did say that he was considering one of her points, namely the potential for a job-sharing arrangement. The claimant responded by email the same day to Mr Cunningham expressing her concern as to the process albeit addressing further specific questions raised by him. Specifically, she confirmed that she would be willing to accept a reduction in her rate of pay and to rearrange her existing contractual hours if that would assist.

51. On 19 January 2017 when she had still not heard from Mr Cunningham the claimant sent him a further email chasing him for a response and reminding him that it was a very upsetting and difficult time for her. She also wrote,

"I would be most grateful if you could please advise me as to the latest status of the redundancy and the date that this will take effect?"

52. It should not have been necessary for the claimant to chase Mr Cunningham on 19 January for a response. At the very least he could have acknowledged her email of 10 January, even if he was not then immediately in a position to respond to it. In the event he wrote at some length to the claimant on 20 January 2017. His letter is at pages 197 – 199 of the hearing bundle. He could, and in the judgment of the tribunal, should have offered to meet with the claimant. The respondent had obligations to the claimant as her employer. Consultation is a two-way process, but it is incumbent upon an employer to facilitate that consultation and to proactively engage

with its employee. Read in its entirety and in the context of their unsatisfactory meeting, Mr Cunningham's letter of 20 January does not do that. Particularly in the context of the 6 January 2017 meeting we consider that the letter would have been perceived by the claimant as hostile in so far as it raised as many questions as it answered, was legalistic in its tone, and reinforced that the respondent was unwilling to engage meaningfully with the claimant or to meet with her to discuss the matter face to face. The letter concluded,

"If as part of that process I decide that a further consultation is necessary I will contact you to arrange a suitable time and venue".

53. We make two observations. The first meeting was not a consultation meeting in any meaningful sense and secondly, this was precisely the time for a meeting.

54. At this point the claimant engaged solicitors who wrote to the respondent on 3 February 2017. When they did not receive any response to their letter they sent a follow up letter on 16 February 2017. We note that in that letter they sought confirmation as to when the claimant would be in receipt of her final salary including her redundancy payment. The respondent entrusted its response to its solicitors who wrote to the claimant's solicitors on 16 February 2017 (pages 2015 – 208 of the hearing bundle). In their letter, the respondent's solicitors stated that the consultation period would finish on 28 February 2017. However, there was no suggestion that the parties might meet again or what form any further consultation would take. The tribunal concludes that by this date the claimant would, reasonably, have had very little confidence in the consultation process. However, her solicitors did not specifically respond to the letter of 16 February 2017. Instead, on 7 March 2017, they emailed the respondent's solicitors seeking confirmation that the redundancy process had concluded and stating that they assumed the claimant remained employed. In a further email dated 8 March 2017, the respondent's solicitors stated that as neither the claimant nor her solicitors had provided the information requested in Mr Cunningham's email of 10 January 2017, the respondent would make a final decision without the benefit of that information. We find that the claimant had in fact, as best she could, provided the information that had been sought in Mr Cunningham's email of 10 January 2017. It seems therefore that the respondent proceeded to make a decision on the claimant's continued employment without having regard to the fact she had indicated a willingness to accept a pay cut and to rearrange her contractual hours.

55. By a letter dated 10 March 2017, the respondent wrote to the claimant to confirm she was redundant and that she would be paid in lieu of notice. She was reminded of her right of appeal, a right which she did not exercise.

Law and Conclusions

Unfair Dismissal/Automatically Unfair Dismissal

56. Subject to any qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer (section 94(1) of the Employment Rights Act 1996). The fairness of any dismissal is ordinarily determined in accordance with section 98 of the 1996 Act. The onus is upon an employer to show a potentially fair reason for dismissal and if, but only if, the employer discharges this burden of proof the tribunal will go on to determine whether the dismissal was fair or unfair in the particular circumstances. Questions of fairness are determined in accordance with section 98(4) of the 1996 Act; it is often said that this involves a neutral burden of proof.

57. In certain circumstances an employee's dismissal is automatically unfair. Section 99 of the 1996 Act provides that a dismissal is automatically unfair if the reason or principal reason for the dismissal is of a prescribed kind and relates, amongst other things, to pregnancy, childbirth or maternity leave. Section 99 must be read in conjunction with regulation 20 of the Maternity and Parental Leave etc. Regulations 1999. Regulation 20(1) of the 1999 Regulations provides that an employee is to be regarded as unfairly dismissed if, inter alia, the reason or principal reason for the dismissal is of a kind specified at paragraph (3). The kinds of reasons specified in paragraph (3) include reasons connected with the pregnancy of the employee (regulation 20(3)(a)), the fact the employee has given birth to a child (regulation 20(3)(b)), and the fact an employee has taken, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave (regulation 20(3)(d)).

58. In terms of the burden of proof under section 99 and regulation 20 above, it is not for the claimant to prove her case, she only needs to produce some evidence to the tribunal to create a presumption in law that the dismissal was for an inadmissible reason under section 99 of the 1996 Act. It remains the respondent's burden to establish, on the balance of probabilities, the reason for the dismissal.

59. There is seemingly no appellant case law that directly considers the test for causation under section 99 of the 1996 Act. Mr Bidnell-Edwards relies upon the Employment Appeal Tribunal's judgment in Rees v Apollo Watch Repairs Plc [1996]. The background to the claimant's dismissal in that case was her unavailability for work through pregnancy, which led to the appointment of a replacement who the employer found to be more efficient and acceptable to it than the claimant. The employment tribunal fell into error in Rees because it considered how the respondent would have treated a man in a comparable position to the claimant. However, the House of Lords in Webb v EMO Air Cargo (UK) Ltd (No.2) [1995] ICR 1021, had ruled that no such comparison may be made. In Rees the Employment Appeal

Tribunal concluded that the effective cause of the claimant's dismissal was her absence on maternity leave and that this was discrimination on the grounds of her sex. The Employment Appeal Tribunal said,

"In reaching that conclusion we reject the submission of Mr Griffin that there has been a break in the chain of causation. The immediate cause of her dismissal, as the tribunal found, was that Mr Pollock found Mrs Turner more efficient and acceptable than the applicant.

That is a gender neutral reason in much the same way as the need to find a replacement for an employee herself absent on maternity leave as in Webb v EMO Air Cargo (UK) Ltd. However, the underlying reason is the application's absence on maternity leave."

60. Rees was an appeal against the dismissal of the claimant's complaint of direct discrimination. It had not come before the employment tribunal as an automatic unfair dismissal claim. On appeal leave had been given for the grounds of appeal to be amended to invite the Employment Appeal Tribunal to rule that the reason or principal reason for dismissal was that contained in section 60(1) of the Employment Relations (Consolidation) Act 1978 (the precursor to section 99 of the Employment Rights Act 1996). However, in the event, the point was said by the Employment Appeal Tribunal to be academic as the dismissal had been found to be unfair under general principles. The Employment Appeal Tribunal observed,

"We do not consider it helpful to investigate the relationship between sections 60(1) of the Employment Protection (Consolidation) Act 1978 and section 1(1)(a) of the Sex Discrimination Act 1975."

61. Such an investigation would undoubtedly have been helpful to this tribunal. Nevertheless, it is clear that Rees does not directly assist us in considering section 99 of the 1996 Act and regulation 20 of the 1999 Regulations. However, we do have regard to another decision of the Employment Appeal Tribunal that was not referred to us by either party in the course of the proceedings, namely Intelligent Applications Ltd. v Wilson EAT 412/92. In that case Ms Wilson was made redundant following the reallocation of her duties during her absence on maternity leave. The Employment Tribunal found that there had been a potential redundancy situation in her department for some time. However, the reallocation of duties had taken place because she had gone on maternity leave. There had been no suggestion that the reorganisation would have taken place at that time for any other reason. The reason for Ms Wilson's dismissal, which was redundancy, had its origins in and was therefore connected with her pregnancy and accordingly was automatically unfair. This decision was upheld by the Employment Appeal Tribunal.

62. We refer to our finding above that although Brexit and certain other matters provide a backdrop to the claimant's redundancy, as Mr Cunningham himself acknowledged in the course of his evidence, the claimant's redundancy had its origins solely in and was therefore connected with her

pregnancy. Her duties were reassigned as between the respondent's accountants and Ms Rush and her other colleagues because she went on maternity leave, and it was as a result of her ongoing absence on maternity leave that it was identified that these arrangements might become permanent. In the circumstances, and following Intelligent Applications Ltd, in our judgment the claimant was automatically unfairly dismissed.

63. We add for completeness that even had the claimant's redundancy come about as a result of factors unconnected to her maternity leave, we would still find the dismissal to be unfair applying section 98(4) of the Employment Rights Act 1996. In short, the respondent failed to engage in meaningful consultation with the claimant as to the reasons why she was at risk of redundancy or how the redundancy of her role might be avoided, whether by looking for cost efficiencies elsewhere, by putting Ms Rush at risk of redundancy or by considering a job share arrangement between the claimant and Ms Rush.

Section 18 of the Equality Act 2010

64. Section 18(2) of the Equality Act 2010 provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, they treat her unfavourably because of the pregnancy, or because of illness suffered by her as a result of it. It is also unlawful discrimination to treat a woman unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or addition maternity leave (section 18(4) of the Equality Act 2010). The operative causal test in each case is *"because"*. Section 99 of the Employment Rights Act 1996 and its predecessor, section 60 of the Employment Protection (Consolidation) Act 1978, have together been in force over 40 years yet Parliament adopted different statutory language when enacting section 18 of the Equality Act 2010. The question we have grappled with is whether the expression *"because"* has the same meaning and effect as *"for a reason connected with"*. In our judgment it does not.

65. Mr Bidnell-Edwards referred us to the judgment of the Supreme Court in R(E) v Governing Body of JFS (SC(E) [2010]. In the course of its judgment the Supreme Court referred to the judgment of the House of Lords in Nagarajan v London Regional Transport [2000] 1AC501. Mr Aston also relied upon Nagarajan in his closing submissions. We were referred to two passages from Lord Nicholls' judgment in Nagarajan,

"Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the claimant's job application is racial, it matters not that his intention may have been benign."

"In every case it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of

race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator." (our emphasis)

66. Baroness Hale in R(E) went on to observe,

"The distinction between the two types of 'why' question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not."

67. It is in the context of these observations (albeit made after Rees had been decided and seemingly without explicit reference to the Employment Appeal Tribunal's decision) that the decision in Rees is perhaps more clearly understood, namely that the reason why Ms Rees was dismissed was because she was pregnant and then absent on maternity leave. Unlike the Employment Appeal Tribunal in Rees, we are required to consider the relationship between section 99 of the 1996 Act and section 18 of the 2010 Act. Having regard to the passages above in Lord Nicholls' judgment in Nagarajan we conclude that whilst the claimant's redundancy was connected with her pregnancy and resulting maternity leave, in the sense that the two events were associated, the pregnancy and resulting maternity leave were not the operative cause of the treatment in question. They were not the reason why she was dismissed, rather Mr Cunningham identified that her duties could be redistributed and outsourced at a significant cost saving to the business.

68. We are further supported in our conclusion by a decision of the Employment Appeal Tribunal that has been reported since we retired to consider our judgment. In South West Yorkshire Partnership NHS Foundation Trust v Jackson UKEAT/0090/18/BA the claimant was one of several staff put at risk of redundancy; she was on maternity leave. The respondent's HR department sent to her (inaccessible) work email details of redeployment opportunities, with the result that she did not find out about them for several days. Her claim of unfavourable treatment under s18(4) of the Equality Act 2010 succeeded. The tribunal upheld the claim as the Claimant did not get the email 'because' she was on maternity leave. However, the Trust's appeal succeeded as the Employment Appeal Tribunal considered that the tribunal had erred in applying the test for causation. Whilst the unfavourable treatment would not have happened 'but for' taking maternity leave, the tribunal failed to consider 'the reason why' the email was sent to the claimant's work email. It was said by the Employment Appeal Tribunal that the 'reason why' test could be satisfied where a rule is applied which is inherently discriminatory, or where the protected characteristic has actually operated on the discriminator's mind, namely the point made by Lord Nicholls in Nagarajan.

69. In our judgment the fact that the respondent's requirement for the work that the claimant was doing had diminished was the reason why she was dismissed. There was nothing inherently discriminatory about this,

notwithstanding it came into focus whilst the claimant was on maternity leave. In our judgment, the claimant's pregnancy, pregnancy-related absence and subsequent maternity leave did not operate on Mr Cunningham's mind in his decision to terminate her employment.

70. As to the acts short of dismissal complained of, we deal with these in the order in which they are identified in Mr Bidnell-Edwards' List of Issues. In order for the claimant to succeed there must have been unfavourable treatment (during the protected period or any period of compulsory maternity leave), and that treatment must be because of the pregnancy etc:

Act E

Given our findings above, we do not consider that Mrs Farrow treated the claimant unfavourably during their meeting on 6 April 2016 or at any time on 7 or 8 April 2016, or indeed that any of her comments to the claimant were because she was pregnant or seeking to exercise her right to maternity leave.

Act F

Given our findings above, we do not consider that Mr Cunningham treated the claimant unfavourably in sending her a contract of employment to sign on or around 3 December 2016 or indeed that he did so because she had been pregnant, given birth or had exercised or sought to exercise her right to maternity leave.

Act G

The claimant no longer pursues her complaint that she was treated unfavourably in the matter of her Christmas bonus.

Act A

In the list of issues, the unfavourable treatment complained of is the claimant being informed that she had been selected for redundancy. Further detail is provided at paragraph 41 of Form ET1, namely that the complaint concerns the identification of the claimant's role as being at risk of redundancy. In our judgment the claimant was genuinely identified as being at risk of redundancy. That may have been unfavourable treatment, but in our judgment, it was not unfavourable treatment because she was on maternity leave, had been pregnant or had given birth. As regards the mental processes of Mr Cunningham, the alleged discriminator, for all the reasons set out above we conclude that the claimant's pregnancy, the birth of her child and subsequent period of maternity leave were not a consideration in his thinking and the decisions he took. As to the timing of the communication, we return to this below.

Act B

The claimant's complaints relate to Mr Cunningham's letters of 10 and 20 January 2017. Mr Cunningham's letter of 10 January 2017 failed to address the points raised by the claimant. In our judgment his letter was, and was reasonably perceived by the claimant to be, hostile, the inference being that the claimant was behaving unreasonably and was personally responsible for the success or failure of the consultation process. As such, she was treated unfavourably in being written to in the terms she was. However, we conclude that the claimant's pregnancy, childbirth and maternity leave were not the reason why Mr Cunningham wrote to the claimant in the terms he did. As we set out below, we consider his letter was instead a reaction to her grievance of 19 December 2016. As regards his letter of 20 January 2017, this letter was drafted by Astons solicitors; although it was approved and in that sense adopted by Mr Cunningham, it provides only limited evidence of Mr Cunningham's state of mind. Again, in our judgment, the claimant's pregnancy, childbirth and maternity leave were not the reason why Mr Cunningham wrote to the claimant in the terms he did.

71. Accordingly, the claimant's various complaints under section 18 of the Equality Act 2010 do not succeed.

72. There is reference at paragraph 10 of Mr Bidnell-Edwards' List of Issues to section 47C of the Employment Rights Act 1996. However, Form ET1 did not include any claim under section 47C and no such claim was identified at the case management hearing. There was no application during the hearing before us to amend the Claim Form to include a claim under section 47C.

Victimisation

73. Section 27 of the Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act; or
(b) A believes that B has done, or may do, a protected act.

Protected acts are defined in section 27(2) and includes "making an allegation (whether or not express) that A or another person has contravened this Act".

74. In our judgment the claimant's grievance of 19 December 2016 was a protected act. In her grievance she made a clear allegation that the respondent, or Mr Cunningham, had contravened the Equality Act 2010 by discriminating against her. In which case the issue we have to determine is whether the claimant was subjected to any detriment by the respondent and,

if she was, whether that was because she had done the protected act. The four detriments complained of by the claimant are as follows:

a. The respondent's failure to invite the claimant to a grievance meeting to discuss the merits of her allegations.

   In this regard the respondent did fail to invite the claimant to a grievance meeting and we are satisfied that Mr Cunningham's failure to hold a grievance meeting, or at least to give the claimant the opportunity of a meeting, amounted to a detriment. We are not persuaded at all by the explanation that Mr Cunningham sought to put forward for this, namely that he had all the information he needed to provide a response to the grievance. Instead, as set out above, we find that Mr Cunningham was affronted by the grievance and we conclude that the failure to invite the claimant to a grievance meeting was, at least partly, a manifestation of that affront. In our judgment the claimant was subjected to this first detriment because she did a protected act.

b. Mr Cunningham's letter to the claimant informing her that the respondent did not identify any merit in her allegations.

   In our judgment the failure to uphold the claimant's grievance was a detriment. In one sense Mr Cunningham was firmly of the view that the claimant's allegations were without any merit. But his conclusion in that regard is inextricably bound up with and tainted by his failure to afford the claimant an opportunity to state her grievance. However firm he may have been in his views, the decision on the grievance was as much a conscious or sub-conscious expression of Mr Cunningham's affront as was his failure to meet with the claimant. In our judgment the claimant was subjected to this second detriment because she did a protected act.

c. The respondent's selection of the claimant for redundancy on 29 December 2016

   In fact, we have found that the claimant was selected for redundancy much earlier, namely in late October when Mr Cunningham met with his solicitors and identified that her role should be placed at risk. Although the claimant was subjected to detriment in being placed at risk of redundancy, in our judgment this was not because she had done a protected act, but rather as set out above because Mr Cunningham genuinely identified that there was a reduced requirement for the work she was doing and/or because her duties could be re-distributed amongst the respondent's accountants and its other staff.

d. The respondent terminated the claimant's contract of employment with effect on 10 March 2017.

   Again, the claimant was not dismissed because she had done a protected act; the reason why she was dismissed was because there was a reduced requirement for the work she was doing and/or because her duties could be re-distributed amongst the respondent's accountants and its other staff.

75. There will be a further hearing to determine remedy given our findings and judgment. Notice of that hearing will be notified separately, including any case management orders.

_____
Employment Judge Tynan

Date: 15 April 2019

Sent to the parties on: .....

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For the Tribunal Office