EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104785/2017

Held in Glasgow on 21 and 22 January 2019 and 1 February 2019 (Members' Meeting)

Employment Judge M Robison
Members Ms K Ramsay
Mr A MacMillan

Ms K Anderson — **Claimant**
Represented by
Ms L McQuade
Trainee Solicitor

Hot Coo Investments Limited — **Respondent**
Represented by
Ms J Barnett
Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant was dismissed by the respondent on 30 January 2017;
2. the claims are lodged out of time;
3. the Tribunal does not therefore have jurisdiction to hear the claims which are dismissed.

REASONS

1. The claimant lodged a claim with the Employment Tribunal on 28 September 2017, claiming unfair dismissal, discrimination because of pregnancy/maternity and/or sex, breach of contract, and for notice pay and holiday pay. The respondent entered a response resisting the claims.

2. At this hearing the following issues required to be determined:

a. Whether the claimant was dismissed or whether she resigned;

b. If the latter, whether she was constructively dismissed;

c. What was the effective date of termination;

d. If she was dismissed (constructively or otherwise), was she unfairly dismissed under section 98 of the Employment Rights Act 1996 (ERA);

e. Was there a breach of section 73 of the ERA, implemented by regulation 18(2) of the Maternity and Parental Leave Regulations 1999 (MAPLE), by the respondent's failure to allow the claimant to return to work after maternity leave;

f. Was she thereby automatically unfairly dismissed for a reason relating to pregnancy or maternity under section 99 ERA and Regulation 20 MAPLE?

g. Was the claimant unfavourably treated because of pregnancy or maternity contrary to section 18 of the Equality Act 2010?

h. Was the claimant less favourably treated because of her sex contrary to section 13 of the Equality Act;

i. Was the respondent's failure to pay notice pay a breach of contract?

j. Was the claimant due outstanding holiday pay?

k. Were any or all of the above claims out of time?

l. If so, was it not reasonably practicable to lodge the claim in time, and if not, was the claim lodged within a reasonable time thereafter;

m. If the Equality Act claims were lodged out of time, was it just and equitable to extend time?

3. Ms McQuade had prepared a skeleton argument (written submissions) which she lodged at the outset of the hearing. In that she made reference, in addition to the above claims, to a claim relating to a failure to carry out a risk assessment. As Ms Barnett had no notice at all of this claim, she objected to the amendment sought by Ms McQuade. In the circumstances, this being a new head of claim not

previously plead, the respondent therefore having had no notice of such a claim, made on the morning of the hearing, and which would require significant additional factual enquiry, and in any event having been made out of time, we refused the application to amend.

4. During the hearing, the Tribunal heard evidence for the respondent from Mr Christopher Lessani, who described himself as the owner of the restaurant BRGR at 526 Great Western Road Glasgow. The Tribunal also heard evidence from Mr David Fleming who was described as Mr Lessani's business partner and the claimant's line manager. The Tribunal also heard evidence from the claimant, and although the Tribunal was due to hear from other witnesses for the claimant, on reflection Ms McQuade decided not to call them.

5. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These documents are referred to by page number.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

7. The claimant commenced employment with the respondent as an assistant manager on 10 September 2014, at the restaurant called BRGR on Great Western Road in Glasgow, which was the day that it opened.

8. There are currently four BRGR restaurants (owned by Chris Lessani but operated by different companies) in Giffnock, Edinburgh and Clarkson.

9. The claimant was not at any time issued with a written contract of employment.

10. In or around August 2015, the claimant advised David Fleming that she was pregnant.

11. In or around December 2015, the claimant had a meeting with Chris Lessani, Kim Lessani and David Fleming, at which she handed in her MATB1, to discuss maternity leave, and pay and duties while pregnant. The claimant's sister Lindsay Anderson accompanied her for moral support.

12. Due to illness during pregnancy, the claimant commenced maternity leave early on 15 January 2016. The respondent did not confirm, in writing or otherwise, the date on which her maternity leave was due to end.

13. The claimant's role was covered, during her maternity leave, by the manager and two supervisors working at the restaurant.

14. On 17 October 2016, the claimant texted David Fleming advising him that she was taking one year of maternity leave and intended to add on accrued holidays and then return as assistant manager.

15. On or around 15 November 2016, that claimant texted David Fleming to ask when her maternity pay would end, so that she could add her annual leave entitlement at the end of her maternity leave. David Fleming responded to advise that he would find out for her and suggested meeting up for a coffee. He expressed a desire to meet the claimant's baby in a number of texts.

16. On 14 December 2016, the claimant texted David Fleming and asked if he could arrange for her maternity pay to be put into her bank account. David Fleming responded that he needed to arrange a meeting, as he had done a spread sheet, and suggested that she may have been due back a few weeks ago. However, he said that they could discuss the position at their meeting.

17. Notwithstanding, a further payment of SMP was put into the claimant's bank account on 20 December 2016. The claimant was overpaid a total of seven weeks' SMP which totalled £977.06.

18. On or around 22 December 2016, the claimant was removed from the Facebook group which was the vehicle used to communicate shifts, rotas etc for staff. The claimant queried this by text, and David Fleming replied that there was no need for her to be on it because the area manager, who had recently been appointed (Mairi Johnstone) was taking care of that. When she advised that she had also been taken off the staff page, he said that she would be put back on her return and adding, "no point boring you with all that and dirty nappies".

19. After various abortive attempts, the meeting between David Fleming and the claimant took place on 6 January 2017. This was an informal discussion about

the claimant returning to work. She advised him that she did not wish to work 45 hours per week as she had done before she went on maternity leave. This was because she could not arrange childcare around the long hours and rotating shifts. The claimant requested a position in the office.

20. David Fleming ascertained that there was no position available in the office. He then arranged to have another meeting with the claimant but he was unable to attend. He therefore arranged for the claimant to meet Mairi Johnstone, the new area manager, whom the claimant had not previously met.

21. The claimant's maternity leave was due to end on 14 January 2017.

22. At that meeting, which took place on 30 January 2017, the claimant asked Mairi Johnstone whether she could work less hours, and less days on set shifts in her role as assistant manager in order that she could arrange childcare. She was told that would not be fair on the rest of the team. She was not offered assistant manager role on less hours. Instead she was offered a team member role for 18 hours per week on less pay.

23. The claimant was not happy about this but she did not say so at the meeting. Nor did she indicate that she was prepared to accept that proposal.

24. Mairi Johnstone subsequently e-mailed the claimant. The e-mail was dated Monday January 30 but no time is recorded. The e-mail stated "lovely to meet you today. 2 shifts per week. 18 hours. Pay rate £7.20 per hour as new job position chosen. 3 month probation in new job role. Thanks Mairi".

25. The claimant went from that meeting to meet an employment lawyer.

26. On 6 February 2017, the claimant texted David Fleming and stated the following "Hi David. Just to advise you that following my meeting with Mairi where I was advised that I will be coming back as a team member, which is a demotion and that my hourly rate would be lowered and I will also be on a 3 month probation despite my length of service I have been in contact with an employment lawyer for some legal advice. I thought I would let you know this as you should be receiving some correspondence from him shortly".

27. On 9 February 2017, the respondent advertised for an assistant manager for the restaurant on Great Western Road.

28. On 23 March 2017, the claimant's solicitor wrote to "The Manager, BRGR, 529 Great Western Road, Glasgow G12 8HN" whereas the correct address is 526 Great Western Road G12 8EL, stating inter alia "our client made contact with your area manager to arrange her return to work, but nothing has been finalised and she is unsure as to what has been happening with her employment and we require an urgent response from you so that we may instruct our client further".

29. The claimant's solicitors wrote again on 31 May 2017, referring to previous correspondence and stating "our client is an employee of BRGR and has been seeking a return to work following maternity leave. We are concerned that no efforts have been made to accommodate her return to work and she has not received any payment or other documentation from you as her employers".

30. The claimant's solicitors wrote again to the respondent on 7 July 2017 referring to "our previous correspondence and telephone calls to your organisation" and stated, inter alia, "we hold that our client, although not at work at present, remains an employee of BRGR and would remind you of your statutory obligations to provide work for employees and must insist on a response as to why our client has not been provided with any details of her times of work as an Assistant Manager with your company. Our client has also not received a p60 which was due at the end of the last financial year, or a p45 which would be required for the end of her employment".

31. These letters did not reach Mr Lessani.

32. By letter dated 20 September 2017, sent recorded delivery to the same address, the claimant's solicitor stated, referring to "previous correspondence and telephone calls", stating that when the claimant "tried to return to work she was told she could be offered an alternative post and that she would be placed on probation. No details of this or her return to her actual position was discussed with our client and despite a previous telephone discussion, no efforts have been made to assist our client in returning to work and she has also not been paid since the end of her pregnancy. We consider the manner in which our client has been

treated as discrimination in terms of the Equality Act 2010 and have been instructed to obtain your position in respect of settling any claim our client may have against your company on a without prejudice basis, or if you are not willing to negotiate such a settlement then we will have no option but to raise an action at the Employment Tribunal and damages may be significant…..if we do not hear from you within the next 7 days we will consider your failure to response (sic) as confirmation that you are no longer intending to continue to employ our client. We also note that you have never sent her a p45 to terminate her employment."

33. On receipt of that letter, Mr Lessani telephoned the claimant's solicitor and advised that her job was still available for her to return to, either full-time or on lesser hours if she preferred.

Relevant law

Unfair dismissal and time limits (Employment Rights Act)

35. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer.

36. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".

37. In *Western Excavating Ltd v Sharp* 1978 IRLR 27, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose

his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

38. Section 97 of the ERA defines "effective date of termination" (EDT). Where an employee's contract of employment is terminated by notice, whether by the employer or the employee, the EDT is that date on which the notice expires. Where the contract of employment is terminated without notice, the EDT means the date on which the termination takes effect (see Regulations 7(6) below).

39. Section 99 ERA read with regulation 20(1) and (3) MAPLE states that an employee is automatically unfairly dismissed if the reason or principal reason for the dismissal is inter alia, connected with the employee's pregnancy; the fact that the employee has given birth; the fact that she took AML; the fact that she failed to return after a period of AML in a case where the employer did not notify her of the date on which the maternity leave would end, and she reasonably believed that the period had not ended.

40. Section 73(4)(c) ERA read with regulation 18(2) MAPLE states that an employee is entitled to return from additional maternity leave (AML) "to the job in which she was employed before her absence or, if it was not reasonably practical for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances".

41. Regulation 7(6) MAPLE states that "an employer who is notified …. of the date on which….an employee's ordinary maternity leave period will commence or has commenced or has commenced shall notify the employee of the date on which her additional maternity leave shall end".

42. Section 111(1) of ERA states that a complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. Section 111(2) states that an employment tribunal shall not consider a complaint unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable 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.

Equality Act 2010 and time limits

43. Section 13(1) of the Equality Act 2010 sets out the provisions relating to direct discrimination, which where an employer treats or would treat an employee less favourably because of a protected characteristic, in this case sex.

44. Section 18(2) and (4) of the Equality Act 2010 relates to pregnancy and maternity discrimination in the employment context, and states that an employer discriminates against a woman if, during the protected period, that is while the claimant is absent on maternity leave, he treats her unfavourably because of the pregnancy or because she is exercising maternity leave. Section 18(5) makes it clear that if the treatment is in implementation on return of a decision taken in the protected period, the decision is taken to have been made in that period.

45. Section 123 of the Equality Act 2010 states that a complaint must be made to the employment tribunal before the end of three months starting with the date of the act of discrimination, 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 the period; failure to do something is to be treated as occurring when the period in question decided upon it.

Holiday pay and time limits

46. The law relating to arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 13(1) states that all workers are entitled to four weeks' annual leave in each leave year. Regulation 13A states that a worker is entitled in each leave year to a period of additional leave of 1.6 weeks in any leave year beginning on or after 1 April 2009.

47. Regulation 30(2) states that an employment tribunal shall not consider a complaint relating to holiday pay unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the payment should have been made, 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.

Notice pay and time limits

48. The provisions relating to claims for unpaid notice pay are contained in the ERA and the Employment Tribunals (Extension of Jurisdiction (Scotland) Order 1994.

49. Section 86(1) of the ERA states that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years.

50. This section implies, through statute, a minimum period of notice into the contract of employment. Thus the failure of an employer to pay the statutory minimum notice as set out above is a breach of contract.

51. The 1994 Order states, at Article 3, that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim is one for damages for breach of a contract of employment and the claim arises or is outstanding on the termination of the employee's employment.

52. Article 7 of the 1994 Order states that an employment tribunal shall not entertain a complaint in respect of an employee's contract unless it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim. Article 7(c) states that where a tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that time, then a complaint can be lodged within such further period as the tribunal considers reasonable.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

53. While we found all of the witnesses to be essentially credible, none were particularly reliable. We found the evidence of all of the witnesses to be vague and lacking in detail. There was a difficulty for us in this case because of the lack

of detail in respect of some key passages of evidence, and particularly in respect of dates, given the lack of any formal documentary evidence.

54. Mr Lessani's evidence in particular was largely second hand particularly in respect of what Ms Johnstone, who could not be traced to give evidence, had said at the key meeting with the claimant. For that reason, where there was a conflict between his position and the claimant's, we preferred the evidence of the claimant.

55. Although his evidence was unreliable in some respects, we have accepted that Mr Lessani had not receive the letters from the claimant's solicitors dated 23 March, 31 May, and 7 July, bearing in mind that the address/postcode was wrong. We accepted that he received the letter dated 20 September, but it was sent recorded delivery.

56. Otherwise, there was only one dispute on the facts, and that was whether the claimant had, at the meeting with Mr Fleming, said that she did not wish to take on the responsibility of the assistant manager role. We have concluded that Mr Fleming must have misunderstood the claimant's proposals in respect of her returning to work, and that she would not have said that she could cope with the responsibility of the assistant manager role but rather that her difficulties related to rotating shifts and long hours in the role. We did not however believe that discrepancy to be pivotal in this case, since we have accepted the claimant's evidence that her difficulty was in returning on a rotating shifts basis on full-time hours.

Employment Rights Act 1996: Unfair dismissal

Termination of employment – dismissal or resignation?

57. There was a central issue of dispute and that related to the question whether there was a dismissal or a resignation in this case, and in particular what then was the effective date of termination. This was a crucial matter because our conclusions in respect of the claims which the claimant was making depended on this.

58. Ms Barnett argued that the claimant had resigned by the text message of 6 February 2017. Mr Fleming understood this to be a resignation particularly because of the reference to having contacted an employment lawyer. He acted on his understanding by advertising the role of assistant manager some three days later.

59. Ms McQuade in contrast did not accept that this text could be construed as a resignation. There was no reference to a resignation in the text and it would have been a simple matter of stating "I resign" had that been her intention.

60. Nor, she argued, was the claimant's employment terminated at that time. In particular, David Fleming failed entirely to respond. He did not reply to the text. Although in evidence he said that he had not communicated any requirements to Ms Johnstone, simply that she was to arrange the claimant's return to work, he did not take any steps to contact the claimant, to advise her that this proposal, referring as it does to demotion, lower pay and probation, was not his intention at all. Notwithstanding, he maintained in evidence that the assistant manager post was still open to her and had she returned he would simply have transferred any newly appointed assistant manager to one of the other restaurants.

61. Ms Barnett's response was that Mr Fleming's position was that the new role was offered by mutual agreement, although that is clearly not the case given the language of the text, rather than the e-mail from Ms Johnstone.

62. Ms McQuade argued that there was no conduct on the part of the respondent which could be construed as having terminated the claimant's contract at that time. She submitted that through the letters from her solicitors, the clamant had shown an intention to remain working with the respondent, and she did not accept that the respondent had not received the first three letters. Rather, the claimant's employment had been terminated by the actions of the respondent in failing properly to respond to the claimant's solicitors' assertion that she would treat her contract of employment as terminated should there be no reply to the letter of 20 September within 7 days. She relied on the fact that there was no communication at all with the claimant regarding the termination of her employment, no letter was sent, no P60 was sent, no P45 was sent.

63. We considered very carefully whether, in light particularly of the fact that the respondent did not communicate at all regarding the termination of her employment, and the claimant made no express words of resignation, it could be said that there was a dismissal or a resignation, there being no non-ambiguous or indeed even ambiguous words to refer to. This is an objective question, requiring us to draw inferences from the actions of the parties and all of the surrounding circumstances.

64. We were of the view, after careful consideration, that we could not say that employment ended on 27 September 2017. We did not accept that the failure of the respondent to communicate with the claimant, in particular to fail to send a P45, was determinative of the matter. The question of the date of termination, particularly in a case involving claims based on breach of statute, is not a matter for selection by one party or another, or indeed by agreement (*Fitzgerald v University of Kent* 2004 ICR 737 CA). Rather the effective date of termination is a matter of law.

65. The claimant's position is that there was a termination on 27 September 2017, but the circumstances had not changed since 6 February, when the claimant argues there was no dismissal. By 27 September, there was still no communication of any kind communicating dismissal to the claimant. Ms Barnett submitted that the date 27 September is consequential on her solicitor's advice and not her personal view, and indeed interestingly the claimant seemed to suggest in evidence that she still did not consider her employment to have been terminated because she had received no communication to that effect from the respondent.

66. We have accepted Mr Lessani's evidence that he did not receive the first three letters, the address and postcode being incorrect. His position then is that the respondent heard nothing further from the claimant after the text of 6 February, and only from her solicitor after 20 September. His unchallenged evidence was that he telephoned in response and made it clear that she could return as assistant manager, or a part-time or full-time basis.

67. We did not accept that assertions by the claimant's solicitor (which the respondent did not receive) were sufficient to conclude that the contract of employment continued until such times as the claimant's solicitor indicated that it would be considered that the contract was at an end. Indeed, the only thing that changed between 6 February and 27 September was that Mr Lessani had telephoned to advise that she could return to her job, on lesser hours if she chose to.

68. We noted too that the ET1, lodged on 28 September, makes no mention of a termination on 27 September, leaves the date that employment ended blank, and indeed aside from ticking the "unfair dismissal" box, no further pleadings relate to the termination of the claimant's employment.

69. Further, in the context of constructive dismissal, if it were to be said that 27 September was the date of resignation (rather than dismissal), then we agreed with Ms Barnett that the claimant had waited too long following the breach, which we were of the view took place on 30 January 2017, to found a claim of constructive unfair dismissal, ad would be taken to have by that time affirmed the contract.

70. For all these reasons we concluded that 27 September was not the effective date of termination. We turned then to consider whether we could say, as contended for by the respondent, that the employment terminated on 6 February by reason of the claimant's resignation.

71. Following careful consideration, we took the view, on balance, that this was one of those circumstances where the correct inference to draw was that the actions of the employer were indicative of the claimant having been dismissed. This was particularly in light of what the claimant was told at the meeting on 30 January, and the subsequent e-mail. We were of the view that the correct reading of the e-mail was that the claimant was dismissed from her job as assistant manager, and that she was being offered a new job as a team member.

72. Ms Barnett suggested the reference to "new job position chosen" indicated that this was the choice of the claimant and that a mutual agreement was reached. That is not supported by the claimant's evidence, and we did not hear evidence from Ms Johnstone, but further it is not plausible that the claimant would have

accepted a demotion, a cut in salary, but not least a probation period. We could not accept that the claimant would agree to a probation period in a team member role when she had performed the role of assistant manager well over a number of years. Nor did we accept Mr Lessani's attempt to suggest that "probation" meant something other than the normal meaning of employment for a trial period. It was the reference to "probation" particularly, as well as the reduced salary, which led us to conclude that the effect of this e-mail was to dismiss the claimant from her role as assistant manager. We accepted the evidence of Ms Anderson, who we believed was candid in her description of her reaction to the proposal, and ultimately that she had not "chosen" or accepted this proposal for a new job.

73. In coming to the conclusion that a dismissal can be inferred from these facts, we had in mind *Kirklees Metropolitan Council v Radecki* 2009 IRLR 555, a case in which the Court of Appeal held that removing an employee from the payroll while he was suspended and negotiating a settlement agreement, although not an express statement that he was being dismissed, was sufficiently unequivocal statement of the employer's intention to terminate the contract. We did not accept Ms Barnett's submissions, relying on that case, that the text message, the reference to an employment lawyer, and the claimant's failure to return to work or make any direct enquiry to aid that, demonstrated an intention to resign as at 6 February 2017.

74. During submissions, we also referred parties to the case of *Hogg v Dover College* 1990 ICR 39, the facts of which bear considerable similarities to this case. In that case, the EAT held that the college's letter to a teacher removing him as head of department, and offering him a demoted post on less salary, amounted to an express dismissal.

75. We came to the conclusion that the facts point to dismissal because we were of the view that there was an obligation on the employer to communicate in some way with the claimant to determine her intentions. Had Mr Fleming assumed, as he said he did, from the text, that she had resigned, then it was incumbent on him to contact the claimant to confirm that he had correctly understood her intentions. His failure to do so reinforced the position that the legal reality here was that the

claimant's employment in the role as assistant manager was terminated at the meeting with Ms Johnstone, as confirmed in the e-mail.

76. While there was no express communication of dismissal in this case (that being found to be implicit from the wording of the e-mail on 30 January 2017), we were aware that in practice it is only in exceptional circumstances that *resignation* will be the proper inference to draw from the ***employee's*** conduct in the absence of anything express. In concluding as we did, we had in mind the dicta of Rimer LJ in the case of *Zulhayir v JJ Food Service Ltd* 2014 ICR D3 CA, that "an employer cannot unilaterally deem an employee to have resigned when he has not; and a removal of the employee from the employer's books by a process of such deeming …would arguably amount to a dismissal".

77. Although it was by no means clear cut, we came to the conclusion that the employer's conduct should be regarded as a dismissal, and were clear that would take effect on 30 January 2017, which is the effective date of termination.

78. We were aware that this was not an argument advanced by either party. We were aware too, that in the case of *Hogg v Dover College*, the EAT had concluded, *in the alternative*, that the fundamental changes to the teacher's terms of employment were such that he had been constructively dismissed.

79. Similarly, if we are wrong to conclude that the circumstances of this case point to a dismissal, then we are of the view that the only other possible interpretation of the circumstances is that the text of 6 February is a response to the respondent's proposal that the terms of her engagement with the respondent should be altered, and that she should be demoted and receive less pay. We were clear that if this was to be viewed as a resignation, then we were in no doubt that the respondent's proposal, which involved demotion, less pay and a probationary period, was a fundamental breach of contract entitling the claimant to resign. In that case, the effective date of termination would be 6 February 2017. It follows that we did not accept Ms Barnett's submission that the claimant had failed to meet the tests laid down in *Western Excavating v Sharp*.

80. Whether we are right to say that this is a dismissal by the employer, rather than a constructive dismissal by the claimant's resignation, either way it is a dismissal.

81. We were conscious of the significance of these conclusions, because of the impact this has on time limits, an issue which we deal with later. Suffice to say at this stage that the different dates for the effective date of termination makes no difference to our conclusion on time limits.

82. Having found that the claimant was dismissed (constructively or otherwise), we heard no submissions from Ms Barnett to suggest that in the event that we found there to be a dismissal (constructive or otherwise) that dismissal was nonetheless fair in the circumstances. Thus no potentially fair reason was advanced in this case, the onus being on the respondent to do so. Even if it might be said that the claimant's insistence on returning part-time should be taking into account in the assessment, in our view dismissal was prima facie unfair, not least because of the complete lack of procedure or indeed even clear communication with the claimant in regard to the dismissal.

83. There is of course a difficulty however for the claimant because of time limits, discussed later.

Automatically unfair dismissal for a reason related to pregnancy or maternity

84. Not only does the claimant in this case argue that dismissal was unfair under section 98, she argues that it was automatically unfair for a reason related to pregnancy or maternity under section 99, in which case there would in any event be no requirement to consider whether the respondent's actions were reasonable in the circumstances.

85. The claimant argues that the failure to permit her to return to work at the end of her maternity leave amounts to a breach of section 73 and regulation 18 because the offer of the position of team member was less favourable than her previous position. The claimant was "entitled to return from leave to the job in which she was employed before her absence". Where that is "not reasonably practical" then she should return to "another job which is both suitable for her and appropriate for her to do in the circumstances".

86. Ms McQuade also relied on the respondent's failure to confirm to the claimant the date that her maternity leave was due to end. That failure, in breach of the

regulations, would entitle the claimant to argue automatically unfair dismissal, in terms of regulation 20(3)(ee), where she had not returned but she reasonably believed that her maternity leave had not come to an end.

87. In this case, the claimant argues that the respondent failed to allow her to return to the job she was engaged in before she went on maternity leave. It should be said that there is no argument made by the respondent that it was not reasonably practicable for the claimant to return to that job. The respondent's evidence is that Mr Fleming was of the view that she could return to work in the role of assistant manager. He confirmed that the role had not been filled during the claimant's maternity leave, but had been covered by the manager and by supervisors, and it was only when he believed the claimant to have resigned that he advertised her role.

88. The difficulty for the claimant in this case of course is that she was not asking to return to her role of assistant manager on no less favourable terms and conditions. Rather, she wanted to return to work on different terms and conditions, specifically part time. Indeed, initially she had proposed that she undertake a completely different role in the office, and in evidence she said that she expected that her terms and conditions would change and that she would "negotiate" them. When that was not available, she understandably sought to return in her role as assistant manager, but doing less hours and on fixed shifts. It seems that Ms Johnstone advised that was not possible, although that is not what Mr Fleming or indeed Mr Lessani thought.

89. We could not therefore say that the claimant was dismissed because she was not being permitted to return to work in her previous role. The respondent's evidence, which we accepted, was that she could return to work in her previous role. It was the claimant herself who said that she could not return to her previous role. This was primarily because the long hours and rotating shifts were not suitable for her childcare arrangements. That is understandable, but it does preclude the claimant from succeeding in an argument that the respondent refused to allow her to return to the same job (or indeed a job with no less favourable terms and conditions). When asked by Ms Barnett if she thought she had an automatic right to return part-time following maternity leave, the claimant said "morally" that she did believe

she should have been allowed to return to such a position. And indeed had the claimant followed up the text with Mr Fleming, with whom we heard and could glean from the text messages the claimant had a good relationship, then it may well have been that the claimant would have been accommodated part-time in her role as assistant manager.

90. Nor could we say that this was a case which fell within the circumstances of regulation 20(3)(ee), because although this was a case where the respondent had failed to notify the claimant of the day on which her maternity leave ended, she was not dismissed because she had remained absent while reasonably believing that her maternity leave had not ended. Rather the facts here are that the claimant was negotiating a return to work following what she understood to be the end of her maternity leave and during a period of annual leave which had accrued during maternity leave.

91. If dismissal was not related to any failure on the part of the respondent to allow her to return to the same job; or to the fact that she had failed to return because she was not sure when she was due back, then it could not be said that it was automatically unfair for those reasons.

92. Could it be said otherwise that the dismissal, by which we mean the decision that she was not to continue as an assistant manager, related to other reasons set out in regulation 20? Specifically, could it be said that the reason (or principal reason) for dismissal was a reason related to pregnancy, to the fact that she had given birth or the fact that she had taken maternity leave?

93. In this case we have found that the claimant was dismissed on 30 January 2017. We have concluded that the reason she was dismissed, and offered a “new” job as team member, was because she was not willing or able to work full-time hours in her role as assistant manager. This is because as discussed above we accepted the respondent’s evidence that she could have returned to the role on a full-time basis. Indeed, the respondent’s witnesses appeared to suggest that she could have returned to the role on a part-time basis, but that she did not make any request or further approach following the meeting with Ms Johnstone to present that as an option.

94. While reference was made during submissions to the Flexible Working Regulations, which would have given the claimant a right to formally request an alternation to her hours, we noted that no such request was made in this case.

95. For the reasons set out above, we do not accept that dismissal in this case was for a reason related to pregnancy or maternity contrary to section 99 ERA, and therefore the claim of automatic unfair dismissal does not succeed.

Equality Act 2010

Discrimination because of pregnancy or maternity

96. The claimant also argues that the employer's conduct amounts to unfavourable treatment because of pregnancy and maternity. In such cases, no comparator is required, and the focus of our enquiry is the reason why she was treated the way she was treated. Was it because of pregnancy or maternity?

97. We have come to the view, in the context of an unfair dismissal claim, that the reason the claimant was dismissed was not for a reason related to pregnancy or maternity, but rather related to the fact that the claimant wanted to return to work on a different contract.

98. We are aware that while the tests for unfair dismissal, where we are concerned with whether pregnancy, maternity etc are the reason (or if there is more than one) the principal reason for the dismissal, when it comes to a claim under the Equality Act, discrimination need not be the sole reason or indeed even the main reason for the treatment, so long as it was the effective cause (*O'Neill v St Thomas Moore School* 1996 IRLR 372 EAT).

99. Relying on *Blundell v St Andrews Catholic Primary School* UKEAT/0329, Ms Barnett submitted that the claimant had asked for a reduction in hours and that s18 gives no automatic entitlement to change hours following maternity leave, although in this case the respondent made it clear she could return on reduced hours, even at September 2017. Relying on *Swiggs v Nagaranjan* 1999 4 All ER 65 and *Burnett v West Birmingham AHA* 1994, she submitted that the proposed change was made for non-discriminatory reasons, and based solely on the

claimant's request to reduce her working hours and assume a role with less responsibility.

100. Ms McQuade argued that this was a case where the burden of proof passes to the employer to explain their actions under section 136 Equality Act. She relied on a number of facts in support of that submission, namely the haphazard way in which the respondent dealt with their staff, which would include the complete absence of systems on the part of the respondent in respect of dealing not only with pregnant employees, but also with regard to payroll systems and more generally evidenced for example by the failure to issue contracts of employments or documents such as P45s or P60s; the failure to communicate with the claimant regarding matters relating to her maternity leave and return to work, not least the failure to notify the claimant, as required by statute, of the date of her return. She also relied on the fact Mr Fleming removed the claimant from the facebook group shortly before she was due to return to support her submission that an inference of discrimination should be drawn and that the burden of proof passed to the respondent to show no discrimination.

101. We also noted that there was considerable delay from the time the proposal to meet with the claimant (15 November) and that meeting actually taking place (6 January), Mr Fleming stating that he was too busy to meet before that, and again being too busy to meet with the claimant on 30 January. We considered further that the fact that Mr Fleming failed to respond to the text of 6 February at all could be said, along with these other facts, to support the view that the burden of proof had shifted.

102. We were prepared to accept, given these facts, that the burden of proof did transfer to the respondent to satisfy this Tribunal that there was a non-discriminatory explanation for her treatment.

103. We therefore gave consideration to whether or not there was a non-discriminatory reason why the claimant was treated the way that she was. We should say that we did take into account the rapport which the claimant appeared to have with Mr Fleming, as evidenced by the text messages. We got the impression that, although the respondent appeared to have no systems, and

their approach to managing staff was at the very least haphazard, this was demonstrative of shambolic management of staff rather than any deliberate or even subconscious act of discrimination. As we understood it the claimant was not in fact replaced during the currency of her maternity leave, although the respondent's management hierarchy was, to say the least, lacking in clarity. We did note however that, acting on what he thought to be the claimant's resignation, three days later (it being accepted that the advert was placed on 9 February 2017) the respondent sought to replace her with another assistant manager. We noted too that the respondent continued to pay SMP for seven weeks after it should have ceased (and presumably they will not be able to recover that overpayment from the Government in the usual way). We noted Mr Fleming's evidence that after he had prepared the spreadsheet he seems to have realised that she was overpaid but he was not going to address the matter just coming up to Christmas and indeed he paid another week of SMP into the claimant's bank account on 20 December. We came to the view that the actions of the respondent, which might point to a finding of unfavourable treatment because of pregnancy, must be put down to the haphazard manner in which the business was run rather than any deliberate or indeed even subconscious acts of discrimination because of pregnancy/maternity.

104. We did query why Mr Fleming had taken her off the facebook group at the time when he did. Mr Fleming said that he was not wanting the claimant to be bothered by notifications which she admitted were of no relevance to her, but the claimant had not complained about this and had he been concerned he might have taken this action much earlier in the claimant's maternity leave. However ultimately came to the view that this too was an example of the haphazard and ad hoc way that the business was run, there being no systems in place to bring this to the respondent's attention until Mr Fleming arranged for the spreadsheet relating to the claimants' SMP to be prepared.

105. Rather, we were of the view that the respondent treated the claimant the way that they did because she did not wish to return to work on a full-time basis. It was Ms Johnstone's decision not to allow her to return to the role of assistant manager on a part-time basis, and Mr Fleming's evidence was that he had only understood

that the meeting was to determine the claimant's plans for returning to work. It follows therefore that we have found no evidence to support Ms McQuade's submission that a decision to dismiss or discriminate against the claimant was made during the protected period and implemented on the claimant's expected return to work.

106. The claimant had also indicated that she would argue that she was less favourably treated because of her sex contrary to section 13 of the Equality Act; (ie direct sex discrimination) but as this matter was not addressed in submissions, we assumed that Ms McQuade had decided not to pursue that argument, but rather to focus on the provisions of the Equality Act relating to pregnancy and maternity. It should be noted, given the failure to facilitate the claimant's return to her former role on a part-time basis, that no claim of indirect discrimination was pursued.

Working Time Regulations: Holiday pay

107. While Ms McQuade contended for an effective date of termination following dismissal as at 27 September, in the event of such a finding, the parties agreed that the claimant would have accrued 49 days' entitlement to holiday pay. Alternatively, the respondent contended for a resignation effective 6 February 2017, and in the event of such a finding, parties were agreed that the claimant would have accrued 28 days holiday pay entitlement.

108. However, we have decided above that the effective date of termination is 30 January 2017 and we accept that the claimant would have accrued 28 days entitlement to holiday pay during her absence on maternity leave. We have calculated, on that basis, that the claimant would have been due to be paid 18 days of holiday pay.

109. Ms Barnett also advised that it had come to the attention of the respondent that the claimant had been overpaid in respect of what would have been SMP for 7 weeks, that is a total of £977.06. She had initially proposed that this be off-set against the holiday pay due. The Tribunal queried whether this was legitimate in the absence of any agreement relating to overpayments, even in the context of SMP. In any event, it may be that properly considered, that could be viewed as

contractual maternity pay. As it transpired, there was no requirement for the Tribunal to determine the matter, given our conclusion in relation to time limits, discussed below.

Breach of contract: failure to pay notice pay

110. Similarly, it was argued that the claimant's employment having been terminated unlawfully by dismissal (as at 27 September), the claimant would be entitled to receive notice pay, and that the failure to pay notice pay was a breach of contract. We accepted that, absent any time bar issue, the claimant would have been entitled to three weeks' notice pay calculated at the agreed net weekly sum of £288.75 in respect of termination as at 30 January 2017.

111. To the extent that the claimant also argued that the demotion and reduction in pay was a breach of contract, we understood that to related to the alternative constructive dismissal argument.

Time limits

112. On the basis that we have taken the EDT to be 30 January 2017, there is then no question that all of the claims have been lodged out of time, since on that basis the claims should have been lodged by 29 April 2017 (which may have been extended for up to one month in the event of ACAS conciliation to 29 May 2017).

113. The position does not change if the alternative date of 6 February 2017 is viewed to be the effective date of termination, because the very latest date would then be 5 June 2017, whereas the claim was lodged on 28 September 2017.

114. We heard submissions from Ms McQuade, in respect of the claims under the Employment Rights Act and separately under the Equality Act, that, in the event of the Tribunal concluding that the claims had been lodged out of time, the Tribunal should nevertheless allow the claims to be pursued, although late.

Employment Rights Act claims

115. Given that the claim was lodged out of time, the first question is whether it was not reasonably practicable to lodge the claim in time, and if not, was the claim lodged within a reasonable time thereafter.

116. Relying on *Lezo v OCS Group UK Ltd* [2010] All ER (D) EAT, Ms McQuade argued that as the claimant and her solicitors made ongoing efforts to contact the respondent it was only reasonably practicable to make an employment tribunal claim after all efforts to negotiate with the respondent had been exhausted, and that the claim to the employment tribunal was submitted within a reasonable time after the deadline expired.

117. As to whether it was "not reasonably practicable" to have lodged the claims in time, as Ms Barnett forcefully argued, this is a case where the claimant almost immediately sought the advice of a legal firm. She submitted that the legal firm should be well aware of the time scales, especially when no response had been received from the respondent to the first three letters sent. The letters which have been lodged suggest that the correspondence may be relied on in court, and the letter of 20 July indicates that a failure to respond may result in court proceedings being raised. This was therefore not a case where the claimant could rely on reasonable ignorance of her rights. She pointed out too that the early conciliation certificate was issued the same day ACAS was contacted, suggesting a request was made for the certificate to be issued without any contact with the respondent.

118. We were of the view that the claimant fails at this first hurdle. We could not say, given the claimant was immediately in receipt of legal advice – her evidence was that she went straight from the meeting with Ms Johnstone to a solicitor - that it was not reasonably practicable for her to have lodged her claim in time. We accepted Ms Barnett's submissions that the claimant's solicitor ought to have been well aware of the time limits, and we may say also of the possible risk that an employment tribunal would find that the effective date of termination was 30 January or perhaps more likely from their point of view at least 6 February. Having found that it was not "not reasonably practicable" to lodge the claim in time, there was no requirement for us to consider the question of whether the claim was lodged within a "reasonable" time thereafter.

119. In such circumstances, the time limit tests being essentially the same, the claims for unfair dismissal, breach of contract and holiday pay are lodged out of time, and therefore are dismissed.

Equality Act claims

120. While we have found in this case that the claims under the Equality Act are not well-founded, we went on to consider, in any event, whether these claims were lodged within the appropriate time frame.

121. The test in regard to extending time for Equality Act claims is of course different from the other claims, and that is that claims can be lodged late in circumstances where it was just and equitable to do so.

122. Further and in any event, claims under the Equality Act should be lodged within three months of the date of the act of discrimination, and where there is conduct extending over a period, at the end of that period. Here, the act complained of is the action of Ms Johnstone on 30 January 2017. Consideration was however given to whether it could be said that there was a continuing act of discrimination in this case.

123. Ms McQuade pointed out that letters were being written by the claimant's solicitor during the period between February and September, and also that the failure of the respondent to notify the claimant of the date she was due to return from maternity leave meant that she had a legal right to postpone her maternity leave.

124. Ms Barnett submitted that there was no continuing act in this case because there was no continuing relationship between the claimant and the respondent after 6 February 2017, and there was no direct action on the part of the claimant to suggest that her contract was continuing.

125. We did not accept Ms McQuade's submission, concluding that any act of discrimination, if argued to be continuing, could not be said to have continued beyond the e-mail from Ms Johnstone, and that the actions of the claimant's solicitor in writing to the respondent could not be said to be conduct (or a failure to act) on the part of the respondent, not least because we have found that they did not receive the first three letters.

126. We turned then to consider whether it was just and equitable to allow the claim to be lodged late. We accept that our discretion to extend time is broader than under the "not reasonably practicable" formula (*DPP v Mills* 1998 IRLR 494), and that

we can take into account any matters which we judge to be relevant (*Hutchison v Westward Television Ltd* 1977 IRLR 69). However we were aware too that time limits are however exercised strictly in employment cases, and the onus is on the claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

127. Notwithstanding, the discretion to extend time is as wide as that given to the civil courts under the Prescription and Limitation Act 1973 (*British Coal Corporation v Keeble* 1977 IRLR 336). We require therefore to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and have regard to all other circumstances and in particular a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

128. We were however of the view that in this case the fact that the claimant had obtained professional advice immediately after the meeting on 30 January but did not lodge the claim until 28 September must weigh heavily in our deliberations. This was not a case where the claimant could be said to be ignorant of her rights and the reason for the delay was because she was waiting to hear from the respondent. While there might be prejudice to the claimant in not allowing her claim to be heard at all, in this case consideration has been given to the claimant's claims under the Equality Act, and as it happens, we have decided that they are not well-founded.

129. In the circumstances of this case, we have concluded that it was not just and equitable to extend time to lodge the claim.

Conclusion

130. We have decided that the claimant's claims under the Equality Act fail (and in any event are out of time); and that although we have found that the claimant was

unfairly dismissed and entitled to holiday pay and notice pay, we have found that those claims are lodged out of time, and therefore they too are dismissed.

131. Although we have found that the claimant has lodged her claims out of time, we believe that it would be helpful to record that we accepted Ms Barnett's submission that the claimant had failed entirely to mitigate her losses.

132. This conclusion was based on the claimant's evidence that she had made little or no effort to look for another job. This she said was linked to the fact that she was under the impression that she was still employed by the respondent between February and September, although we do not accept that would have precluded her from looking for another job. We also heard that she did not sign on or claim benefits until July 2018, and that was because she was in the fortunate position that her partner was until then in full-time employment and they were staying rent-free in her parents' flat.

133. But perhaps more importantly, we heard that the claimant had ascertained two days before her daughter's first birthday in May that she was again pregnant with her son who was born in January 2018. This would also explain why the claimant took little or no steps to seek alternative employment during the period from February to December 2017. We would therefore not have accepted that she was due any compensatory award as contended for in the claimant's schedule of loss.

134. Further, although lodged too late to be taken into account, we noted that the claimant has applied for a number of jobs in the period from October 2018, and so these did not in any event relate to the period in question, that is from February 2017 to December 2017 (when we understand that the claimant would in any event have gone onto maternity leave had she been working).

135. However, we believe that it is appropriate and indeed necessary to stress that the respondent has had a "narrow escape" in this case. Had it not been for the fact that the claimant had made it clear that she did not wish to return to her job on a full-time basis (as well as the issue of time limits) the outcome may have been different. It was submitted that the respondent's approach to personnel matters was haphazard, but we would go further and describe it as chaotic. Indeed it would appear that the respondent has (or at least had) no formal personnel

systems at all – no contracts of employment were issued, there was at least a lack of clarity about payroll systems, highlighted not least by the overpayment of SMP, there were no maternity policies, indeed apparently no equal opportunities policies or employment policies at all, even those tailored for a relatively small employer. Further our task in this case was hindered by the lack of clarity over roles, especially management roles, and reporting lines at all levels.

136. While we accepted Ms Barnett's submissions that the claimant should have "picked up the phone" to Mr Fleming, following his failure to respond to her text message, we noted that the claimant's understanding of the advice which she received from her solicitors was not to make further direct contact with them. As it transpires that was a flawed course of action, and it may have been that the matter could have been sorted out without the need for matters to come to this Tribunal.

137. However, ultimately we were of the view that it was incumbent on the respondent to have communicated with the claimant. Had they not ignored the text sent on 6 February, then again, the matter may have been capable of being resolved, and if David Fleming had told the claimant that there had been a misunderstanding, then management time and costs need not have been spent on defending this claim.

Employment Judge: M Robison
Date of Judgment: 06 February 2019
Entered in register: 07 February 2019
and copied to parties