EMPLOYMENT TRIBUNALS

Claimant: **Ms J Forbes**

Respondent: **Single Homelessness Project**

JUDGMENT

The claimant submitted an application dated **28 February 2020** for reconsideration of the judgment sent to the parties on **18 February 2020.** That judgment has been reconsidered without a hearing. The original judgement has not been varied or revoked as a result.

REASONS

Background

1. The claimant made a formal application on 28 February 2020 for a reconsideration of the reserved judgment on liability made in her case. The judgment was promulgated and sent to the parties on 18 February 2020 and therefore the application for the reconsideration was received within the time lime set out under Rule 71 of the Tribunal Rules.

2. The reserved judgment dismissed the claimant's claims of pregnancy discrimination contrary to section 18(2) of the Equality Act. It was reached following a hearing held in public over the course of three days from 14-16 January 2020. The claimant attended the hearing and represented herself.

3. I decided that it was in the interests of justice that for me to reconsider the judgment.

4. As required under Rule 72(1) I sent a notice by email to the parties asking them for any response to the application by 30 March 2020 and seeking the views of the parties on whether the application could be determined without a hearing.

5. I have determined the matter without a hearing. Both parties have provided lengthy written submissions.

6. I apologise to the parties for the length of time it has taken to complete the reconsideration exercise. The COVID-19 pandemic has meant that I have been allocated to other duties.

Amendment to Claim

7. In her application, the claimant refers to a discussion that took place at the hearing about a possible amendment to her claim. She has not recorded it correctly. However, as we have not referred to it in our reserved judgment, it is important that we set out the correct position.

8. On hearing the claimant give evidence, (part way through her evidence) the tribunal panel considered that allegation 1.7 might need to be reframed as a victimisation claim. The claimant appeared to be alleging that her line manager only raised the issue of her poor performance in the meeting held on 20 August 20 in response to the claimant having made a complaint about the line manager.

9. We raised the possibility that allegation 1.7 was better understood as an allegation under section 27 of the Equality Act 2010 with the parties. The claimant agreed that she wished to the complaint to be considered in this way. The respondent objected to the amendment.

10. The complaints that the claimant made about her manager (and others) do meet the definition of a protected act under section 27 of the Equality Act because the claimant was alleging that she was being discriminated against because of her pregnancy.

11. When considering a claim under section 27 of the Equality Act, the tribunal is required to undertake a similar assessment when considering a claim under section 18 of the Equality Act. We have to ask ourselves, did the respondent subject the claimant to a detriment because the claimant did a protected act.

12. Our conclusion in relation to allegation 1.7 is at paragraph 200 of the judgment which says:

> *"…..the reason the respondent behaved in this way [i.e. raised performance concerns with the claimant] was not because the claimant was pregnant. The reason the respondent behaved as it did was because it had genuine concerns about the claimant's performance which it felt it needed to raise with her to ensure that all sides had a clear understanding of each other's concerns. Similarly, we do not find that the respondent raised the concerns in order to retaliate against the claimant for raising concerns about Ms Daybicharran*."

13. It is clear from our conclusion that we considered that the respondent had genuine concerns about the claimant's performance and this is what motivated it to raise them with her at the meeting on 20 August 2018. We concluded that the respondent's action were not because the claimant was pregnant, nor were they because the claimant had raised concerns about Ms Daybicharran. Although this paragraph in the judgment does not

expressly say that any complaint of victimisation would therefore not succeed, this was what we intended, and I accept we should have been clearer in saying so.

Additional Points by the Claimant

14. The claimant uses the paragraph numbers of the judgment to make a large number of additional points in her application. I have considered each of these and attach my observations in an appendix to this judgment, setting out her points and responding to them. For the sake of completeness, my observations need to be read in conjunction with the original judgment

15. Having been through each of the points raised by the claimant, I am satisfied that she has not raised any points that lead me to consider that there is a need to vary or revoke the original judgment in the interests of justice. I am satisfied that nothing that the claimant has said places doubt on any of the findings of fact or legal conclusions made in the original judgment.

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Employment Judge E Burns
23 September 2020

JUDGMENT SENT TO THE PARTIES ON

24/09/2020.

FOR THE TRIBUNAL OFFICE

APPENDIX

2. *The Summary states that I withdraw one of my claims as it was paid which I was unaware of and would like to see the evidence of this.*

The case management summary of the preliminary hearing held on 26 September 2019 records that the claimant had withdrawn one of her breach of contract claims. If she had done done so, the tribunal would not have been able to consider such a claim as it can only hear breach of contract claims from employees who have left their employment.

27. *Risk of Preeclampsia is a high-risk pregnancy as a maternal woman as this is a danger to your life and unborn child's life.*

We acknowledge and accepted that the claimant's pregnancy was high risk. This fact was never in dispute.

30. *I the claimant asked to be referred to Occupational Health, which was agreed in court, as SHP did not initiate this within the protected period so therefore they did not see that this appointment was urgent and this is discrimination.*

The respondent's behaviour with regard to referrals made to occupational health was not an issue the tribunal was asked to consider. In any event, we found as a matter of fact that one referral was made in any event and a second referral would have been made if the claimant had not stopped working.

32. *During the hearing I the claimant explained why I sent the email to Mr Campbell, as Miss Daybicharran agreed during the hearing she told me to email Mr Campbell about seeing clients. I would also stress that I emailed Mr Campbell as I felt pressured by Miss Daybicharran and I did not once say during court or within the evidence that I volunteered so this is incorrect. I would like to know why Judge Burns has concluded that I was not put under pressure. As I have pointed out and given evidence in the past, the reason why I did not bring this to the attention of my managers is that once you put a complaint in about this member of staff Miss Daybicharran she becomes nasty and mistreats you. This was agreed in the hearing that once I put my complaint in Miss Daybicharran made allegations that I lied about my where about at work and started to micro manage me and also informed my service manager of things that did not happen, just to make me feel uncomfortable and to convince my Service manager that I could not do my job, which was all discussed during the hearing. I was pressured and discriminated against as Miss Daybicharran was not happy that she had to carry my caseload.*

Our factual finding on this point was based on the evidence we heard. It was not a perverse conclusion for us to reach and is explained in the judgment if this section is read as a whole.

33. *I am not a fulltime worker so this should not be compared. I work 18 hours a week so my caseload should only be 8-10 clients.*

We gave the figure for a full time link worker in order to make a pro-rated comparison. We did not make a comparison with a full time worker.

35. *It was highlighted by Judge Burns herself that if an employee takes a break or comes in 10-15 later they can make up the hours. When Mr Campbell was asked if he had discussed this with me, he said "Yes this conversation did happen" and that is why I would input 10 or 15 minutes breaks on my time sheet. So this was resolved, as Mr Campbell admitted to confirming this with me during the hearing, but he then informed me during the protected period that I could not take breaks, even though I was told I could; and the evidence shows this. I was discriminated against, as I needed to take regular breaks more than other staff due to being pregnant.*

It was not clear to us that the way in which the claimant was required to complete electronic timesheets and/or whether she was allowed to take a lunch break of she worked after 1pm was ever resolved in the sense that both parties reached a shared understanding of the position. It was not necessary for us to resolve this in order to reach a view on the particular allegations that the claimant was forced to work longer hours than she should have. We found that the respondent allowed the claimant to take increased breaks.

49. *I the claimant was not paid in full, but this was struck out due to my claim not being put in on time; so this is incorrect information.*

Before us, the claimant did not dispute that she was paid in full between 23 July 2018 and 6 October 2018. The respondent deemed her maternity leave to have commenced on 7 October 2018.

84. *This is incorrect, as there is no evidence stating that Matt will send on the training we received. I explained during the hearing that, at this training session, I asked for the information to be sent on, which I was belittled for and it was not agreed; however Matt the trainer did send on what I had asked for after training, without agreeing to it, as we were rudely interrupted by Miss Daybicharran. If there is no evidence to Matt agreeing to this, this should not be in the summary. Miss Daybicharran was not happy that I asked for extra help and seemed to have enough of me wanted extra help and discriminated against me because I was pregnant by belittling me in front of work colleagues.*

Paragraph 84 sets out the evidence that Ms Daybicharran gave. Our factual conclusion is at paragraph 87. We preferred the evidence of the claimant on this point.

86. *As the claimant, I explained why I did not raise my Line Manager's behaviour during supervision; as I explained that, in the past when I have raised a complaint about my line manager, she has become very abusive and has made it uncomfortable in the work place, as was heard during the hearing (paragraph 89).*

In this paragraph we are simply noting a fact which was admitted by the claimant at the time and is admitted above. We took into account what she told us about why she did not raise the issue with her line manager.

89. *There is no evidence of this allegation that I was lying about my whereabouts, because Miss Daybicharran made this up, so that I would be dismissed, as she was upset about my complaint I put in about her. This allegation was untrue and was never proven and should not be in the summary without evidence.*

We made no finding that the claimant had lied to her line manager. We found that the claimant's line manager believed the claimnt had lied to her. We did not explore whether this belief was justified.

90. *During the hearing when I was giving my evidence and when I also was cross examining Miss Daybicharran about the mistreatment that occurred in 2017 whilst working at PRHA, I was told on 2 occasions by Judge Burns that this cannot be spoken about during the hearing and that we must keep to the point of the discrimination within the protected period. Therefore, this should not be in the summary without real evidence and if I was told that this has nothing to do with my discrimination, why has it been put in the summary that helped with the panel conclusion. This seems very unfair.*

We briefly referred to the earlier dispute in our judgment as this appeared to be part of the context for the difficult relationship between the claimant and her line manager. We made no findings as to any wrongdoing by either the claimant or her line manager in relation to the earlier dispute. It was not relevant for us to hear about it in any detail at the hearing.

95. *This event took place within the protected period, where I was belittled and felt uncomfortable during this. This comment was made due to me asking for further help during the protected period and Miss Daybicharran was annoyed by this, as she was aware I needed extra help due to being pregnant, working less hours and my health this is discrimination.*

We accepted that the claimant felt belittled. However, we concluded that the comment was not made because the claimant was pregnant and therefore the relevant legal test was not met. The claimant appears to be of the view that if we found something happened during the protected period her claim would be successful. This is not accurate. The test we applied was whether any treatment was <u>because of</u> the claimant's pregnancy, rather than during the period she was pregnant.

103. *I had stressed during court and within the evidence why I had not raised any issues with Miss Daybicharran whilst pregnant, as she becomes very confrontational and suffering with high blood pressure, this was not good for my health or unborn child.*

We recorded in the judgment, as a factual finding that the claimant did not challenge Ms Daybicharran. This is not disputed by the claimant. The panel took the claimant's explanation into account.

106. *I was told that the work had to be done before I left, so therefore that means if it takes five or 20 minutes it had to be completed. I have stressed several times why I did not react to this, as I felt uncomfortable communicating with Miss Daybicharran and due to my health and high risk pregnancy I did not bring this to the attention of my managers nor address it with Miss Daybicharran for the safety of my unborn child.*

This is evidence which the tribunal considered when reaching our conclusion.

125. *This was agreed before the TUPE, as it was confirmed during the hearing and it should have been noted that if SHP could not upheld this due to my health within the protected period, I should have been given the choice to transfer over or not. It was confirmed during the hearing from the Director himself, Mr Howard Rosenthal, that SHP have issues with communication and transferring information and therefore this affected me in the protected period, which is unfavourable. I was discriminated against due to me having extra breaks due to my pregnancy and this was removed because Miss Daybicharran made an allegation that I took a 30 minute break and I did not as I was standing outside the office door getting air due to feeling unwell.*

We found that the respondent had reassured the claimant that it would accommodate her needs during the TUPE consultation. This was at an early stage of her pregnancy before the need to access a room on an ad hoc basis whenever she became unwell had been confirmed.

132. *Several discussions between Miss Daybicharran and myself would had not been evidenced, due to the manner I was spoken to by her. Miss Daybicharran admitted during the hearing that we had several meetings, but there is no evidence of this and that is the reason.*

The claimant's point is not clear. We heard oral evidence from both her and Ms Daybicharran. The claimant cross-examined Ms Daybicharran.

133. *This is because Finlay said that I could access the room and Miss Daybicharran said I could not have access to the room. This was an ongoing battle about Unit 6 and this caused me a lot of stress and worry within the protected period, which is unfavourable behaviour due to being pregnant*.

The tribunal reached a different finding on this point. We preferred the evidence of Ms Daybicharran. It was not perverse or irrational for us to do so based on the evidence before us.

140. *I was asked several times from Mr Campbell, 5 times by Miss Daybicharran and twice by Miss Davis. I worked at SHP for 6 weeks before being signed off and was confirmed during court I was asked over 10 times to change appointments which is more than once a week I was asked. If you asked somebody or more than 3 occasions to change an appointment this is clearly harassment during the protected period because I was pregnant and therefore is discrimination.*

Our finding at paragraph 139 is that not all the discussions with the claimant concerned whether the claimant could change the appointments. There were also discussions about her providing evidence of the appointments. We drew a distinction between these.

142. *There is no evidence that states Mr Campbell advised me the claimant to screen shot my appointments and send them over, so there for this should not be in the summary.*

Mr Campbell gave this evidence orally and it was accepted by the tribunal.

148. *This outlines that Miss Daybicharran had asked me to change my appointments 5 times.*

Our finding was that the claimant was asked if she would consider changing her appointments 7 times in total. She was never made to change her appointments.

160. *I was asked over 7 – 10 times including by my service manager as he admitted to asking me several times about changing appointments within the 6 weeks, I worked at shp due to being pregnant, which I felt pressured. SHP have discriminated against me for having several appointments due to the nature of my pregnancy.*

The tribunal panel reached a different conclusion. The claimant has not provided any new evidence or indicated how our conclusion was legally incorrect.

162. *There is no evidence that states that when I was asked over 7 – 10 times about changing my appointments, that I agreed to this so therefore this statement is incorrect. I explained to SHP every time that I was asked, that my appointments could not be changed due to the nature of my pregnancy and on the occasion when I did ask the NHS, this was because of an upsetting conversation with Miss Davis, who again pressured me about changing appointments and if I could show evidence.*

The claimant said in her oral testimony, which was corroborated by some contemporaneous documentary evidence, that she initially thought she would be able to arrange her appointments for non-working times or days. She agreed to do this. However, as her pregnancy progressed she later learned that this was difficult to do and also, she formed the view that she did not want to change the appointments because of the increased risk. We record that she told her employer about her concerns in paragraph 164.

164. I constantly informed Miss Daybicharran and Mr Campbell why my appointments could not be changed as discussed during the hearing. There is no evidence of these discussions, but during the hearing, SHP admitted to asking me several times in the 6 weeks that I worked at SHP.

The tribunal's finding was that the claimant's underlying reason for not wanting to change her appointments was because she was concerned about the health of her child. We do not criticise her for this. It was an entirely

reasonable position for her to take. On her own evidence, she did not tell the respondent this was her reason until 25 July 2018. Instead she had told the respondent several times that she would ask about changing the appointments and/or had referred to practical difficulties only.

Unnumbered: *The evidence during court shows that I first asked about my Annual Leave in June 2018 I then brought it to Mr Rosenthal attention in August. Further evidence was produced during the hearing that SHP only looked into these 4 months later and took a further 9 months to inform me of their findings. HR Director Howard Rosenthal admitted during the hearing on 2 occasion that there is a lack of communication within their HR department and due to this my pay was affected and my AL was not rectified within the protected period. Why has this been contradicted due to me having my child early when the fact is I asked for my AL in the protected period; this was refused and this affected me, so this was not justified? This was not a genuine error that SHP withheld my AL because of my pregnancy.*

The tribunal panel made findings in connection with this issue. It was legally correct for the respondent to start the claimant's maternity leave when it did which was ultimately what led to the annual leave issue. (see paragraph 207).

166. *If an individual is asked more than 3 times, to change their appointment this is harassment and therefore this is unfavourable behaviour within the protected period because I was pregnant.*

The tribunal panel reached a different conclusion. The claimant has not provided any new evidence or indicated how our conclusion was legally incorrect.

169 *It was highlighted during the hearing that there was confusion, as it was a fact that SHP managers and HR department failed to transfer this information, as it was confirmed that there are communication issues within the HR department that again affected me in the protected period. HR manager, HR staff and my service manager were all aware but deliberately did not transfer this information because I was pregnant.*

There was no evidence before the tribunal that the respondent deliberately did not transfer the information about the claimant's entitlement to holiday because she was pregnant.

182. *This was unfavourable treatment within the protected period that led to discriminating against me without caring about my health and talking down to me that caused a lot of stress. Miss Davis did not rush to rectify this, which caused me further worry and states herself that this has been quite stressful which it should have never been as she should of supported me. It was only stressful because she discriminated against me and I tried my best to address this with her but she did not care. Miss Davis mistreated me because I was pregnant and wanted to make things hard for me during my time at SHP. This is clearly seen in the evidence.*

The tribunal panel reached a different conclusion. The claimant has not provided any new evidence or indicated how our conclusion was legally incorrect.

183. *This is factually incorrect was no discussion about my performance I was told as I was about to leave the meeting "Your performance will be addressed upon my return". This was said to cause me further stress during my pregnancy.*

The tribunal made a finding of fact that there was a discussion about the claimant's performance at the meeting on 20 August 2020.

192. *I did not accept that Miss Daybicharran's behaviour was ok during the hearing, as due to this unprofessional meeting I was admitted into hospital due to stress at work for being pregnant after being verbally attack by my line manager, which was addressed in court. How can the Panel have agreed that Miss Daybicharran did not act unprofessionally, if they are basing their findings on evidence? During this meeting, I was discriminated against for being pregnant by Miss Daybicharran and Mr Campbell as I stated their behaviour within my evidence.*

The tribunal panel accepted the evidence given by Mr Campbell that the claimant did not say, during the meeting itself, that she was unhappy with Ms Daybiccharran's conduct. In addition, the tribunal made a finding in fact, based on Mr Campbell's testimony that Ms Daybiccharran did not behave in an unprofessional way in the meeting. We acknowledged however, in paragraph 197, that although the respondent was entitled to raise the performance issues and did not do so because the claimant was pregnant, the claimant was caused distress as a result.

193. *During the hearing the evidence showed that my performance issues were past at PRHA; but during the hearing Mr Campbell stated that it was SHP and PRHA, which we could clearly see was untrue as Mr Campbell could only show evidence from PRHA and this was brought up during the meeting as Mr Campbell discriminated against me for struggling with my work when pregnant.*

The tribunal panel found that there was a general discussion about the claimant's performance. The documented examples were from before the transfer, but the discussion covered her performance pre and post transfer.

194 The evidence does not show that the respondents had ongoing concerns about my performance, other than evidenced about a client's NI number and inputting one risk assessment.

The evidence was that the respondent had concerns that the claimant was not meeting targets for a number of tasks, even though her client load had been reduced and she was not meeting with clients face to face.

199. *The Panel has found that the way that my managers addressed my performance was clumsy but the fact was she discriminated against me for*

being pregnant (197) Is this not unfavourable behaviour? They have also concluded that I did not suffer, which I clearly did, as I was admitted to hospital where I could have lost my unborn child, because of the stress of this meeting and discriminating against me. I also continue to suffer now, as the panel were aware that ongoing issues are continuing in 2020 and to be signed off further for work related stress from 2019-2020.

The panel did not consider that the respondent's behaviour amounted to unfavourable treatment. An employer is entitled to address performance concerns with its employees and the meeting of 20 August 2020 appeared to a good opportunity do this. The clumsy part, in our view, was the way in which the respondent referred back to the previous performance discussions. In any event, even if the behaviour did constitute unfavourable treatment, we did not find it was because the claimant was pregnant.

200. *During the hearing SHP admitted that there was not a discussion about my performance at SHP during the meeting and the issue was at PRHA; and Mr Campbell sent the evidence over. He had no concerns about my performance before, until Miss Daybicharran brought it to his attention after the transfer. Miss Daybicharran also admitted in court that she was told not to address my performance issues at PRHA, as it would cause me a lot of stress during the protected period. If that is so, why has Mr Campbell and Miss Daybicharran both admitted to having several conversations about my performance, if they knew the affect, it would have in the protected period? Therefore this is unfavourable behaviour; and due to me having numerous of appointments, mini breaks and health issues, this slowed down my performance at work, so I was discriminated against because of this.*

The tribunal panel found that the respondent was cautious about raising performance issues with the claimant, but decided that it needed to do this.

204. *SHP have the power to allow members of staff to use their AL to stretch out their maternity leave, but because of the lack of care and treatment towards me whilst pregnant, they did not rush to look into my AL that they owed me and they decided against this and withheld it.*

There was no evidence before the tribunal that the respondent withheld the claimant's annual leave entitlement.

212. *The issue was resolved 13 months after I brought it to SHP attention this is clearly not right.*

There was a delay resolving the holiday leave issue, but it was resolved. The allegation the panel were required to consider was an allegation that the respondent refused to authorise the claimant's annual leave and that this constituted unfavourable treatment because she was pregnant. We were not required to consider the allegation that the delay in resolving the issue was a detriment to the claimant.

215. *The evidence shows that Mr Rosenthal was informed about my AL in July/Aug and the evidence shows that it took Mr Rosenthal 3 months to contact PRHA to ask about my AL. I was discriminated against, as Mr*

Rosenthal waited until my maternity leave started before looking into my AL and this is clearly showed within the evidence.

The tribunal found that the respondent acted lawfully in starting the claimant's maternity leave when it did. Even if the respondent had resolved the question of holiday entitlement leave much earlier, this would have made no difference to her ability to take the leave before the start of her maternity leave.