THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE:
EMPLOYMENT JUDGE BALOGUN

MEMBERS: **Ms SV MacDonald**
Ms N O'Hare

BETWEEN:

Mrs Clarice Boateng

Claimant

And

London Borough of Croydon (1)
Gillian Bevan (2)
Catherine Black (3)

Respondents

ON: **7 – 11 October 2019 &**
14 November 2019 (In Chambers)

Appearances:
For the Claimant: In Person
For the Respondent: Ms G Rezaie, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By claim forms presented on 1 March 2018 and 28 January 2019, the Claimant brought complaints of failure to allow reasonable time off for ante-natal classes; direct sex discrimination; Indirect sex discrimination; harassment and victimisation. The claims are brought against her former employer and 2 individual respondents. All claims were resisted by the Respondents.

2. We heard evidence from the Claimant and from her witnesses, Mike Skipper (MS), Union Representative, and Christabel Acqaah (CA), her sister. On behalf of the Respondents, we heard from: Gillian Bevan, Head of HR for Resources Department (R2); Catherine Black, Head of Payments, Benefits and Debts (R3); Barbara O'Neill (BON), Corporate Debt Recovery Manager; Joyce Denloye (JD) Debt Recovery Officer; Eoghan O'Dwyer (EOD) Strategic Collections Manager; and Kimalain Gadsby (KG) Welfare Rights and Income Maximisation Manger.

3. The parties presented a joint bundle of documents comprising 4 lever arch folders and running to 1552 pages. References in square brackets in the judgment are to pages in the bundle.

The Issues

4. The agreed issues are set out in a List of Issues document and shall be referred to more specifically in our conclusions.

The Law

Time off for antenatal appointments

5. By section 55 of the Employment Rights Act 1996 (ERA) a pregnant employee is entitled to time off work to attend ante-natal appointments. Where an employer unreasonably refuses time off for this purpose, an employee may bring a complaint to the tribunal (s.57).

Direct Discrimination

6. Section 13 of the Equality Act 2010 (EqA) provides that 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. The Claimant relies on the protected characteristic of sex.

Indirect Discrimination

7. Under section 19 EqA, where A applies a provision, criterion or practice (PCP) to B, it is discriminatory in relation to the protected characteristic (in our case sex) if:

    a. A applies or would apply the PCP to persons who do not share B's sex

    b. It puts or would put persons of B's sex at a particular disadvantage compared with persons not of her sex.

c. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Harassment

8. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and the conduct has the purpose or effect of –

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

9. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Victimisation

10. Section 27 EqA provides that a person (A) victimises another person (B) if A subjects B to a detriment because a) B does a protected act or b) A believes that B has done, or may do, a protected act.

11. The protected acts in question are listed at section 27(2).

Burden of Proof

12. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

13. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the Claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.

14. In cases of indirect discrimination, the burden is on the Claimant to prove the PCP and that it placed or would place persons that share her characteristic at a particular disadvantage compared to others. Nelson v Carillion Service [2003] IRLR428

Findings of Fact

15. The claimant commenced employment with R1 on 8 April 2014, as a Debt Recovery Officer in the Sundry Debt team, working as part of a team of about 6 or 7 colleagues.

16. The Claimant's contract of employment provided that her normal place of work was the Respondent's offices at Bernard Weatherill House, 8 Mint Walk, Croydon CR0 1EA. [210B]

17. At some point in late 2015 the Claimant was allowed to work from home although this appears to have been an ad hoc/discretionary arrangement rather than a formal change to her contract.

18. Between 30 November 2015 and 17 January 2016, the Claimant was off sick from work following a miscarriage and returned on a phased basis.

19. At the time of her return, the Claimant's manager was Elizabeth Hemsworth (EH) who started on 16 November 2015, a couple of weeks before the Claimant went off on sick leave.

20. On her return, the Claimant was advised that she would have to work from the office for the time being and at a meeting on 29 February 2016, with R3, and R2, the reasons for this were explained. The Claimant was told that this was because of her poor communication with the office while working at home, issues around her performance and the need to support her following her absence. [669G-I]. The matter was reviewed in May 2016 but it was decided that the Claimant should continue working in the office as her performance had not reached the level necessary for homeworking. [669S-T]

21. On 27 May 2016, the Claimant took time off to attend a hospital appointment. At the time of this appointment the Claimant suspected that she was pregnant but did not know whether it was a viable pregnancy as there was concern that she might have a cyst. Following a scan, she found out that she was 9 weeks' pregnant.

22. The Claimant did not apply for time off to attend the appointment at any time before the actual appointment. In fact, she booked the time off work as flexi time (although it was subsequently amended to ante-natal appointment retrospectively).

23. On 11 August 2016, the Claimant commenced a 3-month secondment on a pilot scheme within the Welfare Rights team, reporting to KG. The Claimant was allowed to work from home when necessary for approximately 1-2 days a week.

24. On 25 August 16, KG carries out a pregnancy risk assessment with the Claimant. This involved going through a standard proforma with her and from her answers, establishing whether any adjustments were required. [322-328] One of the outcomes was that the Claimant was allowed to work from home on a more regular basis. In addition, a chair assessment was carried out resulting in the loan of a more comfortable chair to the Claimant for use up until her maternity leave. [331, 335-336]

25. The Claimant was due to return to her substantive role in November 2016 when her secondment was due to end. However, between 31 October 2016 and 7 November 2016, she was off sick after falling down the stairs at home. The Claimant worked from home on Monday, 7 November 2016. Although the Claimant attended the office briefly on 8 November, she was signed off again on that day and was never signed back as fit to return to work at any point prior to her maternity leave commencing on the 7th December [409-413].

26. On 29 September 2017, the Claimant attended the office for a meeting with BON to discuss her imminent return from maternity leave. The Claimant was updated on changes to working practices that had occurred in her absence, in particular, the

introduction of agile working whereby most of the team worked 3 days at home and 2 days in the office.

27. The Claimant's evidence was that BON told her that she would be required to work from the office for the first 3 months of her return. BON disputed this, claiming that she told the Claimant it would only be for the first month. The Claimant clearly believed it was 3 months as this was what she relayed to her union representative on the same day. [456]. Further, when the union representative wrote to the Respondent challenging the 3-month requirement, they never went back to him to say that it was actually a month. On balance, we prefer the Claimant's evidence and find that she was told she would have to work from the office for 3 months.

28. On 16 October 2017, the Claimant returned from maternity leave and attended a return to work meeting with BON. At the meeting, the Claimant informed BON that she had made an application for flexible working on 5 October 2017 which had not been responded to. Unfortunately, the email was not received as the Claimant had entered BON's email address incorrectly [429-436]. The Claimant requested to work from home so that she could continue breastfeeding her daughter. BON told the Claimant that the request would be considered once received but in the meantime, she could have an additional 1½ hour lunchbreak so that she could go home to feed her daughter. (Home was a 10-min walk away).

29. After the meeting, BON sent a follow up email confirming their discussion, and in the paragraph numbered 2 wrote:

"*During our meeting you have told me that your husband looks after your daughter 2 days a week and on those days, you express the milk, so he can feed her. May be you should consider doing this on other days too?*" [447]

30. The Claimant relies on this extract as an act of harassment.

31. On 16 October 2017, after the meeting with the Claimant, BON consulted HR on the flexible working application. Because the reasons put forward by the Claimant related to breastfeeding, HR decided that they needed to explore what measures needed to be put in place in the workplace. [462]. To that end, R2 wrote to Joel Benham (JB), Health and Safety Compliance Consultant, asking about a risk assessment for the Claimant [448B] JB carried out further enquires and later informed the Respondent that a risk assessment was not required as the Claimant was not breastfeeding or expressing milk on the premises. [448A]. The Claimant relies on the failure to carry out a risk assessment as an act of direct discrimination.

32. On 18 October 2017, the Claimant was signed off work with stress. [465] She returned on a phased basis for 2 weeks from the 3 November. Due to a combination of phased working and annual leave, she was in the office for no more than 2½ days per week during November. [475-476].

33. On 28 November 2017, the Respondent wrote to the Claimant confirming that she could commence agile working 3 days a week from that week.

34. On 28 March 2018, the Claimant told JD, a colleague and friend, that she was going home to feed her baby. A conversation then took place about breastfeeding during which JD commented that the Claimant should not be fully breastfeeding at

a year and a half and should give her baby bottled milk during the day. The Claimant disagreed, saying it was her baby and she could breastfeed her up to the age of 5 if she wanted to. In response JD said: "*you just want her to play with your boobs.*"

35. Later that day, the Claimant sent an email to JD asking her to stop going on about her breastfeeding of her daughter as it made her feel uncomfortable. [969] She then raised a formal complaint about this the following day. [970]

36. The Claimant relies on this incident as an act of harassment.

37. Between 17-18 January 2019, the Claimant was off sick. On the 23 January, she had a telephone return to work interview with EOD, who at the time was covering for BON who was on long term sick leave. The Claimant was advised that as this was her 4th absence in the last 12 months and that she had been absent for a total of 9 days in 12 months, she had hit a trigger point for an absence review meeting [1253-1255].

38. Under the Respondent's managing sickness absence policy, an attendance review meeting will be carried out if an employee's absence hits a trigger point of either 7 days absence in previous 12 months or 5 occasions of sickness absence in the previous 12 months. [1370]

39. The review meeting was held on 12 April 2019. After discussing the Claimant's absence with her and upon recognising that since the original trigger 3 months had passed without further absences, EOD confirmed that the matter would be closed after the 18 April. [1356-1357].

40. The Claimant contends that the management of her sickness absence at this point was an act of victimisation.

Submissions

41. The parties gave oral submissions, which we have taken into account.

Conclusions

42. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the agreed issues:

Time off for antenatal appointments

43. The Claimant had 12 ante-natal appointments in total. This claim originally related to a number of appointments but through the process of cross examination, it was whittled down to a single appointment, the one on the 27 May 2016, referred to at paragraphs 21 and 22 above.

44. It seems to us that for section 55 ERA to apply, the request for time off must be made before the appointment. The Claimant told us that she rang EH after the appointment and told her of the pregnancy. Even if the request can be made retrospectively, the Claimant does not say in her statement that that EH refused it.

45. At paragraph 17 of her witness statement, the Claimant refers to a mediation meeting with her union representative, EH and HR. She says that just before she left work on that day, she spoke with EH (she uses the initials LH) near the lifts and confirmed her pregnancy and that EH congratulated her. That was the 29 June 2016. There would have been no need for her to announce her pregnancy to EH on that day if she had already told EH by phone on 27 May, as she claims.

46. It is quite common for women to delay announcing their pregnancy until after the first trimester, to ensure that everything is progressing normally. Given that the Claimant had miscarried a previous pregnancy, we consider it unlikely that she would have announced her pregnancy to EH on the 27 May when she was only 9 weeks pregnant. By 29 June, the Claimant would have been around the 12-week point and we find, on balance, that this was the first time she notified EH of her pregnancy. Therefore, EH could not have refused her time off to attend an ante-natal appointment on 27 May.

47. The complaint is therefore dismissed.

48. Even if we had found that there had been an unreasonable refusal, we would still have dismissed the claim as it is out of time. Section 57(2) ERA provides that a complaint must be brought before the end of 3 months beginning with the date of the appointment concerned. The last date for presenting the claim was therefore 26 August 2016. The claim was presented on 1 March 2018 and no evidence was given as to why it was not reasonably practicable to present it in time.

Direct Discrimination

Undue delay in carrying out pregnancy risk assessment

49. In our findings at paragraph 24, we refer to a pregnancy risk assessment having been carried out on 25 August 2016. There was no evidence to suggest that there was any delay in dealing with this. In cross examination, the Claimant said that her discrimination complaint was about the failure of the Respondent to carry out an updated assessment after she was diagnosed with SPD (Pelvic Girdle Disorder). The Claimant received that diagnosis on 17 November 2016, and it is referred to in a doctor's note of the same date [413]. As the Claimant was off sick at that point and did not return until the end of her maternity leave, there was no need for an updated risk assessment and no opportunity to carry one out. This was why there was no assessment. It had nothing to do with the Claimant's sex. This complaint is not made out.

Failure to carry out a breast-feeding risk assessment

50. At paragraph 31 above, we found that enquiries were made by the Respondent as to whether a breast-feeding risk assessment was necessary but the advice received was that it was not as she was not proposing to breast feed or express her milk on the company premises. Given that an assessment was unnecessary, it is difficult to see what detriment or harm the Claimant has suffered that amounts to less favourable treatment on grounds of sex. The complaint is not made out.

Requiring the Claimant to notify her colleagues when she left work in the middle of the day to breast-feed her daughter

51. The Claimant contends that she was required to inform her colleagues that she was going home to breast feed. She relies on an email sent to her by BON on 17 October 2017, in which she says "*I would be grateful if you could just let the team know when leaving and when you expect to come back. This will help the team to ensure that we have an appropriate telephone cover*" [451] Nowhere in the note is the Claimant asked to notify her colleagues that the reason she is leaving is to breastfeed her daughter.

52. The Claimant relies on Justin Megalora (JM) as her male comparator. He had an arrangement with the Respondent whereby he was allowed to leave work early every Wednesday and it was the Respondent's evidence that he had been instructed to let the team know when he was leaving. The Claimant did not challenge this. In fact, her evidence was that JM informed the team by email when he was leaving. The Claimant was therefore not treated less favourably than her male comparator. Further, it is clear from the email extract that the reason for the instruction was so that there was appropriate telephone cover and BON confirmed this in her evidence to the Tribunal. That is a reason that has nothing to do with sex. This claim is not made out.

Indirect Discrimination

53. The PCPs that the Claimant relies upon are i) the requirement that those returning to work after a prolonged absence be permanently based in the office for a period of 3 months before being entitled to work from home for 3 days a week and ii) A requirement to notify colleagues when leaving work in the middle of the day in order to breast-feed.

54. In relation to i) there was no evidence that this requirement was applied to anyone other than the Claimant. In relation to ii) It is not possible for this to be a neutral PCP as, by definition, it can only apply to women. In any event, we have already found that no such requirement was applied to the Claimant.

55. The Claimant has therefore failed to discharge the evidential burden of showing that PCPs were applied and the claim fails at this point.

Harassment

Being required to notify colleagues when she was leaving work in the middle of the day to breast feed her daughter

56. Based on our conclusions at paragraphs 51 and 52 above, this complaint is not made out on the facts.

BON pressed the Claimant to express breast milk rather than leave the office to breastfeed her daughter

57. This complaint is essentially about the contents of the email BON sent to the Claimant on 16 October 2017 following their meeting on that date. The offending paragraph is set out at paragraph 29 above. In her evidence, BON accepted that

she had discussed breastfeeding with the Claimant when she met with her on 29 September and 16 October, but this was in the context of discussing her options and putting in place adjustments. Although the Claimant denies saying that she expressed milk when her husband looked after her daughter, we are satisfied that BON genuinely believed that this was said, albeit she may have been mistaken, and it was in that context that she made the suggestion about expressing her milk. The Claimant clearly objected to this suggestion and in her email in reply, said that she felt the comment was inappropriate [605]. Inappropriate, maybe, but, on an objective view, it cannot reasonably be perceived as sexual harassment.

On 28 March 2018, when leaving the office, a colleague shouted at her asking why she still had to go home to breastfeed her daughter

58. This is a reference to the matters at paragraphs 34 and 35 above. The Claimant told us that she was offended by the comments. She says that they were shouted across the office though we accept JDs evidence that this was not the case. When it was put to the Claimant that JD's "*playing with boobs*" comment was a joke, she took great umbrage at this, stating that it was not a laughing matter, that she was a Christian and that what was being suggested was incest. In our view that was an extreme reaction.

59. The Claimant accepted that she and JD were good friends. JD had attended hert her wedding and was the first person she told about her pregnancy. The Claimant also accepted that they would sometimes discuss parenting and breast-feeding and that JD would give her the benefit of her advice on these topics. On that basis, the discussion that took place on 28 March 2018 was not unusual. The Claimant clearly felt passionately about breastfeeding and was uncomfortable about the direction in which the conversation had gone. However, given the context, we find that the Claimant's perception of this as harassment was not reasonable. The complaint is not made out.

<u>Victimisation</u>

60. The claimant relies on her tribunal proceedings as the protected acts

Expressing a desire to "get rid of" the Claimant.

61. The Claimant alleged that R2 and R3 wanted to get rid of her. She says that she was told this by her colleague Riley in a telephone conversation. Riley was supposed to attend the tribunal to give evidence on behalf of the Claimant, however he told her that he could not do so. This was hearsay evidence which was so lacking in detail as to be of no value. The complaint is not made out.

<u>Management of Sickness Absence</u>

62. This is a reference to the matters at paragraphs 37-39 of our findings. The Claimant contends that R3 instigated the absence review and had been controlling the matter behind the scenes. There was no evidence to support this and we accept the evidence of both CB and EOD that this was not the case.

63. We are satisfied that the reason for the review was that the Claimant had hit the absence triggers and in accordance with the policy, a review meeting took place.

64. We also accept EON's evidence that others within the team who had hit the absence triggers were treated in exactly the same way. EON refers to this in his email to the Claimant of 15 April 2019. [1356].

65. In the event, the review resulted in no further action being taken so it is arguable whether there was any detriment suffered by the Claimant. However, if there was, we are satisfied that it was not related to her bringing these proceedings. The victimisation claim fails.

Judgment

66. The unanimous decision of the tribunal is that all claims fail and are dismissed.

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Employment Judge Balogun
Date: 13 December 2019