EMPLOYMENT TRIBUNALS

Claimant: Ms S Jallow

Respondent: QBE Management Services (UK) Limited

Heard at: London Central

On: 22, 23, 24, 27 & 28 January 2020

Before: Employment Judge Khan
Ms S Campbell
Mr D Carter

Representation
Claimant: In person
Respondent: Mr T Cordrey, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:-

(1) The pregnancy discrimination complaint succeeds in relation to issue (aa) only.

(2) The remainder of the pregnancy discrimination complaint fails and is dismissed.

(3) The flexible working detriment complaint fails and is dismissed.

(4) The respondent is ordered to pay the claimant damages for pregnancy discrimination as follows: (i) £4,000 for injury to feelings and (ii) interest at the daily rate of £0.88 from 21 March 2019 until the date of this judgment. This payment to be made within the next 28 days.

REASONS

1. By an ET1 presented on 11 June 2019, the claimant brought complaints of pregnancy discrimination, detriment on the ground that she made a flexible working request ("flexible working detriment") and unauthorised deductions from wages. The respondent resists these complaints.

2. At a preliminary hearing on 10 October 2019 the claimant withdrew her complaint of unauthorised deductions from wages and this complaint was dismissed on withdrawal.

The Issues

3. We were required to determine the issues listed below which were enumerated in the Employment Judge E Burns' Order dated 11 October 2019 and refined by us following discussion with the parties:

3.1 Detriment on the ground of making a flexible working request (sections 80F and 47E(1)(a) of the Employment Rights Act 1996 ("ERA"))

(1) It is accepted that the claimant applied to the respondent for a change to her terms and conditions of employment in accordance with section 80F ERA on 21 May 2018.

(2) Did the respondent subject the claimant to any detriments by any act or deliberate failure to act, as follows?

a) By Sonia Chhatwal increasing her workload when she allocated to the claimant the bulk of the workload of a former colleague in July 2018.

b) By Sonia Chhatwal reducing the time spent at monthly one-to-one meetings with the claimant between July and December 2018.

c) By Sonia Chhatwal allocating additional work to the claimant on numerous occasions between July and December 2018.

d) By Sonia Chhatwal failing to ensure that when the claimant was absent on holiday or sick leave others picked up her work between July and December 2018.

e) By Sonia Chhatwal giving her a "2" rating in her PMP review undertaken on 1 February 2019.

f) By Stephen Flack allocating additional work to the claimant in February 2019, which is said to be from a senior colleague, with little or no training and no handover notes.

g) By Peter Scarf failing to fully investigate and uphold the grievance submitted by the claimant on 6 March 2019.

h) By Nick Menear failing to uphold the claimant's appeal against the grievance outcome on 14 June 2019.

(3) If so, did the respondent so treat the claimant on the ground that she had made an application under section 80F ERA?

3.2 Direct pregnancy discrimination (sections 18(2) and 39 of the Equality Act 2010 ("EQA"))

(1) It is accepted that the claimant was pregnant in March and April 2019.

(2) Did the respondent treat the claimant unfavourably as follows?

aa) By Stephen Flack saying that the claimant had taken too many days off for sickness and too many antenatal appointments and this was affecting her output and letting the team down:
i) in a telephone call on 21 March 2019
ii) in a meeting in the week commencing 25 March 2019.

bb) By Stephen Flack saying that the claimant had taken too many antenatal appointments:
i) in a meeting in early April 2019
ii) in an email on 12 April 2019.

(3) If so, was it because of the claimant's pregnancy or of illness suffered as a result of it.

3.3 Time limits / limitation

(1) Were the claimant's complaints listed above at (a) – (f) presented within the time limits set out in sections 48(3)(a) & (b) ERA 1996?

3.4 Remedy

(1) If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation, will decide how much should be awarded. It is noted that the claimant has not suffered any financial loss and is seeking an award for injury to feelings.

The Relevant Legal Principles

Flexible working

4. Section 47E ERA provides that

> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee –
> (a) made (or proposed to make) an application under section 80F [ERA]

5. Detriment is not defined by the ERA but it is analogous to the concept of detriment in the EQA.

Pregnancy discrimination

6. Section 18(2) EQA provides that:

> 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.

7. By analogy with the approach adopted in disability discrimination (see Trustees of Swansea University Pension & Assurance Scheme v Williams [2015] IRLR 885, [2015] ICR 1197, EAT) unfavourable treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial:

> "Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be."

8. The tribunal must consider whether the claimant was treated unfavourably because of the pregnancy or pregnancy-related illness. This requires some causal connection (see Johal v CEHR UKEAT/0541/09) and it is not enough for this to be part of the background. It must be an effective cause of the treatment complained of (see O'Neill v Governors of St Thomas Roman Catholic Voluntary Aided Upper School [1996] ICR 33).

Detriment

9. Section 39(2) EQA provides that:

> An employer (A) must not discriminate against an employee of A's (B) –
> …
>
> (a) by subjecting him to any other detriment.

10. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

11. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

12. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Burden of proof

13. Section 136 EQA provides

> …
>
> (1) 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.
> (2) But subsection (2) does not apply if A shows that A did not contravene the provision.

14. In many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870, SC).

Witnesses and documents

15. We heard evidence from the claimant.

16. For the respondent, we heard evidence from: Sonia Chhatwal, Group IT Finance Manager (formerly Lead IT Finance Analyst); Nick Menear, Chief Operating Officer (formerly Director of Underwriting Operations); Peter Scarf, Senior Legal Counsel; and Stephen Flack, Finance Director, IT.

17. There was a hearing bundle which exceeded 750 pages. We read the pages in the bundle to which we were referred.

18. We allowed additional evidence relating to antenatal appointments, process notes, Outlook entries and WhatsApp exchanges.

19. We also considered the respondent's closing submissions. The claimant did not make any closing submissions save for saying that she relied on the evidence already given.

The Facts

20. Having considered all the evidence, we find the following facts on the balance of probabilities. These findings are limited to points that are relevant to the issues in dispute.

21. The respondent is part of the QBE Insurance Group which provides specialist insurance and reinsurance, and is listed on the Australian Stock Exchange.

22. The claimant commenced employment with the respondent on 14 September 2015 as an IT Finance Analyst.

23. She was recruited by Stephen Flack, Finance Director, IT. Sonia Chhatwal, Lead IT Finance Analyst, line managed the claimant between December 2015 and January 2019. She has been line managed by Mr Flack since this date.

Informal flexible working arrangement

24. The claimant went on maternity leave from 25 January 2017. She returned to work on 22 January 2018.

25. Ahead of her return to work, in January 2018, the claimant met with Ms Chhatwal to discuss her working pattern. Although it was Ms Chhatwal's preference for the claimant to work two days from home, she agreed to the claimant's request to have three homeworking days each week with the claimant working the remainder of the week in the office. Ms Chhatwal told the claimant that she would need to make a formal flexible working application ("FWA").

26. The claimant requested homeworking because she was concerned about her son's health and wanted to be on hand, and available to monitor him. She had already made arrangements for her son to attend nursery for eight days a month and was therefore intent on working three days from home each week, on average, to fit around this arrangement. She told Ms Chhatwal that she hoped to maintain this working pattern until her son's second birthday when she intended to work two days at home and three at the office each week. We find it unlikely that Ms Chhatwal expressly agreed to this. This was an informal agreement of no specified duration.

27. The claimant returned to work on 22 January 2018 under this new working pattern. She sent her proposed homeworking days for each month in advance and these were authorised by Ms Chhatwal. The claimant agreed that at this stage Ms Chhatwal was being supportive and flexible towards her childcare needs.

28. In March 2018 the claimant's department moved into the IT Department, and under the management of Laura Dobbyn, Head of Financial Performance, whose team was part of the European Operations ("EO") Financial Planning and Analysis ("FP&A") team. No one else in the EO team worked from home for three days a week, other than Harpinder Dhillon who had a homeworking contract for five days and who did not have the same job role or level of responsibility as the claimant. The claimant's informal agreement was therefore exceptional.

29. Later that month, Ms Dobbyn emailed Ms Chhatwal to raise two concerns about the claimant's homeworking arrangements. She had heard a

rumour that the claimant looked after her child whilst homeworking. She told Ms Chhatwal that, if true, this was unacceptable, as the claimant was paid to work not care for her child and this would also create issues for other colleagues in the team who paid for childcare. Ms Dobbyn also queried the amount of time the claimant worked from home as she had not been visible. When Ms Chhatwal confirmed that the claimant was working three days from home, Ms Dobbyn questioned whether this was suitable because of the need for the claimant to interact with project managers and noted that this also set a "difficult precedent". She asked Ms Chhatwal to discuss the claimant's homeworking arrangements with her to ensure consistency across the team.

30. Ms Chhatwal told Ms Dobbyn that she had initially agreed to two homeworking days and that she agreed subsequently to a third day because of the claimant's childcare issues. This was misleading in two respects: firstly, Ms Chhatwal had agreed to three homeworking days from the outset; secondly, as Ms Chhatwal confirmed in her evidence to the tribunal, she had not discussed the claimant's childcare arrangements with her since her return to work. We find that Ms Chhatwal misled Ms Dobbyn because she was now aware that her informal arrangement with the claimant conflicted with Ms Dobbyn's desire for fewer homeworking days and parity across the team. However, it is also notable that Ms Chhatwal reassured Ms Dobbyn that this working pattern had not impacted on the claimant's performance whose work was comparable with her peers.

31. Ms Dobbyn told Ms Chhatwal that the claimant would be required to work in the office until her working pattern had been formalised. This prompted Ms Chhatwal to arrange a meeting with the claimant on 5 April 2018.

32. Ms Chhatwal asked Mr Flack to accompany her to this meeting for support in resolving the conflict between what Ms Dobbyn and the claimant wanted. Her own manager, Richard Carter, Finance Manager, was on sick leave. Mr Flack had been her manager until August 2017. They were friends and he was happy to support her. He had also recruited the claimant, had initially line managed her and was very familiar with her work.

33. At this meeting on 5 April 2018 the claimant was asked about her childcare arrangements on her homeworking days. We find that the claimant said that she had cared for her son whilst homeworking when she had sat him down in front of the TV. Although the claimant denies saying this we find it unlikely that Ms Chhatwal would have invented this detail. This is also consistent with the fact that this issue had already been flagged by Ms Dobbyn; it was something which Ms Chhatwal wrote to the claimant about on 8 May 2018 when she warned her that it could result in disciplinary action; Ms Chhatwal discussed this issue with HR on 15 May 2018; and it was also discussed at the flexible working meeting on 30 May 2018 and was referred to in the outcome letter which followed. Ms Chhatwal told the claimant that this was not acceptable. We accept Mr Flack's evidence that the claimant became defensive.

34. We find that Ms Chhatwal also told the claimant that she would need to submit a FWA. Ms Dobbyn had told her that this was required and it was the purpose of this meeting.

35. The claimant met with Ms Chhatwal and Mr Flack again to discuss her working arrangements. She wanted to continue to work from home for three days a week. She was told that this was inconsistent with the arrangements in place for other colleagues in the EO team. We find that when the claimant said that she was going to involve HR Mr Flack showed his frustration, although he denied this. The claimant says that Mr Flack reddened and gripped his pen. Not only do we find it unlikely that the claimant would have invented this detail, we take account of an email Mr Flack wrote in February 2019 when he questioned the involvement of HR in an unrelated process and described this as "overkill". However, all this appeared to demonstrate to us was that Mr Flack had become frustrated by the claimant's apparent intransigence. We do not find that Mr Flack was opposed to the claimant making a FWA as he in fact sent the claimant a link to the FWA form after this meeting. As will be seen, both Mr Flack and Ms Chhatwal gave the claimant advice on completing her FWA which she agreed was helpful.

36. It is also notable that the claimant was told that Ms Dobbyn had directed that she would need to work in the office until her FWA had been agreed. This was never enforced and the claimant's informal working pattern subsisted until her FWA was agreed. This is likely to have been because Ms Chhatwal supported this.

Draft FWA

37. Having also met with Susan Mison, Employee Relations Specialist, to discuss this, the claimant sent her draft FWA form and covering email to Ms Chhatwal on 4 May 2018. The claimant proposed to work two days a week at home i.e. on Thursday and Friday. She then met with Ms Chhatwal and Mr Flack later that day to discuss this. She says that both managers were concerned about three statements in her form and email which they wanted her to remove:

    37.1 The claimant had referred in her covering email to their informal flexible working agreement in January 2018. The claimant says that Ms Chhatwal was concerned about this because it conflicted with what Ms Chhatwal had told Ms Dobbyn. Although Ms Chhatwal says that this was not an issue because Ms Dobbyn would not have seen this document (and did not in fact see the claimant's FWA) we find that this was capable of compromising Ms Chhatwal as it would have revealed that Ms Chhatwal's email dated 27 March 2018 was misleading. As Mr Flack said in his evidence to the tribunal, the final FWA would be a statement of record and remain on the claimant's HR file. There was a risk that this would be seen by Ms Dobbyn. However, this was a background issue and not a compelling justification for the claimant's FWA. Its removal did not therefore put the claimant at any disadvantage.

37.2 The claimant had also noted in this email that she had been told in April 2018 that this arrangement could not continue because of changes to the department and Ms Dobbyn had wanted her to work from the office from mid-May 2018. However, this statement did not compromise Ms Chhatwal. Nor was it a valid justification for this FWA.

37.3 In her draft FWA the claimant said that the reason for this request was because she wanted to monitor her son's health and she would be stressed about her child's wellbeing as a result of being separated from him. This suggested that the claimant remained intent on having her child at home whilst she was working. We agree with Mr Flack that this was not an appropriate reason to support her FWA. We also accept his evidence that he advised her to remove this wording because he wanted to avoid any liability attaching to the respondent in the event that the claimant's son became unwell whilst she was homeworking.

38. Ms Chhatwal met with Ms Mison on 15 May 2018 to discuss the claimant's FWA when she noted her concern that the claimant had been looking after her sick son instead of working from home – she was also concerned that the claimant was not being frank about her childcare arrangements. Nevertheless, she told Ms Mison that she was minded to agree to this FWA.

39. There was another meeting between the claimant, Ms Chhatwal and Mr Flack on 17 May 2018 when the claimant agreed to amend her draft FWA. The claimant agreed in her evidence that her managers told her that they had made these changes to increase the chance of her FWA would be approved. She accepted that these changes were designed to shift the focus of her FWA from her child to increasing her productivity and wellbeing. She subsequently reported that this input had been "very helpful".

FWA

40. The claimant submitted her FWA on 21 May 2018. It did not refer to her initial informal agreement with Ms Chhatwal.

41. The claimant was told that it could take up to three months to process her application. Ms Chhatwal agreed to expedite this process within 28 days. A meeting was scheduled on 30 May 2018 to discuss her FWA. Ms Chhatwal had tried to schedule a meeting sooner but this had not been possible because Ms Mison was unavailable. The claimant thanked Ms Chhatwal for expediting her application.

42. The claimant met with Ms Chhatwal and Ms Mison to discuss her FWA on 30 May 2018. She was insistent that she needed two homeworking days. The claimant's childcare arrangements were discussed and she confirmed that a neighbour would care for her son on both days she worked from home. Ms Mison referred the claimant to the respondent's policies on emergency leave and parental leave, and Ms Chhatwal assured the claimant that she would be given time off if there was an emergency to care for her son.

43. The claimant's FWA was approved on 31 May 2018. This was based on the claimant's son being in nursery for three days a week and with a neighbour caring for him on the two days the claimant worked from home so that she would not have responsibility for childcare during her working hours.

44. The claimant says that her relationship with Ms Chhatwal changed for the worse after this. However, the person whom the claimant says treated detrimentally was the same person who supported her FWA, expedited the FWA process and agreed to it.

Issue (a): Consolidation of David Earrey's work in July 2018

45. When David Earrey, another Finance Analyst in the claimant's team, gave notice, consideration was given to the consolidation of his work when he left the business in early July 2018. In an email exchange on 4 June 2018 Ms Chhatwal told Ms Dobbyn that this work could be absorbed by another Finance Analyst, Rachel Holmes, and the claimant "could also pick up some additional tasks too". Ms Chhatwal did not discuss the claimant's capacity with her. She assessed that the claimant had spare capacity. We accept Mr Flack's evidence that the claimant's maternity cover in 2017 had a week's spare capacity each month and also Ms Chhatwal's evidence that this was why she felt the claimant was able to take on this additional work.

46. Ms Chhatwal emailed the claimant on 16 June 2018 to say that Mr Earrey's work would be absorbed into the team "for the time being", she had allocated tasks to the team and the main new task for the claimant was the resource recharges. She advised the claimant to book sufficient time with Mr Earrey to handover this work. Later that day Ms Chhatwal emailed the team with a breakdown of the work she had reallocated. She tabulated this work noting the time allocation which Mr Earrey had given each task. Although this was initially envisaged as being a temporary arrangement this reallocation became a permanent one.

47. The claimant complains that Ms Chhatwal allocated the bulk of Mr Earrey's work to her. She became responsible for the following work:

    47.1 Innate Recharges ("IR") i.e. recharging of resource costs to projects. This was a time-booking system. We accept Mr Flack's unchallenged evidence that the work involved was to create a journal by manipulating data from a list of names, project codes and hours and to add the cost centre and day rates. Mr Earrey had set aside 2 – 4 hours per month for this work.
    47.2 Reallocation of invoices for Moore Stephens and Mphasis (IT suppliers to the respondent) to the corrects budget. This work involved splitting the costs between projects based on back up data provided by suppliers. This had taken Mr Earrey approximately 10 minutes each month.
    47.3 Check WBSU end move applicable costs to budgets. This had taken Mr Earrey between 15 – 30 minutes each month.
    47.4 Resending timesheets. This was an ongoing task.

47.5 Raising project codes and resources on IR. This was an ongoing task.

48. In her evidence to the tribunal, Ms Chhatwal said that she absorbed 70% of Mr Earrey's workload with the remainder being spread across the team. However, relying on the times which Mr Earrey had ascribed to each task (which excluded the ongoing tasks) Mr Chhatwal absorbed just over 50% and the claimant absorbed 33% of this work. Taking account of the ongoing tasks which were also allocated to the claimant, it is likely that she had over 50% of the total work. Either way, the bulk of the work that was reallocated to the finance analysts went to the claimant and not Ms Holmes as Ms Chhatwal had initially intended. We do not find that this was a detriment because the work was within the claimant's scope of competence and she had spare capacity to absorb this new workstream which had taken Mr Earrey less than a day each month to complete.

49. Notably, Ms Chhatwal and Mr Carter were put at risk of redundancy on the same date i.e. 16 June 2018. We find that Ms Chhatwal knew that Mr Carter, who she says was often absent on sick leave, was going to be the one to be made redundant. This is revealed by the way in which she reallocated Mr Earrey's work. Although Ms Chhatwal had identified that Ms Holmes had spare capacity, she allocated very little of Mr Earrey's work to Ms Holmes. This was because she knew that she would need to reallocate some of Mr Carter's work to Ms Holmes if and when he was made redundant. Ms Holmes was also a good fit for this work as she had been working on the GIS budgeting process which overlapped with Mr Carter's work. This was in fact what happened. When Mr Carter was made redundant at the end of June 2018, Ms Chhatwal allocated around 30% of his workload to Ms Holmes. Ms Chhatwal absorbed the bulk of Mr Carter's work.

50. Even had we found this work reallocation to have been a detriment we would not have found that it was done on the ground that the claimant had made a FWA. Ms Chhatwal allocated more of Ms Earrey's work to the claimant because Ms Holmes had been earmarked to take over some of Mr Carter's work and the claimant was the only other finance analysist who had spare capacity to pick up this work.

Mid-year PMP

51. At her mid-year performance review ("PMP") the claimant was given a "3" rating by Ms Chhatwal which meant she had been deemed to have met the expectations of her role and her objectives. In her evidence, Ms Chhatwal agreed that the claimant's volume and output was comparable with her peers in June 2018. We accept the claimant's unchallenged evidence that she had been given a "3" rating for each of her previous mid-year and end of year PMPs.

Issue (b): Additional work between July – December 2018

52. The claimant complains that she was given the following additional work from July 2018:

52.1 Resending timesheets. This work was fully handed over to the claimant in August 2018. She said that this work took 5 hours a month.

52.2 Dealing with queries arising from IR. Ms Chhatwal agreed that this work was undertaken by the claimant and Ms Holmes. We accepted Mr Flack's evidence that this work typically involved sending a timesheet or reallocating a project code and would take a maximum of 2 hours a month.

52.3 Raising project codes and resources on IR. This was fully handed over to the claimant in August 2018. She said that this work could take up to 2 – 3 hours a month.

52.4 Dealing with queries generated on the Mphasis and Moore Stephens work.

53. Although Ms Chhatwal had not told the claimant that she would be required to deal with queries generated from IR, Mphasis and Moore Stephens, her responsibility for this work flowed from the fact that she had end-to-end responsibility for these processes. This additional work flowed from the reallocation of Mr Earrey's work which we have found was not done on the ground of the claimant's FWA. Nor we find that this was a detriment as this work was within the claimant's scope and she had capacity to deal with it.

54. The claimant says she was now working over 48 hours each week and over 60 additional hours each month. She says that none of her colleagues were working as many hours. We accept Ms Chhatwal's evidence that the claimant never complained about this to her. The only evidence of late working by the claimant were emails on 14 and 15 August 2018 and a Skype conversation at year-end on 21 December 2018. There was no contemporaneous documentary evidence of additional hours being routinely worked by the claimant or of her complaining about her working hours prior to her grievance in March 2019. It is also notable that when the claimant canvassed her colleagues, Ms Holmes and Yetunde Koledoye, another IT Finance Analyst, neither agreed that she had complained about working late or long hours.

IR work

55. The IR work generated a lot of queries and took the claimant a couple of days a month to complete. A reason for this was that the claimant was processing timesheets for two-thirds of the EO team i.e. approximately 120 staff, instead of the smaller EO Change Management Unit ("MU"), which was around 50-strong. Although Mr Earrey had been dealing with the larger cohort, the claimant was only required to deal with the smaller EO Change MU. This was clearly set out in the handover notes written by Mr Earrey which the claimant received on 18 July 2018. The claimant was struggling with this work which had only taken Mr Earrey 2 – 4 hours each month.

56. The claimant complained about the IR work at monthly team meetings and at her one-to-one meetings with Ms Chhatwal. Although Ms Chhatwal denied this, she agreed that the claimant had raised this issue at one team meeting and Ms Holmes and Ms Koledoye also agreed that

she raised the issue of offshoring some of her work to the Group Shared Services Centre ("GSSC").

57. In late July 2018, Ms Chhatwal suggested that the claimant discuss the difficulties she was having with the IR work with Ms Homes as she was working on a similar project. It took the claimant almost three months to do this. She then met with Ms Chhatwal and Ms Holmes in November 2018. The claimant agreed that from this date she understood how she could simplify the IR work. Had the claimant discussed this work with Ms Holmes earlier she would have reached this point sooner. The claimant then created a new model for this work in January 2019 based on what Ms Holmes had been doing.

58. In relation to outsourcing this work, we accept Ms Chhatwal's evidence that this was not suitable because the IR work required manual intervention. In order to outsource this work it had to be streamlined to limit this manual work.

59. Ms Chhatwal and Mr Flack felt that the claimant took too long to identify the problems she had with the IR work and to understand that she was unnecessarily complicating it. Nor had she acted proactively to streamline this work.

Issue (c): One-to-one meetings between July – December 2018

60. It is agreed that in the first half of 2018 the claimant's monthly one-to-one meetings with Ms Chhatwal took at least one hour. The claimant complains that Ms Chhatwal reduced the amount of time of these meetings in the second half of 2018. She says that after she made her FWA these meetings were much shorter and sometimes lasted for only 15 minutes. Ms Chhatwal agreed that some of these meetings were shorter but only by 10 minutes.

61. We accept Ms Chhatwal's unchallenged evidence that over the same period she had more ad hoc meetings with the claimant. This was because the claimant needed support with the additional work she had been given. This is consistent with the claimant's evidence that she was struggling with her workload and her ongoing concern that she had been allocated too much work. We therefore find that whilst the duration of their one-to-one meetings between July – December 2018 reduced, Ms Chhatwal provided additional support to the claimant at other meetings over the same period to discuss specific areas of work. The claimant therefore received more support and not less overall. We do not find that this put the claimant at a disadvantage and did not therefore amount to a detriment. It is notable that the claimant did not subsequently complain about this issue in her subsequent grievance.

Issue (d): Handovers between July – December 2018

62. The claimant complains that Ms Chhatwal failed to ensure that colleagues picked up her work during her sick leave and holidays between July and December 2018. She did not specify any dates or any work which was not handed over.

63. The claimant says a consequence of this was that she was compelled to work from home on days when she was on leave. In her evidence, however, she agreed that she was never instructed to work on these dates. We were taken to correspondence in which the claimant communicated with Ms Chhatwal on leave days and was told to log off and rest.

64. The claimant also agreed that Ms Chhatwal picked up some of her work which had urgent deadlines. She also accepted that she requested leave "quite often" at late notice when her son was unwell. This made it more difficult to handover work, although we accept Ms Chhatwal's unchallenged evidence that she ensured that any urgent work was picked up in these circumstances. We also accepted Ms Chhatwal's unchallenged evidence that before the claimant took any planned leave they considered whether any of her work would need to be covered.

65. Ms Chhatwal met with Ms Mison on 11 September 2018 to discuss the claimant's attendance. Her attendance in August and September 2018 was erratic. Her son was often sick and, as noted, she had requested leave or homeworking at short notice. She had asked to work from home on nine Mondays. She was also having miscellaneous medical problems and her timekeeping was poor.

66. The claimant had a miscarriage in October 2018. In the same month she was diagnosed with depression, stress and anxiety by her GP and prescribed anti-depressants. She did not report this to her managers or HR at the time.

67. By late 2018 the claimant's managers were concerned about her performance. The claimant had struggled to meet some of her deadlines. Ms Chhatwal chased her about the recharges journal in late September 2018. In November 2018 the claimant missed her month-end deadline. The claimant was also late meeting her year-end deadline when Ms Chhatwal and Mr Flack had to assist to complete this work.

68. In a Skype conversation between Ms Chhatwal and Mr Flack on 21 December 2018 concerning this year-end work, Ms Chhatwal noted that the claimant in running late was "letting the whole team down"; Mr Flack commented "what a surprise" and told her "make a note so you don't forget for her performance meeting when you give her the score". This was a reference to the provisional year-end PMP rating of "2" which Ms Chhatwal had given the claimant and which meant that she deemed the claimant to have "partially met expectations". If ratified by Ms Dobbyn and her manager, this would have several adverse consequences for the claimant: she would be put on an informal performance improvement plan; forfeit a pay rise and any bonus paid at her manager's discretion capped at 50%. This would also impact on her opportunities for promotion.

Issue (e): Year-end PMP review in February 2019

69. When Ms Chhatwal was promoted in January 2019, Mr Flack took over as the claimant's line manager. Ms Chhatwal conducted the claimant's

year end-PMP in February 2019. Ms Chhatwal confirmed the claimant's "2" rating.

70. Ms Chhatwal was required to benchmark the claimant's performance against her peers

71. We find that the claimant was given this rating because her managers felt that she was underperforming in her role in comparison to her peers. Both Ms Chhatwal and Mr Flack felt that there were issues with the claimant's performance, she was struggling with a lower workload than her peers and was less self-sufficient. Ms Chhatwal and Mr Flack felt that the claimant was not proactive nor was she taking a more global and strategic view on the figures she was processing. The reallocation of Mr Earrey's work was also a factor because the claimant had struggled to manage this new workstream. We do not therefore find that the claimant was given this rating on the ground that she made a FWA.

72. Ms Chhatwal identified two issues in particular:

    72.1 The claimant had not acted proactively in challenging the project managers on their forecasts on the Small Change Business ("SCB") portfolio. Jenny Banerjee, who was the Portfolio Manager agreed. The claimant understood that the project managers had the final say on the figures and felt that she had limited scope to challenge them. The claimant failed to grasp the importance of the adjusted forecast figures which she had greater scope to challenge. Ms Chhatwal therefore concluded that the claimant had failed to take the initiative and challenge the project managers to free up funds that could otherwise have been reallocated.

    72.2 The claimant had taken a correspondingly narrow approach to her role in focussing on whether the SCB figures were correct. She had failed to understand the wider governance implications. The claimant was responsible for completing monthly reports which she discussed with Ms Chhatwal and Ms Banerjee before presenting them at the monthly SCGG meeting. When Ms Chhatwal had agreed that the claimant could take leave on the same day as the SCGG meeting in December 2018, it had not occurred to the claimant to provide any handover on the figures. She had just sent the figures to Ms Banerjee. Ms Chhatwal felt that this demonstrated that the claimant had failed to understand that her role was not merely to present the figures but to challenge them. As Ms Chhatwal had noted at the time, it was important from a governance perspective that someone from finance was at the meeting to interrogate the figures.

<u>Issue (f): Allocation of additional work from February 2019</u>

73. In February 2019 the claimant was given the additional responsibility for the Run Portfolio. This had previously been undertaken by an IT Finance Manager. She says that she was given higher level work which was inconsistent with her "2" rating and the scope of her role was extended without any promotion. She was also concerned that without adequate training she was being set up to fail. The claimant also complains that

there were no handover notes for this work. The claimant says that the decision to reallocate this work was made by Mr Flack because he had a personal relationship with Ms Chhatwal and in this way it was related to her FWA.

74. Although the claimant says that 40% of this work was within her scope, we accepted Ms Chhatwal's evidence that all of the work allocated to her was within the claimant's competency as a finance analyst. The claimant's maternity cover had assisted in this work in 2017 and this work is now being done by another Finance Analyst, Rachel Ojo.

75. The decision to allocate this work to the claimant was taken by Ms Dobbyn. The intention had been to transfer this work to the claimant in July 2018 on the basis that the SCB work would be transitioned to project managers by Q3. This did not happen until early 2019 because of the delays in transitioning the SCB work. Ms Chhatwal had instead picked up this work, in the meantime, because she had capacity and not because it was higher level work.

76. By the date that the Run Portfolio work was allocated to the claimant she was no longer responsible for SCB work and she agreed in evidence that this freed up "quite a lot" of time. The IR work had also been simplified and took up less of her time. In respect of this new workstream, the claimant was responsible for budget reporting and this involved liaising with the budget report holders some of whom were in leadership positions. However, Ms Chhatwal continued to be responsible for reporting to the leadership team at governance meetings on this work. We accepted Mr Flack's unchallenged evidence that this work was never fully handed over to the claimant by May 2019 when the claimant went on leave followed by maternity leave.

77. It is accepted that there were no handover notes. In relation to training, Ms Chhatwal provided some training by going through transactions with the claimant. There was an intention for the claimant to shadow Ms Chhatwal but this did not happen.

78. We do not find that the allocation of this work to the claimant was a detriment. This work was within her competence and she had capacity to complete it now that the SCB work had transitioned to the project managers and the IR work had been simplified. Nor do we find that she was disadvantaged by the lack of handover notes or training. The claimant was able to write up her own process notes and request training. However, even had we found that this was a detriment we would not have concluded that it was because of her FWA. The reason for this allocation of work was that the claimant had capacity and it was within scope of her role. This was a similar to the reallocation of Mr Carter's work to Ms Holmes in 2018.

PMP review

79. When the claimant queried challenging her PMP rating she was told by HR that there was no right of appeal. Instead a meeting was arranged with Mr Flack and Ms Dobbyn. A meeting was also arranged between the

claimant and HR to discuss this. However, when Mr Flack challenged this, HR cancelled it. Although Mr Flack says that he did not instruct HR to do this this is likely to have been the effect of his email.

80. When the claimant met with Mr Flack and Ms Dobbyn on 12 February 2019 her "2" rating was upheld. Mr Flack emailed the claimant on 19 February 2019 to explain that the rating was based on her output. She needed to take greater ownership in driving improvements and understand outcomes. In his evidence to the tribunal, which we accept, Mr Flack said that his focus was behaviours, accountability, responsibility and ownership. He looked at the value the business was getting from the claimant compared with other finance analysts. He felt that the claimant had not taken ownership by failing to take any steps to streamline the IR work so that it could be offshored to GSCC. In relation to understanding outcomes, he referred to the SCB portfolio and the claimant's focus on funds returned, which he said did not impact on the balance of available monies, instead of the adjusted forecast, which did.

Sickness absences

81. The claimant had sickness absences on 13, 18 and 19 February 2019. This meant that she had taken a total of 10 days' sickness absence in the previous 12 months. She was only entitled to be paid for eight days' sick leave over this period. As the claimant's manager, Mr Flack had discretion to pay the claimant for the additional two days' sickness absence. HR contacted him on 6 March 2019 to query whether this additional leave would be paid and he replied the next day to say "I don't see why we should pay, QBE hasn't had the benefit of the resource for the days…" We find that Mr Flack was unsympathetic towards the claimant's sickness absences as he viewed this as unused resource.

82. By this date the claimant had taken another two days of sick leave i.e. on 4 and 5 March 2019.

83. The claimant met with Mr Flack later that day, on 6 March 2019, to discuss her sickness absence when he told her that she would not be paid for the additional sick leave she had taken. The claimant was surprised by this because she assumed that her sickness record would reset on 1 January.

84. Later that day the claimant lodged a formal grievance, although she did not complain about her sick pay. Her grievance was focused on her workload, her relationship with Ms Chhatwal and her PMP rating.

85. On 11 March 2019 the claimant informed Mr Flack that she was pregnant. Mr Flack did not consider or enquire whether the claimant's recent sickness absences were pregnancy-related and her pay for her recent sickness absences was not reinstated.

86. The claimant was too unwell for work the next day. She reported to Mr Flack that she had stomach cramps. She says this was related to her pregnancy, although she did not tell Mr Flack this. Although Mr Flack did

not recall any discussion, in evidence, he said that he assumed that the claimant's sickness absence on 12 March 2019 was pregnancy-related.

Antenatal appointments

87. The claimant emailed Mr Flack on 13 March 2019 to inform him that she had two antenatal appointments on 19 and 21 March 2019, and she asked to work from home on 19 March 2019. 21 March 2019 was a homeworking day when the claimant said that she would work until 3.00pm. Mr Flack replied to agree and wish her well.

88. On the same date she met with Ms Mison. In her contemporaneous file note Ms Mison recorded that the claimant had been taken off anti-depressant medication because of her pregnancy, she was having withdrawal symptoms and had been referred to a counsellor by her GP. Ms Mison also noted that the claimant had referred to her grievance and regretted making a FWA as her relationship with Ms Chhatwal had deteriorated. Whilst this may have been Ms Chhatwal's genuinely held view we have found for the reasons already given that Ms Chhatwal did not treat the claimant detrimentally on the ground that she made a FWA.

Issue (aa): Telephone call on 21 March 2019

89. On 21 March 2019, the claimant telephoned Mr Flack from hospital to report that her antenatal appointment was running an hour late. In her evidence to the tribunal, she said that Mr Flack told her that she had taken too many sick days and antenatal appointments, and this was affecting her output, and she was letting the team down. The claimant said that because of this she rushed back home to work and missed her appointment. Mr Flack was unable to recall this telephone call. In his evidence to the tribunal, he said that the claimant's sickness absence was not an issue at this stage and he could not recall ever telling the claimant that her sickness was affecting her work. He also said that this did not sound like something he would say, although he was unable to categorically deny it. In relation to antenatal appointments, he said that the claimant had only had two antenatal appointments at this point so that this too was not an issue for him.

90. We do not accept Mr Flack's evidence. We find that he complained about the amount of time that the claimant was taking on sickness absences and on antenatal appointments. We make this finding because:

    90.1 The claimant disclosed a record of antenatal appointments from which we accepted that she did not attend this appointment as it was not listed. She therefore missed her appointment. We do not feel that the claimant would have taken this step lightly. Although her pregnancy was not at this stage deemed high-risk, she was in the first trimester and she had suffered a miscarriage in October 2018. She had discussed her miscarriage a week earlier with Ms Mison. She was clearly mindful of this. We find that she missed her appointment because she felt compelled to do so.

    90.2 We find that the claimant left the hospital when she did because Mr Flack complained about the amount of time she had been away

from work on sick leave and antenatal appointments and the impact on her output and her team.

90.3 The claimant's sickness absences were an issue for Mr Flack and the respondent at this stage: the claimant had exceeded her entitlement to paid sick leave over the previous 12 months and Mr Flack had met with her on 6 March 2018 to discuss this issue with her.

90.4 We also take account of Mr Flack's unsympathetic view that the claimant should not be paid for sickness absences as the business had had no benefit from her on these dates. This is consistent with the claimant's evidence that Mr Flack was unsympathetic towards such absences as they were unproductive.

90.5 This is also consistent with a comment that Mr Flack made to Ms Mison later that month about the impact of the claimant's absences, including those on 4, 5 and 12 March 2019, on her colleagues, which was that "other members of the team have had to pick up her work at short notice causing issues in the team…"

90.6 The comments that Mr Flack is alleged to have made were also consistent with his evidence in relation to the claimant's performance, including about her output. It is likely that he used this language.

91. We find that this was detrimental to the claimant. Not only did these comments upset her they compelled her to miss an antenatal appointment at an early and potentially critical stage of her pregnancy. We find that an effective cause for this comment was the fact that the claimant's antenatal appointment. We also find that an effective cause for these comments was that the claimant had taken sickness absences which included her absence on 12 March 2019, which Mr Flack assumed was pregnancy-related and on 4 and 5 March 2019 which were also likely to be pregnancy-related.

Issue (aa): Meeting on 25 March 2019

92. The claimant and Mr Flack met on 25 March 2019 when they discussed her sickness absences. The claimant alleges that Mr Flack repeated the same comments that he made on 21 March 2019 which he denies. Having already found that Mr Flack made critical comments about the claimant's sickness absences and her antenatal appointment on 21 March 2019 we find that it is likely that he repeated these comments at this meeting. We prefer the claimant's evidence over Mr Flack's for the same reasons we have given above. This was only four days after the incident on 21 March 2019 and the impact of the claimant's absences on her output and on her team live remained a live issue for Mr Flack.

Issue (g): Grievance investigation and outcome

93. Peter Scarf, Senior Legal Counsel, was appointed to investigate the claimant's grievance. He had no previous experience of conducting such an investigation. He received no formal grievance training but met with Ms Mison who advised him on the process. The claimant attended a grievance investigation hearing with Mr Scarf on 20 March 2019. Mr Scarf also interviewed Mr Flack and Ms Chhatwal as part of his investigation.

He then wrote to the claimant on 4 April 2029 when he dismissed her grievance.

94. The claimant complains that Mr Scarf failed to investigate and uphold her grievance because she made a FWA. She says that this was because he had a personal relationship with Ms Dobbyn. Mr Scarf denies this. He sits on the same floor as Ms Dobbyn but they cannot see each other from their desks. They are seated five banks of desks apart. Mr Scarf says that in four years he has spoken to Ms Dobbyn twice. He denied speaking to Ms Dobbyn about this grievance. We accepted his evidence.

95. In respect of the investigation, the claimant's complaint is that Mr Scarf failed to interview Ms Gough or Ms Banerjee as he had agreed to do at the grievance hearing. This action was recorded in Ms Mison's note of the hearing. We accepted Mr Scarf's evidence that he had only agreed to consider speaking to these potential witnesses and concluded that this was unnecessary when he read the additional documents which the claimant had given him. This was the reason why he did not investigate Ms Gough and Ms Banerjee. Had we been required to make findings on this, we would not have found that the failure to interview these potential witnesses amounted to a detriment because they were both interviewed as part of the appeal investigation which resulted in the same outcome as Mr Scarf's investigation.

96. Nor do we find that Mr Scarf dismissed the claimant's appeal on the ground that she made a FWA. We accepted that having carried out his investigation, he concluded that these complaints were unfounded.

Issue (bb): Meeting in early April 2019 and email on 12 April 2019

97. From the correspondence we were taken to it did not appear to us that the claimant told Mr Flack or HR that she had missed the appointment on 21 March 2019.

98. The claimant emailed Mr Flack on 11 April 2019 to tell him that she had antenatal appointments on 16 April 2019 and 2 May 2019. She asked to work from home on the first date. Mr Flack replied the next day to agree when he noted "I have been asked by HR if there is a reason why you are having more appointments than is routine?" The claimant complains that in putting this question to her Mr Flack was complaining that she was taking too many antenatal appointments.

99. The claimant also complains that Mr Flack made the same complaint at a meeting earlier that month although she was unable to say when. It is notable that when she cross-examined Mr Flack she put her allegation a different way i.e. he had told her that her antenatal appointments were not realistic. Mr Flack denies this and in his evidence to the tribunal he said that he did not recall meeting with the claimant between 25 March – 9 May 2019.

100. We accept Mr Flack's evidence that Ms Mison had advised him to query the claimant's antenatal appointments during a meeting with her which took place between the claimant's email on 11 April 2019 and his reply

the next day. We also accept that he understood wrongly that the claimant was having scans instead of other antenatal appointments which had led HR to query this.

101. The claimant replied on 25 April 2019 to say that she did not understand why HR were querying her appointments. She listed the four appointments which she had requested time off for. Mr Flack then replied to say that the confusion was that HR understood that scans were only required at 12 and 20 weeks then at week 36 if there was a risk of a breach. This appeared to us to have been Mr Flack's confusion. The claimant responded to say that she was happy to provide evidence of her appointments. In the end, Mr Flack felt that the claimant was being defensive and decided not to pursue this issue.

102. We do not find that Mr Flack's comments in which he was seeking to clarify why the claimant required four antenatal appointments amounted to a detriment. This did not put the claimant at a disadvantage. Mr Flack was not criticising the claimant nor was he telling her, on this occasion, that she was taking too many antenatal appointments. He was following reasonable HR advice.

103. The claimant had a return to work meeting with Mr Flack and Ms Mison on 9 May 2019 when they agreed that she would be paid for all sick leave up to 24 May 2019. The claimant submitted a MatB1 form confirming that her child was due on 22 September 2019 and she would commence maternity leave on 8 July 2019. It was agreed that the claimant would start and finish work earlier on her office days to avoid peak commuting times. To reduce her workload she was excused from the May month-end process. The claimant agrees that Mr Flack was supportive of her and her pregnancy from May 2019.

Issue (h): Grievance appeal outcome

104. The claimant appealed the grievance outcome on 12 April 2019. Her appeal was heard by Nick Menear, then Director of Underwriting Operations, on 15 May 2019. Mr Menear conducted his own investigation and dismissed the claimant's appeal. He wrote to the claimant on 14 June 2019 to confirm this outcome.

105. The claimant says that her appeal was dismissed on the ground that she made a FWA on the basis that Mr Menear had a personal relationship with Mr Flack. She provided no evidence for this. We accepted Mr Menear's evidence that he did not have a personal relationship with Mr Flack. We also accepted Mr Flack's evidence that he had never spoken to Mr Menear outside of work. In relation to the claimant's appeal, Mr Menear said that he had spoken with Mr Flack twice, firstly as a courtesy to inform him that he had been appointed appeal manager and secondly when he interviewed him as part of his investigation. We do not find that the claimant's grievance appeal was dismissed on the ground of the claimant's FWA. Mr Menear conducted his own investigation and concluded that the claimant's complaints were unfounded.

106. By this date the claimant had been on annual leave since 28 May 2019 and she remained on leave until she went on maternity leave on 8 July 2019.

107. We accepted the respondent's evidence that the claimant's maternity cover left after two months as there was not enough work to occupy a full-time role. The claimant's work has since been reallocated across the remainder of the team.

Conclusions

Flexible working detriment

108. The claimant contends that the alleged treatment at issues (a) – (h) was done on the ground that she made a statutory flexible working request on 21 May 2018.

108.1 We have found that issue (d) fails on the facts.
108.2 We have found that issues (a), (b), (c) and (f) were not detriments.
108.3 In respect of issues (e), (g) and (h) we have found that this treatment was not done on the ground that the claimant made this flexible working request.

109. This complaint fails.

Pregnancy discrimination

110. The claimant contends that the alleged treatment at issues (aa) and (bb) was because of her pregnancy.

110.1 We have found that issue (bb) fails on the facts.
110.2 We have found that issue (aa) succeeds.

111. Therefore this complaint succeeds in part in relation to issue (aa) only.

Jurisdiction

112. It is not necessary to make any findings on jurisdiction because of our findings above.

Remedy

Injury to feelings

113. The claimant seeks only damages for injury to feelings.

114. Having considered the guidance in Vento v Chief Constable of West Yorkshire Police (no. 2) [2002] IRLR 102 and the Presidential Guidance: Vento Bands (2017) as updated by the Second Addendum (March 2017), we have concluded that the discrimination found falls within the middle of the lower Vento band and that it would be just and equitable to make an award to the claimant for injury to feelings of £4,000.

114.1 The discriminatory conduct we have found was discrete and of limited duration i.e. comments made by Mr Flack on 21 & 25 March 2019. The claimant agreed from May 2019 that she was supported by Mr Flack and the respondent in relation to her pregnancy.

114.2 We find that Mr Flack's comments on 21 & 25 March 2019 upset the claimant. He was criticising the claimant for her output and the impact on her team and he linked this to her absences from work which included her antenatal appointments and pregnancy-related sick leave.

114.3 We have found that Mr Flack's comments on 21 March 2019 not only upset the claimant but compelled her to miss an antenatal appointment at an early and potentially critical stage of her pregnancy.

114.4 We also take account that the claimant was at this time suffering with withdrawal symptoms from the cessation of antidepressant medication and she had been referred to a counsellor by her GP. We do not find that Mr Flack comments caused these issues but it is likely that they exacerbated them.

Interest

115. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Under regulation 2 the tribunal shall consider whether to award interest and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

116. Interest at 8% on £4,000 is £0.88 per day. We therefore award the claimant interest of £0.88 per day from 21 March 2019 until the date of this judgment.

_____

Employment Judge Khan

15 May 2020

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 May 2020

FOR EMPLOYMENT TRIBUNALS