EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MISS A ELLISTON		LONDON BOROUGH OF ISLINGTON

Heard at: London Central

On: 11 April, 2019

Before: Employment Judge O Segal QC
Members: Ms S Boyce; Ms O Stennett

Representations
For the Claimant: In person
For the Respondent: Ms McColgan, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

The Claimant's claim under s. 13 Equality Act 2010 is dismissed.

REASONS

1. The Claimant brings a claim direct discrimination because of her pregnancy, arising out communications between herself and the Respondent concerning a job application the Claimant made for the role of Legal Assistant.

2. The Claimant represented herself, and the Respondent was represented by Ms McColgan of Counsel. We express our gratitude for the way in which both conducted the proceedings.

3. The issues were identified by REJ Potter at a Case Management hearing on 28 February 2019 and we refer to those below.

Evidence

4. We had an agreed bundle of 82 pages. We had witness statements and heard live oral evidence from:

4.1. on the Claimant's behalf: herself.

4.2. for the Respondent: Ruth Hayward (HR Resources Advisor); and Angela Nolan (Principal Solicitor).

5. We comment at the outset that we consider that all the witnesses were doing their best to assist the Tribunal.

Facts

6. The Claimant was and remains employed by the Nursing and Midwifery Council. She is on maternity leave at present.

7. **Shortly before becoming** pregnant, she applied to the Respondent for the role of Legal Assistant, for which she was qualified and for which she was short-listed for an interview on 12 July 2018.

8. The Claimant became ill with a pregnancy related illness on about 9 July and remained ill until 18 July.

9. When she realised she would not be able to attend the interview, the Claimant phoned on 10 July and advised the relevant HR officer, Ms Brown, who worked as a locum at the Respondent until 24 July 2018, that she was unwell and could not attend on the 12th; she explained that her illness was pregnancy related.

10. The Claimant followed that up with an email timed at 10:39 to Angela Nolan, who was in charge of recruitment for the position and who was interviewing for that and

other roles during most of the week 11-13 July. The email stated that the Claimant was currently unwell and could therefore not attend the interview on 12 July. It continued: *"I do not wish to formally withdraw my application, as I am still very much interested in the role and would kindly ask that my application be retained on file in the event that any further vacancies arise in the future, although I understand that I would probably have to submit a new application for any future roles. Kindly acknowledge receipt of this email."*

11. The Claimant also emailed Ms Brown at 11:31 the same day, copied inter alia to Ms Nolan, rehearsing their communications to date, including that her illness was pregnancy related, and ended: *"Can you kindly confirm what the position is with regards to my application in light of my current circumstances."*

12. Ms Brown responded to the latter email at 12:06: *"I confirm I have cancelled your scheduled interview, I have not withdrawn your application."*

13. Ms Nolan responded to the first email at 12:16, during a break from interviewing when she was able to catch up briefly on a number of emails: *"Thank you for your email and for letting us know and I hope you feel better soon".* Ms Nolan did not respond to the latter email to Ms Brown which had been copied to her.

14. Interviews were concluded by 13 July and an appointment made and confirmed by 24 July, on which date the Claimant's application was formally noted on the system as "withdrawn" and she was notified of that. In response, the Claimant sent, at 17:07, an email to Ms Brown (not copied to anyone else) asking her to confirm the status of her application.

15. Ms Brown had left the organisation by that time and did not receive the email. At some point, an automated out of office response was set up on her email account, saying that she had left and asking those emailing her to contact another member of the team. However, the Claimant did not receive such an automated response.

16. Ms Hayward told us, and we accept, that when a member of staff leaves from the role that Ms Brown performed, the Respondent's practice is that emails sent to their account thereafter are not read by anyone else. Thus, in the event, nobody read the Claimant's 24 July email to Ms Brown.

The Law

17. Section 13 EqA 2010 provides that

> *"A" discriminates directly against "B" if B establishes the detrimental action relied upon (e.g. dismissal), and A treated B less favourably that A treated or would treat others (an actual or hypothetical comparator) whose circumstances are not materially different to B's and the less favourable treatment is because of a protected characteristic.*

18. Ms McColgan referred us to a few authorities for propositions of well-established law; of which in the circumstances we note only ***Hair Division Ltd v MacMillan* UKEATS/0033/12**, which confirms that a tribunal must be careful not to confuse a respondent's knowledge of a claimant's pregnancy with the question whether that was the reason for the treatment complained of, most obviously (as in that case) where the decision maker is not the person whom the claimant tells of her pregnancy.

The parties' submissions

40. The parties' submissions were sensibly brief, focussing on the factual findings they wanted us to make.

41. The main issue of dispute was whether we should accept Ms Nolan's evidence that she had not seen the second email the Claimant sent on 10 July.

42. There was also an issue of the natural reading of the first email sent that day.

Discussion

24. On the facts we have found, the claim must fail.

25. We address the contentious issues in a little more detail.

Issue 1

26. The Claimant's email of 10:39, quoted at para 10 above, naturally reads, we all feel, as communicating that she was reluctantly accepting that she was not able to continue her application for the present position, but that she wanted to be considered for any future similar position as Legal Assistant.

27. In any event, we accept Ms Nolan's evidence that this was the way she read that email.

28. That being so, we accept the Respondent's case that Ms Nolan's response to that email was appropriate and predictable.

29. The complaint of unfavourable treatment made in that regard must therefore fail.

Issue 2

30. We accept Ms Nolan's evidence that she did not read (or at least did not see any reason to respond to) the email of 11:31 the same day sent to Ms Brown and copied to her. In the circumstances – a Principal Solicitor in Childcare trying to catch up on work during a short break in a week of interviewing – we find it unsurprising that Ms Nolan would not have read an email addressed to an HR officer only copied to her, and equally unsurprising that if she had read it she would have not considered it required any action from her.

31. Again, the complaint of unfavourable treatment made in that regard must therefore fail.

Issue 3

32. Finally, on the facts found, the complaint of unfavourable treatment in respect of the non-response to the Claimant's 24 July email must also fail.

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Employment Judge Segal

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Date 9 July 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 August 2019

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FOR THE TRIBUNAL OFFICE