EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Mrs C McEvoy	**Anthony Jones**

Heard at: **London South Employment Tribunal**

On: **11-13 December 2019**

Before: **EJ Webster**
Ms Bharadia
Dr Fernando

Appearances
For the Claimant: Mr McEvoy (Claimant's partner)
For the Respondent: Ms C Casserley (Counsel)

JUDGMENT

1. The Claimant's claim for maternity discrimination is upheld.
2. The Claimant's claim for automatically unfair dismissal is upheld.
3. The Claimant's claim for unauthorised deduction from wages is not upheld.
4. The Claimant's claim for unpaid holiday pay is upheld.
5. The Claimant's claim for sex discrimination is not upheld.

6. The total damages award made to the claimant in compensation for the upheld claims is **£45,795.74.**

WRITTEN REASONS

7. Oral reasons were given at the hearing. Subsequently, by email dated 24 December 2019, the respondent requested written reasons.

The hearing

1. By an ET1 dated 26 October the claimant brought claims for sex discrimination and maternity discrimination. It was clarified at the outset of the hearing that there was no claim for indirect discrimination being brought by the claimant.

2. After a day of hearing evidence the tribunal sought comments from the parties regarding the fact that it appeared, from the facts of the case, that the claimant was also bringing a claim for automatically unfair dismissal under s99 Employment Rights Act 1996. The claimant's representative (her husband), who was not legally qualified, said that he thought that this was already one of her claims. He said that this had already been made part of her claim because her witness statement made it clear that she felt that her dismissal had occurred because she was on maternity leave and used the phrase "automatically unfair dismissal". It was not however on the List of Issues that had been made following the preliminary hearing, nor had it he raised it when we went through the Issues at the outset of the hearing.

3. The respondent's representative did not expressly agree to any such amendment but she did agree that such a claim did not require any more evidence from the parties or any of the witnesses, nor would it require any further preparation by her or her client nor that any different submissions would need to be made. She all but accepted that the respondent was not prejudiced in these circumstances as the claimant had already set out a claim that her dismissal was an act of direct maternity discrimination. Respondent's counsel later clarified this stance at the point at which remedy was discussed stating that her client was disadvantaged because the potential remedy afforded under 99 ERA allows for an ACAS uplift to be applied. This discussion is dealt with under remedy below

4. The tribunal therefore reached a judgment that allowing the claimant to amend her claim to include a claim for automatic unfair dismissal was in the interests of justice and the overriding objective. Applying the principles in the case of Selkent Bus Co Ltd v Moore [1996] I.C.R. 836 we allowed this amendment as it is only a relabelling exercise in circumstances where the claimant had no legal representation. We bore in mind the principles regarding such amendments as set out in Selkent and the guidance given in the case of Ladbrokes Racing Ltd v Traynor UKEATS/0067/06. Whilst the application to amend was only made when the tribunal sought representations from the parties part way through the hearing, we concluded that the amendment placed the parties on an equal footing, that it was in the interest of justice and the overriding objective. The inclusion of an automatically unfair dismissal claim was only a relabelling

exercise as the facts underpinning the claim were identical to those underpinning the direct discrimination claim and it required no additional work or evidence by the parties.

5. We heard oral evidence from the claimant, Mr Blackmore, Ms Lineker and Ms Miles for the respondent. All provided written statements and Mr Blackmore provided an additional supplementary witness statement which we considered. We were also provided with an agreed bundle numbering 118 pages. Several documents were added to the bundle during the hearing to bring it to this total.

The Issues

6. S13 Equality Act 2010 - Direct discrimination because of sex
   (i) Did the respondent subject the claimant to the following treatment:
      (a) Misrepresent the discussions at the return to work meeting on the 23 August 2018
      (b) Terminate the claimant's contract by letter dated 6 September 2018?
   (ii) Was that treatment 'less favourable treatment@ ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies on hypothetical comparators.
   (iii) If so was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

7. S18 Equality Act 2010 - Pregnancy and maternity discrimination
   (i) Did the respondent treat the claimant unfavourably as follows:
      (a) Misrepresent the discussions at the return to work meeting on 23 August 2018?
      (b) Termination of the claimant's contract by letter dated 6 September 2018?
   (ii) Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?
   (iii) Was any unfavourable treatment because she was exercising or had exercised the right to ordinary or additional maternity leave?

8. Automatic unfair dismissal – s99 Employment Rights Act 1996

   8.1 Was the claimant dismissed?

   8.2 If yes was the reason or principal reason for the dismissal by reason of maternity?

The Law

Statutory Provisions

9. S18 Equality Act 2010

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

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

(a)because of the pregnancy, or

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

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

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

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

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

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

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

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

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

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

10. By section 99 of the Employment Rights Act 1996, it is relevantly provided that:

"(1) An employee who is dismissed shall be regarded … as unfairly dismissed if -

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to -

(a) pregnancy, childbirth or maternity,

…"

11. By regulation 20 Maternity and Parental Leave Etc Regulations 1999, it is provided:

"20. *Unfair dismissal*

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

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

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

(a) the pregnancy of the employee;

…"

Relevant Case law and discussion

12. By section 136(2) of the Equality Act 2019, it is provided that:

"(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."

13. In deciding whether a female employee has been discriminated against because of pregnancy or maternity within the meaning of *section 18* of the EqA 2010, the test is whether she has been treated unfavourably, and there is therefore no need for a comparator.

14. The meaning of treating someone “unfavourably” has been considered by the Supreme Court in the context of discrimination arising from disability cases (*Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65*). The court has held that the concept is broadly analogous to the concepts of disadvantage and detriment found elsewhere in the Equality Act 2010.

15. To fall within section 18, a woman’s pregnancy or maternity leave does not have to be the only or even the main reason for her unfavourable treatment. A woman’s pregnancy or maternity leave only needs to materially influence the

employer's conscious or subconscious decision-making for the unfavourable treatment to be discriminatory.

16. We considered the case of Interserve FM Ltd v Tuleikyte UKEAT0267/16/JOJ as we were taken to it by the respondent. This case establishes that the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination. Further, this case establishes that:

"*It follows that it is necessary to show that the reason or grounds of the treatment- whether conscious or subconscious – must be absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under s 18."*

17. The correct test is therefore "what was the respondent's conscious or subconscious reason for treating the claimant unfavourably?" This is necessarily a subjective process (*Martin v Lancehawk Ltd t/a European Telcom Solutions UKEAT/0525/03*; approved in *Igen Ltd and others v Wong and other cases [2005] IRLR 258*)

18. The burden of proof is approached in a two stage test.

- Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.
- Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

19. The Court of Appeal has explicitly confirmed the continued application of the two-stage approach in *Ayodele v Citylink Ltd [2017] EWCA Civ 1913*. The court or tribunal must reach findings as to the "primary facts", including any "circumstantial" matters that it considers relevant (*Anya v University of Oxford and another [2001] IRLR 377 (CA)*). Having established those facts, the court or tribunal must decide whether they would be sufficient to justify an inference that discrimination has taken place. Once a tribunal has decided that there is a prima facie case, it must look to the respondent's explanation to decide whether it had non-discriminatory reasons for the treatment. Unless the court or tribunal accepts those reasons, it must make a finding of discrimination.

Factual findings

20. The claimant was employed as a commercial account handler by the respondent on 6 March 2017. The respondent is a small (28 members of staff) commercial insurance broker. The date of termination is in dispute.

21. The claimant told the respondent that she was pregnant in May 2017 and went on maternity leave in Nov 2017. During her maternity leave the claimant carried out some work at the request of the respondent, namely making phone calls for sales purposes. We accept, from the text messages provided in evidence that

the claimant agreed to do this work. We understand from her evidence that she felt pressurised to agree to do the work for fear of losing her job. However, viewed objectively we do not accept that the messages sent around this time or topic amounted to pressure on the claimant to accept the work or deliver it once she had accepted it. They were messages aimed at finding out what she had done and asking her to report on her progress which were understandable as the respondent would need to assign the work elsewhere if the claimant was not able to complete it herself. They were not so numerous as to be oppressive nor were they haranguing in tone.

22. It is clear that the claimant was not able to complete the work which is not a criticism given that she had a very young baby at the time. The claimant provided the tribunal with no evidence to confirm how much work she did complete during this period of time. We note that the respondent has already paid her for 2 days' in respect of this work and she has not provided evidence that this was insufficient to compensate her for the work actually done.

23. In amongst the texts around doing work whilst on maternity leave, the claimant sent a text about her return to work. The message dated 13/4/18 at 09.30 (pg 59) said as follows:
"I was thinking maybe 1.5 days to start with and then take it from there? Are there any particular days you want me to work/not work around the other part time people? Then I can check with my mum and nursery's [sic] and see what availability there is."
Mr Blackmore responds to that message on 1 May saying:
" Hi Courtney just coming back to you on the 1.5 days we can work with that. Need to sort out how we make it work but in principle that's fine."
She then responds on 2 May
"Hi Steve, OK that's great, I may be able to increase once I get settled back in"

24. We conclude that the claimant reasonably concluded from this exchange that, at this point in time, Mr Blackmore had agreed to allow her to work 1.5 days per week when she returned to work. We also conclude that he did not communicate to her any change to that stance before the return to work meeting on 23 August 2018.

25. We make this finding because in evidence Mr Blackmore accepted that whilst he was aware of the increased needs to the business and how busy the business had become in the claimant's absence, he never communicated this to the claimant at any point. He also accepted that he never told her that the increased workload would change their ability to accommodate her working part time.

26. Subsequently the claimant messaged Mr Blackmore again on 8 August 2018:
"Not sure if I'm to early or what the protocol is but wondered if I could come in for a chat about when I will be coming back to work and what hours/days etc?"

He responds on 14 August 2018 saying:
"Yes we do need to have a formal meeting about your return to work I'm around tomorrow morning alternatively next weds or Friday. Let me know what suits."

27. In evidence Mr Blackmore said that this was not a formal meeting although his witness statement (paragraph 14) states that it was a formal meeting and he says the same in the text message to the claimant quoted above. He also said in evidence that he felt that the only purpose of the meeting was to discuss, the claimant's application to work flexibly. It has been accepted that no formal flexible working request was made. However Mr Blackmore said that he interpreted the claimant's approaches by text as being equivalent to such an application.

28. We find that the claimant attended that meeting with the intention of discussing her working hours on her return to work. We therefore do not consider that the formal status (or otherwise) of the meeting has any bearing on the subsequent discussion.

29. We accept the claimant's evidence, because it is clear from the intervening texts, and Mr Blackmore's witness evidence, that she was under the impression that she was going to talk about returning for 1.5-2 days per week as opposed to any other working pattern. She was also still under the impression that Mr Blackmore was happy with that arrangement as he had not told her anything different since his text on 1 May.

30. The content of the meeting on 23 August is heavily in dispute. The evidence provided concerning the content of the meeting is also in dispute – we deal with that first.

31. Firstly we deal Mr Tibble's attendance. Mr Tibble, a colleague, was in the same room as the claimant and Mr Blackmore during the meeting. However it is now conceded by Mr Blackmore that Mr Tibble played no active part in the meeting and was just getting on with his work in the same room. This is confirmed by Mr Tibble's witness statement. Mr Tibble did not appear at the tribunal to give evidence for reasons that were never explained but a witness statement was provided.

32. There were two sets of notes of this meeting – one handwritten, and one typed. Both were created by the respondent. The typed notes were sent to the claimant on 19 September under cover of a letter from Mr Blackmore (p 69). In that letter Mr Blackmore states that the notes were taken by him and Mr Tibble. This seems a strange thing to write given that Mr Tibble had not taken notes and it transpires not taken part in the interview. It is therefore unclear as to why, in his cover letter (p69) Mr Blackmore states that the notes were taken by Mr T as well as himself. We find that this was a deliberate attempt by Mr Blackmore to attempt to show the claimant that he had a corroboratory witness to his

version of events and that it would be difficult for her to disagree. Although it may be correct that during the meeting Mr Blackmore, was under the misapprehension that Mr Tibble was paying more attention than he actually was, we do not accept that at the point at which he wrote up his notes, he could have thought the same and could accurately describe his notes as being notes taken by David Tibble and himself at the meeting. He must have known that was untrue at the time that he wrote the letter.

33. We do not accept that the typed notes are an entirely accurate record of that meeting. We reach this conclusion for several reasons:
    (i) Mr Blackmore accepts that he wrote them a month after the meeting.
    (ii) They add significantly to the handwritten notes of the meeting (which we deal with below)
    (iii) The claimant objected to the content of these notes immediately. There would be no reason for her to do that if they were accurate.
    (iv) Mr Blackmore, in answer to a question from the tribunal, confirmed, contrary to this note, that he had not told the claimant that business needs had changed and they now needed her full time. In evidence he said that he had instead asked her if she wanted to work full time. This is, in our view, a crucial difference.
    (v) They are misleading in suggesting Mr Tibble was an active attendee at the meeting.

34. We do however accept that the handwritten notes provided late by the respondent for this hearing, are notes that were taken of the meeting. The claimant states that Mr Blackmore took notes during the meeting. The notes that we have (pg 118) are brief but do not contradict either person's version of the meeting. We accept that they were sent by Mr Blackmore to his adviser in October shortly after the situation became difficult.

35. The claimant's version of the meeting is at paragraphs 9-11 of her witness statement. We accept this as broadly accurate given that it is corroborated by the hand-written notes.

36. We conclude that the conversation centred around the claimant wanting to work 2 days per week. We find that the claimant set out at the beginning of the meeting that as opposed to 1.5 days she could do 2 days. We find that in response to that assertion Mr Blackmore asked her how she thought that would work and there were discussions about possible problems with her performing her role in 2 days per week. Both parties agree that this was discussed. The claimant did not however understand that the problems discussed meant she could not return 2 days a week. Instead she interpreted this as meaning that they may have to find her a different role to do and she would have been willing to do that hence suggesting administrative work. We find that at no point in this conversation did Mr Blackmore tell the claimant that:

(i) They were now too busy to be able to consider allowing someone to work 2 days per week;
(ii) That if the claimant could not do her job that they had no alternative role for her;
(iii) That if she could not work full time, then they would not be able to accommodate her return to work at all.

37. We reach this conclusion because we believe both parties were having this conversation with two very different understandings of the context for the business. Mr Blackmore says that he was trying to think about how to make 2 days per week work and he wanted to consider that option. That may be the case but at no point did he say to the claimant that the business could not support that working pattern and that her only option would be to come back full time. Instead they continue to focus on how 2 days per week may or may not work in theory with both acknowledging there may be problems. However Mr Blackmore never said that the problem could result in termination.

38. Given that the claimant, reasonably concluded that, as all that had been discussed was the possibility of her returning 2 days and nothing had been said to her which indicated that this was impossible and/or could result in her losing her job, we find it was also reasonable that the letter dated 6 September came as a complete shock to her. The letter states that the respondent could not accommodate her request for flexible working and sets out the list of possible statutory reasons for refusing a flexible working request. The letter ends with the phrase *"I do hope that this will not be too much of a disappointment to you and wish you all the best for the future".*

39. We find that it was reasonable for the claimant to believe that this was a dismissal letter. We also find that it was meant to be a dismissal letter. We do not accept Mr Blackmore's evidence to the tribunal that he was using a template and meant to wish her the best for the remainder of her maternity leave. His witness statement says that he added the phrase to a template, but he contradicted that in cross examination today. We find that he did add the phrase as he later uses it again in a text message. We do not believe that it was part of the template. Mr Blackmore's adamantly asserted in evidence that he was sure that the claimant could not have worked more than 2 days per week, and he therefore believed that there was no way the claimant could return to work once they had turned down that request. We find it is far more likely, if that is what he understood the claimant's position to be, that he believed she would not be coming back to work at all and he was wishing her all the best for the future. Further there is nothing in the letter to say when the claimant was expected back to work on a full time basis or what role she would be returning to. There is nothing to suggest an ongoing relationship whatsoever.

40. In addition Ms Lineker confirmed in evidence that her witness statement says that she thought the claimant's employment ended on 6 September after she

had spoken to Mr Blackmore about it. She says that this is where she got the termination date from. We do not accept her subsequent answer to counsel in re-examination that the solicitor had written this paragraph. They may have done but it is still her evidence and she stated twice in response to questions from Mr McEvoy that she believed this to be the termination date following a conversation with Mr Blackmore.

41. Further, Ms Lineker sent a WhatsApp message to the claimant (p65) on 14 September, confirming to the claimant that Mr Blackmore had told her the claimant would not be returning to work. We do not accept that he had in fact said that she could not come back part time and that Ms Lineker therefore extrapolated that the claimant would not come back at all. We find it more plausible that Mr Blackmore told her that the claimant was not coming back to work at all.

42. Mr Blackmore accepted that the phrase "We wish you all the best for the future" could be misinterpreted but says that this is clarified very quickly in his subsequent text messages (p 66). However we find that the first text message sent by him on 16/9/18 at 11.27 in fact reinforces that he believes she cannot come back to work because they cannot accommodate 2 days per week which he believes is all she is willing to do.
He says again, *"I wish u the best of luck in the future."* He also says *"I can see you to discuss if you wish but the decision has been made based on what you said in the meeting, so unless you are able to come back full time I'm not sure what value that would bring as there's not more I can actually add?"*

43. In circumstances where someone is on maternity leave and absent from the business, we consider that receiving a text such as this would reinforce their understanding that they had been dismissed – he wishes her the best for the future and says that a further meeting would have no value and says that a decision has been made.

44. Mr Blackmore said that this text offers her a meeting and tells her that they need a full time person and that in that context the claimant should have understood that there had been a misunderstanding and she was welcome back to work. However, in the same message he also says a meeting would add no value and he says that the only way things could be different is if things have changed for her. In a context where until she got the letter on 6 September the claimant had reasonably had no idea that her part time working was not going to be accepted by the company we are not sure why the onus was on her to say that things had changed. This was an understandably shocking letter and she was not unreasonable in taking 3 days to think about it.

45. When she does respond she does make it clear that she would be willing to work full time. Given that his text on 16th is the first time that Mr Blackmore puts to her that her only option is full time working, her response, 3 days later, that

she would consider it even if it was not ideal for her, is not, as the respondent appears to suggest, the claimant 'trying it on' and changing her story to say she was now willing to work full time. We do not consider that this was a change. The claimant, when raising the issue of her hours and return to work, has consistently said in her messages on this subject that she wanted to discuss what hours/days worked for the business. Whilst we accept that when asked she said she would prefer 2 days, there is nothing in the evidence that corroborates the respondent's version that in the absence of her being able to work part time she would not be willing or able to return to work at all.

46. Her messages consistently say that she would like 2 days 'for now' (e.g. pg 59 13.4.18). In the notes of the meeting on 23 August, Mr Blackmore has underlined the phrase "for now". It is clear that there is some option for an increase in working days and that is never even considered by Mr Blackmore or discussed with the claimant. Mr Blackmore unilaterally decided that because he could not accommodate her preference for 2 days per week there would be no ongoing relationship. The claimant in all her messages where this is discussed says that she will do what works for the business and mentions not just childcare by her mother but also exploring nurseries if needs be. The fact that she did not have any of this place at the meeting on 23 August was because she was still under the impression that Mr Blackmore had agreed she could work 1.5 days per week. Nothing in the interim had been communicated to her to suggest otherwise.

47. We do not accept that the evidence of Ms Miles and Ms Lineker adds much to the respondent's case. They were clear that they had not had a conversation with the claimant about her return to work or part time working since she had gone on maternity leave. Further it does not contradict the claimant's case that she would have preferred to work part time, (which she has maintained throughout) but in the face of that not being an option she was also willing to consider full time work. We suggest that these statements support the claimant's case that assumptions were made by the respondent, that because the claimant had always said she would prefer to work part time, that meant she would only work part time and only work 2 days per week.

48. We consider that it is this assumption that underpins everything Mr Blackmore did, firstly in dismissing the claimant on 6 September, and secondly in his subsequent actions when the claimant points out that his assumptions were incorrect.

49. By text message (p66) on 17 September at 21.18 Mr Blackmore offered the claimant the right to appeal against his decisions. We note the use of the plural for decisions and suggest that this further reinforces our finding that Mr Blackmore and both dismissed the claimant and refused her request for flexible working (though we appreciate no formal request was made).

50. Her response on 19 December is criticised by the respondent and said to be too late because of the three day delay. As stated above we do not agree that in a context where someone has just been dismissed out of the blue, taking three days to consider what to do next is unreasonable. The claimant clearly states that she was willing to work full time but underlines that Mr Blackmore's behaviour had made her feel awkward and she wants to seek legal advice.

51. Mr Blackmore then writes formally to the claimant. It is notable that this is the first time he chooses to formalise matters since his letter of 6 September. All other communications had been by text. Yet, at no point did he try to call the claimant to explain that there had been a misunderstanding. He stated in evidence that this was because her first email expressing surprise had arrived on a Sunday morning and we accept that it may not have been sensible to call then. However he does choose to continue texting and at no point tries to have a conversation to her which presumably would have clarified the misunderstanding he says there was around her dismissal.

52. The second paragraph of the letter at pg 69 is ostensibly helpful and suggests she return to work full time. However, we find that those sentiments are undermined by the 4th paragraph which states that he is enclosing notes taken by him and David Tibble. Given that, by now, he knew (as found above) that Mr Tibble had not taken any notes and in fact not been party to the meeting, we find him suggesting otherwise in this letter is disingenuous. Its aim was, we find, to suggest to the claimant that he could evidence that his version of the meeting was correct and had corroboration. Further we find that the notes that were included were inaccurate as discussed above and this further undermined the claimant's trust in Mr Blackmore and his account of what was happening.

53. Mr Blackmore then goes on to argue about sending her the word version of the notes. We were not told why she wanted the word version of the notes however, we do not find it plausible that Mr Blackmore was unable to find this document given that he had just written it and made it into a PDF. His behaviour in refusing to send her the Word version understandably further undermined the claimant's trust in the respondent's intentions.

54. The claimant then sent the letter at pg 74 which set out comprehensively the claimant's concerns with Mr Blackmore's behaviour so far. In that letter (p77) she summarises what we now find to be the crux of the situation.

"In paragraph 3 of your notes you state:

However doing anything other than 2 consecutive days would not be possible."

This is an assumption made by yourself and not something I stated at the meeting.

You go on to state in paragraph 4:

SB said ideally he would like CM to come back full time, and just for the sake of clarity would that be an option although presumably note, CM replied no that would not be possible. SB asked if two was the max number of days that CM could do, CM confirm that this would be the case for the foreseeable future."

This was categorically not discussed and you have implied that a presumption was made that I wold not be able to return to work full time. At no stage during the meeting or in your subsequent letter of 6 Sept was it made clear that the only role available to me at the company was my full time position."

55. We believe this version of events is reinforced by the handwritten note where it is clear Mr Blackmore asks the claimant if she would want to work full time to which she says no, 2 days for now. This is fundamentally different from saying she would not consider full time work at all.
56. We also believe that the absence of any notes of any discussion about alternatives such as compressed hours or more than 2 days per week, shows that the claimant was not told that her request for 2 days was not sustainable by the business. Had Mr Blackmore told her that, we are sure that a discussion of some sort would have ensued. Both parties accept that no such discussion took place.

57. This is further confirmed by the respondent's adviser Mr Holliday in his letter (pg82) which says in the second paragraph:
"The meeting was founded on the earlier text exchange that you would be discussing part time working but your criticism of this paragraph in the note seems to suggest that you were willing to consider coming back to your full time role…"

58. The claimant's letter (pg 74) was then dealt with by the respondent's adviser, Mr Holliday. It was not dealt with as a grievance or an appeal and no process was followed with regard to meeting the claimant or understanding her concerns. From this point on it appears that the claimant corresponded only with Mr Holliday until she submitted her claim form to the tribunal.

59. The respondent asserted that they did not know that the claimant had left their employment and that this was the reason for the letter dated 16 November. However, in evidence, Mr Blackmore said that he knew she was not coming back when they received the ET1 which is dated 26 October. We therefore do not conclude that this letter supports the respondent's contention that she remained employed at this stage or that her employment continues to be in abeyance even at the date of the hearing. Whilst Mr Blackmore may have been acting on legal advice, the fact is that it appears to be advice designed to cover up what had already happened.

Conclusions

60. Taking the issues in turn. We conclude that Mr Blackmore did misrepresent the discussions at the return to work meeting on 23 August 2018 in that he:
    (i) Sent the claimant the letter on 6 September dismissing her for not being able to work full time having assumed that she could only work 2 days per week.
    (ii) Sent her a text message on 16 September stating that full time working does not work for the respondent when this had not been discussed with her.
    (iii) Sent another message on 16/9 stating that termination ought to be arranged.
    (iv) Fabricated the typed notes on page 56 including adding that Mr Tibble was in attendance and creating notes were not reflective of the totality of the meeting
    (v) Suggested that Mr Tibble had taken the notes provided by letter dated 19 September.
    (vi) Indicated that the claimant had made a formal request for flexible working when she had not.

61. We have also found that Mr Blackmore dismissed the employee by letter dated 6 September and intended to do so because he had wrongly assumed that the claimant could not come back to work more than 2 days per week and reached a decision about her future employment based on that incorrect assumption.

62. We conclude that these actions do amount to unfavourable treatment. The meaning of treating someone "unfavourably" has been considered by the Supreme Court in the context of discrimination arising from disability cases (*Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65*). That case stated that the concept of unfavourable treatment is broadly analogous to the concepts of disadvantage and detriment found elsewhere in the Equality Act 2010.

63. The fact that Mr Blackmore dismissed the claimant in circumstances where she wanted to return to work is a clear detriment. Mr Blackmore never asked the claimant what she would do if he could not accommodate her returning to work 2 days per week. He did not properly communicate to her at all because she was on maternity leave. That he then sought to misrepresent what happened at the meeting was unfavourable as his behaviour undermined any trust and confidence in him or his 'legal' adviser regarding any attempts to rectify the 'misunderstanding'. Mr Blackmore was seeking to undermine the claimant's legitimate concerns about the situation and cover up his mistake of dismissing her by letter on 6th September.

64. We find that the burden of proof has shifted to the respondent. We find that the dismissal and subsequent treatment of the claimant as described above, all of

which occurred whilst she was on maternity leave and therefore within the protected period, provide a set of facts or a prima facie case from which the tribunal could infer maternity discrimination.

65. No comparator is necessary for maternity discrimination claims. However, the EHRC guidance states that it can be helpful to consider a comparator. The test that we must apply is what was the reason for the unfavourable treatment? Was the reason the claimant being on maternity leave? We have carefully considered the points we were taken to by Ms Casserley in the case of Interserve FM Ltd v Tuleikyte UKEAT/0267/16/JOJ and reminded ourselves that it is not sufficient that unfavourable treatment simply happens whilst a woman is on maternity leave.

66. We conclude that the dismissal did occur because the claimant was on maternity leave. Mr Blackmore made the decision to dismiss the claimant because he made several unfounded assumptions about the claimant and her ability to work full time. Had the claimant been at work (as opposed to absent on maternity leave) and made a similar request to work part time, we find it implausible and improbable that Mr Blackmore would have done anything other than spoken to her properly about the pressures on the business, explained that they needed a full time employee and properly communicated with her about all issues. He accepted that their relationship had been positive before she went on maternity leave. In evidence Mr Blackmore said that the claimant had been a good worker. We find it wholly unlikely that had she been present in the workplace he would have dismissed her with no notice and no discussion about alternatives or remaining in her role on a full time basis. It is Mr Blackmore's failure to properly communicate with her, which arose specifically because she was absent from the workplace on maternity leave, that led to the decision to dismiss the claimant. This coupled with his assumptions about her desire to only work part time whatever the impact on her ability to return to work occurred because she was on maternity leave.

67. There were no discussions whatsoever with the claimant about why her part time working on 2 days per week could not be accommodated. The discussion was that it might be difficult but he would see if he could make it work. He did not make any alternative suggestions for the claimant to consider. He also, at the point at which he concluded 2 days per week could not work, did not offer the claimant the possibility of coming back full time. We find that these failures led to the claimant's dismissal.

68. We do not find that the respondent has provided any non-discriminatory reason for the treatment. In evidence before the tribunal, Mr Blackmore justified almost every act or decision he made by saying that they were either a mistake or that he had been advised by his legal advisers to take the actions that he did. Whilst we accept that he may have handled many return to work meetings before and allowed women to work part time, on this occasion his failure to properly

communicate with the claimant occurred because she was on maternity leave and this was unfavourable treatment. He has not explained the presumptions and assumptions he made, nor his behaviour in subsequently trying to cover them up. He has responsibility for his actions and decisions regardless of whether they occurred following legal advice.

69. We conclude that the unfavourable treatment set out at paragraph 7(i) above occurred because the claimant was on maternity leave. We reach this conclusion because we believe that once the claimant had challenged her dismissal, Mr Blackmore panicked and tried to back track. We find that his concern was based on the fact that he was worried he had made a mistake with someone on maternity leave and was attempting to cover his tracks.

70. We also consider that given that his behaviour was designed to cover up what we have found to be a discriminatory decision, the subsequent behaviour in covering that up is inherently linked to the claimant being on maternity leave.

Sex Discrimination

71. S18(7) Equality Act 2010 states that where an employee has been discriminated against by a reason covered under s18 Equality Act (i.e. maternity discrimination), the same act cannot also be found to be direct sex discrimination. We have therefore not gone on to consider this aspect of the claimant's claim.

Automatically unfair dismissal

72. As concluded above the claimant was dismissed on 6 September 2018. We consider that she was dismissed because she was on maternity leave thus making it an unfair dismissal for the purposes of s99 Employment Rights Act 1996.

73. Mr Blackmore dismissed the claimant because he failed to properly discuss her return to work with her and assumed that if he could not accommodate her part time working request she would not want to come back to work. He made this assumption without communicating properly with her at all because she was on maternity leave.

74. He followed no process in reaching this decision other than having one meeting with her at which her part time working was discussed in very limited terms. He then dismissed her without any warning. This would not have occurred if she had not been on maternity leave. His failure to communicate properly with her about the needs of the business or her possible return to full time work were directly linked to the fact that she was on maternity leave and therefore absence from the business. Had she not been on maternity leave he would not have dismissed her because that communication would have taken place more effectively. We conclude that his failure to communicate with her and therefore his decision to dismiss her arose because she was on maternity leave.

75. No proper process was followed. There was no meeting to discuss termination, no appeal process was provided and when the claimant did write to say how unhappy she was with the decision to dismiss her, the respondent and its adviser did not offer the claimant a genuine appeals process. Firstly Mr Blackmore indicated that an appeal would not change anything because the decision had been made and could not be changed. Then, the respondent's adviser wrote to the claimant setting out why she was wrong to be upset. This was not a genuine appeals process and nothing about the dismissal complied with the ACAS code on disciplinary processes.

76. We conclude that this was therefore an automatically unfair dismissal.

77. It is not disputed that the claimant was not paid her accrued but untaken annual leave for the period of her maternity leave to the termination date of 6 September. The respondent has stated that it has not paid it to her yet because it understood her to still be employed until relatively recently. We find that this is incorrect and that the claimant is entitled to be paid her accrued but untaken holiday pay up to her dismissal on 6 September 2018.

78. It is not in dispute that the respondent has not paid the claimant her notice pay. The respondent states that this was because she remained an employee. We do not agree and have found that she was dismissed, without notice on 6 September 2018. We find that she was dismissed in breach of contract and is therefore entitled to her notice pay.

79. We were not provided with any evidence of any unauthorised deductions from wages regarding the period the claimant says she worked during her maternity leave. We therefore cannot make any finding in relation to this claim.

Compensation – factual findings and conclusions

80. The claimant claimed a basic award, loss of earnings, pension loss, injury to feelings, an uplift for failing to follow ACAS procedure, aggravated damages, unpaid holiday pay and unpaid notice pay.

81. S123 ERA 1996 states that tribunals must award damages that are just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

82. S124(2)(b) Equality Act 2010 states that a tribunal may order the respondent to pay compensation to the complainant. The aim is to put the claimant into the position she would have been in but for the discrimination (Ministry of Defence v Cannock and ors 1994 ICR 918 EAT).

83. The claimant's weekly wage was disputed. The claimant was paid a basic wage and also earned commission. We were provided with 6 payslips and used them to calculate a mean weekly gross wage of £640.72 and a net weekly wage of £484.

84. Whilst Ms Casserly did not have instructions to agree a weekly wage with the tribunal, both parties accepted the tribunal's calculations were accurate in reaching this figure. The claimant accepted that this figure was an accurate average weekly wage for her and accepted it as the basis for our subsequent calculations.

Basic Award

85. The claimant had not yet been employed for two years. Her basic award is therefore limited to £508.

Loss of earnings

86. The claimant had not found work after her dismissal. She said that she had not been able to find work because of her ill health. She had been signed off by the GP as unable to work due to stress and anxiety. The claimant provided sick notes for the period up to 25 November 2019. She did not provide evidence after this date. The respondent challenged this evidence stating that it was not clear that this ill health had been caused by the respondent's behaviour towards her. We find that it is more likely than not that the respondent's behaviour did cause her ill health and accept the claimant's oral evidence that her dismissal from work at this time meant she found it very difficult to have the confidence to find alternative work particularly after she became pregnant again.

87. We have therefore awarded her damages up to the date of the last sickness absence certificate that she provided to the tribunal which amounts to 53 weeks' loss of earnings. The amount does not need to be capped as we have found that her dismissal was discriminatory. We make this award on the basis that it is just and equitable to do so under s123 ERA and that we may compensate the claimant for the loss she has suffered as a result of the maternity discrimination.

    53 weeks x £484 net weekly wage = £25,652.

Pension Loss

88. We accept, based on the claimant's payslips that the respondent made a 5% contribution to the claimant's pension scheme and that in the absence of securing alternative employment the claimant has suffered that loss.

    5% of £25,652 = £1,282.60

Loss of statutory rights

89. We award the claimant £300 in respect of her loss of statutory rights.

Holiday pay

90. Based on the weekly wage agreed with the claimant and calculated above, the tribunal calculated that the claimant's daily rate of pay was £96.80. It was agreed that the claimant had accrued but not taken 17 days annual leave.

91. 17 x £96.80 = £1645.00

ACAS Uplift

92. S207A TULR(c)A provides that a tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award by no more than 25% where an employer has failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

93. The claimant claimed that any award should be uplifted by 25% due to the failure to follow any procedure in dismissing her. The respondent objected on the basis that the respondent had not been aware that it was facing a possible claim under the Employment Rights Act until part way through the hearing as the claim for automatic unfair dismissal was only made part of the Issues to be decided by the tribunal at the beginning of the second day of the hearing.

94. Whilst we accept, having referred to the ACAS Code and Guide, that no fair procedure was followed in respect of the claimant's dismissal and subsequent appeal process, we have taken into account the fact that the respondent was not aware that it was facing the possibility of this claim until after this hearing had commenced. We have factored this into our overall assessment of the equity of the position faced by the parties and have therefore awarded an uplift of 15% to the claimant's compensatory award.

Aggravated Damages

95. We have not found, nor been provided with evidence which suggests that the respondent has behaved in a high handed, malicious insulting oppressive manner (Alexander v Home Office 1988 ICR 685, CA) or that the manner of the wrong was particularly upsetting, was done in a way that was spiteful or vindictive or intended to wound or that the respondent has conducted the tribunal proceedings in an unnecessarily offensive manner (Commissioner of Police of the Metropolis v Shaw EAT 0125/11). We have concluded that the respondent made assumptions about the claimant's ability to return to work and behaved accordingly as opposed to behaving maliciously. We have therefore made no award in respect of aggravated damages.

Injury to Feelings

96. The claimant asserted that her injury to feelings award fell in the mid bracket as set out by the case of Vento and asked for £12,000. The respondent agreed with the bracket but stated that it ought to be £10,000.

97. The claimant has been diagnosed with stress and anxiety since her dismissal. She was prescribed medication for a period of time to alleviate the symptoms but stopped taking the mediation when she became pregnant. She described to us that she had suffered very low moods, sleep disturbance, difficulties facing the day and looking after her child. We accept that evidence particularly given that it was reinforced by the fact that she has been signed as unable to work by her GP for the same period of time.

98. We therefore consider that it is appropriate that her injury to feelings award falls within the middle bracket and award her £12,000.

Final Calculations

99. It should be noted that in the original decision provided orally to the parties, he Basic Award made above was erroneously included in the calculation of the compensatory award when the ACAS uplift was applied. On reconsideration of its decision under its own motion the tribunal has adjusted the award as the Basic Award is not part of the compensatory award and therefore is not subject to the ACAS uplift.

100. The remedy to which the claimant is entitled is as follows:

(i) Basic Award - **£508**

(ii) Compensatory Award:

£25,652 loss of earnings
£1,282.60 pension loss
£1,654 – net unpaid 17 days' holiday pay
£300 – loss of statutory rights

£28,879.60 **=** Total

£4,331.94 - ACAS uplift of 15% applied to compensatory award

Total compensatory award = £33,211.54

(iii) Injury to feelings award - **£12,000**

TOTAL AWARD = £45,795.74

Employment Judge Webster
9 February 2020