EMPLOYMENT TRIBUNALS

Claimant: **Joanne Haider**

Respondents: **1. Cloud Social Media Ltd**
2. Henry Jones
3. Caroline Jones

Heard at: **Southampton** **On:** **24, 25, 26, 27, 28 June 2019**

Before: **Employment Judge Dawson , Ms Sinclair, Mr Knight.**

Representation
Claimant: In person
Respondent: Mr Shah, solicitor

JUDGMENT

1. The claimant was unfairly dismissed by the 1st respondent and
   a. the 1st respondent is ordered to pay to the claimant the sum of £385 in respect of the basic award,
   b. no compensatory award is made.
2. The claimant's claim of breach of contract against the 1st respondent in respect of notice pay is well-founded and the 1st respondent is ordered to pay the sum of £385 to the claimant.
3. The claimant's claim of unauthorised deduction of wages against the 1st respondent is well-founded and the 1st respondent is ordered to pay the sum of £292 to the claimant.
4. The claimants claim in respect of holiday pay is well-founded and the 1st respondent is ordered to pay the sum of £2371.70 to the claimant.
5. The claimant's claim of discrimination against the 1st 2nd and 3rd respondents under sections 18 and 26 Equality Act 2010 is well-founded and the respondents are ordered to pay to the claimant the sum of £22,786, inclusive of interest on a joint and several basis.

It is recorded that the provisions of the Employment Protection (Recruitment of Jobseekers Allowance and Income Support) regulations 1996 do not apply to this judgment.

REASONS- LIABILITY

1. The claimant presents claims of unfair dismissal on the grounds of pregnancy, discrimination on the grounds of pregnancy/maternity, harassment on the grounds of sex and monetary claims for notice pay, holiday pay, arrears of wages and damages arising out of the breach of a contract to transfer 10% of the shares in the 1st respondent to the claimant.

2. By order of Employment Judge Richardson on 27th of March 2018 the 2nd and 3rd respondents were added to the proceedings although not all discrimination claims are against both respondents. The contract claim is proceeded with against all 3 respondents.

   The issues

3. Shortly before the hearing representatives for the claimant ceased to act and she conducted the hearing in person. However, whilst still having the benefit of professional representation the claimant and the respondent had agreed the list of issues which appears at page 74 of the bundle. At the hearing this was clarified to be a definitive statement of the list of issues, but further clarifications were provided, namely;

   a. in respect of issue 3.4 the claimant was not seeking an order transferring any shares in the 1st response business but simply a monetary award,

   b. the respondents did not pursue issue 4.1 and did not assert that the claimant contributed to her dismissal,

   c. although the respondent was not pursuing a Polkey argument it was, in respect of remedy, arguing that the principles set down in Chagger v Abbey National Plc [2010] IRLR 47, and summarised below, should be applied,

   d. there was no issue as to the liability of or for the 2nd and 3rd respondents in the sense of whether they were behaving as agents of the 1st respondent when they performed the acts alleged. Mr Shah accepted that they would be the agents of the company to the extent that the claimant's allegations were proved.

4. We heard from the claimant and the 2nd and 3rd respondents.

   The Conduct of the Hearing

5. Prior to the hearing a timetable had been agreed and recorded in the order of Employment Judge Livesey, at page 70 of the bundle. At the outset of the hearing the parties agreed that the timetable remained appropriate and

the parties helpfully completed the cross examination of the witnesses in the time allowed. Mr Shah was not able to fully complete his closing submissions in the 45 minutes allowed and those submissions were, therefore, truncated in order to maintain the timetable agreed. We were grateful to the parties for their cooperation.

6. During the course of the hearing the claimant sought to adduce further documentation (EC1-3), Mr Shah was not able to point to any prejudice on the part of the respondents and we considered that it was in the interests of justice to admit that documentation. Mr Shah was permitted to ask additional questions arising from those documents at the outset of the respondents' evidence. The claimant also sought to place before the Employment Judge, only, various bank statements. The judge declined to consider the statements on the basis that only he would look at them and, in any event, the claimant did not pursue an application to adduce those documents.

7. The Employment Tribunal enquired with the parties at the outset whether any adjustments were needed in respect of the hearing; Mr Shah told us that both the 1st and 2nd respondents have dyslexia and may need more time to read documents. During the course of questioning the 2nd respondent the claimant said that she, too, had dyslexia. We agreed that all witnesses could have as long as they needed to consider the documents and should ask for breaks if they wanted them. We allowed breaks whenever they were requested.

The Law

8. The Maternity and Parental Leave etc Regulations 1999 provide as follows

> 10 Redundancy during maternity leave
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> 1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
>
> 2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).
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> 3) The new contract of employment must be such that—
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> a. the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

b. its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

20 Unfair dismissal

1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

   a. the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

   b. the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—

   a. the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

   b. it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

   c. it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

   a. the pregnancy of the employee;

   b. the fact that the employee has given birth to a child;

   c. the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;

d. the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave];

e. the fact that she took or sought to take—

i. . . .

ii. parental leave, or

iii. time off under section 57A of the 1996 Act;

9. It is instructive to consider what Harvey on Industrial Relations and Employment Law states;

> "Although the current terminology of the ERA 1996 and MAPLE SI 1999/3312 reg 20 is taken from normal unfair dismissal law, it is likely that a tribunal will look at the necessary causal connection particularly carefully if it is alleged that pregnancy or maternity, or a reason related thereto or connected therewith, was the real reason for dismissal. This approach can be traced back to the early decision of the House of Lords in *Brown v Stockton-on-Tees Borough Council [1988] 2 All ER 129*, *[1988] IRLR 263*. In that case a woman was selected for redundancy because she was pregnant. It was not disputed that there was a genuine redundancy situation. Nonetheless the House of Lords, reversing both the EAT and the Court of Appeal, held that the dismissal contravened the then equivalent of ERA 1996 s 99 and was automatically unfair. The following passage of the speech of Lord Griffiths (with whom Lords Bridge, Lowry, Brandon and Goff concurred) demonstrates the purposive approach.
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> > "[Section 99] must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and he is not prepared to make the arrangements to cover her temporary absence from work he is deemed to have dismissed her unfairly. I can see no reason why the same principle should not apply if in a redundancy situation an employer selects the pregnant woman as the victim of redundancy in order to avoid the inconvenience of covering her absence from work in the new employment he is able to offer others who are threatened with redundancy. It surely cannot have

been intended that an employer should be entitled to take advantage of a redundancy situation to weed out his pregnant employees."

(Division J Family Matters/4/B(2) Reason or principal reason)

10. In respect of the burden of proof in respect of such cases, we have noted that the Claimant has less than 2 years' service and have therefore considered the following extract from Harvey and the cases noted therein

> "The position on the onus of proof may be different, however, if the employee had less than two year's continuous employment at the effective date of termination of her employment. In such a case, the employment tribunal has no jurisdiction to entertain a complaint of unfair dismissal unless the claim falls within one of the statutory grounds (pregnancy and pregnancy-related reasons being such) for which there is no minimum service requirement. The traditional view is that in such situations the onus of proof as to the reason for dismissal is on the employee, since it is for the party asserting jurisdiction, where this is disputed, to establish the facts conferring jurisdiction: *Smith v Hayle Town Council [1978] ICR 996, CA*.
>
> [418.01]
>
> The established position may not be quite as clear-cut as it appears at first sight, however. Dismissal for pregnancy or pregnancy-related reasons is sex discrimination. A woman claiming sex discrimination will be entitled to rely on the shifting burden of proof under EqA 2010 s 136. It would be a strange result if the tribunal found for the claimant under the EqA, applying s 136, but went on to find that she had not discharged the burden of proof as to the reason for her dismissal under ERA 1996 s 99.
>
> [418.02]
>
> Moreover, the ECJ has made it clear in *Paquay* (above, at para [407]) that the Burden of Proof Directive applies to discrimination by way of dismissal for pregnancy or related reasons under Art 10 of the PWD (Directive 92/85) (see para 37 of the judgment). Since s 99 is intended as the domestic implementation of Art 10, it must at least be arguable that the shifting burden of proof applies to section 99 claims; and that would equally be the case whether or not the employee had sufficient service to make a claim of *ordinary* unfair dismissal. Moreover, if and to the extent that the Court of Appeal's reasoning in *Kuzel* gives greater protection to the employer unable to show that there was no discrimination than would be the case if the claim was brought under the EqA 2010, it can be argued that *Kuzel* should not be followed in section 99 cases, since to do so would be to fail to give full effect to a right derived from EU law. These are points for consideration in future litigation"
>
> Para J/4/B(4)

11. The following are relevant sections from the Equality Act 2010.

13 Direct discrimination

1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

18 Pregnancy and maternity discrimination: work cases

1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

    a. because of the pregnancy, or

    b. because of illness suffered by her as a result of it.

3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

    a. if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

    b. if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

   a. it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

   b. it is for a reason mentioned in subsection (3) or (4).

26 Harassment

1) A person (A) harasses another (B) if—

   a. A engages in unwanted conduct related to a relevant protected characteristic, and

   b. the conduct has the purpose or effect of—

      a. violating B's dignity, or

      b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

   a. the perception of B;

   b. the other circumstances of the case;

   c. whether it is reasonable for the conduct to have that effect.

5) The relevant protected characteristics are—

   age;

   disability;

   gender reassignment;

   race;

   religion or belief;

   sex;

sexual orientation.

109 Liability of employers and principals

(1) ...

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as al-so done by the principal.

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

12. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

13. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in

> support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

14. In Birmingham City Council and another v Millwood UKEAT/0564/11/DM the EAT considered the question of whether an inadequate explanation for treatment would cause the burden of proof to shift. Langstaff J said

> "**[25].**..We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.
>
> **[26]** What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which *King v Great Britain-China Centre* [1991] IRLR 513, [1992] ICR 516 was the leading authority in relation to the approach a tribunal should take to claims of discrimination. Although a tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.

15. In considering questions of causation, in Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that that if the protected

characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

16. In the victimisation case of *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls considered that the test (in the context of victimisation) must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?

17. In deciding whether the claimant was treated unfavourably we have had regard to the decision in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 that, in respect of the definition of detriment,

> "As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.
>
> But once this requirement is satisfied, the only other limitation that can be read into the word is that in-dicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a rea-sonable worker would or might take the view that in all the circumstances it was to his detriment? An unjusti-fied sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

Whilst acknowledging that the test in section 18 the Equality Act 2010 is one of unfavourable treatment, rather than a detriment, we consider the judgment to be helpful in assessing what would amount to unfavourable treatment.

18. In Chagger v Abbey National Plc [2010] IRLR 47 the Court of Appeal held that " In assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss. The gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination" (taken from the head note).

19. In respect of breach of contract claims, the Employment Tribunals Extension Of Jurisdiction (England And Wales) Order 1994, Article 3, provides 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 -

> (a) the claim is one to which s 3(2) of the Employment Tribunals Act 1996 applies …
>
> (b) the claim is not one to which art 5 applies; …

20. Section 3(2) Employment Tribunals Act 1996 provides

> (2) Subject to subsection (3), this section applies to—
>
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
>
> (b) a claim for a sum due under such a contract, and
>
> (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
>
> if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

21. In *Nosworthy v Instinctif Partners Ltd* the EAT held that, in connection with a claim arising out of a share purchase agreement (amongst others) "As acknowledged in his skeleton argument the claim for the value of shares and loan notes under the Share Purchase Agreement is under a "contract connected with employment" within the meaning of art 3(a) and the Employment Tribunals Act 1996 s 3(2). Subject to the Bad Leaver provisions the earn-out payments are dependent upon the Claimant remaining in the Respondent's employment until after 31 December 2015. The claim was therefore brought under a contract "connected with employment". In our judgment the means of advancing that claim, by disapplying the Bad Leaver provisions, does not alter the claim itself" (paragraph 51).

22. In Gestmin SGPS SA v Credit Suisse (UK) Ltd, Leggatt J gave the following helpful guidance

> *Evidence Based On Recollection*
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> **[15]** An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> **[16]** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be

more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called “flashbulb” memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description “flashbulb” memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been “refreshed” by

> reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> **[21]** It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> **[22]** In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

23. We have approached the evidence in that way.

24. Given the number of issues in this case it is most helpful to set out our findings and our conclusions in respect of each issue as we progress.

General Findings Of Fact And Conclusions

25. The 2nd respondent is the mother of the 3rd respondent.

26. The claimant was employed by First Social Ltd as a sales and marketing manager on 6 June 2016. Her offer letter is written by the 3rd respondent

who describes himself as the Managing Director.

27. In respect of that employment the claimant's contract provided "19. The holiday year will commence on day of and run for one year (the "Holiday Year")" (sic).

28. The schedule to the contract gives the date that continuous employment began as 6 June 2016 and in respect of holiday states "7. Holiday entitlement and holiday pay: the holiday year commences on the day of and runs for one year from the commencement date. The employee will be entitled to 21 days of paid annual leave… With bank and public holidays to be excluded…".

29. The claimant's employment environment was relatively informal. She worked at the home of the 2nd respondent, with the 2nd respondent usually present. She worked in a small office off the kitchen. She was given free rein of the house and used the kitchen to make drinks and food. The atmosphere was informal. Discussions about work often took place over breakfast.

30. In the summer of 2016, the 1st respondent was jointly owned by the 2nd respondent and one Stephanie Howard. A decision had been made that Stephanie Howard and Mrs Jones would separate their business interests and Ms Howard would "leave and take half of the existing clients of the respondent". We were not told how many clients. We have not been told the precise mechanism by which that took place and it is not important for these findings. Thereafter First Social Ltd was, according to the claimant, merged with the respondent. Again we have not been told the precise way in which that merger took place and that is of some greater importance.

31. As far as it is possible to tell from the evidence it appears that the respondent took over the business of First Social, carried on servicing the half of clients which Ms Howard had not taken, and carried on operating from the 2nd respondent's home. The claimant assisted in the merger/takeover operation and, in about the start of November 2016, became employed by the first Respondent. At that stage the business was solely owned by the 2nd respondent. She was not an employee but was, we understand, a director at Companies House. The 3rd respondent was not a statutory director in the business, did not own shares and was not an employee.

32. Although not listed as an issue, the question has arisen, as part of the evidence, of whether the claimant's employment with First Social Ltd transferred to the 1st respondent under the Transfer of Undertaking (Protection of Employment) Regulations 2006. To the extent that it is necessary for us to resolve that issue we find that TUPE did apply to that transfer, the clients and the services provided to them were taken over by the 1st respondent, the business carried on operating from the same premises and used the same staff (the claimant and Mrs Jones) and in our judgment there was, therefore, a transfer of an economic entity which retained its identity. If there were any real doubt about that point it is dealt with in the 1st Respondent's Response which appears at page 31 of the bundle and in which the respondent stated "7. It is averred that the Applicant deliberately kept this information from the Respondent. Had the

Respondent been aware of her intentions the employment would not have been extended under TUPE".

33. We find that the claimant was not issued with a new contract of employment in November 2016 and her terms and conditions remained unchanged from those which had been applicable when working for First Social Ltd save that her title became Director of Sales and Marketing.

34. The respondent was a small business providing social media for companies using several platforms to include Facebook, Instagram and Twitter. Clients would be recruited by cold calling, which was part of the role of the claimant although Mrs Jones also did some cold calling. Mr Jones was not employed by the respondent nor was he a shareholder or director. He was employed on a full-time contract with Apple in its Southampton store. He worked around 40 hours a week on a shift basis and had time off during the week and commuted from Bournemouth. He was however involved in the business, he assisted his mother with the running of the company.

35. Initially the claimant was the only employee of the respondent, however, in November 2016 it was decided to employ a content writer. The claimant and Mrs Jones were both engaged in deciding the appropriate type of person to employ and recruiting that person.

36. Recruitment of the content writer took place by placing an advertisement on a closed Facebook page for mothers with young children. It had been decided by Mrs Jones and the claimant that such a person would be the right kind of candidate for the work needed.

37. The claimant's role involved not only cold calling clients but also negotiating terms with them and she was able to agree prices and terms and conditions and sometimes visited clients with Mrs Jones.

38. The claimant told the respondents that she was pregnant towards the end of November 2016.

39. The claimant went on maternity leave on 18 May 2017 although did some work on 23 May 2017.

40. Against those general findings of fact we set out our findings in respect of the particular issues. We deal with the issues largely in the order they are set out at page 74 however;

    a. we deal with discrimination under sections 18 and 26 Equality Act 2010 simultaneously within each issue

    b. we will return to the question of unfair dismissal towards the end of our findings.

<u>Issue 2.1.1 – Changing their attitude… when the claimant announced she was pregnant</u>

41. We regard this allegation as largely setting out the background to the subsequent allegations but, as set out in more detail below, we find that the respondents' attitude primarily changed from around the middle of February 2017 and, therefore, do not accept that there was unfavourable treatment

from late November 2016 as alleged. From February 2017 there was some unfavourable treatment on the grounds of pregnancy as set out below.

Issue 2.1.2 December 2016- excluding the claimant from a business meeting with the company accountant

42. As part of the process when the business of First Social Ltd was transferred to the 1st respondent, the claimant was told that she would be given a 10% shareholding in the 1st respondent. That agreement can only have been made with the 2nd respondent who owned the shareholding in the 1st respondent (or at least would do so once Ms Howard had exited from the business). Mrs Jones confirmed in evidence that it was intended that the shares would be given as soon as she could take her own salary from the business, in about September 2016.

43. The claimant's evidence in this respect was that the entitlement to shares was given to her in exchange for her giving up her rights under a performance bonus by which she was paid £100 per sale for every sale over 3 sales that she made in a month (the performance bonus). The respondents' evidence was that the claimant was offered a 10% shareholding but it was performance related.

44. We find that the claimant did, on the balance of probabilities, agree to give up her rights under the performance bonus in exchange for the shares but it was still a requirement of the agreement that the claimant would perform in the same way that she would have done under the performance bonus, in order to win the right to the shares. We return to the correct legal interpretation of the agreement below.

45. In fact the claimant accepted that she did not meet her target of 3 sales per month in November and December 2016.

46. When the claimant was informed that the company accountant was attending in December 2016 she was told that there would be a discussion about shares. The claimant, in her evidence, accepted that she was told in that meeting that the shareholding issue was in order and would be sorted, but it is clear that she was not given any particular date, nor did she press for one. It is clear from the claimant's email of 8 February 2017, at page 176 of the bundle, that the shareholding was discussed with the company accountant in December 2016 since she writes, "nor has it been discussed *since* Roger's visit in December." (Emphasis added)

47. Most of the meeting with the company accountant on that day was a personal one between Mrs Jones and the accountant about her pension. That was not a business meeting and it was not appropriate that the claimant should be part of it. She was not unreasonably excluded from that part of the meeting.

48. We note, further, that with the permission of the respondent the claimant spoke to the accountant about a business she was in the process of setting up - running a sweet shop. The fact that the respondent permitted her to have such discussions suggests that the relationship was not as sour as the claimant now believes.

49. We do not accept the allegation that the claimant was excluded from the

business meeting with the company accountant and, therefore, this allegation fails.

2.1.3 – January 2017 – excluding the claimant from discussion/ several meetings regarding Lisa Coleclough for whom the claimant was the line manager

50. The claimant was involved in interviewing Ms Coleclough and helping to decide whether she should be employed. She was involved in agreeing the wage structure and taught her many of the basics of the job. She reviewed content writing that Ms Coleclough had produced.

51. While we accept that the respondents' business, being small as it was, did not have a particularly hierarchical structure in the way which the claimant would maintain today, we do accept that she would have had the impression that she was Ms Coleclough's line manager.

52. In fact, the only evidence we heard of actual exclusion in respect of any meetings regarding Ms Coleclough was in relation to a salary increase she was awarded by the 3rd respondent. That was not disputed.

53. We consider that it would be reasonable for the claimant to consider that she had been treated unfavourably because of the exclusion from any discussions or meetings in relation to a salary increase.

54. We do not consider that the exclusion from that discussion would amount to an act of harassment given that we do not think it would have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (even taking into account the claimant's perception).

55. At this stage we do not find that the question of the claimant's pregnancy was particularly prevalent in the respondent's mind. For the reasons set out below we find that the claimant's pregnancy only became a real issue for the respondent at the time the claimant was seeking statutory maternity pay. At this stage whilst the respondent was, of course, aware of the claimant's pregnancy, we do not find that the pregnancy was a significant reason for the claimant's treatment. Thus we do not find that the treatment was because of her pregnancy or related to her sex.

2.1.4 – 8 February 2017 – questioning the contents of the claimant's call statistics

56. The evidence in relation to what happened on 8 February lies primarily in the email of that date from the claimant at page 176 of the bundle.

57. We find that on 8 February Mrs Jones challenged the claimant about the number of calls she had been making the day before and told her that she should make around 40 calls per day. That is the figure which appears in the claimant's email and was not challenged in the respondent's reply at page 175.

58. On 7 February 2017 the claimant had spent a period of time on the telephone to a hotel. That was personal business and we find niggled Mrs Jones.

59. We were shown the call statistics in evidence which show that in relation to the claimant's calls, she had made approximately 39 calls on 7 February, and was therefore doing what was asked of her.

60. We note that in that email the claimant raised other matters which were of concern, namely not having been offered her 10% shareholding since December, issues in relation to Ms Coleclough's line of command and communication about business matters. In the same email the claimant makes reference to maternity issues stating that she has agreed that she will claim statutory maternity pay from the government on condition of receiving 6 weeks' pay at 90% from the respondent. The claimant does not link the issues to which we have referred to the question of her maternity.

61. When the claimant was asked about whether she was making any link, at the time of writing the email, between the concerns she expresses and her maternity, she stated that she had not made any such link at the time but did so, essentially, with the benefit of hindsight.

62. Having heard the evidence of Mrs Jones and the claimant, we find that by 8 February 2017, Mrs Jones was feeling irritated by the amount of time she perceived the claimant was spending in setting up her sweet shop business and the irritating telephone call to the hotel on 7 February was the trigger for the conversation.

63. Whilst the claimant's pregnancy and discussions in relation to thereto were also in the mind of Mrs Jones we do not find that they were a significant reason for the treatment on 8 February. For the purposes of clarity, we do not find that the discussion related to the claimant's sex, in the sense that she was pregnant either.

    Issue 2.1.5 – 17 & 21 February 2017 – denying the claimant was entitled to maternity pay and Mrs Jones saying "if I have to pay you maternity pay, the business just can't afford it and I'll just fold the fucking business."

64. This allegation is made against the 1st and 2nd respondent only.

65. By 31st of January 2017 there had been an agreement between the claimant and the respondents in relation to maternity pay.

66. An email of 31st of January 2017, at page 174 bundle, from the claimant to the company accountant states "also Lindy, Henry and I have discussed statutory maternity pay and I have agreed to take government maternity allowance, however, I will be paid 6 weeks at 90% from Cloud Social Media."

67. We find that was an arrangement which the claimant was happy with as also confirmed in the email of 8 February 2017 set out above.

68. We find that not only was the claimant happy with that agreement but it was one which the claimant had negotiated (the email of 8 February 2017 refers to her claiming statutory maternity pay from the government, on condition of receiving 6 weeks pay at 90%).

69. It benefited the claimant to make that arrangement with the respondent since

a. if she claimed Maternity Allowance from the government she would be able to claim, the relevant payment per week or 90% of her average weekly earnings for 39 weeks,

b. if the claimant claimed statutory maternity pay she would be able to claim 90% of her average weekly earnings for the 1st 6 weeks followed by, the relevant payment per week or 90% of her average weekly earnings for 33 weeks,

c. the arrangement which the claimant reached with the respondent therefore left her better off in that for the 1st 6 weeks she was in receipt of 90% of her average weekly earnings from the 1st respondent plus the £146.68 which she could claim from the government.

70. The arrangement also benefited the respondent to some extent since it did not have to pay the Statutory Maternity Pay and reclaim it from the government but, equally and to its detriment, it could not reclaim the money it would pay to the claimant.

71. The respondent appeared to change its mind in respect of the arrangement and by letter sent to the claimant on 17 February 2017, page 194 of the bundle, stated "unfortunately, you do not qualify for maternity pay from Cloud Social Media Limited. This includes the initial 6 weeks' pay when you begin your leave." In evidence it was apparent that view was based on taking the claimant's start date for employment as November instead of June 2016.

72. The letter goes on to state "In regards to your time off and any other of your maternity rights, we are very happy to work with these and to ensure that you will be welcomed back after your time away *should you want to stay with Cloud Social Media Limited*." (our emphasis).

73. Doing the best we can with the limited evidence which we have we find that that statement, and in particular, the reference to "should you want to stay…" reflects the start of a frustration on the part of the respondents with the claimant and her pregnancy/maternity position.

74. We accept that there was, thereafter, a meeting on 21 February 2017 between the claimant and Mrs Jones at which Mrs Jones reinforced what was said in the letter of 17 February 2017, that the respondent was not willing to pay maternity pay. However we do not accept that it went as far as her saying that she would fold the "fucking business". Had she said that we think the claimant would have referred to that phrase in subsequent correspondence.

75. Moreover the refusal to pay 6 weeks pay at 90% is not one which the respondent maintained. By a document dated 1st of March 2017 the same amount was described as a bonus payment and a statement made that "you will be receiving a bonus for the work that you have completed, this will be paid out in 2 separate payments totalling 90% of your regular monthly pay over a six-week period. These payments will be made on the following dates [the dates were then set out]." (Page 179 of the bundle).

76. We find that it was unfavourable treatment for the respondent to say (even between 21 February and 1 March 2017) that it would not pay the sums

which it had previously agreed to pay to the claimant. Moreover we find that would amount to unwanted conduct which would create a hostile or offensive environment for the claimant.

77. The question, then, arises as to whether the unfavourable treatment was because of the claimant's pregnancy or because the respondent simply wished to save money. It is right to say that, but for the claimant's pregnancy, she would not have been in the position that she was and would not have been needing to negotiate with the respondent in the way that she did. But we have reminded ourselves that the correct test in a case such as this is not "but for" but "what was the reason why the respondent behaved as they did". We find that the reason why, was because the respondent wished to save money, not because it was motivated by the fact that the claimant was pregnant. Therefore the claim of pregnancy discrimination in this respect fails.

78. The unwanted conduct which caused the claimant to be in a hostile or offensive environment was, likewise, related to the desire to save money not sex.

2.1.6 – not giving the claimant paid leave for attending a maternity appointment

79. This allegation is made against the 1st and 3rd respondent.

80. The claimant attended a maternity appointment on 1 March 2017.

81. On 9 March 2017 the claimant raised various concerns in relation to pay and holidays (page 180 of the bundle). In that email she wrote "March – leaving early was for a maternity appointment on the Wednesday is accurate however, as pregnancy -related it is payable…" (Sic).

82. Mr Jones replied on 13 March stating "March is not yet complete, so no need to point errors in regards to that month…".

83. The respondents did not ask for proof in relation to the reason for the medical appointment and the implication that such proof was required, made during this hearing, was inaccurate.

84. Not paying the claimant when she had to attend a medical appointment due to her pregnancy was, in our judgment unfavourable treatment. It was also unwanted conduct which would have the effect of creating a hostile or offensive environment for the claimant.

85. In this respect we find that the reason for the treatment was because the claimant was pregnant. On the balance of probabilities we find, by now, that the timekeeping of the claimant had been affected because of her pregnancy, caused by her morning sickness and the issue with maternity pay, was vexing the respondents and was a significant reason for her treatment.

86. Moreover, it was misconduct related to her sex because she was pregnant.

2.1.7 – Refusing the claimant's request for leave

87. There was a clear confusion during the claimant's employment, between the claimant and the respondents and amongst the respondents themselves, as to what the claimant's holiday year was. We do not find that confusion was deliberate or connected to the claimant's pregnancy, it was genuine (albeit not particularly reasonable on the part of the respondents).

88. Having regard to the contract which the claimant was given, the holiday year was from June to May in any year. It is clear from the email at page 181 of the bundle that, by 3rd of May 2017, the claimant had at least 3 days left to take (the letter at page 190 suggest that the claimant may have had as many as 11 days to take). However Mr Jones's reply to the claimant's request for holiday at page 181, was to deny her any further paid leave but to offer unpaid leave. He also added the comment "if you are struggling with maintaining work commitments due to your pregnancy we can discuss your early departure on maternity leave if you so wish."

89. The claimant had untaken holiday and, therefore, the respondent should have allowed her to take it. It did not. Whilst we have found that the respondents were confused about holiday, the definite and somewhat hostile stance taken in that email was, we find, significantly influenced by the claimant's pregnancy and the consequences of it.

90. This allegation is made against both the 2nd and 3rd respondent but was defended, at least in part, on the basis that only the 3rd respondent made the decision. We reject that, having regard to the 2nd paragraph of the email of 6 of May 2017 from Mr Jones which states "we have considered this request to accommodate you…".

91. We find that this allegation is proved and amounted to direct discrimination contrary to section 18 the Equality Act 2010 and harassment on the basis that the refusal of holiday would create a hostile or offensive environment for the claimant and it was related to her sex because of her pregnancy.

2.1.8 – 1 June 2017 – failing to pay the claimants bonus as agreed

92. This allegation is made against Mrs Jones and the 1st respondent.

93. We have set out above that the respondent agreed to pay a sum equivalent to 90% of 6 weeks of the claimants pay to the claimant. There is no dispute that amount was paid. The only issue in respect of this part of the claim is that the claimant states there was an agreement between her and the respondent that if she took her maternity leave early she would be paid the bonus early.

94. We have struggled to see an evidential basis for this claim and one is not set out in the claimant's witness statement. The respondents' position in this respect has been consistent. The terms of the bonus were set out in the document of 1 March 2017 and repeated in Mrs Jones's letter of 1 June 2017. We do not accept the claimant's case in this respect that there was an agreement to vary the payment date and, consequently, this part of the claim fails.

2.1.9 – 1 June 2017 – the letter from Mrs Jones changing arrangements previously agreed regarding maternity leave and pay

95. The claimant was questioned about this allegation and stated that her complaint was that the terms as to payment of the bonus have been changed and the letter at page 190 of the bundle stated that she had 3 days of holidays left whereas before she had been told that she had no days left.

96. As we have set out, we are not satisfied that there was any change in relation to the payment of the claimant's bonus and therefore there was no unfavourable or inappropriate treatment in this respect.

97. Moreover, we do not consider that it can be said to be unfavourable or otherwise inappropriate treatment for an employer to establish that it had made a mistake and offer the correct number of holidays. Such conduct would not create the proscribed environment for the purposes of section 26 of the Equality Act 2010.

98. In those circumstances this allegation fails.

2.1.10 – 8 June 2017 – email from Mr Jones regarding alleged payment due from the claimant for holiday pay

99. The email referred to is at page 195 of the bundle and we can find nothing inappropriate in this email. We accept that Mr Jones was confused about the claimant's holiday entitlement and we find that, at this stage, the intention in sending the email was a genuine attempt to resolve the confusion.

100. The email was not sent because of the claimant's pregnancy or maternity and was not related to the claimant's sex. It was sent because the respondents, at this stage sought to work out with the claimant what her remaining holiday entitlement was.

2.1.11 – advising the Claimant that they were under no obligation to provide her with keeping in touch days

101. Legally, the respondent was under no obligation to provide an employee with keeping in touch days.

102. The letter of 1 June 2017 which advised the claimant that the respondent was under no obligation to provide her with such days simply set out the correct legal position. It was not unfavourable treatment to state that position. Whilst there may have been some previous discussion about the use of keeping in touch days no firm arrangements had been made.

103. Moreover, we find that the tone of the letter was not inappropriate, particularly in circumstances where it is clear from the surrounding circumstances that a dispute had now begun to form between the claimant and the respondents about pay and holidays.

104. In the circumstances we do not find that the behaviour of the respondents was either unfavourable or amounted to conduct which could amount to harassment under section 26 of the Equality Act 2010.

105. This allegation fails

2.1.12 – Late June and early July 2017 – failing/refusing to accept the claimants telephone calls/respondent the claimant attempts to contact the respondents to resolve outstanding matters

106. In determining this allegation we have found it necessary to revert to the burden of proof.

107. We find, factually, that the respondent did block the claimant's calls. That was accepted by Mr Jones in evidence. The explanation which was given by Mr and Mrs Jones was that the claimant had been calling Mr Jones' personal number excessively and at unreasonable hours and sending texts.

108. If that allegation were true it would provide a non-discrimnatory reason, however we would expect to see the inappropriate texts in the bundle and/or call logs in relation to Mr Jones's phone, or be provided with an explanation as to why they were not in the bundle. We asked Mr Jones's solicitor for any such explanation but none could be provided. There was no contemporaneous text or email from Mr Jones complaining about inappropriate contact or asking for it to stop.

109. In fact, the only texts are those at page 202 and forward of the bundle which were neither sent at unreasonable hours nor excessive.

110. We regret that given the failure by Mr Jones to adduce any evidence to support his assertion in this respect or give any explanation as to why he was failing to do so, we are driven to conclude that the explanation he gives is not true.

111. Whilst we accept that the simple fact of the claimant being on maternity leave combined with her phone calls being blocked may not cause the burden of proof to shift, those matters combined with the explanation which we have found to be untrue do, in our judgment and in accordance with the decision in *Millwood* set out above, do cause the burden of proof to shift.

112. The respondent has provided no other explanation for blocking the claimants telephone calls and in those circumstances we find this allegation, made against all of the respondents to be proved.

2.1 .13 -27 June and 10 July 2017 – sending letters to the claimant to the wrong address

113. The letters should have been sent to number 8 Gray Close but were, instead, sent to number 16 Gray Close.

114. Had these letters been sent, purposefully, to the wrong address then clearly that could be unfavourable treatment or unwanted conduct leading to the proscribed purpose or effect contained within section 26 of the Equality Act.

115. However we consider that the respondents' explanation in this respect, namely that it was a simple mistake by Mr Jones, to be correct. We do

not see any particular benefit to the respondent in sending the letters to the wrong address and in so far as the claimant attributes a sinister motive to the respondent in this respect we think that she is wrong.

116. In those circumstances we find that the treatment was not because of the claimant's pregnancy or maternity and was not related to her sex and this allegation fails.

2.1.14 – 14 July 2017 – cutting off the telephone call from the claimant

117. In her evidence Mrs Jones denied that she had terminated the telephone call. However, that evidence was inconsistent with the clear statement by the respondents in the list of issues that "the respondent accepts that Mrs Jones terminated the call with the claimant on 14 July 2017." A reason is given for the termination of the call in the list of issues, albeit that was not advanced in evidence.

118. At the time of the terminated call Mrs Jones wrote to the claimant stating "thank you for the call, my apologies that the line went down." In the light of the clear statement made in the list of issues we find that statement was untrue and, applying *Millwood* again, we find that the combination of the claimant being on maternity leave, the phone being hung up and a false reason being given is enough to move the burden of proof in this respect and the respondents have not discharged the burden upon them.

119. This allegation is made against the 1st and 2nd respondents and is proved both under section 18 and section 26 Equality Act 2010.

2.1.15 – 10/14 July 2017 – the letter informing the claimant that her role was at risk of redundancy

2.1.16 – late July 2017 onwards – treating the claimant inappropriately throughout the alleged redundancy process including failing to respond to the claimant's proposed revised dates for a consultation…

2.1.20 – the claimant's dismissal.

120. We deal with the above 3 allegations together starting with the question of dismissal.

121. The fact that the claimant was on maternity leave and was selected for redundancy would not without more, in our view, cause the burden of proof to shift in respect of a claim of discrimination on the grounds of dismissal.

122. However, the respondent gave an explanation at the time of the dismissal which is contained within the letter of 10 July 2017, page 201 of the bundle. The letter stated "as it stands in the last 3 months we have seen a reduction in the number of clients renewing their monthly retainers with us which has caused us to re-evaluate the business needs. We are now faced with a shortfall of £1291 per month and I am faced with the prospect of privately funding the business further, which

is not a viable solution in the longer term."

123. If that statement were true it would provide a non-discriminatory explanation for the need to make redundancies. However the claimant has put in issue whether that statement is true. In her statement at paragraph 66 she states "as I left for maternity leave, the respondent was in the strongest position it had ever been in. I felt no unease and uncertainty about the respondent's future and I struggle to understand how in less than 2 months while no longer paying my wages the situation had become allegedly so bad."

124. Moreover in her statement she has written "the respondent have provided an email sent to an external HR company… The email asks for a letter to terminate my employment due to loss of several contracts. Despite many requests, I have not seen any evidence to show that this was the case. The respondents have a history of closing and opening new companies. If the client numbers in the respondent had dropped, perhaps the clients have been moved to another company… I strongly believe the respondent wanted to terminate my employment due to my maternity/pregnancy. Redundancy was used as a cover for this."

125. The respondent has adduced no evidence of any lost clients, any downturn in its income, any contributions from Mrs Jones or any accounts to show that Mrs Jones' director's loan account had increased. Evidence of all of those matters should be relatively simple to obtain.

126. Moreover Mrs Jones's oral evidence went as far as to say she had discussed the difficulties with her accountant.

127. We have reminded ourselves that in an ordinary unfair dismissal claim in respect of redundancy a Tribunal will not usually second-guess a decision by a company that there is a genuine redundancy situation. However this is not that case, the respondent has asserted an explanation as an answer to a claim of discrimination. It knew, well before this hearing, that that explanation was being challenged. The respondents have elected to rely on no evidence to substantiate their explanation.

128. The tribunal asked Mr Shah if there was any explanation as to why there was no such evidence before it, to which his answer was that he could give no answer.

129. Given the centrality of this point and the ease with which the respondent could have established its position (even by a late application to adduce documents during the course of the hearing), we have been forced to the conclusion that the respondents' explanation is not true. That, for the reasons we have given above, causes the burden of proof to shift to it to explain that the reason for the dismissal was not a discriminatory one. It has not done so.

130. In those circumstances we are obliged to uphold the claim, against all 3 respondents, that the dismissal was unfavourable treatment on the grounds of pregnancy or maternity and that it was unwanted conduct which had the purpose or effect of creating a hostile or offensive environment for the claimant related to her sex.

131. On 2nd July 2017, the 2nd respondent wrote to its human resource adviser "would you arrange the letter to [the claimant] to terminate her employment… this due to loss of several contracts…". The terms of the email, being sent before any process had begun, suggest that the decision to dismiss the claimant was predetermined. The letter was sent before any consultation process was entered into and yet the respondents had already selected the claimant for dismissal.

132. In respect of issue 2.1.15, we do not find that the sending of the letter was an act of discrimination in itself but it was simply a consequence of the decision made to terminate the claimant's employment.

133. In respect of issue 2.1.16 whilst we have, already, accepted that the the outcome in the redundancy process was preordained the issues raised, within this issue, in relation to lack of consultation must be seen in a slightly different light.

134. The letter of 10 July 2017 sought to hold a meeting with the claimant on 20th of July 2017 and offered for it take place via telephone or on Skype or at the claimant's house.

135. On 14 July 2017 the claimant wrote stating that she suggested a meeting on Monday or Tuesday next week and raised a formal grievance in respect of lack of statutory maternity pay and wage slips.

136. Thereafter there was a delay but an offer was made by the respondents to meet at the claimant's house on 6 September, to which the claimant replied that she did not believe her house was an appropriate location and sought an agenda in relation to the meeting.

137. By email of 31st of August 2017 the respondents' adviser asked the claimant to provide an alternative date and also offered 8 September to meet. By this time there was some overlap in the email discussions between meetings in relation to the claimant's grievance and in relation to her redundancy.

138. By email dated 7 September 2017 the claimant wrote to the respondent's representative stating "as for redundancy I have your client letter and I am happy to discuss once this grievance is settled".

139. Throughout the process between July 2017 and September 2017 both parties became entrenched in their positions in the dispute. That is, in the circumstances, not surprising but the matters in relation to the redundancy process raised by this issue were not, in our judgment, because of the claimant's pregnancy or maternity or related to her sex but were a consequence of the actions taken by both parties in respect of the process. The failure for meetings to take place was because neither party would move sufficiently from their positions, the claimant, in the end, would not meet until her grievance was resolved and an agenda was provided in advance of the meeting, the respondent was not prepared to take that route.

140. Further, we do not find that the behaviour amounted to harassment within the meaning of the Equality Act 2010.

141. Thus issue 2.1.16 is not made out.

Issue 2.1.17 – late July/early August 2017 – refusing to pay the claimant SMP/requesting a MATB1 form which had been previously received.

142. On the 27 July 2017 Mrs Jones wrote to the claimant enclosing an SMP1 form and stating "the necessary MATB1 form has not been provided to us in a timely manner… Therefore we are no longer required to pay SMP under the guideline" (page 213). That letter would have put the claimant on notice that there was an issue in relation to the timing of submission of MATB1 form(s).

143. The claimant then applied to HMRC and by letter dated 9 August 2017, it wrote to the 1st respondent asking it to fill out a form. In that form the respondent gave the claimant's start date as of June 2016 but stated that the employee had not given them a MATB1 form.

144. On 25th of October 2017 HMRC rejected the 1st respondent's argument that a copy of the MATB1 form emailed to it was inadequate for compliance with the regulations and held that the 1st respondent should pay maternity pay to the claimant.

145. The 1st respondent appealed against that decision and that appeal was upheld on 13 December 2017 on the basis that if, as the claimant had stated, she had submitted to the respondent a MATB1 form in January 2017 it would have been sent too early by reference to the expected date of confinement. The form sent in July 2017 was sent too late.

146. Thus, as a matter of fact, the respondent was right to state that it was not liable to pay SMP.

147. Whilst the claimant was initially successful in her application to HMRC, it would have been possible for her to work out for herself the dates when she needed to submit her MATB1 form to the respondents. Those dates are clear on the government website. Even if her evidence is accepted that she submitted a MATB1 form in January and in July to the respondent, the dates of those submissions meant that there was no liability on the part of the respondent.

148. In those circumstances we have concluded that whilst the claimant did believe that she was being treated unfavourably in this respect, it was not reasonable for her to have that belief. The respondent was not required to pay SMP and did not do so.

149. We have considered whether the respondent's behaviour amounted to harassment but, again, have come to the conclusion that given there was no legal requirement on the respondent to pay SMP, even if the claimants genuine perception of its decision was such as to create the proscribed purpose or effect as set out within section 26 Equality Act 2010, the claimants perception would not have been a reasonable in this respect.

150. Thus we find there was no discrimination or harassment in this respect.

151. The claimant also takes issue with the request by the respondents for the

MATB1 form which she said had already been submitted. We find that the claimant did provide a copy of the form in January and the respondent did ask for a further copy later. We do not find that the respondent did so for discriminatory reasons but simply because it had lost the first copy.

21.18 The nature and content of the correspondence from the Respondent's representative between August and September 2017

152. We have given anxious scrutiny to the respondent's representative's correspondence during this period but whilst we accept it can be seen as brusque, indeed, curt, we do not find that it was of a quality such that it could be said to amount to unfavourable treatment for the purposes of the Equality Act 2010 or harassment.

153. The 1st respondent was advancing its position in the redundancy process. It was doing so by a means which many companies might choose not to but this behaviour was not such as to amount to discrimination.

2.1.19 – 13 October 2017 – letter confirming the claimant's redundancy which also allegedly contained incorrect statements and the removal of the claimant's access to work emails

154. The letter of 13th of October 2017 did not contain inaccuracies. It stated that the claimant had refused the offered meetings to discuss the matter. That was true, albeit that the claimant had offered alternatives..

155. The statement that the respondent had been unable to identify a means of avoiding the redundancy or a suitable alternative role was also, technically, true.

156. In any event, in reality, the unfavourable treatment complained of here is not the letter communicating the dismissal but the fact of the dismissal, on which we have found in favour of the claimant.

157. There was nothing unusual about removing the claimant's access to emails from the point of communication of the dismissal. Whilst we accept that may amount to unfavourable treatment it was not because of the claimants pregnancy or maternity, nor was it related to her sex, it was because she had been dismissed.

2.1.21 – Failing to deal properly with the claimant's grievance and appeal including the correspondence from the respondent's representative in October – November 2017

158. The grievance which the claimant had raised was not dealt with in accordance with the ACAS code. As set out above, the claimant raised the grievance on 14 July 2017 (page 200 made the bundle) in respect of non-payment of SMP and requesting accurate wage slips. The respondent did not hold any meeting to discuss the grievance but simply wrote on 8th of August 2017, by their representatives, stating that they had discharged the whole of any liability to the claimant, the wage slips were in the correct form and the claimant had failed to provide an original of the MATB1 form.

159. In relation to the appeal against the decision to make the claimant redundant, she appealed by email of 17 October 2017 (page 230 of the bundle) and, on 1st of November 2017, sent a chasing email asking when she would receive a response to her appeal.

160. On 2nd of November 2017 the claimant wrote asking questions in relation both to the appeal process and the grievance process and was met with the response "all this has been dealt with – I do not intend to answer emails which are simply time wasting." (page 238).

161. The claimants emails were not time wasting and that response was inappropriate.

162. No meeting took place in relation to the grievance nor in relation to the claimant's appeal.

163. We find in this respect the claimant was treated unfavourably and the respondent did engage in unwanted conduct which had the effect of creating a hostile or offensive environment for the claimant.

164. We find that, in this respect, the respondent was motivated by the claimants pregnancy or maternity since this was a continuation of the dismissal, it was also unwanted conduct related to the claimants sex because of her pregnancy and maternity.

165. This claim against all respondents succeeds.

2.1.22 – Failure to honour the alleged agreement to give the claimant 10% of the business

166. According to the 2nd respondent, whose evidence in this respect largely accorded with the claimants', the intention had been to give shares in around September 2016. The failure to give shares at that date cannot have been to do with the claimant's pregnancy because the respondent was not aware of the claimant's pregnancy.

167. Whilst the respondent had stated its continuing intention to give the claimant shares in the business, we find that, given that on the claimant's own evidence in November and December 2016 she did not reach her sales targets, it is more likely than not that it was performance concerns in relation to the claimant which stopped the transfer of shares taking place in the latter half of 2016.

168. The reason for the failure to transfer was not because of the claimant's pregnancy or sex. Whilst we are cognisant that the claimant might have argued that there was an ongoing obligation to transfer the shares, we find that the issue got lost in the general confusion about holiday pay and the negotiations about maternity pay. We do not find there was a positive decision to refuse to transfer the shares to the claimant from February 2017 onwards. Thus we do not find that the actions or inactions in this respect were because of the claimant's pregnancy or related to her sex.

Issue 2.2- Time

169. We find that from February 2017 onwards there was an underlying whereby the respondents were irritated by the claimant's pregnancy and its attendant consequences and that the actions we have set out above and found proved were part of a continuing course of conduct and so the claims that we have found proved above are not out of time.

Issues 2.3 to 2.5

170. These issues have been dealt with above as we have reached our conclusions.

Issue 3.1– Notice pay

171. The respondent admitted during the course of the proceedings that it had not paid notice pay to the claimant and the claimant is entitled to it.

172. This claim succeeds

Issue 3.2 – Holiday Pay

173. The claimant in her schedule of loss has set out a calculation in relation to holiday pay which was not challenged by the respondent. The respondent's position is that it does not know what holiday pay is due.

174. The claimant's evidence in this respect was given by reference to page 190 of the bundle (Mrs Jones's letter of 1 June 2017) which sets out that as at 1st of June 2017 the claimant had an entitlement of 21 days and had taken 14 days as paid leave. That left the claimant with holiday.

175. In addition the claimant would accrue holiday pay during her period of maternity leave. The period between the claimant's maternity leave starting (18 May) to the date of termination on 15 November is 6 months. The claimant was entitled to 28 days per year and therefore in that six-month period would accrue a further 14 days holiday pay.

176. The claimant has not been paid holiday pay and this claim succeeds.

Issue 3.3 – Arrears of pay

177. At paragraph 99 of her witness statement the claimant sets out the claim in relation to arrears of pay. The respondent agreed in April 2017 that she was owed £461 but she has only been paid £169. Thus £292 is outstanding. That calculation was not challenged and is well-founded.

Issue 3.4 – Contractual entitlement to a 10% share

178. Primarily we find that this claim fails due to a lack of certainty in relation to the terms of the agreement.

179. Whilst it is not necessary to have a formal agreement to transfer shares in a company, in this case there was no agreement as to basic terms of the agreement, such as what performance would be considered acceptable in order for the claimant to earn her shares (did she have to hit her target on every month and over what period) and when the share transfer would take place. We find that the agreement was, in fact, no

more than a statement of aspiration on the part of the 2nd respondent.

180. However even if we were wrong in this respect, we would find that the terms of the agreement were such that the claimant had to perform in such a way as she would have earned the sales bonus (which she exchanged for the share agreement) in order to be entitled to the transfer of shares. The claimant's own evidence was that she did not hit her sales targets for the months of November and December 2016 and therefore would not have earned a sales bonus and, in those circumstances, we do not consider that the respondent was in breach of contract in failing to transfer to the claimant any shares.

Issue 1- Unfair Dismissal

181. We have found above that the dismissal of the claimant amounted to an act of discrimination. We have, however, found that allegation proved by applying the reversal of the burden of proof provisions contained within the Equality Act 2010. The question arises whether that is sufficient to find that there was an unfair dismissal of the claimant within the meaning of the Employment Rights Act 1996.

182. Neither party addressed us on this issue.

183. Noting that the claimant has less than 2 years service but also the extracts from Harvey on Industrial Relations and Employment Law set out above, for the reasons set out by the editors of Harvey in relation to the case of *Paquay* we find that the claim of unfair dismissal is also proved.

Issue on *Chagger*

184. This was a new issue raised by the respondent but it is appropriate for us to consider it. Having considered it we have concluded there is no basis for finding that had the respondent not discriminated against the claimant she would have been dismissed for any other reason. Whilst Mrs Jones' at times in her evidence, stated that she found the claimant to be bullying and intimidating towards her, she did not suggest that she had been minded to take any action against the claimant in this respect and at other times during her evidence she expressed that she liked the claimant and felt that she would be good for the business and wanted her to succeed.

185. In those circumstances we do not find that it would be appropriate to reduce compensation on this basis.

Overall Conclusions

186. In respect of the discrimination claim the claimants claims under section 18 and 26 Equality Act 2020 in respect of the following issues are well-founded; 2.1.6, 2.1.7, 2.1.12, 2.1.20, 2.1.21. The other claims are not well founded and are dismissed.

187. The claimant was unfairly dismissed by the respondent because the principal reason for her dismissal was pregnancy or maternity contrary to section 99 the Employment Rights Act 1996.

188. The claimants claims in respect of unpaid wages, notice pay and holiday pay are well-founded.

189. The claimant was not contractually entitled to a 10% share in the 1st respondent's business and that claim is dismissed.

REASONS- REMEDY

190. Following giving judgment on liability we moved onto determine remedy. In this respect we heard from the claimant and the respondent called no evidence. The claimant was cross-examined on her evidence.

191. The issues are whether the claimant has properly mitigated her loss, whether the claimant is entitled to an award in respect of various expenses, whether any sum is due in respect of the basic award in relation to the unfair dismissal claim and what sums are appropriate in respect of injury to feelings. We assess the claim in respect of discrimination initially.

192. We accept the claimant's evidence that if she had not been dismissed she would have taken 26 weeks maternity leave. That would have finished on 16 November 2017 which also coincides with the effective date of termination advanced by both parties.

193. We find that the claimant did not fail to mitigate her loss. It was reasonable for her to try to keep to the same hours that she would have been working had she not been dismissed. She had childcare responsibilities and, at least in the initial stages of unemployment, it was not unreasonable for her to try and seek something comparable in terms of the hours that she had been working on. We also accept that she was emotionally vulnerable as a result of what had happened to her and it would therefore take her longer to get new employment. In reaching that conclusion we have taken into account the evidence from the doctor as well as the claimant's evidence today and the matters in her witness statement.

194. We accept the claimant took a job when she could. Initially that was in an Asda store where she worked in security. We accept there was no option for more hours but in any event, as we have already said, we take the view that it was reasonable for her to seek to match the hours that she would have been working for the respondent, particularly now she had a new baby.

195. We reject the respondent's argument that it would in some way have been incumbent upon the claimant to work in the sweet shop business which she owned. Had she worked in the sweet shop she would have displaced the manager, but the manager was only being paid a minimum wage and therefore the claimant would have earned no more than she was doing in Asda, unless she increased her hours.

196. The claimant did try to carry out some direct sales work to make money and we find that was entirely to her credit. It was not reasonable for the respondent to expect her to do more than she did. The claimant then took another job which was, again, for lower pay than she had been on with the respondent. We find that given her emotional state that was reasonable up to this hearing. Whether the same position would be reasonable going forward from today is another matter but it does not fall to us to decide that because the claimant is not claiming any ongoing loss. Therefore, we find the claimant's losses to date to be reasonable.

197. Applying those facts to the calculation of the loss we find as follows.

198. Firstly we consider the sums which the claimant would have received but for the dismissal. The claimant would have been on maternity leave until the effective date of termination but then would have returned to work at £325 per week. The claimant suffered no financial loss whilst on maternity leave. Therefore, a loss from 16 November 2017 to today's date is to be calculated at the rate of £325 per week, being 84 weeks at £325 per week which gives a total of £27,300.

199. In addition, the claimant has claimed, in her schedule of loss, sums in respect of a bill from HMRC for miscalculation of wages and deductions. The claimant told us in evidence that was in respect of tax which the respondent should have deducted from her wages but which the respondent failed to deduct; therefore, the claimant was left with a tax bill at the end of the year which she was not expecting. Whilst we are sympathetic to the claimant's position, in terms of financial loss, the payment of tax which she was always liable to pay does not amount to a financial loss which is recoverable from the respondent.

200. The claimant also claims higher mortgage repayments because she took out a higher interest mortgage over a five-year fixed-term period rather than a two-year fixed-term period because she felt more insecure as a result of the dismissal. Again, whilst we are sympathetic to the claimant in that respect, the law requires that the only sums that are recoverable are those which are not too remote. Applying the usual legal test in this respect we find that a loss such as higher mortgage repayments is too remote to be recoverable and we are not able to award any sums in respect of it.

201. The claimant claims £900 in respect of loss of statutory rights. In fact, she had no statutory rights at the point of dismissal but makes the point that if she had not been discriminated against she would have been likely to earn those rights by her continued employment. We think that argument is right but we think it is wrong to say that the loss of statutory rights is to be valued at £900. That is too high and normally one would not receive an award of more than £500.

202. Given the claimant did not have two years service it is appropriate to reduce that claim because there is some speculation as to whether the claimant would have remained employed for two years. This is, in reality, a

claim in respect of a loss a chance to earn statutory rights and we award £350 in respect of that chance.

203. Therefore, the total loss to the date of the hearing is £27,300 plus £350 which amounts to £27,650.

204. It is then necessary to give credit for those sums set out in the claimant's schedule of loss; benefits of £5,662.02 income from ASDA of £4,939.23, income from support work of £4,853.52, income from Scentsy of £2,229.26, income from The Body Shop £95.28 giving a total amount of income £17,779.30 and therefore a net loss i.e. the difference between £27,650 and £17,779.31 of £9,870.69.

205. Because this is a discrimination claim, the claimant is also entitled to interest on that amount, we have taken the interest from the mid-point of the loss to today's date. We have calculated the midpoint of the loss to be 14 September 2018, that is 41 weeks to today's date at 8%. On £9,870.69 the interest is £622.61.

206. We then come to the claim for injury to feelings. We take the view that this case falls within the middle band of the Vento guidelines. We have referred ourselves to the Presidential guidance which updates the awards in accordance with inflation.

207. We have also looked at various comparable awards for pain suffering and loss of amenity in personal injury awards, in particular, we referred ourselves to awards for post traumatic stress disorder and awards for orthopaedic neck injuries to give ourselves a broad overview.

208. We agree with Mr Shaw that it is appropriate to make one award in respect of injury to feelings against all three respondents Looked at overall it is appropriate to make one award which would be jointly and severally enforceable against all respondents.

209. We have taken account, in reaching our decision on the appropriate amount, of the fact that in relation to one of the allegations of discrimination the claimant asserted that the respondent had failed to follow the ACAS Code and we have taken account of our discretionary ability to increase an award in that respect under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. In the circumstances of this case we have included the sum within the award for injury to feelings rather than give a separate award under the 1992 Act.

210. Taking into account this was an act of dismissal but it was not the most severe kind of discrimination, we take the view the appropriate award for injury to feelings is £10,000. The claimant is entitled interest on that amount from the date of the discrimination. That is 84 weeks at 8% on £10,000 amounting to £1,292. .

211. We have also considered the question of aggravated damages. We have referred ourselves to the guidance of the Employment Appeal Tribunal in the case of HM Land Registry v McGlue [2013] EqLR 701 at paragraphs 31 and 35 that an award of aggravated damages can be considered by the tribunal where either an act of discrimination was done in an exceptionally upsetting way or where appropriate due to subsequent conduct of the parties eg where a case is conducted at a trial in an unnecessarily offensive manner.

212. We have looked again at the original response put in by the respondent to this case. Paragraphs 4, 5 6 and 7 of that response which appear at page 30 of the bundle are surprising.

213. Paragraph 4 reads:

> "Late November 2016 Applicant Notified Respondent of her pregnancy. It is averred however, that as the projected due date was 1 July 2017 she would have been pregnant on 26 September at the time of her employment the applicant would have been two months pregnant a situation as a mother of which she would already have been aware especially with the complications referred to but deliberately concealed the fact from the Respondent". (sic)

214. Paragraph 5 reads:

> "In any event therefore, she would not have been able to produce the MATB1 form in January as she alleges. In the event she waited for the baby to be born in order to make her spurious allegations. Investigations are being undertaken at HMRC to determine whether or not the claim was false in its terms and thereby a criminal act".

215. Paragraph 6 reads:

> "Notwithstanding her pregnancy the applicant started her own sweet shop business in Poole. In a radio interview she falsely stated that the date of commencement was six months previously. It is suspected that she also gave this false information to the local rating authority. Insofar as the respondent is concerned it was clear that it would have been necessary to have made the necessary arrangements for the commencement business well before the commencement of her employment with the respondent."

216. Paragraph 7

"It is averred that the applicant deliberately kept this information from the respondent. Had the respondent been aware of her intentions her employment would not have been extended under TUPE ".

217. We take account of the fact that once the respondent obtained different representation that response was replaced. However, we consider that response to be wholly inappropriate. The Response, taken as a whole, is a deliberate attempt to imply that the claimant was guilty of criminal conduct, in respect of which there is no evidence and the allegations in respect of the Rating Authority are wholly irrelevant. In respect of the sweet shop, we have found that the Respondents were aware of the claimant wanting to set the same up and therefore the allegation in paragraph 7 is simply untrue. It is difficult to see how those allegations could be properly pleaded or even considered to be properly pleaded. We take the view that this discrimination was made worse by the original ET3 being written in an unnecessarily offensive manner and we award the sum of £1,000 in respect of aggravated damages.

218. The total award for discrimination is £22,786

219. In addition, by agreement between the parties in respect of the unfair dismissal award, the claimant is entitled to a basic award of £385. She is not entitled to a further compensatory award since would that amount to double recovery. It is agreed that the claimant is entitled to notice pay of £385, unpaid wages of £292 and holiday pay of £2,371.70.

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Employment Judge Dawson

Date: 19th August 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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