EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Barrett	**v**	TUI UK & Ireland

Heard at: Amersham **On**: 27, 28 & 29 January 2020

Before: Employment Judge Clarke QC

Members: Ms J McGregor
Mr R Eyre

Appearances

For the Claimant: In person
For the Respondent: Mr B Frew, Counsel

JUDGMENT

1. The claims for:

   1.1 Constructive unfair dismissal;
   1.2 Automatic constructive unfair dismissal;
   1.3 Discrimination under section 18 of the Equality Act 2010;
   1.4 Detrimental treatment by reason of taking maternity leave or being pregnant;
   1.5 Direct sex discrimination;
   1.6 Harassment where the protected characteristic is sex;

   are all dismissed.

REASONS

Introduction

1. By a claim form presented on 5 June 2018, the claimant brought complaints of:

   1.1 Ordinary constructive unfair dismissal;

1.2 Automatic unfair dismissal (relying upon section 99 of the Employment Rights Act 1996), alleging that her dismissal was connected with her pregnancy or taking maternity leave;

1.3 Discrimination by reason of a pregnancy or maternity leave, contrary to section 18 of the Equality Act 2010.

1.4 Detrimental treatment contrary to section 47C of the Employment Rights Act 1996 where the prescribed reason relied upon is one relating to pregnancy, child birth or maternity.

1.5 Direct sex discrimination.

1.6 Harassment, contrary to section 26 of the Equality Act 2010, where the protected characteristic relied upon his sex.

2. The issues arising between the parties are set out at paragraph 6 onwards of a case management summary issued following a preliminary hearing on 14 December 2018. Those include issues which might arise from the fact that the claimant had sought and obtained two ACAS early conciliation certificates and issues arising from whether the claims were presented within the primary limitation period.

3. We heard from the claimant and (very briefly) from Ms Eleanor Colston-Lynch, one of the claimant's reports. For the respondent, we heard from Mr Luke Bailey. At the material times he was the manager of that part of the finance department where the claimant worked. We also heard from Mrs Louise Williams and Ms Karen Switzer. They were, respectively, the person who heard the claimant's grievance and the person who heard the appeal in respect of that grievance.

4. We were provided with a bundle of documents agreed between the parties. Whilst reading the witness statements, we read those documents in the bundle which were referred to therein. A very few additional documents were referred to during cross examination. We did not otherwise consider the documents in the bundle. In particular, the hearing looked only at issues relating to liability (leaving remedy to be considered later, if appropriate) and that section of the bundle containing remedy related documents was not looked at.

Findings of fact

5. The claimant worked in the respondent's finance department from 20 August 2012 until her resignation. She resigned on 23 April 2018, effective on 23 July. The respondent is the well-known travel company. Its finance department has some 250 employees divided into groups. Each employee has an operational grade. The claimant was latterly a grade 4 manager, beneath her were grade 5 employees. The respondent has some 74 grade 4 posts. The respondent does not find it easy to recruit into grade 4 positions, which have an annual attrition rate of some 13%, such that vacancies occur with some frequency.

6. The various groups within the finance staff work at what are called ‘pods’. So far as the group the claimant formed part of was concerned they had two pods each comprising a unit of ten working spaces with computer terminals. The units had five such spaces on each side, separated by a very low partition, which the users could see each other over the top of. The claimant’s reports (latterly two in number), her immediate manager (Mr Thompson) and his manager (Mr Bailey) sat at spaces on the pods, although Mr Bailey tended to hot desk. The members of the group were friendly and not particularly hierarchical in the way in which they worked. Mr Bailey would, for example, often deal with the claimant’s reports without consulting her, or her manager. By late 2016, Mr Bailey had worked in the department for some five years but had only had his then leading role for part of that time.

7. The claimant informed Mr Thompson of her pregnancy in December 2016. She told us that she was immediately treated differently, but gave no details when pressed and made no complaint at the time. We consider that this was not so. She gave the information that she was pregnant some six weeks into her pregnancy (in case she might experience morning sickness). We consider that this reflected the trust and confidence she felt in the management team at that time.

8. The claimant’s intention was always to start maternity leave on 11 July, but to use annual holiday so that her last day at work would be 31 May 2017. Mr Thompson and Mr Bailey were conscious that recruiting a person to cover for the claimant for about a year might not be straight forward, especially given the difficulties in recruiting grade 4s. They considered that finding someone would take at least a month and that person might well need to give notice, if recruited from outside the respondent, of up to three months, as they would be a qualified or part-qualified accountant and such persons usually have that sort of notice requirement.

9. They looked to recruit internally, if they could. The temporary post offered a good opportunity for someone at grade 5 who was looking for promotion to demonstrate their abilities. Enquiries were made, but only one potential candidate was identified, but proved unsuitable. Ms Daisy Eggleton, a grade 5, was in the process of leaving the respondent. She was highly thought of and this appeared to be an opportunity to retain her. Mr Bailey spoke to her, but she was not interested. However, after she started her new job, she changed her mind. Hence, she was interviewed for the temporary post by Mr Thompson and Mr Bailey.

10. That interview took place on 10 March 2017. It lasted an hour. Mr Bailey had some concerns, so spent a further 45 minutes discussing various matters with Ms Eggleton. The claimant suggested that Ms Eggleton was appointed without any proper, or usual, interview or selection process being undertaken. That was not so and the claimant did not explain from where she had gained that impression.

11. Ms Eggleton only had to give one weeks' notice. The decision was made to recruit her immediately. That meant that she would be able to work alongside the claimant from 27 March until the end of May 2017. Mr Bailey saw considerable advantage in that, despite the relatively long handover period. It would enable a smooth handover and it would provide an extra team member at a time when his group was under pressure and undertaking some reorganisation.

12. Part of that reorganisation directly impacted on the claimant's job. Up until this time, she had had only one person reporting to her, namely Eleanor Colston-Lynch. Another grade 5, Kayleigh King reported to Mr Thompson directly. Ms King dealt with internal accounting matters for the finance department itself. Mr Thompson was taking on additional responsibilities, so was to lose Ms King as a direct report, transferring her to report to the claimant. The evidence (including contemporaneous documents) was inconsistent as to whether and to what extent the change took place prior to the arrival of Ms Eggleton. We consider that the change did not happen prior to Ms Eggleton arriving.

13. When the decision was made to recruit Ms Eggleton as maternity cover for the claimant, the issue arose as to how best to deal with the transfer of reporting lines for Ms King. Mr Bailey decided that rather than have her report to the claimant for a short period and then to Ms Eggleton for a year, it made more sense for her to move to Ms Eggleton and then to the claimant when the claimant returned. He discussed this with the claimant and the claimant did not raise any objection. Hence, that is what was done.

14. The issue then arose as to how to structure the seating on the pod. Those affected (including the claimant) discussed this in what the respondent refers to as "huddles", being informal group meetings. What was proposed, a proposal which emerged from huddle process, was that the claimant should move from sitting between Ms Colston-Lynch and Ms King to sit opposite Ms King and that Mr Thompson would move from that seat to the neighbouring pod. Ms Eggleton would then take what had been the claimant's seat. The Claimant would then sit diagonally opposite Ms Eggleton and Ms King. Such a position had been found to be the best for communication in the pods. That move was confirmed in an e-mail from Mr Bailey of 23 March 2017. He asked to be contacted if anyone had a problem and suggested a physical move on the next Wednesday or Thursday, acknowledging that some people would be absent that day.

15. The claimant raised no objection to the proposed changes, either in the huddles or in response to the e-mail, which was copied to her. She says that she was upset and anxious, but said nothing because she did not want to add to that level of stress she was already experiencing. She suggested that she was, as a result of the move, isolated from her reports and felt that Ms Eggleton was ousting her. She also complains that her belongings were moved in her absence. She was at a hospital appointment that day. Although we note that this had been anticipated

and she did not ask that the moves be made on a day when she was present.

16. In fact, she was not isolated from her team of two, and one of them was someone that she was not going to have as a report until her return. She sat very close to them and to Ms Eggleton. They could see each other, talk to each other and easily see work on each other's screens if that became necessary. She expressed particular concern to us about needing to see work on Ms King's screen. However, given the nature of Ms King's role, this could be very sensitive material and Ms King was reporting to Ms Eggleton at this time.

17. For the period until the claimant left there was, increasingly, a duplication of work between her and Ms Eggleton. However, the claimant continued to do her job, save for the new element of working with Ms King. Save for meetings relating to that work, she attended all meetings relevant to her job and was involved as before she announced her pregnancy. She remained the name lead contact for her work until the day of her departure when the change was communicated by her in an e-mail to those needing to know of her handover to her maternity cover.

18. The claimant told us of a conversation she overheard part of between Ms King and Ms Eggleton in the run-up to her departure. She could not date the conversation more accurately than to say it was not long after Ms King joined. Ms King and Ms Eggleton were going to or from the coffee point and she says that she heard something which made her think that Ms Eggleton was saying that she was going to take the claimant's job permanently and that Ms King agreed with this. The claimant did not raise this at the time with either of the two ladies (seeking an explanation of what they were referring to) or anyone else. She accepted in cross examination that she did not hear much of the conversation, that she did not hear enough to understand the context of what she heard, and that she might have "got it wrong". Having heard Mr Bailey and looked at the contemporaneous documents (referred to in more detail below), we are satisfied that at this time, no promise had been made to Ms Eggleton about a permanent job and that she was never promised the claimant's role at any stage until after the claimant had resigned. On balance, we consider that, in the context of events in early 2018, the claimant recalled overhearing a snatch of a conversation and, having persuaded herself at that time that she was being pushed out, saw a significance in that snippet which it did not have. Not only had Ms Eggleton never been promised the claimant's job, she and other team members were repeatedly reminded in regular and irregular meetings of the Mr Bailey's group that she was returning.

19. Shortly before her departure, the claimant asked Mr Thompson if she could take her work laptop with her when on maternity leave. He said that she would not need it as she would not be working. The claimant did not argue with this, nor did she raise the matter again. Mr Bailey was asked what to do with that computer in her absence and he said it should be kept

as a spare. It was unclear how he came to be involved, but the claimant did not raise the matter with him as she could have done. After hearing from Mr Bailey and considering the investigations undertaken in response to the claimant's grievance, raised much later in time, we are satisfied as follows in regard to the computer. Mr Thompson and Mr Bailey anticipated that the claimant could and would receive e-mails on her personal electronic devices, that would include e-mails generated within the respondent's systems as she could log on using her password. Her company laptop would not give her access to anything else that she might reasonably need and all that she would not be able to access would be files needed for day-to-day working or alternative sources of information that she would receive by way of e-mails in any event.

20. The claimant accepted in cross-examination that she would have access to e-mails, but maintained that her password would routinely expire and she needed her laptop in order to renew it.

21. She did access work related e-mails to begin with, but claimed that her password then expired. She could not say when that was, even in very general terms and she never contacted anyone to ask for it to be reset, as she could easily have done. She came into the office in November and later attended the Christmas party, but never raised this issue. Even when sent, by others, copies of e-mails sent to them and relating to Ms Eggleton being given a permanent job (see the e-mail in February referred to below), she did not contact the respondent to say that she could not get access to such e-mails directly. On balance, we conclude that until the time of her return was approaching, she made little, if any, effort to keep in touch by reading e-mails either relating directly to her, or dealing with events like rebranding, senior staff leaving and so forth. We emphasise that we make no criticism of the claimant in this regard.

22. The claimant had a leaving lunch on 31 May 2017. She had raised none of the concerns that she now raises in relation to her treatment up to that time. We are quite satisfied that she must have been a little anxious about the future at that moment and the possibility that Ms Eggleton might prove to be very good at her job. However, we do not consider that she was more anxious or concerned than any other woman about to go on maternity leave, leaving someone else doing her job. So far as the respondent was concerned, it hoped and expected that she would return.

23. We now turn to the period between 1 June 2017 and early January 2018. The claimant had her baby, a girl. She kept in touch with colleagues she was close to, she visited the company with her baby in November and attended the Christmas party in December. Ms Eggleton was performing well, as was another employee (Menno Meijer) also at band 4, who was covering for the absence of a post holder in another post. The claimant raised no concerns about anything in that period. She was aware of her right to arrange paid keeping in touch (kit) days but did not do so. We do not find that surprising. Many women on maternity leave use those days towards the end of the period when preparing to return.

24. In October 2017, Ms Eggleton received a pay rise. It had been noted in a regular review (of pay rate compliance in all posts) that her rate of pay was below the lower point of the band of pay rates for such a role. Hence, it was reviewed. Having been paid less than the claimant to begin with and less than male members of staff doing roles of a similar nature, she was given a pay increase as a recognition of her progress in the role. That was a personal pay review triggered as set out above and based on her performance and not a regular company review of pay generally.

25. During that period, the claimant was also called periodically by Mr Bailey and others with information regarding, for example, the change from Mr Thompson to Ms Desborough Smith as her immediate manager.

26. Mr Bailey chose his one-to-one meeting with his manager in January 2018 to raise the future of both Mr Meijer and Ms Eggleton. He proposed that each be offered a permanent contract. Each was regarded as having potential and each had begun to look for work to start after their current fixed term contracts ended. He did not wish to lose them. He proposed that each be engaged now with a view to their finishing their cover work and then being given another grade 4 role. He was confident that such roles would arise and, if not, that there was project work available for a short period until one did. He pointed out that one grade 4 (Mr Michael Morris) was likely to move in the near future and that Ms Eggleton would be a good replacement. The relevant permissions were given. At this point in time, the claimant was expected to return to her post at the end of her maternity leave. The detailed written presentations which Mr Bailey produced to his superior to justify his proposals made clear that Ms Eggleton would only stay in the claimant's role until the claimant's return date.

27. On 6 February 2018, the claimant asked for KIT meeting to discuss her return to work and this was fixed for early March 2018.

28. On 8 February 2018, Mr Bailey circulated an e-mail which contained this statement:

> "I am delighted to let you know that Daisy Eggleton and Menno Meijer have both been made permanent members of the finance and Tui team. Both are doing a really good job in their roles and I am really pleased with the progress the wider team is making."

29. The claimant was an addressee of that e-mail, but did not access it directly, either because she was still not looking at work e-mails, or because, even when alerted by others to it, she could not access it, either because her password had expired or (as she speculated when giving evidence) that her inbox was now full and so had not received the e-mail in any event. A colleague told her about it and she was concerned.

30. The e-mail did not announce that Ms Eggleton had been given the claimant's role on a permanent basis. It reflected the permissions given to Mr Bailey as set out above. However, the claimant read it as indicating

that Ms Eggleton had been given her job. Mr Bailey had intended that the giving of permanent contracts to the two cover providers would be one of the subjects of discussion at the KIT meeting due to take place in a couple of weeks' time. We consider that it would have been better to have explained it to the claimant in advance and that the e-mail could have been written so as to make clear that Ms Eggleton was still the maternity cover for the claimant. However, we accept that this was what Mr Bailey thought and made clear to his group in regular meetings, where he continued to refer to the claimants' impending return. Had Mr Bailey known of the claimant's concerns, he would have made all this clear to her.

31. In fact, the claimant did not contact Mr Bailey, or Mr Thompson, or Ms Desborough Smith. Instead, on 21 February 2018 she raised a grievance. It complained of the fact that Ms Eggleton had been given her role. She discussed that grievance with HR and raised other matters which, on their invitation, she put in writing. She complained of the way in which Ms Eggleton had been recruited, the reorganisation of desks on her arrival, work being given to Ms Eggleton and not to her (which on explanation in evidence she said related to the change in reporting lines of Ms King), and her not being allowed to keep her laptop. In short, her contention was that Ms Eggleton had always been intended as her permanent replacement.

32. The grievance was considered by Mrs Louise Williams, the General Manager, Customer Experience. She interviewed the claimant and Mr Bailey. The detailed notes show that the various points raised by the claimant were considered in detail. In particular, Mrs Williams asked to look at documents relating to the decision to make Ms Eggleton permanent, relating to the desk moves and relating to how they were announced and what work the claimant was doing towards the end of the period of her pre-maternity leave employment.

33. The claimant was adamant when she spoke to Mrs Williams that she had "lost all my trust and confidence [in the respondent]", that she had no role to go back to, that even if there was some misunderstanding underlying her concerns, she would not feel comfortable coming back to work either in her old role or in a different one. Mr Bailey explained to Mrs Williams how the offer of a permanent post came to be made to Ms Eggleton, that (as he had anticipated) Mr Morris had left and Ms Eggleton was to take his role when she ceased to be the claimant's maternity cover, that he had kept in touch with the claimant (for example by calling her when Mr Thompson changed posts, as referred to above), that he had intended to discuss all these matters and the overall team and the possible expansion of the claimant's role in the future at her KIT meeting in March and that he wanted and expected her to return from maternity leave. He dealt with the complaints the claimant had made by explaining matters as we have found them to be (for example as regards the desk moves and allocation of work).

34. Mrs Williams dealt with the claimant's grievance by letter of 8 March 2018. She upheld one aspect. She felt that more frequent communications with the claimant on changes in the finance department and more widely would

have been preferable, although she considered that the claimant had been treated fairly even in that regard. She made clear that the claimant had misunderstood the situation with regard to Ms Eggleton. She had not taken the claimant's job on a permanent basis. She made clear that the claimant's job remained available for her to return to, but asked for clarity on the claimant's stated intention not to return consequent upon the complete breakdown of trust and confidence as asserted when she interviewed her.

35. The outcome letter reminded the claimant of her right to appeal. She did so. She appealed by letter of 12 March 2018. She disagreed with Mrs Williams' findings and suggested that Mrs Williams was trying to force her to resign by asking for clarity in respect of what she had said about trust and confidence and her unwillingness to return. Most importantly, she made a point which she reiterated at the appeal hearing and which has been a central plank of her case. She considered that if Ms Eggleton had been made permanent whilst doing her role, then she had, in effect, been given that role permanently. To her mind, what Mr Bailey may have believed, or intended, or explained to others, was irrelevant: the simple fact of being given a permanent contract whilst doing that role was conclusive.

36. The grievance appeal was heard by Ms Karen Switzer, the respondent's Director of Aviation Planning. She conducted a grievance hearing with the claimant and spoke to Mrs Williams, Mr Bailey, Ms Desborough Smith, Mr Thompson and the HR Manager (Ms Scott) who had handled the grievance from the start and had spoken to the claimant about it. In the hearing Ms Switzer made clear, on several occasions, that the finance department was saying that the claimant's role was open for her to return to. The claimant considered that Ms Eggleton should not have been given a permanent contract whilst doing her job as maternity cover as that meant that she had been given the job permanently. Despite her best efforts, Ms Switzer appears to us to have been unable to convince the claimant that this was illogical and not a correct interpretation of what had transpired. The claimant went on to say that she had not meant to resign to Mrs Williams and that she wanted now to understand her options.

37. In her letter of 29 March, dismissing the appeal, Ms Switzer gave detailed reasons for its rejection. In particular, she set out what she considered (and we have found) to be the true sequence of events regarding the offer of permanent employment made to Ms Eggleton. She explained that Ms Eggleton becoming a permanent employee "will have no impact upon your return to your current role which remains open to you."

38. The claimant had asked that her options be made clear and Ms Switzer did this at the end of her letter where she stated:

> "You have now exhausted the grievance process, and there is no further right of appeal. In terms of options, we see them as returning to your role or discussing with Rob Coldrake (as you say you have lost confidence in Luke Bailey), Finance Director and Miranda Scott, HR PB, about what other roles/teams you could feel

> comfortable being part of. As I have said, finance is a large function with lots of opportunities at your band, so I am hopeful that if you feel you would rather explore different options, there may be an opening that could work in the wider function. In any case, your role remains available for you to return to."

39. The claimant did not return to work. Instead she resigned by letter of 23 April 2018. She relied upon:

    39.1 Being, in effect, replaced by Ms Eggleton before she left on holiday and then maternity leave.

    39.2 The removal of Ms King as a report, so that she was excluded from this work and meetings relating to it.

    39.3 The fact that she was cut out of "the chain of command".

    39.4 Being made to move desks and this being done without her knowledge.

    39.5 Work being duplicated between her and Ms Eggleton.

    39.6 Colleagues commenting on about whether she was leaving early as Ms Eggleton had taken part of her work.

    39.7 Her role having been promised to Ms Eggleton from the start.

    39.8 The denial of her request to take her laptop on maternity leave.

    39.9 The fact that she only received the February e-mail stating (as she would have it) that Ms Eggleton was taking her job, indirectly.

    39.10 Not being given information about company matters whilst on maternity leave.

    39.11 The fact that her grievance had not been properly investigated.

    39.12 The fact that Mrs Williams had made reference in the letter dealing with her grievance to her having a stated intention not to return to work.

40. In summary, the claimant said that she had been "bullied and harassed" out of her job. In presenting her case to us, she relied upon the rejection of her grievance and appeal as being the "last straw". She resigned on notice, but did not actually return to work.

41. We reject the suggestion that the claimant's grievance had not been properly and thoroughly investigated. Having heard the two individuals involved, read the notes of their meetings and hearings, looked at the material they considered and read their detailed findings as set out in their letters, we consider the opposite to be true. Each, we consider, did a thorough job. They looked at each complaint that the claimant made, they

did not take what Mr Bailey and other managers said at face value, but investigated the background materials which might cast light upon what happened and they did all they could to persuade the claimant that she was mistaken as to Ms Eggleton's position and to encourage the claimant to return.

42. On 12 May 2018, Ms Eggleton sent an e-mail to Ms Colston-Lynch (copied to Ms Desborough Smith) saying that the claimant had resigned in order to spend more time at home with her child. The respondent had not told Ms Eggleton the reasons for the claimant's resignation as set out in her letter. Ms Eggleton was keeping in touch with Ms Colston-Lynch who was herself now on maternity leave. Ms Eggleton made an assumption that the reason she gave was the reason that the claimant was not returning. Immediately on the claimant complaining, the e-mail was corrected.

43. The claimant also relied, as indicated in our summary of her resignation letter, upon what was said to her by others in respect of the early arrival of Ms Eggleton (consequent upon her having to give only a weeks' notice) and what was said by them in respect of the February e-mail. Having not heard from the individuals who conversed with the claimant, it is difficult to know precisely what they said and what the claimant said to them. However, we accept Mr Bailey's evidence that he regularly told members of staff that the claimant was returning and that he at no time told anyone that Ms Eggleton was anything other than maternity cover for the claimant.

44. In summary, we consider that:

    44.1 The claimant was not "marginalised" as she alleges, or poorly treated in any way prior to going on maternity leave.

    44.2 At the time that she left, she did not think that she had been poorly treated, hence her lack of complaints.

    44.3 The claimant was concerned when she saw the e-mail in February that said that Ms Eggleton had been given a permanent contract.

    44.4 She leapt to the wrong conclusion. Had she spoken to Mr Bailey, or Mr Thompson or Ms Desborough Smith, she would have been told exactly what had happened and given reassurance. She did not. Instead, she raised a grievance. The outcome of that grievance provided that reassurance.

    44.5 At this stage, in February 2018, she re-examined the events from when she had first told Mr Thompson that she was pregnant and began to see the various acts that she now relies upon as evidencing some kind of plot to oust her which had been hatched prior to Ms Eggleton being engaged. In fact, as we find, nothing could be further from the truth, equally, nothing could shake the claimant from that view.

The Law and submissions

45. Both the respondent and the claimant provided detailed written submissions. The claimant's submissions were prepared, in advance of the hearing, with considerable assistance from Stevenage CAB to whom we express our thanks. There is little dispute between the parties as to the applicable law, hence their submissions are mainly concerned with applying that law to the facts as contended for by each party. We shall set out below our findings on each head of claim, first summarising the applicable law and any submissions which are not simply an assertion of the factual position contended for by that party.

46. There are claim in time issues in this case. We will deal with those separately at the end after we have dealt with the merits. They do not relate to the unfair dismissal claim which both sides agree (correctly) was presented within the primary limitation period.

Constructive dismissal

47. The claimant relies upon a chronical of events from December 2016 onwards. She says that cumulatively they amount to a breach of the implied term of trust and confidence, a term implied into all contracts of employment. The "last straw" was said in submissions to be the rejection of her grievance. Elsewhere, in the written submissions, it is said to be the failure of the grievance process to give her a "clear reassurance" as to her future prospects and her ability to return to her previous role. We consider that the core of the claimant's case is the revelation that Ms Eggleton had been given her job, which was her understanding of the e-mail sent in February 2018. She raised that core concern by way of a grievance and resigned only when those hearing that grievance failed to recognise or accept that such a breach had taken place.

48. In approaching this matter, we have kept in mind the guidance given by the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. The respondent raised issues relating to affirmation and the impact of her resigning on notice, rather than immediately. In the light of our findings on the alleged breaches of contract, we need not consider these.

49. We turn to the central issue of whether this alleged act (of giving her job to Ms Eggleton) either alone, or with the other acts relied upon, took place in the ways described by the claimant. Putting it another way, is there material here which could amount to a breach of contract, and if so, is the breach sufficiently serious to amount to a repudiation.

50. In that regard, we deal individually with each of the matters identified in the list of issues as being relied upon as amounting to a repudiatory breach. Each of those matters is dealt with below in succeeding paragraphs. In each case we begin by setting out what is said to be the breach of the implied term.

51. The claimant first relies upon “the early appointment by the respondent of Ms Eggleton as the claimant’s maternity cover. She was appointed on 27 March 2017, several weeks before the claimant’s maternity leave was to commence and her employment led to the claimant being, in effect, displaced prior to her taking maternity leave.” There was nothing sinister in the early appointment of Ms Eggleton. It came about in the circumstances set out above and was done for good business reasons. It was fully explained and understood by the claimant at the time. She was not displaced. There was no breach of contract.

52. “Allocating one of the claimant’s direct reports, Ms King, to Ms Eggleton in April 2017, shortly after Ms Eggleton was appointed.” Ms King was allocated to Ms Eggleton. She had never been supervised by the claimant, although this was planned. The decision to allocate her to Ms Eggleton for the period of the claimant’s absence was made for good business reasons. Again, this was explained to and understood by the claimant, who did not suggest that Ms King should report to her for the ten weeks or so before she left. There was no breach of contract.

53. “The management of key elements of the claimant’s duties, in particular transferring management of the finance department’s cost centre to Ms Eggleton in April 2017.” This relates to the allocation of Ms King to Ms Eggleton and is dealt with above.

54. “Without consultation replacing the claimant by Ms Eggleton in meetings that she would normally have attended as part of her job.” Again, this relates to Ms King’s allocation to Ms Eggleton. The meetings were those involving Ms King’s work. The claimant raised no objection to Ms Eggleton attending these meetings alone. There was no breach of contract.

55. “From shortly after Ms Eggleton commenced employment, causing or permitting work related issues and queries relevant to the claimant’s role to be addressed by the financial controller (Mr Bailey) to Ms Eggleton instead of the claimant.” Insofar as this relates to work relating to Ms King it is dealt with above. The claimant remained involved, as before Ms Eggleton’s arrival, in all other aspects of her role and remained the principle point of contact until she left. We have no doubt that Mr Bailey would periodically speak to Ms Eggleton without ensuring that the Claimant was also spoken to at the same time. This was in no way sinister and the Claimant did not consider it to be so at the time. There was no breach of contract.

56. “The removal (at the beginning of April 2017) of the claimant from her working desk so as to enable her to be replaced by Ms Eggleton.” The seating at the pod was indeed reorganised. This was done for good business reasons. It was discussed with the claimant and she did not object to the move then, or when offered the opportunity to do so when the finalised plan was circulated. Again, there was no breach of contract.

57. “Moving the respondent away from her direct reports (in April 2017) so that she was partitioned from them.” She was not removed from her direct

reports. The pod was organised so as to facilitate easy communication between the claimant and Ms Eggleton and between them and Ms Colston-Lynch and so as to enable Ms Eggleton to work with Ms King. The claimant never suggested otherwise until early 2018. There was no breach of contract.

58. "Failing appropriately to organise work between the claimant and Ms Eggleton which caused a duplication of work from 28 March to 1 June 2017." The work was appropriately organised. We consider that an element of duplication was inevitable, especially given the relatively long handover period. There was no breach of contract.

59. "Mr Bailey's refusal of permission for the claimant to take her company laptop with her on maternity leave, thus depriving the claimant from having access to internal e-mails and the company intranet." Mr Bailey did not refuse; indeed he was not asked. Mr Thompson was asked, but said that the claimant would not need the laptop as she was not working. The claimant never pursued this, for example by suggesting why she would need it or speaking to Mr Bailey about the matter. In fact, she could obtain access to all relevant information, because matters on the intranet were communicated via email. In fact, save to the limited extent referred to above the claimant did not seek to access such emails. There was no breach of contract.

60. "Mr Bailey sending an e-mail on 8 February 2018 stating that Ms Eggleton was being appointed to a "permanent position" and that Ms Eggleton was doing "a really good job" in her role, when that role was the claimant's role and failing to communicate in this respect with the claimant, such that she was left to discover the e-mail on 21 February 2018, causing her to feel undermined." The e-mail was indeed sent. It did not reflect an appointment of Ms Eggleton to the claimant's job. What it did indicate is set out above. It could have been more clearly worded, but recipients (who were intended to include the claimant) could have cleared up any confusion by asking a simple question of a manager. The expectation was that the claimant would see the e-mail, being an addressee. The respondent was unaware that she was not accessing her work e-mails and unaware of the circumstances in which this e-mail came to her attention until she raised her grievance. There was no breach of contract.

61. "Human Resources informing the claimant on or around 1 March 2018 that Ms Eggleton had been placed on a permanent contract, but that the team structure remained the same and that no additional role had been created, which led the claimant reasonably to assume that she would not be able to return to her role at the end of her maternity leave because Ms Eggleton was now occupying it." What Human Resources said was correct. The claimant was repeatedly told from this time onwards that what was actually happening was that Ms Eggleton was being given a permanent contract, but not in her role. No new role had been created. She was repeatedly assured that her job was there for her to return to. She would not accept this, for reasons that she found it difficult satisfactorily to explain to us. There was no breach of contract.

62. "The claimant being excluded during her maternity leave from team communications such that she was not in receipt of communications relating to changes within her team, changes to lines of reporting, job opportunities, company updates (including the change of Managing Director), company social events (including the "Hello Tui Party") and the fact Tui employee e-mail addresses had been changed from Thompson addresses to Tui addresses." The claimant was not excluded. All the information in relating to these matters was on e-mails but she did not read them. Indeed, the e-mail relating to Ms Eggleton's appointment to a permanent contract (dealt with above) is a case in point. Furthermore, the claimant came into the office, attended the Christmas party and periodically spoke to Mr Bailey and other staff members. If she was concerned that she was unable to access e-mails, or not obtaining sufficient information, she only had to ask for such problems to be sorted out. The change of email addresses to Tui ones had no practical impact, because the old addresses remained live and emails to the new addresses were copied through to the old ones. There was no breach of contract.

63. "The claimant being asked on 8 March 2018 by Mrs Williams in a grievance outcome letter to confirm in writing her "stated intention not to return to work" when the claimant had made no such statement." The claimant was asked to make her position clear as a result of her stating that she felt unable to return to work as she had lost all trust and confidence in Mr Bailey and in the respondent generally. It was understandable that Mrs Williams wanted that clarified. It is clear from the notes of her meeting with the claimant that she had attempted to obtain such clarity as she should on the day. Mrs Williams' conduct and that of Ms Switzer shows that this was not part of an attempt to remove the claimant, but simply to gain clarity in circumstances where the claimant was saying that she would not return to work (in any position) despite repeated assurances that her job was available for her to return to. There was no breach of contract.

64. "The fact that the claimant had been given no (or no sufficient) information about the appointment of Ms Eggleton, her role in terms of employment such that the claimant had to raise a grievance seeking clarification of those matters on 1 March 2018." The claimant raised a grievance, we find, because she had persuaded herself that the February e-mail showed that Ms Eggleton had taken her job and the claimant reinforced this view by re-examining events in the past and misconstruing them. Once she raised the issue, she was given sufficient information and repeated reassurances as to the true position. Mrs Williams considered (as do we) that communications with the claimant could have been better. It would have been better for Mr Bailey to have been more pro-active, and not waited for the March meeting (which, in the event, the claimant cancelled after raising her grievance) in order to provide a verbal update. However, he had no reason to suspect that the claimant was unclear as to Ms Eggleton's role. That an employer aspires, having considered a grievance, to do better in the future does not mean that what was done necessarily amounts to a breach of contract. We consider that what was done here

could have been done better, but it was adequate and does not give rise to a breach of contract.

65. “The lack of clarity, in the above circumstances, as to the role in which it was intended that the claimant would return to work, and on what terms, this not being addressed necessitated the claimant in raising a grievance, the outcome of which did not address or resolve those matters appropriately.” No-one on behalf of the respondent ever told the claimant (or anyone else) that the claimant was not returning to her role until after her resignation. There was no lack of clarity in the grievance outcome. Once the respondent was aware that the claimant felt that there was some lack of clarity, the position was made abundantly clear and she was consistently reassured, as set forth above. Again, there was no breach of contract.

66. We have considered each of those matters individually. Considering them together adds nothing to the claimant’s case. There was no breach of the implied term as to trust and confidence. As we have found, she was not being marginalised or forced out by the sequence of events she relies upon. Once the respondent knew that she had concerns, it addressed them with care, compassion and clarity.

67. It follows that the claim for constructive unfair dismissal must fail.

Automatic unfair dismissal

68. That claim similarly cannot succeed as there was no dismissal. Hence, there was no principal reason to be located for any such dismissal.

Detriment (section 47C of the 1996 Act)

69. An employee has a right not to be subjected to any detriment by an act done because of her pregnancy, child birth or maternity.

70. Here the claimant relies upon the 15 matters considered above. We have to consider now whether any of those matters amount to a detriment and, if so, whether the detriment was because of the prohibited reason. Hence, we will consider each of those matters again. However, we will not set out the text of the matter in each case, rather we will adopt the numbering system adopted in the list of issues.

    1. There was no detriment. The lengthy handover was an advantage to both the claimant and the respondent. Last minute handovers are, we accept, stressful for all concerned. In any event, that Ms Eggleton was appointed early was not because of the claimant’s pregnancy, child birth or maternity. It does not assist the claimant that “but for” her pregnancy, there would have been no need to engage Ms Eggleton at all, or make the changes necessary to accommodate a smooth handover and efficient working. We consider the law in this regard in a little more detail when dealing with the claim for direct sex discrimination below.

2. We do not consider there to be any detriment. The claimant was not to have the report for some 10 weeks of a handover period, but she was to get Ms King as a report on her return. Even if this could be called a detriment, it was done for sound business reasons which the claimant did not dispute at the time. We doubt that the claimant can be said to have been "subjected" to this treatment when she agreed to it without protest or comment. Even if she could, the necessary link to her pregnancy, child birth or maternity is not established.

3. See number 2 above.

4. See number 2 above.

5. Insofar as the factual sub-stratum for a detriment is established, the analysis in number 2 above would apply.

6. The analysis is the same as in respect of number 2 above. The move of desks was temporary, did not isolate her from her team and was for good business reasons. She did not raise any question or make adverse comment about this at the time.

7. See number 6 above.

8. The work was appropriately organised and some duplication in a handover was inevitable. There was no detriment.

9. There was no detriment. In fact, there was no refusal, only a statement (factually correct and never questioned or taken further) that the claimant did not need the laptop as she would not be working during her maternity leave. The assumption that she could access all relevant e-mails and information without the laptop was correct, subject to any problems which might have arisen regarding passwords and overfull inboxes. Both could have been dealt with, but the claimant did not raise them.

10. There was no detriment. The e-mail was accurate in what it said and the respondent reasonably assumed that the claimant would get it as an addressee. Even if it could be said that the e-mail was incomplete with the potential to mislead (which, considered in context, we reject) that incompleteness and any consequential misleading of the claimant was not appropriately related to the claimant's pregnancy, child birth or maternity.

11. We repeat what we have said above about this allegation in the context of its use as one element of the constructive dismissal claim. There was no detriment in that what the claimant was told was accurate. If it could be said to be incomplete such that it had the potential to mislead, our reasoning and conclusion is as set out in respect of number 10 above.

12. The claimant was excluded, hence there was no detriment.

13. Mrs Williams reasonably sought to clarify the situation. There was no detriment. Any lack of clarity was of the claimant's own making and the need to obtain clarity was, in any event, not appropriately related to the claimant's pregnancy, child birth or maternity. It was a consequence of what the claimant had said to Mrs Williams in the context of her considering the grievance.

14. We repeat our conclusions set out above in relation to the constructive dismissal case in this regard. There was no detriment, the claimant had persuaded herself that the respondent had replaced her, it had not and its repeated attempt to explain the situation to her failed.

15. There was no lack of clarity. We repeat our reasoning in this regard as set out above where we dealt with the matter in the context of the unfair dismissal claim.

71. In all of the circumstances, this claim for section 47C detriment must fail.

Discrimination by reason of pregnancy or maternity leave

72. Section 18 of the Equality Act 2010 provides:

> "Pregnancy and maternity discrimination: work cases:
>
> (1)This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2)A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
>
> (a) because of the pregnancy, or
> (b) because of illness suffered by her as a result of it.
>
> (3)A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4)A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5)For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (6)The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

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

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

73. In Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC65, the Supreme Court found that unfavourable treatment in this context is to be seen as broadly analogous to the concepts of disadvantage and detriment found elsewhere in the Equality Act.

74. Any unfavourable treatment must be "because of" the claimant's pregnancy or her exercising her right to maternity leave. The phrase "because of" has the same meaning as "on the grounds of", the phrase previously used in the predecessor legislation (see the EHRC code). Where, as here, the acts relied upon are not inherently discriminatory, a tribunal must look at the mental processes (conscious and unconscious) of the relevant actor to see if he or she was at least in some way other than a very minor way, inappropriately influenced. In approaching our consideration of that matter, we have kept in mind what is said in the Equality Act about the appropriate approach to the burden of proof. However, as will be clear, we have found the respondents explanation of each of the matters relied upon to be accurate and to demonstrate that its conduct was unrelated to the claimant's sex, or pregnancy, or taking of maternity leave.

75. To fall within section 18, any treatment must take place during the protected period or (see sub-section (5)) be the implementation of a decision taken during the protected period.

76. We have considered each item of allegedly unfavourable treatment. In each case, we have considered whether this amounts to unfavourable treatment and, if so, whether this was because of the protected characteristic.

77. The first group of matters relied upon are those already relied upon as giving rise to constructive dismissal and as being detriments under section 47C. We have considered each above in relation to the claim under section 47C. The tests to be applied are materially the same and our reasoning is equally applicable here.

78. The claimant here relies in addition upon the following matters:

78.1 The failure to give her a pay increase when Ms Eggleton was given one in October 2017. The claimant was paid within the band appropriate for her job. Her place in that band had been assessed by reference to her performance. Ms Eggleton was initially paid a sum which fell outside the band. This was flagged up in a routine check. Hence, her appropriate position within the band was individually assessed by reference to her performance in the job up to the time the pay increase was awarded. She was given a pay increase as a result. She had previously been paid some £2,000 per annum less than the claimant and her wage was now increased so that she was paid more than the claimant. Failing to increase the claimant's pay at this time was undoubtedly unfavourable treatment. However, that unfavourable treatment was not because of the protected characteristic, but because her pay already fell within the band and had already been assessed by reference to her performance.

78.2 The providing in the 12 May e-mail by Ms Eggleton of an incorrect reason for the claimant's failure to return to work. To disseminate incorrect information was unfavourable treatment by another employee of the respondent acting in the course of her employment. However, Ms Eggleton did not give incorrect information because of the claimant's pregnancy or maternity absence. She did so because she did not know the reason for which the claimant said she had resigned and provided what she said based on an inaccurate supposition.

78.3 The claimant's dismissal. As we have found that the claimant was not dismissed, this contention cannot be made good.

<u>Direct sex discrimination</u>

79. We put to one side the fact that section 18(7) provides that a claim falling within section 18 cannot be brought under section 13. Even if these claims could, either by some way of construing section 18(7), or because it could be said that some or all of them fall outside the period of protection provided by section 18, we do not consider that the section 13 claim can succeed where the section 18 claim using the same allegations of fact has already failed. A section 13 claim would involve reliance upon a hypothetical comparator. It could not be shown that there would have been disparate treatment between that comparator and the claimant for the reasons we have already set out above. Anyway, the reason for that differential treatment would not be related to the protected characteristic for the reasons given when dealing with the causation ("because") issue under section 18.

<u>Harassment (section 26(2) of 2010 Act)</u>

80. Section 26 of the 2010 Act provides as follows:

"(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.

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

(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

81. Pregnancy and maternity is not a protected characteristic for the purposes of section 26, but the claimant can argue that the harassment (if she can make it out) necessarily related to her sex.

82. In relation to this head of her claim, the claimant relies upon the same conduct as she relied upon for her claim under section 18 of the 2010 Act and, in addition, relies upon three other matters. In relation to each matter relied upon, we will consider first whether the conduct related to the protected characteristic of sex. We will then consider whether the conduct had the purpose or effect required, taking into account the three matters set out in sub-section (4).

83. We turn first to the matters relied upon in relation to section 18.

84. We have already considered the link (if any) between those various matters relied upon and the claimant's pregnancy, child birth and maternity and, hence, her sex. We have rejected the existence of the required link. Hence, this claim would fail (as regards those matters) for that reason.

85. In any event, we do not consider that the conduct in question had the prescribed effect. We say that for these reasons:

85.1 As regards items 1 to 9 in the list, the claimants' reaction was not of the kind required. She either agreed with what was being done, or saw the commercial sense of doing it and was unconcerned in any significant way.

85.2 The claimant was concerned about the February e-mail and her concern grew, as we have already said, as she reviewed past events and began to see them in a suspicious light. It was not the e-mail itself which caused the extreme concern which the claimant then felt, but the combination of those matters. Her characterisation of the e-mail (and of the past events) was wrong. Even if the e-mail, re-read by her in that light, could be said to have created the required environment, it was unreasonable for it to have done so. As the respondent's reaction to the grievance demonstrates, she

had misunderstood and the claimant would have reassured her (in detail) if she had asked, as it did when she raised her grievance.

85.3 That reasoning applies equally to her complaint based on what HR said to her and her alleged lack of information as to Ms Eggleton's appointment.

85.4 The alleged exclusion from the team communications is factually inaccurate (see above).

85.5 Mrs Williams' request for clarity did not violate her dignity or create the required environment. Even if it had, in her individual case, it should not reasonably have done so in the circumstances. Mrs Williams was reasonably seeking clarity in the light of what the claimant herself had said to Mrs Williams.

85.6 There was no lack of clarity following the grievance outcomes as we have explained above.

85.7 The lack of a pay rise in October 2017 did not violate the claimant's dignity or establish the required environment. Even it had done, it would have been unreasonable for it to have done so. Had the claimant asked why she was not given a pay increase (which she did not do) she would have received a clear, detailed and accurate explanation for what had happened. In fact, we consider that the claimant's state of mind was caused by the February e-mail and her reaction to it, which led her to re-examine past events, as described above, not by the lack of any pay increase.

85.8 The 12 May email did contain an inaccurate statement as to the reason for the claimant's resignation, as explained above. We do not consider that this did violate her dignity or create the required environment. As stated above, the claimant's state of mind (which was now well established) had other causes and she could not have expected that Ms Eggleton would set out the details of her complaints, even if she knew of them.

86. We now turn to the additional matters relied upon.

86.1 The first relates to Mr White's reaction to the early arrival of Ms Eggleton. She accepted that his reaction had been a joke. He was a friend. We consider that she thought nothing of his quip at the time. It is another of those matters which have gained a new (and inappropriate) significance as the claimant has re-analysed the past.

86.2 We have not heard from any of the four ladies said to have commented on the February e-mail to the effect that the claimant's role appeared to have been transferred to Ms Eggleton. It is unclear to what extent the claim had herself had already formed the view that she was being pushed out when these conversations took

place. This conduct does relate to the potential characteristic of sex, as it relates to her return from maternity leave and the availability of her job. Did the conduct significantly contribute her to distress so that it had the relevant purpose or effect? We must consider not only the claimant's perception, but the circumstances surrounding it and whether it was reasonable for her to have formed any view that we find she did form. We do not consider that it was reasonable. This could only have been one amongst many causes of her then state of mind, as we have explained above. The principal cause was her understanding of the e-mail against the background of her re-examination of past events. It was not reasonable for those matters (including what these people said) to have that effect, especially as a call to Mr Bailey would (had it have been made) have nipped this matter in the bud.

86.3 The claimant also relies on three people telling her that Mr Bailey had told them that Ms Eggleton had taken the claimant's role on a permanent basis. He did not tell them that. We do not accept that they so told the claimant. Again, whatever they said, the matter could have been cleared up by a call to Mr Bailey. The factual basis for this aspect of the claim is not made out. Had it been, our analysis would have been as above in relation to what she was told about the February e-mail.

Claim in time issues

87. The claimant applied for and received two early conciliation certificates from ACAS. The parties agreed that the EAT has found that the special regime for calculating the time limit for making an application to the tribunal can only be applied to the first in time of those certificates. We agree. In that case, although the unfair dismissal claim could be in time, unless the various acts relied upon can be said to form part of a continuing course of action culminating in dismissal, or if we were to find it just and equitable to extend time into the secondary limitation period, the claim in respect of them was presented out of time.

88. In fact, we have found that there was no dismissal and, hence, the dismissal cannot be relied upon as the last of a number of acts in a sequence, thus bringing the whole of that sequence "in time".

89. It would not be just and equitable to extend time in this case, because we have considered the merits and rejected each part of the case. To consider the issue divorced from the merits would be wrong and entirely artificial, given our views as to the merits.

Conclusion

90. In all of those circumstances, each aspect of the claim must fail and is dismissed.

Employment Judge Clarke QC

Date: …07/02/2020

Sent to the parties on: .19/02/2020

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For the Tribunal Office