EMPLOYMENT TRIBUNALS

Claimant: **Ms A Niemanski**

Respondent: **Nethouseprices Limited**

Heard at: **Cardiff** **On: 2 and 3 October 2019**

Before: **Mr S Jenkins**
Mr P Charles
Mrs M Farley

Representation:
Claimant: In person
Respondent: Ms J Nevins (Solicitor)

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal; detriment relating to pregnancy, childbirth or maternity; discrimination by reason of pregnancy and maternity; and victimisation; fail and are dismissed.

REASONS

Background

1. The hearing was to deal with the Claimant's claims for automatic unfair dismissal pursuant to Section 99 Employment Rights Act 1996 ("ERA"); detrimental treatment related to pregnancy, childbirth or maternity pursuant to Section 47C ERA; unfavourable treatment because of pregnancy pursuant to Section 18 Equality Act 2010 ("EqA"); and victimisation pursuant to Section 27 EqA. The first of these claims arose from the Claimant's dismissal, ostensibly by reason of redundancy, on 18 October 2019, shortly after her return from maternity leave whilst she was taking a period of holiday before physically returning to work. The Claimant asserted that the reason for her

dismissal was her pregnancy and her having taken maternity leave and therefore was automatically unfair. The Claimant also contended that the Respondent had treated her to her detriment and/or unfavourably in various ways on the ground of her pregnancy or maternity leave, and that she had been victimised, i.e. treated to her detriment having done a protected act.

2. We heard evidence from the Claimant on her own behalf and from Mr Steve Thorne, Sales Manager, and Mrs Catherine Lamond, Managing Director, on behalf of the Respondent. We also considered those documents within a bundle spanning 209 pages, and a supplemental bundle spanning 29 pages, to which our attention was drawn.

Issues and Law

3. There had been three Case Management Preliminary Hearings in this case; 4 April 2019, 10 June 2019 and 11 September 2019, which had identified issues to be considered at this hearing. Synthesising the summaries from those hearings, we identified the following issues for us to address.

Unfair dismissal

4. We had to consider what was the reason for the Claimant's dismissal. Acutely, we needed to decide whether the reason for dismissal was redundancy, as contended by the Respondent, or was due to pregnancy, childbirth or maternity, as contended by the Claimant. If we decided the reason was redundancy then the Claimant's claim for unfair dismissal would fail as she had been employed for less than 2 years. If however we considered that the reason for dismissal was the Claimant's pregnancy, childbirth or maternity, then the dismissal would be automatically unfair pursuant to Section 99 ERA. In contrast to the Claimant's other claims, there were no issues regarding the timing of the Claimant's claim, her claim form having been submitted within time following her dismissal on 18 October 2018.

Detrimental Treatment – Section 47C ERA

5. We needed to consider whether the Respondent treated the Claimant to her detriment in a number of different ways asserted by the Claimant, which we address in our findings below, and, if so, whether any identified detriments occurred by reason of the Claimant's pregnancy, childbirth or maternity.

Pregnancy and Maternity Discrimination

6. In a similar manner to that relating to the claim under Section 47C ERA, we had to consider whether the Respondent had treated the Claimant unfavourably, in the various ways asserted by the Claimant, and, if so, whether any such unfavourable treatment was because of her pregnancy.

7. A particular issue we had to consider here however was whether any such unfavourable treatment occurred within the "protected period" as stipulated by Section 18 EqA. In that regard, Section 18(6) notes that the protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends at the end of the Claimant's additional maternity leave period. We therefore had to be satisfied that any unfavourable treatment that we identified occurred within that period.

Victimisation

8. In relation to this claim, the Respondent accepted that a grievance submitted by the Claimant on 6 July 2017 amounted to a protected act for the purposes of Section 27 EqA. We therefore had to consider whether the Respondent subjected the Claimant to any detrimental treatment on the ground that she had done a protected act.

9. There were therefore several specific factual issues for us to address, specifically as to whether any events or acts amounted to detrimental or unfavourable treatment and we address those in our findings below. We were conscious that we needed to consider whether the events occurred as alleged; if so, whether any such events amounted to detrimental or unfavourable treatment; and, if so, whether any such detrimental or unfavourable treatment arose because of the Claimant's pregnancy, childbirth or maternity and/or because of her protected act.

10. With regard to the Claimant's claims for detrimental treatment, pregnancy discrimination and victimisation, we also had to consider whether the claims were brought within time. All those claims are required to be brought within three months of the act complained of, or where the act is part of a series of similar acts, within three months of the last of them, or where the act is part of a course of conduct extending over a period at the end of that period. If we were not satisfied that the claims had been brought within the required time frame, we would then need to consider whether it would be appropriate to extend time for bringing the claims, applying the appropriate tests set out in the ERA and the EqA.

11. Finally, if we were satisfied that any of the Claimant's claims were made out we would need to consider the matter of what compensation to award.

Findings

12. Our findings in relation to the issues we have identified, found on the balance of probabilities where there was any dispute between the parties, are set out below. We observe that we proceeded on the basis that, as the Claimant was a litigant in person, where the Claimant did not question the Respondent's

witnesses on their version of events it would not be appropriate to reach any conclusion that their evidence was, as a consequence, to be accepted. Instead, we considered the evidence of the witnesses and all the documents in the round. Our findings are set out in a broadly chronological order, but in some areas we have grouped certain findings together to better align our findings with the acts the Claimant asserted amounted to detrimental and/or unfavourable treatment.

13. The Claimant commenced employment with the Respondent on 24 April 2017 as a Sales Executive. The Respondent is a small company operating a property information website. By the time the Claimant was recruited, the Respondent had no physical office space, with all employees working from their homes. A major part of the Respondent's business is selling the website services to estate agents around the country and the Claimant was recruited to join that part of the Respondent's business.

14. Prior to that, the Respondent operated a sales team of two Executives, managed by the Sales Manager, Mr Thorne. The work was expanded and the Claimant was recruited along with another five Sales Executives at that time. The number of employees in total appears to have been rather fluid but there did not, during the course of the Claimant's employment, appear ever to have been more than approximately a dozen employees at any one time.

15. The core element of the Claimant's job was to recruit estate agencies to the Respondent's services, primarily via telephone sales, including cold calling and by face to face meetings, although the bulk of the work appears to have related to telephone work from home.

16. The Claimant was recruited at a salary of £35,000 and was to be entitled to commission once her annual sales revenue exceeded £50,000. Whilst not explicitly set as a target requirement, we considered it implicit within the commission scale that achieving sales revenue of £50,000 per annum, i.e. approximately £4,000 per month and approximately £1,000 per week, was an expectation, albeit that that would not necessarily be achieved in the early period of the Claimant's employment.

17. At the start of the Claimant's employment she was trained in person, along with another recruiter, by Mr Thorne over a three-day period. That training was provided in a similar manner to all the new sales employees.

18. Further training was then provided to the Claimant by Mr Thorne over the telephone as required, again in the same manner as was provided to other new recruits. We observed that Mr Thorne did occasionally provide face to face guidance to some employees, when he happened to be in the relevant area where they were located to see one of his personal clients. That did not arise in relation to the Claimant but we found that that was due to the fact that

Mr Thorne did not happen to be in the Claimant's area in order to call upon her and not for any other reason.

19. The Claimant informed Mrs Lamond about the fact of her pregnancy on 17 May 2017. That led Mrs Lamond to send a letter to the Claimant dated 18 May 2017 noting that the Claimant's expected date of childbirth was 27 September 2017, and setting out various entitlements for the Claimant with regard to various matters. The letter included an indication that the Respondent would keep the Claimant informed of any internal vacancies or opportunities that might arise, or any other company information that might be useful to her, whilst on maternity leave if the Claimant wished, and she responded to confirm that she did indeed wish to be contacted.

20. A risk assessment was undertaken by Mrs Lamond over the telephone on 21 May 2017 and this noted that the Claimant was not expected to work long hours or overtime and had some flexibility or choice over her working hours.

21. Following that, there appears to have been a query from the Claimant to Mrs Lamond regarding whether any holidays she would accrue during her pregnancy could be paid to her in lieu, and in relation to keeping in touch ("KIT") days and the possibility of altering her hours on return from maternity leave, as a letter was sent by Mrs Lamond to the Claimant on 24 May 2017 in relation to these points. The letter, quite correctly, noted that payment could not be made in lieu of holiday and that the Claimant would therefore need to take it. She also explained that KIT days were not compulsory and that, to make any such days as relevant as possible, two months prior to return, if the Respondent had a training day then the Claimant could attend that. The letter noted that this was something that could be discussed nearer the time. Mrs Lamond also confirmed that the Claimant would have the option to submit a flexible working request when she returned should she wish to vary her working week.

22. With regard to the Claimant's performance, the indications, both from the witnesses and the documents was that the Claimant worked hard and, certainly in relation to the numbers of calls she made (against a target of 40 per day when not away at meetings), was comparable to or better than her colleagues. However, those efforts did not turn into the required levels of sales.

23. The Claimant noted in emails to the Respondent that she was struggling with the cold calling element of her work and sought support with that. Whilst we noted that one specific request from the Claimant to Mr Thorne to review the recording of one of her calls was not carried out, we were satisfied that the Respondent did provide assistance via Mr Thorne during conversations. We were also satisfied, as was indicated in an email from Mr Thorne on 27 June 2017, that he was available and able to provide assistance when requested

by any of the sales team. We did not consider that the Claimant was in any different position to any of the other sales executives and we also did not consider that the situation had changed following the Claimant's notification of her pregnancy.

24. Following that email from Mr Thorne, the Claimant provided him with an update later that week, on 30 June 2017, on her "pipeline" and she also explained the reasons why some deals had fallen through. Following this, Mr Thorne decided to call the Claimant to provide support in any way he could. Mr Thorne, in passing, mentioned the fact that he was going to speak to the Claimant on 3 July to Mrs Lamond, and both then decided to join in with that call. Whilst there were no notes of that conversation, and although the Claimant had felt that a recording had been made of it, the Respondent's witnesses confirmed that that was not the case.

25. The Claimant sent an email to Mr Thorne and Mrs Lamond early the following day, 4 July 2017. In this email, the Claimant thanked Mr Thorne and Mrs Lamond for making time for the call the previous day. She set out some of her plans to try to secure more business and also asked for examples of good sales calls to be sent to her. We did not consider that the call involved any detrimental treatment of the Claimant, and her email the following day did not contain anything which was critical of Mr Thorne and Mrs Lamond or which would have led any reader of it to consider that the Claimant felt concerned in any way. The email summary of the Claimant's position did not suggest that Mr Thorne and Mrs Lamond had in any way been challenging during the discussion on 3 July and we considered that their actions were entirely normal in the context of managers seeking to encourage and support a recently engaged Sales Executive to improve her rate of sales.

26. In her claim, and her witness statement, the Claimant raised a concern about an issue that arose prior to these matters. That was that, after informing Mrs Lamond about her pregnancy, Mrs Lamond had sought her consent to inform Mr Thorne as the Claimant's Line Manager. The Claimant contended that she had consented but had specifically requested that no-one else in the company should be aware of that fact. Her evidence in her witness statement was that to do otherwise would infringe her privacy and lead to others having judgmental thoughts about her. Mr Thorne did then refer to the Claimant's pregnancy during a conference call which involved a number of other employees. We found however, that Mr Thorne had not been informed by Mrs Lamond about the need not to disseminate the information about the Claimant's pregnancy any further. Consequently, whilst the dissemination of that information arose in a way that the Claimant had not anticipated, we did not find that that dissemination of the information regarding her pregnancy involved any unfavourable or detrimental treatment. In her witness statement, the Claimant alluded to the disclosure of the information transgressing her right to privacy and potentially leading to judgmental thoughts about her by

her colleagues. Under cross examination however, the Claimant indicated that her desire was to control the notification of her pregnancy but accepted that it was bound to have become known in relatively short order. We did not therefore consider that the inadvertent dissemination of the information of the Claimant's pregnancy by Mr Thorne involved any detrimental or unfavourable treatment.

27. Another issue which the Claimant contended in her claim amounted to detrimental or unfavourable treatment arose with regard to ante-natal classes. On 26 June 2017 at 13:06, the Claimant emailed Mrs Lamond noting that she was looking to book some ante-natal classes which would take place during working hours. An exchange of emails occurred over the next hour when there appeared to be some confusion between the Claimant and Mrs Lamond which led Mrs Lamond, at 13:55 to say that she thought that the Claimant would need to book the relevant period off as holidays. However, later that afternoon, at 15:54, Mrs Lamond emailed the Claimant to apologise and to note that she had just checked the position and had confirmed that the Claimant was entitled to paid time off for ante-natal classes.

28. Mrs Lamond went on to say that if the Claimant could try to go to classes outside of work hours it would be greatly appreciated but that if she could not then, of course, she should go ahead and book the classes during work hours. The Claimant responded within a few minutes noting that the only classes available were during working hours. Mrs Lamond then responded the following morning at 06:31 asking if the Claimant could see if there were other classes in the evenings or weekends, but that if she had no luck with finding anything else then she was happy for the Claimant to attend such classes during working hours. The Claimant responded saying that she completely understood and would try her best to source other classes.

29. The Claimant contended that this exchange with Mrs Lamond amounted to discriminatory treatment of her. However we did not consider that it involved any detrimental or unfavourable treatment of the Claimant. Whilst Mrs Lamond initially suggested that the Claimant would need to take a holiday to attend one appointment, that was swiftly found to be an error and corrected. Indeed, the Claimant did not appear to take particular issue over that. What the Claimant particularly took issue with was the subsequent request by Mrs Lamond for the Claimant to look into the possibility of attending the classes outside working hours. We consider that if the request had ended there then there might have been a case that the Claimant suffered a detriment or unfavourable treatment in that she might have felt pressured into arranging appointments outside working hours. However, Mrs Lamond's requests were always couched on the basis that if the Claimant could not attend classes outside work hours then there was no problem in her attending such classes during working hours.

30. In her claim, the Claimant also raised a number of issues regarding the treatment of her by Mr Thorne, and acutely what she asserted was a change in his attitude towards her following his knowledge of her pregnancy. Some of these were ultimately addressed by the Claimant in a grievance which is referred to in more detail below. However, some specific other assertions were made and our findings in relation to those assertions are as follows.

31. The Claimant asserted that Mr Thorne would make remarks during conference call meetings relating to the Claimant always asking questions, which she asserted he never made regarding any of her colleagues who themselves asked questions. However, we did not consider that Mr Thorne treated the Claimant in any way differently to the way he treated the other sales staff.

32. The Claimant also asserted that Mr Thorne offered better discounts to clients for her colleagues than her, but no evidence was put before us on that and we concluded therefore that no differential treatment of the Claimant arose in this regard.

33. The Claimant asserted that there had been a drop off in the reassuring comments from Mr Thorne regarding any difficulties regarding sales. However, we noted that Mr Thorne specifically arranged to speak to the Claimant on 3 July 2017 and, as the Claimant herself noted in her email of 4 July 2017, there was no indication that Mr Thorne had been anything other than supportive during that discussion. We did not therefore find that there had been any reduction in the support provided by Mr Thorne, let alone any reduction which was in contrast to the Claimant's colleagues.

34. The Claimant also asserted that pressure was mounting on the sales team but there was no indication that that was any greater in relation to the Claimant than her colleagues and we considered that, in a business which derived its income from sales, there would be bound to be pressure on employees to achieve sales.

35. The Claimant also asserted that there was more favourable treatment of the Claimant of one of her colleagues in Scotland who had been visited by Mr Thorne on two occasions. However, we found that the first of those visits was the 3-day introductory training period which had been afforded to the Claimant in exactly the same way, and the second was simply a passing visit made by Mr Thorne to the other employee when he happened to be in the area visiting his clients. We did not consider that there had been any detrimental or unfavourable treatment of the Claimant in that regard.

36. Later in the week after the call on 3 July, on 6 July 2017, the Claimant submitted a letter to Mrs Lamond raising a formal grievance. In that she stated that there were several work related issues which were causing her a great

amount of concern, anxiety and emotional distress which she felt contravened her rights as a pregnant woman. She noted that she proposed to take a day's leave the following day, 7 July, to seek further legal advice and would provide further details of the grievance to Mrs Lamond the following week. The Claimant submitted a self-certificate of sickness with effect from 8 July 2017, and then submitted a certificate from her GP dated 14 July 2017. That certificate noted that the Claimant may be fit for work taking account of advice that the Claimant would benefit from amending her duties to a more admin based and less client facing role.

37. At this point the Claimant informed Mrs Lamond that she was not going to be accessing her work emails which led to Mrs Lamond asking for the Claimant to provide her with her password. The Claimant raised a concern about the privacy aspects of this and the prospect that anyone accessing her emails could pose as her, but Mrs Lamond confirmed that the company only wished to obtain her password to be able to read her emails and she also provided the Claimant with the new password in order that she herself could log in at any time to check the position. Again, we do not find that act was in any way detrimental or unfavourable to the Claimant.

38. The Claimant sent in a further letter to Mrs Lamond dated 14 July 2017 in which she indicated that there was other work that she could do for the company i.e. other than sales, which would be of assistance. Ultimately, as we note below, that happened.

39. The Claimant met Mrs Lamond in relation to her grievance on 18 July 2017 and, in advance of that, she had provided a further document setting out the issues relating to her grievance in more detail. She had grouped her concerns in number of areas as follows; unfair comparisons with colleagues, long working hours/unpaid overtime, no formal evaluation process (we took that to mean appraisal process), lack of training and support, discrepancies in figures/misleading customers, and discriminatory remarks.

40. Following that meeting, Mrs Lamond provided the Claimant with an outcome letter dated 20 July 2017. In relation to the areas of concern raised by the Claimant, Mrs Lamond noted that the use of sales figures was important but that other aspects were also important and that she would review the company's approach. With regard to working hours, Mrs Lamond noted that the Claimant's contract stated that she might be required to work additional hours when necessitated by the needs of the business. She also observed that it is often the case that when someone starts a new job they need to spend more time and that she would look into what other sales related role the Claimant could do to enable her to work fewer hours with less sales pressure.

41. With regard to ante-natal care, Mrs Lamond confirmed that she was happy to support the Claimant to attend appointments without having to make up any hours upon her return. Mrs Lamond also confirmed that their appraisal process needed to be improved and that she would be working on that and also that training and support was something that needed to be improved and that she would look into what more could be done in addition to setting aside more one to one meetings with staff. Mrs Lamond confirmed that she had not had a chance to investigate the Claimant's concerns with regard to discrepancies and figures and would also be going through what the Claimant asserted to be discriminatory remarks with Mr Thorne over the next couple of weeks. The letter concluded by hoping that the solution would be satisfactory but that the Claimant had a right of appeal, which she did not exercise that right.

42. Some weeks later, on 12 September 2017, Mrs Lamond sent the Claimant a follow up letter in relation to these points. In that letter she provided more clarity on the KPIs and targets expected of all staff. She also noted that she would ask one of the company's other employees to go through the Respondents CRM system as that seemed to be taking up a lot of the Claimant's time. Mrs Lamond noted that she had provided alternative work in the short term up to the commencement of the Claimant's maternity leave. Mrs Lamond confirmed her support and approval for ante-natal classes. She also noted that, following the implementation of KPIs they would be having monthly one to one's with staff and appraisals every six months. She confirmed that they would be running "brainstorming" sessions once a month to address training issues.

43. With regard to the discrepancies in figures point, Mrs Lamond did not provide any specific response but she noted that the Claimant had put together a pricing spreadsheet to provide more visibility on pricing within the team. Finally, with regard to discriminatory remarks, whilst Mrs Lamond did not confirm whether she agreed that the remarks had occurred, she confirmed she had given Mr Thorne further training on how to manage staff, which transpired to be a direction that Mr Thorne read an ACAS publication on that.

44. With regard to the consideration of the aspects of the grievance as part of the Claimant's claims, we did not consider that anything asserted by the Claimant amounted to detrimental or unfavourable treatment arising from her pregnancy.

45. The comparison of the Claimant with regard to her colleagues in relation to sales was, we considered, an entirely relevant and appropriate one in the context of a business where the income is driven by sales. With regard to long working hours, we did not consider that there was any pressure by the Respondent for the Claimant to work excessive hours and that if she did so it was by her own volition. The Claimant appeared before us to take issue with

being asked to contact Mr Thorne after 5.30pm and to send emails to him for approval overnight. However, we found that the reference to calling Mr Thorne after 5.30pm was to supplement the possibility of her calling him during the day. Mr Thorne had several other sales executives reporting to him and also was responsible for sales himself and he had indicated to the Claimant that she could contact him after 5.30pm and he might be more free at that point and was happy to speak to her then. There was however no pressure on her to call him at that point rather than during the day. Similarly, whilst the suggestion was made to send emails to Mr Thorne for review overnight, that was simply in order to assist the Claimant with her work. We did not consider that it was in any way a requirement for the Claimant to submit emails after office hours.

46. With regard to ante-natal classes, we were satisfied that the Respondent had acted entirely properly in relation to allowing the Claimant to attend such classes and not putting any pressure on her to make up hours elsewhere at all times.

47. With regard to a lack of appraisal process, we noted that that existed throughout the organisation and therefore we did not consider that there was any detrimental or unfavourable treatment of the Claimant in comparison with her colleagues.

48. With regard to training and support, we have already noted above the training and support provided by Mr Thorne. As with any organisation, it may be the case that additional training could, and even should, have been provided. However we did not find any evidence to suggest that the Claimant's colleagues were treated in any way differently to her and we therefore could not conclude that there had been any detrimental or unfavourable treatment. In this area of the Claimant's grievance, she raised several specific points in which she felt that she had been given conflicting information by Mr Thorne in relation to what she needed to do in relation to her work. Those assertions were not explored in evidence before us, but we considered that, even if the particular events had occurred as described by the Claimant, there was nothing to suggest that they were in any way specific to the Claimant or in any way connected to her pregnancy. We drew the same conclusion in relation to the Claimant's assertions regarding discrepancies in figures and the misleading of customers. Indeed, we could not discern from the Claimant's grievance any indication that these concerns, even if they occurred as described by the Claimant, had any connection to her pregnancy or involved any detrimental or unfair treatment.

49. With regard to the Claimant's section of her grievance letter headed "discriminatory remarks", we noted the Claimant's concern regarding Mr Thorne's reference to her always asking questions and have dealt with that above. We also noted the Claimant's concern that Mr Thorne had made a

demeaning remark during a call when a specific app was not working on her phone at the same time as her boiler was being repaired. However, we concluded that was simply an attempt at humour on Mr Thorne's part. A third issue raised by the Claimant was that, after she had called to check why a customer had not received valuation requests, she was told to run a particular test which was something she had recommended be done previously. Again, even if this occurred as described by the Claimant we could not see any connection of it to the Claimant's pregnancy. A fourth concern was that when the Claimant had obtained a cheque from a customer for £750 plus VAT it was remarked that the deal was "only a couple of hundred quid" in comparison to one of her colleagues who had brought in £2,400 and another colleague who had brought in £499. The Claimant contended that this was demeaning, but again we found nothing to connect such treatment with her pregnancy. The Claimant's final concern in this regard related to her emails and criticisms by Mr Thorne of them. Again, bearing in mind that emails to clients were part and parcel of the sales process, we did not consider there was anything untoward in the Respondent looking to improve the quality of the Claimant's emails.

50. As we have noted, Mrs Lamond agreed, following the grievance, that the Claimant should move into an alternative role for the remainder of her maternity leave. This appeared to be more of a support role and involved updating the Respondent's sales manual and other sales materials. She did this for the last two months prior to commencing maternity leave and no issue appeared to have arisen in this regard. We found that this was a particularly helpful step by the Respondent in that, faced with the sickness certificate from the Claimant's GP, they could simply have taken the approach that she should remain on sick leave and then that her maternity leave should have commenced, in line with the statutory position, 8 weeks prior to her expected week of childbirth which would have been towards the end of July 2017. We considered it was very much to the Claimant's advantage that the Respondent was able to find other work for the Claimant to do during this period. Indeed, following Mrs Lamond's letter of 12 September 2017, the Claimant signed to confirm that she was satisfied that all the issues she had raised in July 2017 as part of her formal grievance had been resolved.

51. Prior to that however one further incident which concerned the Claimant arose and that was that she had discovered that Mr Thorne had told a client of hers that she had started her maternity leave. There was a dispute between the parties as to what was said during this call. The Claimant noted that in a call she had had with the particular customer they had told her that Mr Thorne had told her that she was absent through sickness and was pregnant and indeed that she had had her baby. Mr Thorne's evidence was that he had told the customer that the Claimant was off sick and indeed was pregnant, but that the customer had already been aware of the pregnancy.

52. During the course of the hearing before us, it appeared that the Claimant's main concern was that Mr Thorne had told the customer that she had had her baby at that particular point, when in fact she had not given birth until well over two months later. We noted however that the Claimant's email to Mrs Lamond when she raised this concern noted that she had found out "that Steve had informed my customer that I was off due to having my baby". We considered that that wording was not inconsistent with Mr Thorne's evidence that he had told the customer that the Claimant was absent due to illness and was pregnant. We noted that the Claimant's email did not say that Mr Thorne had informed the customer that she was off "due to having *had*" her baby (our emphasis), and we ultimately concluded that there was a misunderstanding on the part of the Claimant, and that Mr Thorne had not told the customer that the Claimant had had her baby at that point.

53. The Claimant raised two other concerns about her treatment prior to taking maternity leave. The first was that Mrs Lamond had spoken to her about an option of returning to a different position on her return from maternity leave. Whilst we were satisfied that such a discussion took place, we noted that the Claimant had indicated she did not wish to undertake an alternative role and wished to return to her job as a Sales Executive and that is indeed what was due to happen. We did not consider that the mere exploration of an alternative job, bearing in mind that the Claimant had been working in the alternative position for some two months, was in any way inappropriate.

54. The Claimant also raised a concern about an error made by Mrs Lamond in her final payment prior to commencing maternity leave. It appeared that, notwithstanding the letter sent to the Claimant by Mrs Lamond to confirm the arrangements regarding her maternity leave, Mrs Lamond had agreed with the subsequent request by the Claimant to make a payment in lieu of holidays to her prior to going on maternity leave. Whilst that was not strictly compliant with the Working Time Regulations, we were satisfied that Mrs Lamond felt that this would be beneficial to the Claimant and therefore made the payment in lieu in good faith. However, Mrs Lamond indicated that she would pay the Claimant in lieu of seven days' accrued holiday and she confirmed this in an email on 13 September 2017 at 12:16. Shortly after that, the Claimant emailed Mrs Lamond noting that there were also two bank holidays that would arise during the relevant period (25 and 26 December) and therefore there were nine days due in total. Mrs Lamond wrote just over an hour later confirming that the Claimant had nine days in total, but it appeared that that instruction was not provided to the Respondents bookkeeper whom we understood to be the person who managed the payroll. In her evidence Mrs Lamond confirmed that this was a simple error on her part, which was quickly corrected, and we were satisfied that that was indeed the case and that it did not amount to any form of detrimental or unfavourable treatment related to her pregnancy.

55. The Claimant's maternity leave therefore commenced on 5 October 2017, after having taken a period of holiday. In fact, the maternity leave started slightly after the Claimant's due date, but her baby was ultimately born on 9 October 2017.

56. During her maternity leave, the Claimant was in contact with a colleague via WhatsApp and photos of her baby were circulated. Whilst Mrs Lamond sent a card to the Claimant at the start of her maternity leave she made no further contact with the Claimant. The Claimant herself initiated contact with Mrs Lamond on 13 December 2017 via WhatsApp and then sent a further message to Mrs Lamond on 8 January 2018 wishing her a fantastic 2018. There was no response to that message from Mrs Lamond and indeed no other contact from her with the Claimant during this period. This was a point raised by the Claimant as part of her claim of detrimental treatment. Mrs Lamond noted in her evidence that she did not think it was her place to make contact with the Claimant but then when contact was made in December she engaged with it in a cordial manner. Mrs Lamond noted that she had probably simply overlooked responding to the email in January 2018 and that that was not uncommon of her. We were not satisfied that that involved any detrimental treatment of the Claimant.

57. The Claimant noted in her cross examination of Mrs Lamond that there had been reference in their initial correspondence that the Claimant might be able to attend training in the last two months of her maternity leave if any such training was available, but Mrs Lamond's evidence, which we accepted, was that there was no such training taking place at that time. We did not therefore find that there was any detrimental treatment of the Claimant by the Respondent during the course of her maternity leave.

58. Just prior to her anticipated return, the Claimant sent an email to the Respondent on 4 September 2018. She noted that as 5 October 2017 had been her last official day at work before maternity leave, her official return date should be the first working day after 5 October 2018, which was 8 October 2018. The parties appear to have proceeded on the basis that 8 October 2018 was indeed the date of the Claimant's return from maternity leave, as they discussed wanting to arrange a call with the Claimant on that day which would be taken as a "KIT meeting" for which the Claimant would be paid. That suggested that, as far as the parties were concerned, the date of the Claimant's return from maternity leave was 9 October 2018.

59. However, we note that as a matter of fact, and indeed law, maternity leave ends at a specific point and that is, in circumstances where the employee takes ordinary and additional maternity leave, 12 months after it commences. We noted that the maternity leave commenced on 6 October 2017, and therefore the Claimant's maternity leave ended on 5 October 2018.

60. At the telephone meeting on 8 October 2018, attended by Mrs Lamond and her husband, Mr Greg Lamond, who was at the time also a Director, the Claimant was informed that, on her return, the focus of her role would change in that the Respondent had concluded that it achieved better sales following telephone calls and with fewer visits to customers.

61. We did not consider this amounted to any formal change of role for the Claimant. She was to continue to be a Sales Executive, and when she had previously been undertaking the Sales Executive role, it had largely involved telephone work in any event. We noted that the Claimant did not raise any concern about that point or about any of the issues that she had raised in 2017. Also during this conversation the Claimant was notified that her probation period would be extended due to the fact that she had not been employed continuously for 6 months. We found that that was not in fact the case in that the terms of the probation period in the Claimant's contract, whilst referring to the possibility of extension, did not involve any form of automatic extension. We concluded therefore that, notwithstanding that the Claimant had been absent on maternity leave at the end of her 6 month probation period, in the absence of any formal extension by the Respondent at that time, she was in the position of having completed her probation by the time of her return. Ultimately however, nothing significant turned on that point.

62. Immediately following the meeting with the Claimant, Mr and Mrs Lamond discussed the position of the Respondent generally. It appeared that the estate agency business had taken a significant downturn, primarily driven by Brexit concerns, over the previous year or so, and that the Respondent had suffered as a consequence. Indeed, the company's accounts up to April 2018 showed that they had made a loss in that financial year and further losses were forecast. Some employees who had left had not been replaced but Mr and Mrs Lamond considered that they still needed to make further reductions and that would involve redundancies within their sales force.

63. Mr and Mrs Lamond then contacted their advisers, and it was agreed that the Claimant and, one of her colleagues working in the North East, both of whom had started at about the same time and therefore only had about eighteen months' service, would be dismissed by reason of redundancy. The other salesperson, who had longer service, would be retained. In evidence, Mrs Lamond sought to also justify the retention of that person due to their better performance, in comparison with the colleague in the North East, who had worked throughout the eighteen-month period, and in comparison with extrapolated figures for the Claimant. However we considered that they were merely after the event justifications by Mrs Lamond and that the criterion for the redundancy of the Claimant and her colleague was that they had less than two years' service. Whilst using that criterion is perhaps not ideal, and could be open to challenge in other circumstances, we considered that the use of that criterion, applying as it did to the Claimant's colleague as well as to the

Claimant herself, demonstrated that the reason for dismissal was not related to the Claimant's pregnancy. The Claimant's colleague in the North East was dismissed in the same way, for the same reason, and on the same day.

64. The Claimant was called to a meeting on 17 October 2018 to inform her that she was facing redundancy, which was then confirmed by letter the following day. That meeting was with Mrs Lamond but she was accompanied by an HR Consultant who seemed to manage the meeting rather than Mrs Lamond. The Claimant took issue with some comments of the Consultant relating to the Claimant looking tired and also a reference to breastfeeding. However we did not consider that those were in any sense discriminatory or detrimental but were simply comments made to try to put the Claimant at ease.

65. As we have noted, the Claimant was dismissed with effect from 18 October 2017. She was paid one week in lieu of notice and also a three-week ex gratia payment. The Claimant contended that that was incorrect in that she was entitled to one month's notice having passed her probation period. As we have noted above, we agree with that, but the provision of one week's pay in lieu of notice plus an untaxed three weeks ex gratia payment meant that the Claimant did not suffer financially as a result of the Respondent's actions. Furthermore, no claim for breach of contract was before us.

Conclusions

66. Applying our findings above to the issues we identified, our conclusions were as follows.

67. With regard to the Claimant's unfair dismissal claim we were satisfied that the reason for her dismissal was redundancy and was not connected to her pregnancy, childbirth or maternity. We were satisfied that the Respondent had identified a genuine need to make redundancies which involved two out of the three remaining sales executives. Whilst the dismissal of employees in a redundancy situation on the basis of their lack of continuous service may raise other issues, we did not consider that using that as the redundancy selection criterion was connected to the Claimant's pregnancy or her maternity leave. As we have noted, the Claimant's colleague, who had not been absent on maternity leave, was treated in exactly the same way.

68. We noted the Claimant's claim that she felt that the Respondent had failed to comply with Regulation 10 in the Maternity and Parental Leave Regulations 1999, i.e. to offer her suitable alternative employment. In that regard she asserted that the fact that one of the sales executive roles was remaining should have led to her being the person identified to remain with the other two employees being made redundant. However, we noted the terms of Regulation 10 and did not consider that there had been any breach.

69. We noted that Regulation 10(1) states that the 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. As we have noted above, we concluded that the Claimant's additional maternity leave period ended on 5 October 2018 and the identification of her as redundant did not arise until after that time. In any event, Regulation 10(2) notes that where the Regulation applies, that, where there is a suitable available vacancy, the employee is entitled to be offered that alternative employment.

70. We did not consider that that requirement, even had it applied, would have meant that, in a selection process between three, the employee who was on maternity leave would automatically be the one to be retained. We did not consider that Regulation 10(2) impacted on the management by an employer of a redundancy selection exercise and we considered that an employer was able to manage such a process with a view to retaining the most appropriate employee, whether that be the employee on maternity leave or not. The benefit of Regulation 10(2) for an employee on maternity leave is that she is to be afforded preferential treatment in relation to any "suitable available vacancy", i.e. any other position within the organisation which is vacant. In relation to the circumstances which applied in the Respondent's organisation in October 2018, there was no such suitable available vacancy, and there could not therefore have been any breach of Regulation 10(2), had it applied.

71. With regard to the Claimant's claims for detrimental or unfavourable treatment, we first considered whether such claims were out of time and concluded that they were. We noted that the Claimant had raised several concerns about the way she had been treated in June and July 2017, and had indeed raised a grievance about them. However, in September 2017, she had confirmed to the Respondent that she was happy with the outcome of her grievance. The only matters of which she subsequently complained were the discussion with Mrs Lamond about returning to a different role, which we considered was not inappropriate in the context of the fact that the Claimant had indeed been fulfilling a different role in the last two months of her employment prior to going on maternity leave, and the mistake in relation to the payments in lieu of her holiday pay which we considered was precisely that, a simple human error. We did not consider that any lack of contact on the part of the Respondent with the Claimant during her maternity leave amounted to detrimental treatment. Whilst there had been some discussion about the prospect of the Claimant attending some KIT days prior to her return from maternity leave, that was only if it was appropriate and, as it transpired, it was not. Finally, we considered that the discussion with the Claimant on 8 October 2018, about the fact that her role would be focussed more on telephone sales, was not a detrimental act, and was in any event in line with the Respondent's changed approach to achieving sales.

72. Ultimately, we did not consider that there was any form of detrimental act which was within time. As we have already noted, we did not consider the dismissal itself was in any sense connected to the Claimant's pregnancy or her maternity leave and we therefore considered that her claims of detrimental treatment, both under Section 47C ERA and Section 27 EqA, and her claim for unfavourable treatment under Section 18 EqA were out of time.

73. With regard to the question of possibly extending time, both parties had referred us to the test set out in British Coal Corporation -v- Keeble [1197] IRLR 336, which incorporated the provisions of Section 33 of the Limitation Act 1980. We considered those factors and noted, in particular, the length of the delay in pursuing matters in 2017 and the steps taken by the Claimant to obtain appropriate professional advice. We noted that, if the events of 2017 were considered to have been discriminatory or detrimental, and we discuss that further below, the Claimant had not brought proceedings for some 18 months. We also noted that the Claimant had taken advice at the time and had referred to doing so in her grievance letter. She had also, as we have noted confirmed to the Respondent in writing that she was satisfied with the outcome of her grievance in September 2018. We therefore did not consider that it would be just and equitable to extend time in relation to the claims under the EqA. We also did not consider that it had not been reasonably practicable for the Claimant to have brought her claims in relation to detriment under Section 47C ERA within time, which is a significantly stricter test.

74. We also noted with regard to the claim under Section 18 EqA that the claim relates to unfavourable treatment during the protected period and that the dismissal occurred outside that period.

75. Whilst not strictly necessary for us to conclude, bearing in mind our conclusions with regard to the time point, we felt it appropriate to record our conclusion that, even if the Claimant's claims in relation to the events of 2017 had been made in time, we did not consider that they would have amounted to detrimental or unfavourable treatment. As we have noted in our findings above, we did not consider that the incidents complained of involved the Claimant suffering any detriment. We did not consider that the treatment the Claimant received was by reason of her being pregnant or due to her being due to take, or having taken, maternity leave. We also did not consider that any treatment afforded to her was derived from the fact that she had raised a grievance in July 2017 asserting that she felt that she was being discriminated against.

76. Overall, our conclusion was that, whilst there may have been some minor deficiencies in the way that the Claimant had been treated, they were entirely explicable by the Respondent's nature as a small business under pressure to produce revenue by way of sales. We did not conclude that any treatment of the Claimant was motivated by her pregnancy or her maternity leave and that

her colleagues were treated in the same way. Ultimately therefore we considered that all the Claimant's claims should be dismissed.

Employment Judge S Jenkins
Dated: 14 November 2019

JUDGMENT SENT TO THE PARTIES ON

……17 November 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS