EMPLOYMENT TRIBUNALS

Claimant: Mrs D Isles

Respondent: Weetwood Hall Hotel Limited

HELD AT: Leeds **ON: 7 to 10 May 2019**

BEFORE: Employment Judge Wade
Ms H Brown
Mr I W Taylor

REPRESENTATION:

Claimant: Mr Y Lunat (solicitor)
Respondent: Miss A Smith (counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 10 May 2019, the written record of which was sent to the parties on 15 May 2019. A request for written reasons was received from the claimant. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 10 May 2019 are repeated below:

JUDGMENT

1 The claimant's claim of unfair dismissal is well founded and succeeds.

2 The claimant's Equality Act complaint of dismissal because of pregnancy or the exercising of maternity leave rights succeeds.

3 The claimant's complaints of victimisation are dismissed.

4 The claimant's complaints of unfavourable treatment because of pregnancy during her notice period are dismissed, save that allegation (ii) succeeds.

5 BY CONSENT, the parties having reached agreement, the Tribunal makes no remedy Orders.

REASONS

Introduction

1. The claimant presented the complaints above, and the issues were set out in a case management discussion and orders from Employment Judge Jones in 2018, with arrangements made for a hearing in February 2019. That hearing was postponed because Mr Hicks, the respondent's management director, was not available. The case has come before the Tribunal later than desirable in Equality Act complaints.
2. The evidence we have heard to determine complaints which are essentially about dismissal and pregnancy, and maternity related discrimination, has been from the claimant herself, and on behalf of the respondent from Mr Kershaw its general manager, Mr Hicks its managing director, Mr Szesci its operations manager, Miss Crozier, a former colleague and the revenue manager, and Mrs Rostron its HR officer.
3. The law was set out for us in Miss Smith's skeleton argument and the relevant principles were clear.
4. We will say something about why we have made the particular findings below, but there is much of the chronology that is not in dispute and it follows we considered the witnesses to be generally doing their best to give an honest recollection.

Findings of fact – events leading to resignation

5. The respondent's hotel is a commercial business owned by Leeds university. If it makes a profit, that goes to the university. It employs about 120 people and it is very well used to processing maternity leave for staff. It has outsourced HR management, advice and support to a third party supplier and we refer to that third party supplier in these proceedings as DLP.
6. The claimant joined the respondent in 2006 and she worked her way up to become its director of sales by 2015 or thereabouts. By 2017, when she commenced her first maternity leave she had a salary of about £39,000 or thereabouts. She had worked directly for Mr Hicks, the managing director, until Mr Kershaw joined at the end of 2016. Mr Kershaw was appointed general manager and the claimant reported to him. That was in the context of Mr Hicks having a young family, some ill health, and wishing or needing to take a step back from hands on management.
7. For the few months that the claimant and Mr Hicks worked together before her maternity leave, Mr Kershaw and the claimant had an amicable and good working relationship. There was nothing amiss. There was a new building in place to accommodate the sales team and they were involved in those changes together. Towards the end of the maternity leave the claimant experienced two bereavements in quick succession. At that time Mr Kershaw told her to take all the time she needed to return to work: he was genuinely sympathetic about her difficult circumstances at that time.

8. During 2017, when the claimant was on maternity leave, an issue had risen concerning the financial reporting of conference room income by her team. It resulted in the departure of her former colleague Miss B, by the late summer, or thereabouts, of 2017. Miss B was the claimant's sales manager and de facto deputy: she had run the office when the claimant was on leave, when she had been travelling for work, and during the maternity leave. There had been two appointments to provide maternity cover, neither of whom were in place or neither of whom lasted to be in place by 2018.

9. The investigation of the financial reporting issue had given rise to some ancillary comments from the claimant's team, in her absence, about her management style. At the time Mr Hicks considered those comments, when he learned of them, to be sour grapes and a matter he would have discussed with the claimant over coffee, as he had done in the past when feedback had arisen of a similar nature. There was nothing more untoward about those comments. That no doubt explains why neither Mr Kershaw nor Mr Hicks sought to talk to the claimant about them on two 'keep in touch days', referred to as 'kit' days, which took place in September and November of 2017.

10. On 12 January 2018, the claimant was in touch by email with Mrs Rostron, the respondent's HR officer, to request compressed hours when she returned to work: working 34 hours over four days Monday to Thursday. Her aim was to achieve a better work life balance, as she put it, but without a great impact, we might conclude, on her salary, nor on fulfilling the role that she had held previously. She also indicated in that request her flexibility to amend the hours to suit the demands of the business including travelling, attending events outside those hours, and so on. She had previously always attended external conferences, events and sales opportunities at some distance from home and she was clear in her flexible working request that she had secured childcare from Monday to Thursday.

11. On 15 January the claimant had to be away, and so was unable to meet either Mr Kershaw or anyone else to discuss matters, but she was clear that she was happy to meet as soon as she could and when it suited the respondent, to discuss her return to work and her request. She was clearly keen to have matters organised, because she was due to return on 2 April and unsurprisingly she needed to commit to both childcare and other arrangements to return to work.

12. She and Mrs Rostron then had difficulties securing a meeting at which Mr Kershaw could be present. In the end it was decided that DLP, the external HR provider, would send their person to conduct a meeting. The meeting was confirmed for 6 February. On 5 February, later in the day, the claimant emailed the respondent to say a second pregnancy was confirmed, and she was happy for Mr Kershaw to be told about that.

13. The chronology is less than clear after this. We can find that somewhere after 12 January, Mr Kershaw had considered the claimant's request for compressed hours, 34 hours a week over four days, and he decided that it could not be accommodated, because covering what was left from the claimant's post would not be an attractive, or 'doable' recruitment. We accept his evidence about that. He agreed that position with Mr Hicks and he agreed that the respondent could offer three ordinary length days in the office, a total of 22.5 hours with a salary of £23,400 for the claimant. That would leave some budget to be able to fill the gap that was left and secure an appropriate job share person.

14. The DLP representative who conducted the meeting with Mrs Rostron and the claimant present, as far as we know, did not take any notes. Mrs Rostron did not take any notes on 6 February and neither did the claimant. The DLP representative followed the meeting up with a letter confirming an offer to the claimant, which had been agreed upon by Mr Kershaw and Mr Hicks, sometime between 12 January and 6 February, to the effect that three days could be accomodated.

15. It is clear that the respondent had decided to refuse the request for 34 hours before that meeting. We conclude that from the chronology and the oral evidence that we heard, irrespective of the discussion in that meeting.

16. The claimant asked the DLP rep for details of the aspects of her role that would be given to the two day recruitee. That is the gist of her request. She did not receive a reply to that request, other than a request from the DLP rep that they meet. When there was no reply to her request, the claimant simply emailed the respondent on 16 February to say that she would be returning full time to her previous post, and indicating that she would welcome further kit days between then and her return: she knew of course that there had been some changes in the business, which she would needed to assimilate, not least that her former colleague, Miss B, had departed.

17. Some time between 16 February and 22 February, (again we can't be entirely certain of which day) Mr Hicks, Mr Kershaw and two representatives from DLP met and they discussed making the claimant a severance offer. Those discussions must have included the criticism of the claimant's management style that had arisen from her colleagues in the 2017 investigation. They must have included something about sales targets. We draw these conclusions because the DLP representatives were instructed by Mr Hicks and Mr Kershaw. They would not have had their information from anywhere else, unless they were making it up, such as to include it in a letter to the claimant, as they then did. Similarly that discussion had to involve the claimant's request for flexible working, which of course the first DLP rep knew about, because she had been involved in the communication of its rejection.

18. Mr Kershaw and Mr Hicks' position was that they saw nothing wrong in providing the claimant with another option to the two matters that had already been discussed: a return to work of three days, or a return to work full time, and that further or third option was leaving the business with a severance payment. (A fourth option of returning to the post on 34 hours had already been rejected). At this time, the claimant had rejected the three day week, and had confirmed she was returning to work, as was her right, to her full time post.

19. For whatever reason Mr Kershaw and Mr Hicks decided not to have these conversations directly with the claimant: the putting of a severance offer to the claimant was delegated to DLP to 'sound her out'. That was Mr Hicks' evidence, without having any calculation, at that stage, of the severance payment that they would offer.

20. That meeting took place as we know on 22 February, but before that meeting we accept the claimant's evidence that in communications seeking to fix the date she had asked what the meeting was about; she had been told it was to discuss kit days and her return to work and her flexible working request.

21. At the start of this meeting with the DLP rep, and again we accept the claimant's evidence about this, the claimant was asked for her comments on taking a

voluntary severance offer that could potentially diminish the child care costs associated with returning to work. Her recollection is entirely consistent with Mr Hicks' direction to DLP that she be sounded out. The conversation was not, however, left at that. The claimant was told by the DLP representative that changes were due to take place in the business because of poor financial results and that they could potentially result in redundancies. The claimant's case that the word 'redundancy' was said in the meeting was the subject of a clear denial from the respondent throughout this case, and indeed earlier, when the claimant complained about it. On this finding let us explain why we preferred the claimant's evidence.

22. We have clear evidence from her in her witness statement and indeed in the communications she made much more contemporaneously than that. We have no evidence from the DLP representative. We have no notes. We know that the claimant gave instructions to her legal advisor soon after that meeting. That is what caused her to approach a legal advisor and that mention of redundancy formed part of her resignation letter some five weeks later. We also know that the respondent had had poor financial results for the first time sustaining a loss, and we know that it was having to re-focus its sales efforts. Against that we have a lack of recollection of Mrs Rostron about many aspects of that meeting, but on her witness statement a denial that redundancy was mentioned.

23. We weigh against Mrs Rostron's denial, that in her response to a resignation letter drafted by the claimant sometime later, a month or so later, albeit we consider that response was drafted by DLP, it was said, "we don't want any misunderstandings. You have not been placed at risk of redundancy" (and that letter, for reference, is at page 59 of our bundle). It went on: "What was said was you have never been placed at risk of redundancy and there are no plans or discussions to place your position at risk of redundancy. What was discussed with you was the changes in the whole industry and the new and smarter ways we need to work to keep up both locally and nationally which you will see as a change in the way we have to operate".

24. That more proximate response did not say that the word 'redundancy' or 'redundancies' was not used: it was simply seeking to reassure the claimant that she was not at any immediate risk or risk at all, and that there were no proposals to do so. A misunderstanding suggests that the word was used, but its meaning is disputed.

25. As we have said Mrs Rostron said she could be clear that there was no use of the word in the meeting, it wasn't threatened or alleged, she said. In our judgment Mrs Rostron is mistaken about that, and about the words used in the meeting, and the claimant is not mistaken about it. The claimant's account is to be preferred as more reliable.

26. We also bear in mind in reaching that finding that there are many other phrases used both in writing and in person to the claimant which were seeking to persuade her of the benefits of a severance exit. In these circumstances and the recent unprecedented business loss, the prospect of redundancies in the future was very likely to have been used in a persuasive way as context for explaining why taking a severance offer might be a wise plan for the claimant.

27. The claimant's account of that discussion, that she would be made redundant in the future if she were not to take this severance offer, is also consistent with the

other forms of persuasion that were evident in the communications to her from DLP. Indeed it is entirely consistent with DLP's subsequent communication that, "they didn't want the claimant to financially miss out" (in DLP's email of 2 March 2018)'.

28. For all these reasons we consider it likely that the word 'redundancy' was mentioned, in the context of the industry as a whole, and the prospect that there could be redundancies in the future, albeit the claimant's role was not specifically at risk of being abolished at that precise time.

29. As to other aspects of that meeting, the claimant's evidence to the Tribunal was that she found it condescending and we accept her evidence about that. It struck us as entirely likely she would feel that way because of the expressed view that the claimant may only be returning to work to qualify for her second period of maternity pay. Understandably the claimant might have found that to be condescending. That it was said to her was confirmed in an email from the DLP representative on 2 March, which confirmed that DLP had discussed what was said to be their view, (which might have been that of Mrs Rostron, the DLP rep, or it might have meant the view of Mr Hicks and Mr Kershaw, the email is not clear).

30. She also found that other stated reasons for the offer being made in the subsequent letter confirming what had been said in the meeting, upsetting and condescending: (her personal circumstances, the request for reduced hours, that she might need to undergo management training, that there would be increased targets for her and more external work when she returned and comments from her team that might need to be addressed on her return). This all said in circumstances in which neither Mr Hicks nor Mr Kershaw had spoken to the claimant about any of these matters on her kit days, nor in Mr Hicks' view, were they matters which needed anything other than a coffee and a discussion.

31. That letter included within it that the respondent 'was in no way putting pressure on the claimant..in fact on your return we'll be able to assist you with training and support to address the matters both with your work and with the team.' It was also said that the premise for the offer was 'comments made by you and from your request for flexible working'. We bear in mind that the claimant's communication, following the refusal of 34 hours, and immediately prior to the offer being made had been: I'm returning to work full time.

32. The claimant was given until 9 March to accept the written severance offer. She asked on 1 March for meeting minutes, and she asked for a breakdown of the severance figure, which by then had been confirmed in the letter to which we have referred.

33. She received a reply on 2 March confirming there were not minutes, but setting out DLP's further confirmation of matters that had been discussed in the meeting, again including the opinion that the claimant might only be returning to access maternity benefits and persuasive comments about the structure of the severance payment and that this "essentially means you will be being paid twice for the same period".

34. After the 22 February meeting the claimant sought legal advice. Her advisor and DLP were then in open correspondence in which it became apparent that the claimant did not wish to accept the severance offer which was put, and arrangements were then made for her to return to work, which in the words of the DLP communications at the time was: 'to the exact same role she left to start maternity on".

35. The claimant then sent a letter of resignation on 29 March giving 11 weeks' notice, provided for in her contract of employment, saying she had lost all trust after being told that her role was at risk of redundancy. She felt insulted that it had been said to her that she was returning to work only to qualify for her second maternity rights, and the suggestion that she would not be able to meet targets or undertake external work. She was very clear in that resignation letter that she had lost all trust and confidence after 11 years' employment with the respondent.

Findings and conclusions allegations (i) to (x)

36. The claimant did then return to work to complete her 11 weeks' notice on 4 April 2018. On the same day she and Mrs Rostron completed a maternity risk assessment. The claimant did not indicate that she would have any problem with travel, but enquiries were made of Mr Kershaw to confirm that there would not be any significant travel in the role during that notice period.

37. The claimant also arranged to take some leave in April and May but otherwise she attended as normal for those 11 weeks. Her last day was 14 June 2018. She provided the respondent with her MATB1 certificate towards the end of that period for her second pregnancy, and she received her statutory maternity pay from the respondent as a result.

38. The events that occurred and were alleged to be contraventions of the Act during that 11 weeks' notice period were pleaded in the claimant's claim form at paragraph 18.

39. It is convenient to make some general findings about that but also deal with whether they were contraventions as pleaded.

40. During this time Mr Hicks took the opportunity to meet with the claimant on 29 and 31 May. That was after ACAS conciliation had been commenced by the claimant on 2 May. On the first occasion the claimant asked Mr Hicks to read her file, because he appeared not to understand what had taken place.

41. The claimant was clear during that period to Mr Kershaw, that the reason she was leaving was the loss of trust as a result of the way she had been treated, both in the severance discussion and the communications that followed.

42. Mr Hicks sought to repair matters by offering the claimant, at that stage, a four day a week role, with three days deployed on her original sales director post and with one day to assist him with new events that he wished to develop. The claimant did not accept that offer. During those discussions with Mr Hicks we simply note that the claimant did not discuss or raise any allegations or complaints about treatment that she alleged had happened during this return to work/notice phase. It is fair to say that we also accept her evidence that she was not willing to raise matters at that stage. She simply wanted to complete her notice period and leave.

43. We have to determine the specific allegations both as a matter of fact and then we have to analyse them as both victimisation and section 18 unfavourable treatment because of her second pregnancy. The fact of a protected act in the claimant's resignation later was not in issue.

(i) Required to sit in the office with general manager

44. During her notice period this was said to leave the claimant feeling isolated and victimised. The context was Mr Kershaw had taken on a good deal of the sales responsibility in the claimant's maternity leave absence. He had been asked to

spend 80% of his time, a very large proportion, on sales, by Mr Hicks because of the income challenges the respondent was facing.

45. In this context we consider that allocating the claimant a desk in the office with him, whether or not that had been discussed on a previous occasion, and with Mr Szesci the operations manager, was an entirely likely state of affairs. This put the three key managers in the business together in circumstances where the claimant was working out her notice. We accept Mr Szesci's evidence, and this was not really challenged, that in that 11 week period, having not known the claimant at all beforehand, he formed a good working relationship with her. Mr Kershaw said the same thing and we do not consider that the claimant felt as subjectively isolated as she described. We do not consider that the location of her in that general office is something about which she could reasonably complain in these circumstances (that is it could not properly be seen as a detriment), but even if we did consider that that was unfavourable treatment of her, it was not because she had complained about maternity discrimination in her resignation letter, or because she was at the time pregnant, it was for entirely practical and commercial reasons. She was treated in the same way that any other person who had handed in their resignation and was due to leave, from a sales position, would have been treated. Indeed, were it not for the circumstances, as indicated in Mr Kershaw's evidence, any other such resignee might have been asked to undertake garden leave. This complaint does not succeed.

46. It is convenient to pause in the list of allegations and deal with the other matters before reverting to allegation (ii). We will come back to that shortly.

<u>(iii) and (iv) Duties not handed back on return/not provided with former levels of communications and responsibilities</u>

47. Allegation three was that, in essence, the claimant's full role was not given to her and her duties were delegated to others. The facts that we have found are that the claimant's full role was not handed back to her on her return, but for the simple reason that whatever was delegated by way of post was going to be for a period of 11 weeks; it did not make practical business sense to hand back, for example, the full portfolio of relationships to which Mr Kershaw referred.

48. Had the claimant not been serving out a period of notice, but had she been, as it were permanently returning to her post, then this is a matter about which she might legitimately have complained, but in these circumstances we consider this was not unfavourable treatment for similar reasons to those above. There were some aspects of her work which it just did not make sense to hand back to her.

49. As to allegation four, again on our findings the claimant had access to the respondent's relevant systems. She had previously understood them and operated them very well. She could have accessed information or asked for information had she wanted it; again it was not that her particular responsibilities had been changed because she had complained of discrimination, but rather she was working a period of notice. She was not allocated demeaning or inappropriate tasks in this period, about which she might properly been able to allege detrimental treatment. She might not have been as busy as she might otherwise have liked, but in our judgment, the fact that she did not raise complaint with anyone probably indicates that this is a complaint which is properly to be considered something about which there was an unjustified sense of grievance in the circumstances. It was not detrimental treatment or unfavourable treatment of her.

(v) Being excluded from weekly meetings

50. As far as allegation five is concerned, the claimant was present in an open plan office during weekly sales meetings. She was not excluded as she might have been in other organisations where a leaver serving out their notice. She participated, she answered questions on our findings. She did not lead those meetings, as she had done previously, but Mr Kershaw, as we have indicated, had taken on that role during her maternity leave and in these circumstances it did not make sense for things to change about again. This complaint fails. Her treatment in this respect was not unfavourable or detrimental treatment in our judgment.

(vi) Moved from extensive travel to office based

51. As far as travel is concerned, allegation six it is not factually in dispute: there was very little travel for the claimant during those 11 weeks. That was for very good reason. The respondent had decided that travel and attendance at external events was not a means of achieving sales and had stopped doing so. There were a couple of local events to which the claimant had been invited and attended at this time, but the reduction of travel and working almost entirely in the office was was in no way connected to the fact that she had made a complaint or pregnancy or maternity and that complaint also fails.

(vii) Not invited to a social night out

52. The claimant's evidence was that there was a social night on 2 June to which she was not invited, and this is a matter where we did have considerable oral evidence which expanded on the written cases of the parties. We also bear in mind that it is clear from the respondent's response that a proof of evidence, or some instructions were taken from Mr Szesci at a very early stage in this case in order for that response to be settled in late July, and presented in early August of 2018. There was not included in that response the detail that we heard but we accepted his evidence it as entirely likely: two other colleague managers, one of whom had worked at a particular restaurant, had come to him to try and organise a night out at that restaurant. The claimant was there when that conversation was happening. We have found that she and Mr Szesci had a good relationship and that was evidenced by Mr Szesci's 'smiley face' in the claimant's leaving card. We do not consider that there was anything untoward about the night out discussion with the claimant. We considered that she is mistaken about the sequencing or order of the comments concerning her going to bed by 10pm, or being in bed by 10pm, and that it is more likely she made this comment; there was no deliberate exclusion of her. That she did not attend was not on Mr Szesci's part because she had complained of discrimination; he did not know about that; nor was it unfavourable treatment of her because she was pregnant.

(viii) and (ix): Mr Szecsi told the claimant Mr Kershaw had said she was a bitch within the business and in two cards Mr Szecsi addressed the claimant as a witch

53. As to allegation eight and nine we deal with these together to some extent, because what is likely is to a large extent influenced by the findings we have made about the relationship between Mr Szecsi and the claimant. Mr Szesci's use of 'witch' and a smiley face in two congratulatory cards is not a detriment to the claimant in the context of their friendly relationship. We do not consider that she took it as such at the time. Nor was his humour because she had made a complaint of discrimination; again Mr Szesci did not know about that. Nor are the references to the claimant being a 'witch' anything more than an in joke between the two of

them, and nothing to do with her pregnancy. We accepted to some extent their joint evidence that this was a joke which had developed. That was certainly Mr Szesci's evidence, and there was nothing in the claimant's evidence that struck as challenging of that position. We consider that the reference to 'witch' **was** a referencing back to an earlier conversation involving the word 'bitch', but to be clear the witch allegations do not succeed for the reasons we have explained.

54. Allegation nine raises a more difficult issue of fact for the Tribunal. The question for the Tribunal is whether the claimant first used the word 'bitch' about herself, as the respondent pleaded having taken instructions from Mr Szesci in July 2018. The context was said to be that some members of the sales team considered her in that way, and she told Mr Szesci that, after which it became a joke between them. The claimant's case which was very different: that Mr Szesci had reported to her during her notice period that Mr Kershaw had described her as a 'bitch' or considered her to be so. That is the essential dispute of fact that we have to resolve. It is fair to say that the claimant accepted in cross-examination that she had used the word herself in explaining why it was used about her, by saying the words that were put to her and they appeared in the grounds of resistance: she "was not a favourite upstairs due to the nature of her role because she has to be a bitch". The claimant accepted that she had said words like that, but only in response to Mr Szesci having said that was how Mr Kershaw had described her, or words to that effect.

55. The claimant's evidence included that Mr Szesci had said that he had not found her to be that way, so he was asking her about it with some surprise. We take into account of course that Mr Szesci is a person for whom English is not his first language. We have to find what is most likely, having heard in much more detail than any of the pleaded cases revealed about the allegations. We find that there had arisen in 2017 feelings of dislike or resentment from some of the claimant's team, and that it was entirely likely that before the claimant returned from her maternity leave, that Mr Kershaw briefed Mr Szesci to some extent about her as a person, and about her coming back to work. We accept Mr Kershaw's evidence that he had not described her as a bitch to Mr Szesci (for that is not and was not his view of her, nor is it likely in the context of their previous good relationship). That does not mean that Mr Szesci did not, as it were paraphrase or use that phrase as his encapsulation of the feedback he had been given, to the effect that her team did not like her as she could be overbearing, which was, in fact the comments that had been made in 2017. We consider it was likely that he did ask her, "why would people say that about you I don't find you to be so", relaying the briefing he had had from Mr Kershaw. In short we accept the claimant's case, but we do not consider that Mr Kershaw ever used that word about the claimant.

56. These deliberations and findings of fact go to explain our assessment of the reliability in the parties' evidence before us. We do not accept the respondent's broad submission that the claimant, in her oral evidence, resiled from statements and was not to be relied upon, and was reluctant to make admissions and so on. One of the directions that we have given ourselves is that a nervous witness is not necessarily a witness who is not telling the truth. We considered that the claimant's overarching evidence was supported by the contemporaneous documentation and that it was highly unlikely that she would have made up this particular allegation, which was, in essence, the respondent's case. On the other hand, facing allegations of discrimination and victimisation we do consider Mr Szesci is mistaken in his recollection about who said what first, (that is that the claimant out

of the blue described herself as a bitch). Of course he has every reason to be mistaken in his recollection given the passage of time.

57. Given the findings that we have made and it being clear that the comment was not made by Mr Kershaw, the making of the comment by Mr Szesci was in no way related to pregnancy or maternity or to the claimant having made a complaint. Both allegations eight and nine fail as allegations of victimisation and section 18 unfavourable treatment.

(x) No exit interview

58. It was accepted that HR did not conduct an exit interview with the claimant before her last day. In all the circumstances of this case, the claimant has an unjustified sense of grievance about this. She had a full opportunity to talk to Mr Hicks about what had happened. She set out the reasons for her resignation. Everybody was clear about what they were and indeed she repeated them to Mr Kershaw as her reasons for resigning. They were well known to HR, to Mr Hicks and to Mr Kershaw. We do not consider that the claimant can assert as a contravention of the Equality Act not having an exit interview in all the circumstances of this case.

Discussions and conclusions on the claimant's constructive unfair dismissal case, said to be contrary to section 99 ERA and Regulation 20 of MAPLE, and an Equality Act contravention (sections 39(2)(c) and 18

59. The claimant's ACAS certificate was issued on 15 June 2018, after she had worked out her notice. She presented a claim to the Tribunal on 12 July. She also presented a grievance, or a list of the allegations that she has made in these proceedings, and to some extent a number of matters beyond those in a communication to HR around the time of her last day. The respondent's response to that grievance was such that it did not accept what was said but would not carry out a detailed investigation.

60. The questions that are identified in the list of issues in relation to the severance discussion in February, or more fully paragraphs 11 to 13 of the claimant's claim form, are: did the respondent act in the way described in paragraphs 11 to 13. Clearly on the factual findings that we have announced, the respondent did act in the ways alleged. Was that conduct calculated or likely to destroy trust and confidence. While we accept in this sense Mr Hicks' evidence that he did not set out or calculate to destroy trust and confidence, the conduct of the February meeting and follow up letter was in circumstances where the claimant had confirmed that she wanted to return to work, and was returning to work full-time from the beginning of April. She had given the respondent 11 years' good service and she demonstrated that she had been capable in her role and was well respected for that. Was the conduct with reasonable and proper cause? The claimant had not intimated at all that she had any interest in her post coming to an end. Sometimes people do intimate such wishes, but on this occasion there was absolutely no indication of that whatsoever. The opposite was the case: the claimant had confirmed in writing she was returning. The conduct was without reasonable and proper cause.

61. In all these circumstances was it likely that the conduct we have found to have occurred would destroy or seriously damage trust and confidence? Of course it was. The respondent's reasons were not as simple as giving the claimant options out of kindness, as the Tribunal posed in one of its questions. If that had been the

case the conversation would have been much more restricted than it was. It would have been very short conversation and probably undertaken by Mr Hicks himself.

62. None of the persuasive factors, some might say coercive factors, which arise again and again in both what was said to the claimant in that meeting and in the communications in writing to her would have been used, if kindness was the only motivation. The claimant was encouraged in communications to accept the offer that had been mentioned, alongside neutral words which suggested it was entirely up to her to decide what to do next, and that the respondent had no vested interest. This was duplicitous 'double speak', to give it its popular name, and commonly destroys trust and confidence between employer and employee: any reasonable participant in that meeting or recipient of the email from the advisors on 2 March would be entitled to conclude that their employer wished them to leave, was using levers to encourage them, and was not neutral about that at all. The claimant resigned in response to that conduct and she was entitled to do so. It was a repudiatory breach of her employment contract.

63. The next question for us is whether it could be said that she affirmed her contract subsequently. We apply Cox: clear authority for the principles that there are no right lines in affirmation and matters are very fact sensitive. We bear in mind that the claimant gave only the notice that she was required to give pursuant to her contract, albeit she considered trust had been irreparably damaged. She is permitted by section 95 to do so but at common law we simply have to assess did she affirm her contract by attending work for the next 11 weeks in circumstances where she said trust and confidence had broken down.

64. We considered that she told Mr Kershaw just that, and Mr Hicks when she had the opportunity to do so. It was clear to us that she was not letting bygones be bygones by any stretch, in working out her contractual notice period. She was in very peculiar and unusual circumstances in that she was pregnant with her second child at that time; a number of her maternity benefits were related to the service which she had at particular points in the chronology, namely 15 weeks before her effective date of termination. Of course that might have borne on her mind and put her in an absolutely difficult position in the Buckland sense. In all the circumstances we do not consider that her conduct was affirming of the respondent's conduct. She did not waive her right to accept the respondent's repudiatory breach and bring the contract to an end, treating herself as dismissed.

65. We then have to ask ourselves the reason why question: was the respondent's principal reason for treating her as it did in making the offer and communicating about it in the way that it did, connected to pregnancy for the purposes of the unfair dismissal complaint. The provisions of section 99 of the Employment Rights Act pose the question: an employee should be regarded as unfairly dismissed if the reason or principal reason is of the prescribed kind relating to pregnancy, childbirth and maternity. Paragraph 20 of the 1999 Maternity and Paternity Regulations prescribe not necessarily entirely helpfully, principal reasons of a kind specified in paragraph 3, and paragraph 3 says: "the kinds of reasons referred to in paragraphs 1 and 2 are reasons connected with': the pregnancy of the employee, the fact of giving birth, the fact that the employee has sought to take or avail herself of the benefits of maternity leave.

66. In our judgment the chronology of this case is absolutely determinative of the reason why or the principal reason for the claimant being subject to the conduct to which she was subject in the making of the offer and the communications about it

and around it. The circumstances of an offer only arose after the claimant confirmed that she was returning to work full-time after she had had a request to return on compressed hours refused and after she had confirmed her second pregnancy. There is no doubt in this case that the principal reason for the conduct which led to the dismissal was the claimant's pregnancy and assertion of her maternity rights both in relation to the first and second pregnancy in the chronology of this case.

67. They are different tests for section 18 and for section 99. The Equality Act requires us to ask the question, was the unfavourable treatment of the claimant which we have found, because of, or materially influenced by, her pregnancy or her exercising of her maternity rights. In some cases one might find that the section 18 complaint succeeds but the section 99 complaint does not, because Section 99 requires a higher standard standard of causation (the principal reason). In this case we found the section 99 complaint to have succeeded and it rather follows that the section 18 complaint also succeeds for all the reasons above.

(ii) On 6 April being asked by Mr Kerhsaw if she was making the right decision and why she had not accepted the lump sum offered

68. Finally, returning to the allegation concerning the conversation on 6 April, shortly after the claimant's return to work, we wanted to announce our conclusions and reasons concerning the alleged dismissal, because we come to assess the conduct on 6 April of Mr Kershaw against conduct which we have already found to be in breach of the claimant's contract of employment. We have already found it to be discrimination because of pregnancy and exercising her maternity leave rights. It will be apparent that Mr Kershaw knew the chronology and detail of these matters, albeit he had not attended the meetings on 6 February or on 22 February. He knew very well what the circumstances were. On our findings we accept the claimant's account of his comments on 6 April. We consider that in recalling that he asked her why she was resigning, or words to that effect, rather than why she had not taken the offer, which was generous, or words to that effect, he is mistaken.

69. It is entirely likely given the path of communications that were in place at the time, namely to persuade the claimant to accept that offer, that he asked her why not, and sought to put it in a positive light. Was that something which was to the claimant's detriment at that point in the chronology? Mr Kershaw said that he considered what she did in returning to work in the circumstances to be brave; of course it was, objectively so. She had taken her decision to rejecting the offer in the way that she did and to return to work for her notice period, and close the chapter, on the offer having been made, the last thing that she needed was to be asked about her reasons for doing so, in a way that is seeking to suggest that she has made a wrong decision. In our judgment that is to her detriment and she can legitimately complain about it. For all the reasons the continuation of the earlier conduct in making the offer in the first place, conduct influenced by her second pregnancy and seeking to exercise her rights to maternity leave. In these circumstances that complaint succeeds as a Section 18 contravention. The remarks were because she had made a complaint, but it was more of the same conduct in seeking to persuade her that she should have accepted an offer that was made in February.

70. Those are our conclusions on liability. The parties went on to agree remedy.

Employment Judge JM Wade

Date 9 August 2019

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