



EMPLOYMENT TRIBUNALS

Claimant: Mrs Kelly Bosch
Respondent: FAC Property Consultants Limited
Heard at: Bodmin **On:** 18 February 2020
Before: Employment Judge Fowell
Mr M T Smaldon
Ms R A Clarke

Representation:
Claimant: In person
Respondent: Mr M Howson, for Peninsula Business Services Limited

JUDGMENT

1. The complaint of discrimination on grounds of pregnancy and maternity is upheld.
2. The complaint of harassment on grounds of religion and belief is upheld.
3. The complaint of direct discrimination on grounds of religion and belief is dismissed.
4. The claimant is awarded compensation as follows:
 - a. Financial loss during sickness absence in December 2017 and January 2018 in the sum of £1,630.00
 - b. Financial loss during her maternity leave period prior to her resignation in the sum of £2,760
 - c. Financial loss post-employment for the 12 months to 5 November 2019, in the sum of £10,500
 - d. Interest on Financial Loss £1,302
 - e. Injury to Feelings £20,000
 - f. Interest on Non-financial loss £3,542
 - g. Grossing up award: £1,331

5. The total loss awarded is **£41,065**

REASONS

Introduction

1. The main complaint in this appeal is one of discrimination on grounds of pregnancy or maternity.
2. The respondent, FAC Property Consultants Ltd, is a firm of estate agents in Cornwall. They have several offices, but the two with which we are principally concerned are in Par, by the south coast, and Bodmin, about ten miles further north. Like most estate agents they do sales and lettings, and also have a financial services arm in Bodmin dealing with mortgages.
3. The claimant, Mrs Bosch, joined them in March 2017. Before that she worked for a much larger chain of independent estate agents as a Senior Negotiator. She had not managed an office before, but this was an opportunity for her to become an Area Sales Manager. In practice that meant that she was to manage the sales operations across the two offices.
4. On her account, when she announced her pregnancy in early October 2017 her managers reacted badly. There was immediate discussion of demotion and a pay cut. She was then berated in a meeting in November. Finally, capability proceedings were instigated with a view to her dismissal. However, before any hearing took place she was signed off sick and then began her maternity leave. About six months after her baby was born she gave notice and returned to work for her former employer.
5. The respondent says that that was not the case. She had been recruited to turn around the Bodmin office, which was achieving almost no sales. They had hoped for some improvement over the summer of 2017, and although there were one or two sales each month during the summer, in September it dropped back to zero. Sales remained bumping along the bottom for the rest of her employment. She was due to get married and go on honeymoon in October so the company remained patient with the lack of results. But shortly before she went away she announced her pregnancy. And while she was off, her one full-time sales negotiator in Bodmin - a lady called Di - resigned, so when Mrs Bosch came back to work there was much to discuss. They required her to base herself in Bodmin from then on and pick up Di's work. A month later, at the November monthly manager's meeting, when there were still no sales, she was evasive and would not reply to direct questions about her plans. In December, given the lack of results, they then began capability proceedings against her, but not, they say, with a view to her dismissal, and these proceedings were shelved when she began her maternity leave. Consequently, they say, there was no discrimination.
6. There is a further complaint of discrimination on grounds of religion and belief. Mrs Bosch is a Seventh Day Adventist. In her Christian tradition, observance of

the sabbath is particularly important, and it runs from sunset on Friday to sunset on Saturday. She complains firstly that when she was moved to Bodmin, she was sent an email after sunset on Friday evening, telling her to go to Par first of all on Monday morning and pick up her computer, which gave her little notice, and secondly that at a meeting on 27 October 2017 her managers made a number of derogatory comments about her beliefs.

Claims and issues

7. The complaints presented are therefore as follows:
 - a. discrimination on grounds of pregnancy and maternity (under section 18 Equality Act 2010)
 - b. direct discrimination (under section 13 Equality Act 2010) on grounds of religion
 - c. harassment (under section 26 Equality Act 2010) on grounds of religion
8. The issues to be decided were set out in a Case Management Order on 15 January 2019 and we will return to the detail of them below.
9. One point not covered in that list is her resignation. This followed long after her claim form, but before the preliminary hearing. It appears to have been assumed by Mrs Bosch that she could claim damages for loss of her employment, although there was never a formal application to amend, and the point was not addressed at the preliminary hearing. Having heard from each side on the first morning of the hearing, we allowed the claim form to be amended so that a further issue to be decided is whether she resigned in response to the alleged breaches.
10. In addressing these issues we heard evidence from Mrs Bosch, and on behalf of the company from Mr Andrew Harvey, the Managing Director, and Mr Kevin Rees, the Group Practice Manager. A witness statement was also provided by a Ms Amy Smith, a Lettings Manager, about one of the meetings in question. (Since she did not attend the hearing, less weight can be attached to that evidence.) There was also a bundle of about 350 pages. Having considered this evidence and the submissions on each side we make the following findings. By way of preliminary points however, references in brackets are to pages in the agreed bundle, and for reasons of confidentiality we will use the first name of any members of staff who did not appear as a witness.

Findings of Fact

11. The sales operation across these two offices was not a large one. Although each office had call-handlers and reception staff, the dedicated sales team essentially comprised ones Sales Negotiator in Par, called Red, and another in Bodmin – Di, the lady just mentioned. Sales in the Looe and Liskeard offices were managed by a colleague called Jonathan. There were also Lettings Managers at the same level, one of whom was Jonathan's opposite number in those offices, Amy Smith.

12. The respondent is part of a group of companies managed by Mr Harvey. There are four others, all in the property sector, although he does not have a background as an estate agent. He is also an independent financial adviser. Assisting him in all of these operations is the Group Practice Manager, Mr Rees.
13. At the time of Mrs Bosch's recruitment the Bodmin office had been in the doldrums for some time. The previous manager had left under a cloud and according to the respondent's own figures, provided at this hearing, there had been only two sales during the whole of 2016. Mrs Bosch was taken on to change all that, but it meant that she was effectively starting from scratch.
14. She was certainly enthusiastic about the new role and convinced Mr Harvey at her interview that she could turn things around, even though she had little experience as an office manager - limited to acting up from time to time when her manager was away - and none in generating business from scratch. Despite that enthusiasm, when she was first offered the role she refused because of the salary. Although the job title was much better she was to be paid about the same, and after all the mileage was taken into account she was no better off. A compromise was reached on the basis that she would get her business mileage paid and so she accepted. On arrival however she was informed that inter-office mileage did not count and so she could not claim that in her expenses. That was not what she had understood when she accepted the job.
15. Her approach in this new role was to seek to introduce some of the practices and procedures in use at her old office. There she had been provided with training and marketing material, and she used these to provide scripts for call handlers and other training measures to make staff in both offices more professional.
16. Her preferred approach was also to keep a healthy margin and offer a better service, charging 2% of the property value. Her colleague Jonathan's approach in his offices was to cut the price to draw in business, and his better established offices was certainly doing much better.
17. As an alternative, the company operated a franchise for a national online estate agency service - seen as a rival to operations like Purple Bricks - called Easy Property. The idea was that if potential customers balked at the 2% price they could be invited to go online and sign up with Easy Property, and the house would be marketed for a fixed fee of £500. This was not something which Mrs Bosch actively pushed, but it was there as a fallback.
18. Among the many marketing initiatives she suggested during her employment was the use of promotional video tours to display the properties. All spending decisions were down to Mr Harvey however and he was cautious about the expense. On 25 April 2017 he emailed her (p.69), both to say that inter-office mileage payments would not be made, but also that he had no appetite for additional expenditure given the poor levels of activity in Bodmin. This was only about six weeks after her arrival, so it does not appear that any sustained period

of investment, beyond her salary, was intended. He ended,

“Sorry to curb enthusiasm, but I now need to start seeing higher returns from Par and definite new instructions from Bodmin without increasing my cost.”

19. She explained in response that she had wanted the videos to give a more professional appearance and justify the higher fees she wanted to charge. She also pressed him about a sales or rental brochure, which she said she needed for a forthcoming Air Ambulance day and for valuation appointments in general. Despite the lack of investment therefore there was continuing activity and enthusiasm on her part.

20. If anything, Mr Harvey’s response was to dampen her enthusiasm even further. He informed her (p.67):

“Please just remember that it is costing about 20k per month for Par and Bodmin combined to operate. As the months tick on by I must have results for both branches. We now have the right people and the software and the equipment. The brochure is in hand. However, I have a limited time and even more limited financial resources available to keep the Bodmin sinking ship afloat.

“I will give the branch three months until the end of July to get this branch back on track or we will simply close the operation. Sorry, but we cannot keep on putting good money after bad. You and the staff will now have to pull the stops out or we have no option than to pull the plug.

“For May I need at least 6 instructions in Bodmin, 8 in June and then 10 in July, that is your target to now hit.

“Sorry, time is pressing and I now need results, I appreciate what you are doing, however you have 3 months to turn it around or we retrench you and Red in Par and write the sales operation off in Bodmin. This will of course mean staff redundancies too.

“That is where I am, I now need results.”

21. Naturally that was a disappointing message, possibly a real blow having only just joined and with such high expectations. It also placed a considerable amount of pressure on her to perform and save people’s jobs. She kept her response short the next day and proposed a chat to discuss expectations. He agreed. She then set out her thoughts in more detail that afternoon. In that email (p.64) she pointed to the difficulties of suddenly turning around an unsuccessful brand, mentioned that the previous week had seen some success in introducing new systems, and expressed her confidence that “if anyone can turn this office around it is me”. But she also tried to impress on him that there was a pipeline of about eight weeks from valuation to payment and that he had realistic about the time it would take. She made clear that she was “extremely annoyed” at his approach but tried to balance that with a more professional and positive outlook elsewhere in her email.

22. When they met it appears that there was some meeting of minds. We have no

record of that meeting but she explained to him that she had lost £1,000 when she left her previous employer because of training costs which had been clawed back. In recognition of this he gave her a £500 bonus.

23. Having perhaps cleared the air to some extent, she continued her efforts. One more traditional method of marketing she then employed was through a local organisation called the Guild of Property Professionals. That included solicitors and surveyors, who often refer business to each other. She collaborated with them over a mailshot, which did start to generate some enquiries.
24. It is hard to judge at this remove how effective her initiatives were over the following month or two. The documentary evidence supplied simply records some sick days for her in the summer and autumn of that year. With hindsight, some of them may have been pregnancy-related. For these she received statutory sick pay or took holiday. There was also a bout of flu in September. Her wedding was planned for 7 October and she had about three weeks holiday booked for her honeymoon after that.
25. There does not appear to have been any renewed threat of redundancy or the closure of the Bodmin office during that period, although results were slow in coming. In June 2017 two sales were agreed. These were perhaps the first shoots of recovery. In July there was another. It took until at least August, when there was another sale, for the money to start coming through, but September and October brought no sales whatever. September may have been affected by her flu absence and October by her honeymoon, but there was no sign of the sort of hoped-for monthly figures of six, eight or ten sales.
26. On 2 October 2017 Mrs Bosch emailed Mr Rees to announce that she was pregnant. She described it as “some very shocking and unexpected news,” before making it clear that it had not been expected. The email described her feelings very openly, “so as you can imagine with all I have on my plate at the moment, I am not in a great place. I will not describe how I am feeling as it’s not very positive.” This was of course a few days before her wedding. In closing she explained that she had a midwife’s appointment on her return, on 26 October 2017, and asked for a meeting with him and Mr Harvey to discuss what she needed to do next. She also asked him to keep the matter confidential but, since she was asking for a meeting with Mr Harvey it seems to us implicit that she accepted that he should be told.
27. Throughout this period, Mrs Bosch kept a diary, a handwritten A4 business diary, in which she recorded her appointments and added comments about the events of the day. She insisted that all of these entries were contemporaneous, although that was questioned at this hearing and it was suggested to her that she had added in details later. We take the view that there was no satisfactory basis for that suggestion. Many of the points recorded in those entries are reflected in her subsequent emails, or have been agreed by the respondent’s witnesses. They also appear to be spontaneous and dashed off without any formal grammar or

phrasing. Nor was there any other general assault on her credibility, as opposed to her capability. We see no reason therefore to doubt that these are genuine diary entries, made at the time.

28. In the first of these (p.95) she recorded that in response to her pregnancy announcement Mr Rees suggested that they meet the next day. That discussion (p.96) is also recorded in her diary. It states that Mr Rees told her that he would have to make Mr Harvey aware, a point which he confirms in his own witness statement. The main point recorded however was that he proposed that she take a step back to a less stressful role to ensure that her health was not affected by work-related stress. She responded, the diary entry notes, by stating that she was not stressed, just suffering from the usual nausea and in the process of organising a wedding.
29. We accept that he did suggest in that meeting, immediately following the announcement of her pregnancy, that she give up some of her management responsibilities. Not only does that accord with the written record but it makes sense in the commercial context faced by the company, which was that there had been no transformation in the fortunes of the Bodmin branch and the progress was slow and uncertain.
30. After that meeting, Mr Rees told Mr Harvey about the pregnancy. A couple of days later, on 5 October 2017, there was a monthly managers' meeting. As may be expected, the meeting went over the figures and performance of each office to see how things were progressing. Mrs Bosch's diary entry records that Mr Harvey opened the meeting by making a disparaging reference to one of the letting tenants as "Alice the slag", who got pregnant whenever she had money troubles, and then asked about a colleague called Beth who was on maternity leave. He made the point that he only had an obligation to offer her old, full-time, job back to her, that she would want to come back part-time, and this was a way of getting rid of her.
31. In his evidence Mr Harvey vehemently denied making any such comments. He said he had no knowledge of any tenant called Alice. Against that we have to have regard to what appears to be a contemporaneous diary note and our view, looking at matters in the round, that these diary notes are reliable. It would also be a sophisticated invention on her part if this point were fabricated.
32. There are other reasons to prefer her account. Further particulars of Mrs Bosch's claim were provided before the preliminary hearing, which detailed this aspect fully (p.13). But there is little in the way of refutation from the respondent. Mr Rees states in his witness statement that he did not hear any remark about Alice and did not recall any conversation about getting rid of Beth. Mr Harvey's statement makes no mention of this meeting at all. There is also the further witness statement of Amy Smith, who was at this meeting, but which is also silent on these points. On balance therefore, we accept that these comments were made.

33. Despite this bruising encounter Mrs Bosch followed that meeting with a detailed email to Mr Harvey (p.102) making him aware of the various initiatives underway in Bodmin. She accepted that the push for fees had been having a detrimental effect on instructions in Par and that she needed to change her approach. She intended to concentrate on a higher conversion rate rather than margin. However, she went on, there was a 70% larger stock list and an improving local reputation in Bodmin. The stage been reached where her training initiatives would bear fruit and she could leave more of the day-to-day work to Di, concentrating on the Par office where there was more activity. This would involve, for example, contacting all customers for whom they had made valuations since January to see if their premises was still on the market and if they could persuade them to switch back to FAC – a practice known as ‘touting’. She had discussed this with Red and he was fully on board with a proposed change of emphasis. It shows that she had taken on board some of the concerns and criticism at that managers’ meeting and was trying to provide a professional response in increasingly difficult circumstances.
34. That was the position when she left for three weeks for her wedding and honeymoon. When she came back, her plans had been disrupted by the resignation of Di, who emailed her resignation to Mr Harvey on 19 October, setting out her reasons. Although she said that she enjoyed being part of the team there and everyone she had worked with, she had been offered a promotion at a larger firm. She also made reference to the fact that, as she had explained at their recent meeting, one of the factors which contributed to her leaving was having to record “every little task I do as well as recording every single phone call I make.” She said it made her feel that she was not trusted to do the job and that she had to justify herself all the time.
35. Mr Harvey, by contrast, at this hearing gave evidence that the main reason she left was because she was bored, having so little to do, and also that she complained of having no supervision whatsoever. That complaint about supervision is difficult to reconcile with her remarks about being micromanaged, and we do not accept that that played any part in her decision. There was however, as there had been for some time, a chronic lack of instructions in Bodmin and she had filled up some of her day by helping out the Lettings department and doing some market research.
36. Her departure left a big hole in the small operation. The only trained valuers and negotiators across the two offices were Di, Red and Mrs Bosch. Mr Harvey and Mr Rees were anxious to have a meeting as soon as possible with Mrs Bosch to discuss matters and that tallied with her request to have a meeting to discuss her pregnancy. They asked to see her on the 26th but she put it off until the next day, when she had seen the midwife.
37. As usual there is a diary note of that meeting (p.109). According to that it began with Mr Rees and Mr Harvey telling her that they felt that her health had affected

her performance at work during the weeks before she went on honeymoon and asked if she wanted to take a pay cut and drop down to a negotiator's salary. They went further, it recorded, and said that the figures showed that she had failed in her job as a manager and they would have to move her to the Bodmin office from the following Monday – this was a Friday. In all probability they would then be making either her or her colleague Red redundant in January if the figures did not improve by then. In response she asked for a marketing budget, to generate this business, which was refused. In her oral evidence she added that she was told that she was the obvious candidate for redundancy, given her salary and job title, and this brought it home to her.

38. There were then comments recorded about her religion. She was asked whether her husband held the same religious views as her, and whether they celebrated Easter and Christmas. These were referred to as pagan festivals and her views described as fables. Given the preceding discussion about redundancy it is hard to see that there was any scope for banter or good nature in these observations.
39. After that meeting, Mr Rees took the initiative and emailed her with a summary of the key points discussed. It notes:

“You confirmed that you felt able to continue in your current role as Sales Manager and felt that the recent period of sickness and fatigue was behind you. Andrew and I are committed to providing you with as much support as possible during your pregnancy. Should you, at any time, feel unable to deal with the effort and stress that goes with your management role then please let me know and I will arrange for your management duties to be removed on a temporary basis. Obviously it would be necessary to adjust your salary to reflect any lessening of responsibility.”
40. This appears to us to be a confirmation that they proposed to her that she step down, and that her salary would be reduced as a consequence. That last point is in direct contradiction of the evidence they both gave at this hearing that there was never any intention of reducing the salary and it was simply a proposal to lighten her load.
41. The email went on to state that she would have “the slightly more onerous task of continuing the revival in Bodmin whilst maintaining your management oversight” and urged her that if she got to the stage where she felt that she could do no more to contact them without delay. This appeared to be inviting her to admit that she had failed.
42. She replied to this email at some length (p.117) raising her concern that many of the points discussed at that meeting were not recorded in his email. The first of these was the threat of redundancy. She said this was the second time since announcing her pregnancy that she had been offered a more junior position on less pay if she felt her health required it, which she had refused. She expressed her concern about the fact that she would now have to do her own job as well as Di's. She mentioned that a comment had been made about her having failed as a manager, that she had been told that Di had quit as a result of her failures, and

that she would now be at risk of redundancy given the state of the Bodmin office. In a further attempt to remain positive and professional she concluded:

“I do not want to make any assumptions as to how positively or negatively the company and Andrew are responding to my pregnancy and so I would like all of the points above clarified before I become alarmed unnecessarily that there may be any problems.”

43. She also mentioned in this context her concerns about the comments made at the meeting on 5 October about Alice and her colleague Beth, and reminded him of the financial stress she was under with her impending maternity leave.
44. Mr Rees replied at corresponding length (p.114), giving a paragraph by paragraph response. But he did not deal with the allegations about her failing as a manager, or that Di quit as a result. He did confirm however that she was offered the opportunity of dropping her management responsibilities, - “I merely reminded you that this option was available.” That reference to *reminding* her also supports our view that this was raised at the meeting on 3 October.
45. These various exchanges took place on 30 and 31 October, a few days after the meeting. On the evening in question she also received an email from Mr Harvey, timed at 8:24 pm, telling her not to go directly to Bodmin on Monday morning but to divert to Par to pick up her computer. As already noted, this would be during her sabbath, giving her less notice. Whether or not she saw it, she went straight to Par on the Monday morning, and emailed him back at that stage to make him aware of the difficulties of moving everything to Bodmin immediately. There was the PC tower and the monitor together with all her other paperwork and desk items to move. One box was already in the boot of her car which Red had moved for her. In short, she was explaining that she needed some help with it all. Without dwelling on this aspect, it took a few days for everything to be moved across and she relied on Mr Rees and others to bring the computer equipment, which he had to struggle herself with some boxes of equipment. There was no parking at the Bodmin office so she had to make her way across town with them. No doubt by then she was annoyed at being directed in this way - having previously been able to choose for herself where she worked - and having no real consideration for her pregnancy. There had also been no pregnancy risk assessment by that stage. Mr Rees’s attitude, expressed in one email at this time, was that the pregnancy did not undermine her ability to undertake everyday tasks, indicating that he thought she was making too much fuss about this move.
46. The email exchange, already described, about what was said at the meeting on 27 October, therefore took place during this rather strained atmosphere the following week. One point which Mrs Bosch did not make in her email listing the points which ought to be recorded from that meeting, was about her religion. The only point she made was about the timing of the email about her move to Bodmin. It was suggested to her that that indicated that her diary note was not authentic. Having considered all of the email exchanges, then and previously, we take the

view that she simply did not want to be unduly confrontational. Throughout her correspondence there is a balance between asserting herself and trying to keep professional and positive relations. In that context, the reference to the email being received on the sabbath was, we judge, her attempt to put a marker down about this issue, and on this point Mr Rees chose to make no response. We accept however that neither he nor Mr Harvey had been aware of when she observed the sabbath, and no thought was given to the timing of the email.

47. The last days of October and the first week of November saw a renewed effort marketing activity. One initiative was to go on some further training which Red put forward. It was training from Easy Property on generating leads and converting more business. Mrs Bosch forwarded this to Mr Harvey and he said that it was broadly a good idea. Later that month however (p.205) when he emailed them about it he made the comment that realistically he could only see Red doing this as Mrs Bosch would shortly be going on maternity leave. In the event, Red formed the view that time would be better spent in the office and neither of them went. Although Mrs Bosch was unhappy about this, we do not accept that this was unfavourable treatment. The comment made was in our view simply a recognition of reality, that she would not be at work when the training was available.
48. Around the same time there were further lengthy email exchanges between Mrs Bosch and Mr Harvey about marketing strategy. He wanted her to concentrate on large house-builders. She felt that many of them had their own agents or she was conflicted from her time at her previous firm, but FAC were too small now to pitch for that volume work. The Guild mailshot had generated the most leads, she felt, and she wanted to focus on leafletting, social media and working with the Guild. There were numerous other suggestions for improvement such as Xmas events, getting Santa into the branch, and going over the data to see what had and had not worked.
49. Another initiative was working on what is referred to as a “mini mag” with the Guild, although as she pointed out she was used to having a marketing team to produce the literature and graphic design needed, rather than having to write it herself. All of these ideas and initiatives were communicated to Mr Harvey it is clear that he was also informed of every sale agreed or significant that at the Bodmin office, either by Mrs Bosch or by Di, who was still there. Mrs Bosch was trying all she could to turn things around, perhaps spurred on by the threat of redundancy. And she was still trying to keep cordial relations with Mr Harvey and Mr Rees.
50. That short burst of renewed activity therefore took place in the run-up to the monthly managers’ meeting on 8 November, only a matter of working days after the meeting on 27 October when she was dispatched to Bodmin. That meeting was also significant. It began at 11 o’clock and was intended to last until 12.30 According to her diary entry (p.175), Mr Harvey left at 12.10 having reduced her

to tears. In front of the other managers, he told her that she had failed and that there were no results. At the end of the meeting, Mr Rees stayed behind with her to complete a review and to go over 'touting strategy' with her.

51. There is a clear difference in the evidence about what took place. Mr Harvey said that he asked her six or seven or eight times what her plans were for the Bodmin office and that she was evasive or refused to reply. This is supported to some extent by the evidence of Ms Smith who statement says that she refused to answer a direct question. The other view would be that this was her being ambushed and berated in public, in front of her colleagues. They all agree however that she became upset.
52. Ms Smith would be unaware of the many exchanges Mrs Bosch had had with Mr Harvey over the previous few days. Every initiative had been discussed and all of the proposals were coming from Mrs Bosch. She had no marketing budget and Mr Harvey controlled all the spending. It is hard to see what Mr Harvey genuinely hoped to learn from her in this context that he did not already know. There were plenty of plans for developing Bodmin, but her consistent view was that they would take time and require further marketing investment.
53. We bear in mind that by this stage Mrs Bosch had been threatened with redundancy and demotion. She was also pregnant and facing a very uncertain financial future. Mr Harvey must have known that there was no simple or obvious short-term solution and so asking her the same question repeatedly in front of colleagues in this way must in our view have been humiliating and upsetting. Again, we prefer her version of events.
54. Subsequent events appear to bear this out. It is well over a year now since Mrs Bosch submitted her resignation and over two years since she was working in the business. The respondent's evidence was that the Bodmin office was now effectively mothballed, that there were properties in the window and that any sales were being handled by Red from the Par office. They had recruited somebody else in the meantime to generate sales but that had only lasted about six months. In short, they had tried to recruit Mrs Bosch at no little expense to build up the business, it had not worked in the timeframe expected and so they had concluded that it would not work. That also supports her view at the time that business development would take time and investment.
55. After that meeting we enter a further period in which there is relatively little documentation. Di left, and Mrs Bosch took over her duties. Her workload did not double, as suggested. On her own admission, she worked the same hours as before, although she had to pack more in and it was more difficult. There appears to have been no further meeting or reconciliation with Mr Harvey. As far as we can judge the marketing efforts continued. The only records in the bundle relate to efforts by Mrs Bosch to book some further holiday. The start of her maternity leave was approaching. She was aware that whilst on leave she would accrue further entitlement to holiday and she hoped to take that holiday

before her maternity leave commenced, to bring it forward as far as possible.

56. At the same time she was concerned about her finances. One of her emails during this period, on 20 November (p.199) raised a concern about her commission. She was working on completing a sale which Di had negotiated and she pointed out to Mr Rees that the move to Bodmin had cost her lost commission was putting her under financial stress. The fact that she had been refused commission on the sale was, she stated, “extremely upsetting” but she would ensure it was completed.
57. The state of stress she was under is illustrated by a further issue which then arose about her expenses. The December monthly managers’ meeting was looming. No doubt unhappy about the rule regarding inter-office mileage she asked for the cost of going from Bodmin to Par and back to be refunded, (p.243) stating that she could not afford to attend meetings at her own expense. She said she would need to take out a bank loan. This led to an email spat and Mr Harvey sanctioned the payment of a further £10 for her to attend the meeting.
58. A similar sign of her stress is shown in her reaction to a letter from Mr Rees setting out her maternity entitlements. It is a detailed and clearly standard-form letter but he inadvertently referred to her employer as Ocean and Country Ltd, one of the other companies in the group. She pointed this out and he confirmed that this was simply a mistake, but she was unhappy that he did not reissue it.
59. There is no record of that December managers’ meeting. The bundle does not include even a diary entry. As it approached, there were also some further exchanges about marketing matters. She emailed Mr Harvey on 6 December to say that the only way to change the marketing strategy was to “plough money into it with regular mail drops and making them available on Rightmove for valuations”, to which he responded that, “I suggest that you refrain now from any reasons or ideas or excuses and hold off until when we meet.” It seems to us there is a sinister note to that remark, against the background of previously taking her to task in public about our marketing efforts.
60. Whatever took place at the meeting, Mrs Bosch carried on with her work as normal, and continued to try and sort out her holiday and maternity leave. Her plan was to start her maternity leave from 16 February 2018 and take as much holiday as she could before then. That request for holiday was refused. Mr Rees accepted that she could take a block of holiday that she had accrued but not holiday that she had yet to earn (p.255).
61. That exchange took place on 15 December, towards the end of the day. Mrs Bosch asked Mr Harvey to suggest any holiday dates that would work (p.258). This crossed within a minute or two of a letter from him inviting her to a capability meeting. It was sent to her by recorded delivery but also emailed.
62. The letter itself is significant. It set out the performance concerns – a lack of progress in securing business and generating sales at the Bodmin office, and a

reduction in returns from the “previously successful” Par Branch. It went on to state that if she was unable to provide a satisfactory explanation her employment may be terminated in accordance with their procedure. The key paragraph stated:

“I would also draw your attention to our capability rules and procedures which states that we retain the discretion to take into account your length of service with us and to vary the procedures accordingly, namely if you have a short amount of service [as she did] he may not be in receipt of any warnings before dismissal but you will retain the right to a hearing and you will have the right to appeal.”

63. In context, this letter was advising her that unless she could explain the failure to secure business et cetera she was liable to dismissal. It did not state that there would be no notice pay but there would be no further warning, i.e. the escalating series of warnings usual in capability proceedings. She responded calmly by saying that it would be difficult for her to get a trade union representative by 20 December and asking for an adjournment.
64. This therefore marked a new and unheralded move by her employer. Previously she had been threatened with *redundancy* if results were not there: now she was threatened with capability proceedings. There had been no immediate trigger, except possibly the discussion about her going on maternity leave shortly. The situation faced by the respondent was not an easy one. Di had left. Mrs Bosch would also be leaving shortly. That would leave no one in the Bodmin office. There was therefore a choice between recruiting somebody new into that role or abandoning the effort altogether. Recruiting somebody new would be difficult while she was on maternity leave.
65. We take the view that Mr Harvey had decided that it would be better to dismiss her at this stage. His evidence was that there was no intention to dismiss her and that the capability hearing might have resulted in a verbal warning, no more. That seems to us at odds with the wording of the invitation letter, which referred only to the possibility of dismissal. He also stated that the purpose of the hearing was to get her to realise the gravity of the situation and to come up proposals. But it appears to us that she would have been all too aware of the gravity of the situation by then and had already come up with numerous proposals, few of which had found favour. Mr Harvey’s evidence on this issue is simply not credible.
66. We are reinforced in that view by the fact that, although signed by Mr Harvey, the invitation letter was for a meeting with Mr Rees. That was explained on the basis that Mr Harvey needed to be kept back for an appeal, which in turn indicates that there would be a need for an appeal. Although dismissal is not the only sanction which could be appealed, it appears the most likely in context.
67. On 18 December however, Mrs Bosch went off sick. She saw her GP and was signed off until 4 February 2018. Following the failure of her requests to take holiday, she had in the meantime advised the company that she wanted to start

her maternity leave from this date, and so she did.

68. Before they received that sick note Mr Harvey responded to the email about needing more time for a representative and rearranged the meeting for 2 January 2018, but that meeting was also impracticable because of her ill-health. Strangely, nothing further was done about her capability hearing. During March she commenced early conciliation through ACAS, and on 20 April 2018 she submitted her claim form. That was shortly before she gave birth. In it, she stated:

“My plans to take just 2 to 3 months of work have been sabotaged as I no longer feel I can work with this company due to intimidation and discrimination at the hands of the owner. I now have anxiety and stress issues which I have never experienced before in my life. I am due to have a baby in one week and FAC have made the entire pregnancy almost insufferable due to stress. I have worked very hard in my career for many years since university and I feel they have ruined this for me.”

69. It certainly seemed unlikely therefore that she would be returning to work. But there was no further communication between the company and her until her resignation in November. Her access to the company’s computer system was terminated on 20 December 2017, the day of the proposed capability hearing. This was justified at this hearing on the basis that the company needed the software licence for other users. We are not persuaded of that since there was no evidence of anyone else joining the company on or around that date. Her email access was removed shortly afterwards and all emails were diverted to Red, in Par, who we understand took over her position.
70. The resignation was submitted on 3 October 2018, giving a month’s notice to 5 November. She stated that she felt unable to return to FAC due to the way she had been treated before she was signed off work with stress. After that, she was invited to a grievance hearing to discuss these concerns but declined to do so. Legal proceedings were already well underway and the issues she mentions had already been raised previously without being treated as a grievance.

Law

71. Turning to the applicable law, the applicable provisions of the Equality Act are as follows:

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.

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.

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

Application of the law to the facts

72. Having reached these findings it is necessary to consider how they apply to the issues identified at the preliminary hearing. Before going into those details we should say that many of them are slightly peripheral to the main events. By way of example, the only complaints made about the capability proceedings and the threat of dismissal (issue 13) that she was told she might be dismissed without notice – although strictly speaking the letter said that she might be dismissed without any further warning – and (issue 14) that the hearing was at short notice. That seems to us to skirt around the main and obvious point that she was threatened with dismissal on grounds of capability because she announced that she was pregnant.
73. In **Scicluna v Zippy Stitch** [2018] EWCA Civ 1320, Longmore LJ summarised the function of a list of issues in ET litigation. He said the following at paragraphs 14 to 16:
 - “14. ...Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment Tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.
74. In similar vein, Mummery LJ in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 ... said:
 - “31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimised. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list.

75. We take the view therefore that the list of issues should be followed unless there is a strong reason to the contrary. Here, the list is essentially taken from the claim form, written by the claimant herself. But instead of elaborating or documenting the key aspects of her claim therefore, it appears at points almost to deflect attention from the real concerns. That is unfortunate, and it seems to us that some adjustment is required, to avoid artificiality.
76. Dealing with each of them in turn, as set out on pages 36 and 37:
- 1) We do not accept that Mrs Bosch was invited to attend an unprecedented number of meetings following the announcement of her pregnancy. The contents of some of those meetings were objectionable, and indeed discriminatory, as we have found, but the number was entirely understandable. They were regular monthly management meetings, or were prompted by her pregnancy or by the resignation of her colleague.
 - 2) She was asked to take a pay cut or demotion, both at the meeting on 3 October and 27 October 2017, or at least she was urged to do so. That is clearly one of the main issues.
 - 3) Similarly she was threatened with redundancy by Mr Harvey at the meeting on 27 October 2017. Again, this is a significant point.
 - 4) At that meeting, she was required to work from Bodmin from then on, and she was required to do so at little notice and without any arrangements made for her assistance - although any event help was forthcoming from some colleagues. The gist of this issue is that she was moved: the lack of notice and assistance are more peripheral aspects.
 - 5) In that new role her work was not *doubled* but she did have more to deal with and that did add to her stress.
 - 6) Her commission-earning potential was also reduced.
 - 7) There were no minutes of the meeting on 27 October but the follow-up email from Mr Rees did omit a number of important points such as the threat of redundancy. Again, the lack of record-keeping is a minor aspect. The real complaint lies in the way she was treated and the other points not recorded, such as the threat of redundancy, being told she was a failure, that Di left as a result, etc.
 - 8) At the meeting on 8 November 2017 Mr Harvey did intimidate her by shouting at her and standing over her in front of her peers.
 - 9) He also discussed another employee's pregnancy in an attempt to discomfort her.
 - 10) The maternity procedure documents were slightly inaccurate but this was not unfavourable treatment.
 - 11) She was not denied access to any training which he could have attended.

- 12) She was set unrealistic targets when told that she should develop 6, then 8 then 10 sales in June to August 2017, but more generally there were unrealistic expectations of what she could achieve.
 - 13) She was *not* notified of the capability hearing at which she might be dismissed without *notice*, but it was to be without any further warning. Again, the main concern is being invited to such a hearing at all.
 - 14) The hearing was to take place at relatively short notice, i.e. within five working days.
 - 15) Subsequently, he was denied access to the company's computer system and then her emails.
77. There are therefore a number of examples of unfavourable treatment, and they seem to us to be the main ones, i.e.:
- a. being pressed to accept a demotion immediately following the announcement of her pregnancy;
 - b. being pressed again at the next meeting on 27 October;
 - c. being intimidated the meeting on 8 November;
 - d. being threatened with redundancy;
 - e. set unrealistic targets from then on; and
 - f. being invited to a capability hearing with a view to dismissal.
78. The next question is whether any of these examples of unfavourable treatment occurred "because of" her pregnancy. We find that the key elements certainly do. That conclusion is inescapable given our conclusion that immediately following the announcement of her pregnancy she had a meeting with Mr Rees at which her demotion was discussed, and that possibility was then revived at the meeting on 27 October. That was almost the next working day. The significance of the meeting on 5 October, with the negative comments about Alison and Beth, simply suffices to reinforce the impression that pressure was being applied to her because she was pregnant. From then on, it appears to us, that she was regarded in a different light. That is evident from the way she was treated at the hearing on 8 November.
79. Then there was the decision to initiate capability proceedings. As already indicated, this came out of the blue. The most likely trigger was the fact that she would soon be leaving on maternity leave. That alone indicates that it was because of her pregnancy. She felt that the capability hearing was rearranged to ensure that she did not survive as far as the qualifying date. Had the hearing go ahead on 20 December 2017 or 2 January 2018 she would not have qualified. That may have been a motive. It may also have been a wish to make a fresh start and avoid having to hold her position open for. Either of these possibilities is pregnancy-related. The other possibility is that the company had simply run

out of patience with the lack of results, but it seems to us that a fair reading of the documentary record, and the efforts made by Mrs Bosch over that period to stimulate business activity in that branch, can only lead to the conclusion that she did everything possible. She was not, as has been suggested, stubborn or intransigent, or wedded to a strategy based on high margins. She was full of ideas. There is nothing to suggest that she did not work hard in implementing them. Capability proceedings seem to us entirely inappropriate in those circumstances. It may have been concluded that the effort would be fruitless and that the office had to close, in which case redundancies might follow. But that was not the approach taken. Redundancies would in any event have involved wider consultation and taken longer. It seems to us that when it came to it the company preferred simply to dismiss her because they had formed the view that the arrangement was not going to work. That is not a capability situation however, and in the absence of a proper reason for initiating it, we prefer the view that it was on grounds of her pregnancy.

80. To complete matters, having formed the view that the company was responsible for a number of unlawful acts of discrimination aimed at removing her, concluding with bogus capability proceedings, it must follow that she was entitled to resign in response. She was not asked about her decision to resign and have made clear in the claim form that she had no intention of returning we see no reason to conclude that she waived any of these breaches of the duty of trust and confidence.
81. As a final comment, in deciding the relevant facts there is also a particular provision dealing with the burden of proof:

136. Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
 - (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.
82. We have not found it necessary however to be concerned with this provision, since in each case the most likely explanation, where we have found in her favour, appears to be the claimant's case. However if we are wrong for any reason about our conclusions, it remains the case that her pregnancy is undisputed and there are many examples of unfavourable treatment. For her to succeed, it only necessary for the claimant to show that there to be "something more" linking the two. That will justify a finding that the unfavourable treatment was "because of" the pregnancy, unless there is a correspondingly convincing explanation on the part of the employer – i.e. cogent evidence that the unfavourable treatment in question was in no sense whatsoever tainted by discrimination. We cannot see any such explanation here. Accordingly, her

complaint of discrimination on grounds of pregnancy and maternity is upheld in all its essentials.

83. The further complaint relates to religious discrimination. This is much simpler. The two allegations relate the email on 27 October, sent during the sabbath, and the remarks made about her beliefs at that meeting. We have already concluded that the email was inadvertent, but equally that these remarks were made.
84. This allegation is pleaded as one of direct discrimination and also of harassment. Direct discrimination requires her to show less favourable treatment, i.e. that she was treated less favourably in this respect than someone of a different faith or none. The allegation is more properly viewed as one of harassment and there is in fact nothing to show that someone of a different faith might not have been equally exposed to adverse comment, in circumstances where the purpose was to unsettle her.
85. Viewed as potential harassment, the next question is whether or not it violated her dignity or created a hostile et cetera working environment. There is a threshold in such cases. But we consider that that threshold is passed here. Given the contents of that meeting there seems very little point in these remarks if not to upset her, or at least to unsettle her. They were inevitably quite personal, affecting her private beliefs, and cannot be excused as trivial or mere banter.
86. Hence, while the complaint of direct discrimination is unsuccessful, that of harassment on grounds of religion and belief is also upheld.

Remedy

87. We heard further evidence from Mrs Bosch about the effect on her of these events, although documentary evidence - particularly medical evidence - was lacking. In short, she suffered from stress and anxiety, with ongoing anxiety attacks. There were concerns about mental health throughout her pregnancy. She was referred by her GP for a course of counselling involving about 20 sessions altogether. By the time she obtained suitable alternative employment on a part-time basis with her former employers - the larger independent estate agents - she had still not recovered but having that part-time work helped her to do so. She had not made any active efforts to find full-time employment elsewhere since taking up that role, although she would now be keen to do so. She had registered with an agency, who last ran her about Christmas for a quick call, it was only looking for full-time roles in Newquay, where she lives, and with independent estate agents. She did not want to join a larger corporate estate agency, which he thought would be less supportive. Her hope is that a full-time role will become available at her present firm although she accepted that that will then give rise to childcare costs which she had estimated at about £800 per month.
88. Mr Howson in his submissions submitted that a further period of loss following taking up this part-time role was realistic and proposed a further 12 month period.

We accepted that assessment of the situation. But for the events described she ought to have been able to make a more extensive search for comparable full-time roles across the county and ought to have been able to find a suitable position relatively quickly, but given the effect on her mental health that was too much to be expected.

89. Some figures had been agreed between the parties, ignoring pence. Looking at her net monthly earnings from the respondent, ignoring those months when she was off sick, the average figure was £1549. In her new, part-time, role, the figure was £674.

90. There was a further question as to whether or not her stress-related sickness absence in the December and January had been attributable to the acts of discrimination. We find that they were. The loss in question during her employment during that period was agreed in the that sum of **£1,630**.

91. We also took the view that, but for the acts of discrimination, and given her financial circumstances at the time, she would have returned to work within three months as she stated in her claim form. For simplicity we base our calculations on the assumption that the last three months prior to the end of her employment she would have been in full-time paid employment with the respondent, although credit has to be given for statutory maternity pay received during that notional period.

92. The total net amount that would have been earned during that period is £4,647. Allowing for statutory maternity pay at £145.18 per week during 2018, a deduction is £1,187, she would have accrued an extra **£2,760**.

93. The final element of financial losses the ongoing loss during the period after her new employment, at the monthly rate of £875 (i.e. £1,549 - £674). There is an error in the figure provided at the hearing (of £9,660) which must now be corrected. Over 12 months that amounts to **£10,500**

94. The total financial losses are therefore:

a. loss during sickness pay	£1,630
b. loss due to extended maternity leave	£2,760
c. continuing loss	<u>£10,500</u>
Total	£14,890

95. Interest is also then due on this total at 8%. There are different rules for the calculation of interest on financial and non-financial losses. In this case interest runs from the midpoint between the date of discrimination and the date of this hearing. We take the first day to be 15 December 2017, when Mrs Bosch was invited to the capability hearing. The midpoint of that period is 18 January 2019, 404 days ago, and hence the interest payable is **£1,302**. That brings the total financial loss and interest to **£16,192**.

96. The next element is her injury to feelings. This is always a difficult matter to assess part Mr Howson realistically accepted that it would be in the middle band and suggested that it would be at about the middle point in that band. For claims issued on or after 6 April 2018 that middle band starts at £8,600 and extends to £25,700. The midpoint is £17,150.
97. We looked at some guidance in *Harvey's on Industrial Relations and Employment Law*, and in particular the guidance cases on pregnancy and maternity discrimination cases in the middle band. There were no appropriate comparators. The nearest factual example was clearly have a much less serious nature. It provides:

**Lipton Group Limited v Cudd UKEAT/0360/14 (19 February 2015, unreported)
— ITF £9,000**

Mrs Cudd was constructively unfairly dismissed and subject to pregnancy discrimination. Having worked for her employer for five years, she announced her pregnancy in December 2012, with an expected date of confinement in May 2013. In January 2013 she was instructed to conduct a handover of her work to a director, who was the sister of the MD and daughter of the chairman. The handover did not fare well and the director and Mrs Cudd each made complaints about each other. The claimant was discriminated against because of her pregnancy in being prevented from raising a grievance informally, holding three meetings on one day, with the MD adopting an aggressive stance in those meeting, and thereafter seeking to implement a grievance procedure disproportionately. Mrs Cudd was very upset by the actions of her employer and initially felt devastated. She had difficulty sleeping and cried frequently. She had a lack of interest in her hobbies, felt tired and lethargic and the experience tainted her period of pregnancy which ought to have been a happy time for her. The unhappiness was persisting at the date of the hearing some 8½ months after the dismissal. The ET awarded £11,000 plus a 10 per cent 'Simmons v Castle' uplift. They erred however in taking into account JSB Guidelines which they had misquoted, and the award was found to be excessive even by reference to the guidelines as the ET understood them. Compensation was therefore reassessed by the EAT at £9,000.

98. There are therefore some similar features but we note that the main events in question occurred over a single day rather than overextended period, and there were none of the much more serious aspects such as the threat of redundancy, being pressed to accept a lower level position, being berated in public and so forth. The effect of the discrimination on Mrs Bosch was in our view markedly more significant and sustained.
99. Even so, the figure of £9,000 at that stage is not insignificant. In 2009 of the original Vento bands were updated in the case of **Da'Bell v NSPCC** [2010] IRLR 19 EAT, as a result of which the middle band was increased from £6000-£18,000. This award therefore lay a quarter of the way from the bottom of that band to the top. That would correspond to an award on the relevant scale today (for 2018 cases) at £12,870. Other cases referred to in *Harvey* show that even a single

incident can result in an award in the middle band, such as a dog handler having her dog swapped around while she was off on maternity leave, so that she did not have the same role on her return.

100. Taking that guidance into account we come to the conclusion that the extent of injury to feelings in this case is rather more than the middle of the middle band and assess it at the figure of **£20,000**.

101. Interest is also due on that amount, but the interest on non-financial losses does not run from a midpoint but from the injury itself, which we again date at 15 December 2017. That was 808 days ago, and at the same rate of 8% the total amounts to **£3,542**. Hence the total non-financial loss amounts to **£23,542**

102. Adding the financial and non-financial loss together yields:

a. total financial loss plus interest	£16,192
b. total non-financial loss plus interest	<u>£23,542</u>
Total	£39,734

103. The final element is to gross up this total for tax. The first £30,000 of any award is not liable to tax, but tax will be due on the excess of £9,734. The amount of tax will depend on the extent of her earnings during the year in question, which at the agreed rate of £674 per month is £8,088. Again, that is a slight correction (lower this time) than the figure calculated incorrectly at the hearing. The total taxable earnings this financial year should therefore amount to £17,822 (adding these two taxable figures).

104. The relevant figure that has to be added to account for this tax is **£1331**. That brings the overall total up to **£41,065**.

105. It is easier to set out the grossing up calculations in reverse to explain that figure. A total award of £41,065 results in a taxable amount of £11,065, allowing for the £30,000 tax-free allowance. To this has to be added the current earnings of £8,088 per year. (That is the agreed net figure but no tax would normally be due on that amount, so it corresponds to the gross amount.) Hence, that the overall figure to be taxed will be £19,153. The first £12,500 of that total will be tax-free leaving a taxable balance of £6,653. That will be taxed at the basic rate of 20%, i.e. £1,331 to the nearest whole pound. Hence adding £1331 to the total showed, after tax, leave Mrs Bosch in the correct position, with a recovery of £39,374.

106. Finally, we concluded that it was not appropriate to make a separate award for the harassment on grounds of her religion and belief. That is not to belittle the impact of that incident but simply to reflect the fact that it is in practice impossible to distinguish between the extent of injury to feelings from the different causes. The overall impact on the claimant of the events in question has been assessed.

Employment Judge Fowell

Date 26 February 2020