Case number: 2602065/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant: Mrs Anna Baszkowska

Respondent: Mr Z Godzisz T/A Info Service

Heard: Remotely, via CVP **On:** 2 & 4 November 2020

Before: Employment Judge Clark
Mrs C Hatcliff
Mr M Alibhai

Representation

Claimant: In Person
Respondent: Mr Hutchings, Solicitor

RESERVED JUDGMENT

The unanimous decision of the employment tribunal is that: -

1. The Claimant's claims of maternity discrimination **succeed.**

2. Compensation will be determined at a remedy hearing unless before then the parties are able to reach agreement.

REASONS

1. Introduction

1.1 This is the final hearing in a claim alleging unfavourable treatment because of the claimant's pregnancy or maternity under s.18 of the Equality Act 2010.

2. The Issues

2.1 There are 6 discrete allegations which form the basis of the list of issues. They were particularised at a previous preliminary hearing as follows:-

a) The decision to pay the claimant holiday entitlement after her maternity leave.

b) That the respondent did not consult her about maternity leave and she felt that they pushed her to decide when she would like to start her maternity leave.

c) That she did not receive written confirmation of her maternity leave within 28 days of her declaration.

d) She made a request that she wanted to work until 28 February 2019 and then take holiday entitlement and then take her maternity leave but did not receive a response to this request.

e) She was informed on 25 March 2019 that she was on maternity leave from 1 March 2019 and that her maternity start date was changed without her agreement.

f) The respondent stopped talking to her and limited her duties once she announced her pregnancy.

2.2 The wording of this particularisation is that of the tribunal. We have been cautious not to ascribe technical legal meaning to aspects of the claim that the claimant did not herself articulate, such as might be inferred from the meaning of a "declaration of her maternity leave" and have instead sought to understand the essence of the complaint. As we discussed with the parties during the hearing, it seemed to us that the first and fifth allegations and also the third and fourth allegations are in essence raising the same underlying complaint of treatment.

3. Preliminary matters

3.1 There have been two preliminary hearings in this matter. At one, the issue of time limits was resolved in the claimant's favour. EJ Victoria Butler found that the first 5 matters alleged were intrinsically connected to form part of conduct extending over a period which was in time. She also found that the 6th allegation, the first in time, was out of time but that it was just and equitable for time to be extended for it to be considered.

4. Evidence

4.1 For the claimant we heard from Mrs Baszkowska only. For the respondent we heard from Mr and Mrs Godzisz and another of Mr Godzisz's employees, Mrs Ilona Zuckova. We received a small bundle running to around 140 pages. Most of the contemporary documentation is in Polish and has been translated. None of the participants required interpreters. Both parties made closing submissions.

5. Findings of Fact

5.1 It is not the tribunal's function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues in the case and put them in their proper context. On that basis and on the balance of probabilities we make the following findings of fact.

5.2 The claimant was acquainted with Mr Godzisz through his employment at a company called TH Clements where she was then an agency worker. She took maternity leave in 2009

and did not return to that place of work after the birth of her first child. In September 2010 he called her and they agreed terms for her to work in his new business, initially on a self-employed basis. In 2013, she became directly employed and that employment is governed by a written contract of employment signed in 2013.

5.3 The business provides advice to polish and Eastern European nationals living in the area on various matters including insurance and travel and offering assistance and translation with various matters including banking and healthcare, to name but two examples. It is a very small employer. It has no experience with HR. It contracts its payroll through a small business accountant. There are no written policies or systems. The only systems or formalities we are aware of are, firstly, that the contract of employment was reduced to writing and, secondly, that there is a holiday booking system based on a request form to be completed by the employee in question.

5.4 In 2014, Mr Godzisz stepped back from the day to day running of the business in favour of his career at TH Clements. His wife then became the manager of the respondent business. Whilst Mrs Godzisz handled the day to day running of the business, she and Mr Godzisz's shared decisions. Mr Godzisz was not present in the office very often.

5.5 The office is small and provided space for three members of staff. The claimant, Mrs Zuckova and a Ms Anna Lenart Dziuba. Mrs Godzisz had an office upstairs from which she managed the respondent's business and various other matters she had interests in. We have been presented with a picture of a happy team that got along well with each other. We are not satisfied that is an accurate picture, at least not at all of the time and not at the material time. We find there were tensions within the team at times as between Mrs Zuckova and Ms Anna Lenart Dziuba and as between the claimant and Mrs Zuckova.

5.6 The staff and Mrs Godzisz were connected on Facebook. The colleagues were aware of Mrs Baszkowska's partner and their plans to marry and it was not a surprise for them to learn that she had fallen pregnant in 2018. In October 2018, the claimant was on holiday in Poland where she underwent a scan to confirm her pregnancy. She posted a picture of the scan on Facebook. We find Mrs Zuckova had been "blocked" by the claimant on Facebook at that time. She did not see the post of the scan. That sounds more sinister than the surrounding circumstances suggest. Around the same time a private message was sent by the claimant to Mrs Zuckova and deleted. Shortly afterwards, a customer came into the workplace who was also a friend on Facebook and she had seen the post by the claimant about the scan. She attended purely to congratulate Mrs Baszkowska and wasn't aware she was still in Poland or that the claimant's colleagues were unaware of her pregnancy. She shared the news with Mrs Zuckova and Ms Lenart Dziuba. Mrs Zuckova then contacted the claimant to ask if that was what the private message had been about and received a "smiley face" emoji response. We therefore find the claimant's two colleagues were aware of her pregnancy from mid-October 2018.

5.7 Mr and Mrs Godzisz deny any knowledge until early December. In deciding whether we accept that we have weighed the competing evidence of what was happening at this time. Part of that is to weigh the fact this was personal news for Mrs Baszkowska but also joyful

news. The nature of the workplace was such that we do not accept such news, which was shared so freely by the visiting client, would not have come to the attention of Mr and Mrs Godzisz around the same time. We are prepared to accept there was some delay before it was known, because of Mr Godzisz's absence from the workplace and Mrs Godzisz being herself on leave and engaged with other business projects but we are satisfied that by early November, the employer and his manager was aware of the claimant's new status as an expectant mother.

5.8 There is some uncertainty in the evidence whether Mr Godzisz met with the claimant in November or December to initially discuss her pregnancy. On balance, we are satisfied that he knew in November, but that the more formal discussion followed the claimant obtaining her MATB1 on 1 December 2018. That meeting was on 7 December 2018.

5.9 Apart from the short spell of leave when Mrs Godzisz's parents visited, we do not accept that there was any significant difference in the amount of time that she spent with the workers in the business around this time. This was advanced as an explanation as to why Mrs Baszkowska may have felt she was being ignored or isolated. We have to reach a finding of fact on the dispute whether Mrs Godzisz's attitude towards the claimant changed on learning that she was pregnant. We have come to the conclusion that the claimant's account is to be preferred. Prior to announcing her pregnancy, we find there would be discussions from time to time about personal matters, small talk and other social interactions. We find these stopped. Mrs Godzisz denied this and said the team was a happy team and nothing changed. Mrs Zuckova was called to support this contention but Mrs Zuckova accepted some tensions. She accepted that there were arguments from time to time. The picture of a close knit team that we were invited to find was not so. We also had to evaluate the contention that Mrs Godzisz was very busy in the period after October 2018 and without consciously distancing herself from the claimant, that the claimant may have perceived this was the case. We have rejected that. We are satisfied the overall opportunities for interaction between Mrs Godzisz and the staff were broadly comparable both before and after October 2018. We found Mrs Baszkowska was convincing in her account that they were both always busy but that even during previous busy times, she had enjoyed a good personal relationship with Mrs Godzisz which stopped after October.

5.10 In reaching this conclusion we have also had to consider and weigh other aspects of the total evidential picture before us. One relates to references to apparently positive interactions and we have been shown a picture of a happy looking, smiling team posing for a Christmas picture to post on the company Facebook page. Another is the fact that positive steps were taken to relieve the claimant of certain duties requiring her to walk to the other side of town to undertake translations. Another is the fact of cards and gifts being given on her final day at work with well wishes for the birth. We accept these so far as they go but do not ascribe them the weight that we were invited to by the respondent. This is not a case where we have detected outright hostility to the claimant's status. We do not find it surprising that the team were required to adopt a happy festive pose for the Christmas picture, or that gifts were given on Mrs Baszkowska's last day in the office or that an adjustment was made

where the claimant could not drive and was very obviously struggling in the later stages of pregnancy with the physical aspects of walking across a town.

5.11 Against that, we find other reference points show a marked indifference to the claimant's circumstances and the rights she had which we found particularly odd in the context of this workplace and which demanded an explanation. They included the absences of any meaningful correspondence to the claimant; that when there was correspondence it did not carry the same simple pleasantries that the claimant's correspondence offered so much so that it was bordering on the terse in its tone. That the absence of correspondence on matters one might think an employer would want to record in writing was essentially described as a "tit-for-tat" response because, it was said, that "the claimant had not put her position in writing". There is also a near complete absence of any reference to what was needed to be done to manage the claimant's impending maternity. A small business like this may well operate with great informality so far as record keeping is concerned but in this case we are not satisfied that things that might be expected to be happening were in fact happening but simply not reduced to writing. We have also had regard to how the claimant's complaints and formal grievance were handled and responded which has informed us of a particular tension in the workplace dynamics. We have considered, but excluded, the employer's ignorance of this as the explanation. We find something more was operating on the mind of Mr and Mrs Godzisz. We have reached a conclusion that that included concern about the time she would be away and their burden of organising the work of the business during her absences. This we find was a particular disruption as Mrs Godzisz was embarking on a new venture at this time.

5.12 As we have stated, we do not accept that the first the respondent and Mrs Godzsiz knew of the pregnancy was the MATB1 disclosure on 7 December but we do accept that was the first formal stage of a maternity process. The claimant had been questioned by both on various occasions, on at least three times and probably more often, about what her plans were for taking maternity leave. This is a difficult balance for employers to strike and particularly small employers such as this where there is no experience of the management of maternity. We say management of maternity in the sense of the total employment relationship and coordination of the associated rights and obligations. We do acknowledge that Mr Godzisz had some experience of maternity limited to health and safety risk assessments that he was responsible for as part of his other employment in a quality control supervisor role. We have found the nature of that experience being advanced was left vague and whatever the level of his health and safety knowledge and experience, it did not lead to an expectant mother's risk assessment in Mrs Baszkowska's case. There was some evidence concerning the claimants' well-being, but not a risk assessment.

5.13 Returning to the claimant's plans, it is usually valuable for both parties to engage with the issues informally and explore each parties perspectives on what is available and what options might be taken before the time comes when the employee has to actually elect and inform the employer of dates and decisions. In this case, we find the claimant perceived the repeated questions about her plans felt like she was being pushed to make a decision she was not ready to make. It was her second child, albeit they were about 10 years apart, and

she was not in a position to be sure what she wanted to do and when she was repeatedly asked during November and December 2018. On 17 December 2018 she wrote an email addressed to both Mr and Mrs Godzisz. The English translation says: -

> ***It is very difficult for me now to define when I should go on Maternity Leave, but Agnieszka, you asked, for this moment I can estimate that I would like to work until the end of February, later I would like to use Annual leave and immediately after that maternity leave.***
>
> ***I have an appointment to see a midwife in the clinic on 3 January at 11:55 a.m. and then on 31 January I have another ultrasound in the hospital at 8:40 a.m. and this may take a little longer because I will have a diabetes test***
>
> ***And Zbyszek, could you remember about the payslip for last month.***

5.14 It is said that this was sent under the subject heading of the "daily report" that all staff had to complete and therefore was not read for some time by either Mr or Mrs Godzisz. We are not sure what the significance of this evidence was. The fact was it was sent and was read soon after. What we have before us shows the translation did not have a subject heading at all.

5.15 Of course, we read this in its agreed translation into English. We have expressed some concern that the different linguistic nuances between how it was translated into English and the original polish may mean the ambiguities we can see may be more or less pronounced in the original Polish. Ultimately, however, that is not a point that either party took and this is an agreed translation and we have to go by what it says in English. A number of conclusions can be drawn about what this information this email conveys. The first is that the claimant is responding to requests for information about her plans at a time when she did not know what those plans would be. She expressed how difficult it was for her to answer at that time. The information she does give is what she thinks at that moment in time. We are satisfied that it is not a notification or declaration of her intentions for the purpose of taking maternity leave.

5.16 We then come to the ambiguity. The way the intention at that time is expressed in English could lead to some confusion. The ambiguity arises in the relationship between taking maternity leave and taking holiday. We feel comfortable in interpreting what is written in the first paragraph was suggesting that she would work until 28 February, then take annual leave and only after that annual leave would she then start her maternity leave. We certainly accept and find that that interpretation is what the claimant intended. Nonetheless, we also accept there is scope to interpret it differently. Use of the word "later" and "immediately after that" are capable of different meanings depending on whether the word "that" is referring back to the annual leave or is a reference to "*that* maternity leave" and this meant it was at least an issue which begged some clarification. The email does not in itself set out how much leave the claimant wanted to take before starting maternity. That may not be so surprising for two reasons. The first is that this was not her notification of maternity leave. The second was that it became clear in evidence that her hope was to be able to take all of her entitlement for that leave year.

5.17 Mr and Mrs Godzisz say they did indeed feel the email to be ambiguous and that Mrs Godzisz sought, and obtained clarification from the claimant at an opportunity when the two

met on the morning of 1 December 2018, that is the day the Christmas photo's were taken. If there was any discussion about maternity at all, which we have some doubts about, we do not accept that such discussion included the explicit clarification alleged. We do not accept that, only 4 days after sending the email, the claimant agreed to a U-turn and explicitly said to Mrs Godzisz that in fact she wanted to take maternity leave and then take her annual leave. We do not accept there had been any material change in the claimant's level of certainty about her future plans. We prefer the view that there was no material discussion at all. The most we can conclude is that at some point between 17 December 2018 and 28 February 2019, the potential for the claimant to finish work on 28 February 2019 turned into a certainty. We have seen an email communication from Mrs Godzisz dated 24 January 2019 concerning her intentions. That states, at that time, that: -

> ***[the claimant], if there are no changes, would like to work till the end of February.***

5.18 The communication is therefore clear as to when the claimant's last day of work will be, it is not clear from this whether the following day marks the start of her maternity or a period of annual leave. Annual leave, whether at the start or end of her period of absence from work, is not mentioned at all.

5.19 Around the same time, on 22 February 2019, Ms Lenart Dizuba left the respondent's employment.

5.20 We have given detailed consideration to whether this is a case of ignorance and not knowing what an employer should or should not do with managing a pregnant employee. We have concluded such a position is not open to the respondent to advance on this part of the chronology at least. It has advanced a positive case that it sought to clarify the ambiguity which we have rejected. We have come to the conclusion that in fact it positively chose not to deal with the claimant's request to take annual leave before commencing maternity leave.

5.21 In December, Mrs Godzisz shared with the other staff, her plans for a new collaborative project with an insurance provider, Polplan. The respondent's other business interests included the sale of insurance and, indeed, the claimant's husband had taken a policy in late 2018 and the claimant herself had made enquiries about a policy for herself in February 2019. Polplan was different. It was car insurance and the idea was to offer this product to the respondents' existing clients. We find that the claimant was left out of the initial staff induction into the Polplan products by Mrs Godsisz. We have considered the respondent's case that that induction was given to all staff and the evidence was finely balanced but we were persuaded to prefer the claimant's account that she was left out of the induction by the respondents own evidence. That evidence was in the form of its grievance outcome letter, to which we return in due course. This matter formed one of Mrs Baszkowska's later grievance complaints which in itself gives some contemporary support to the fact that she at least felt isolated. Following an apparent investigation into the complaints the response, however, did not conclude that she was wrong and to assert, as the respondent has done before us, that she had been included in like terms to the other staff. Instead, the response was to state that -

> ***It was never the intention of the business to make you feel discriminated against and I apologise if you felt this way. In any event, as the proposed co-operation will not affect your duties, I cannot see that the Business would have been obliged to inform you in any event.***

5.22 The only basis on which the collaboration would not have affected her duties was because she would shortly be absent on maternity leave.

5.23 The clamant also alleges around this time that other aspects of her duties were diminished. This relates to the staff moving desks in the office. There are two versions of this. The claimant says that she was asked to move desks to the other side of the office so she was furthest from the door. The reason for that move was because the clients were queueing waiting to be dealt with by the more experienced claimant rather than the other, less experienced, staff. The proposed move was to get the clients used to dealing with the other staff as the claimant would not be there to help them during her maternity leave. Although that change never materialised, we accept the claimant felt as though she was losing her work by the proposed change.

5.24 The alternative account is that Mrs Godzisz noticed the claimant struggling to walk along the corridor to her desk due to furniture obstructing her and offered to move desks and the cabinet as a means of supporting her and making her feel more comfortable. We were directed to a file note to this effect to support this account.

5.25 We have accepted the claimant's account and find this happened. Whilst it may be that these do not have to be either or and it could open to us to accept a factual basis on which there is truth in both accounts, we have some grave concerns about the Respondent's apparent contemporary evidence on the health and safety support offered. First, it is said to have been recorded in a contemporary file note. That in itself is at odds with how this employer had thus far failed to put anything in writing. Secondly, the apparent file note was written in English, not polish. We do not accept that this was the natural language to use for either of the parties when putting things in writing. Thirdly, it is headed "statement". That is an odd heading for a file note. Fourthly, this was not shared with the claimant nor was she referred to it. Mrs Godzisz evidence was that there was actually an original file note which she destroyed and that she re-wrote this "statement" for the purpose of putting the bundle together. We suspect it was more likely part of the exchange of instructions and advice when the respondent was eventually being assisted with the claimant's grievance. Either way, the original, if there was one, is no longer available and has not been retained and we cannot be sure that the content is indeed the contemporaneous expression of this state of affairs. Finally, even if we were to accept the respondent's contentions, the fact this was recorded and retained without the claimant's knowledge in this way would appear to offer some support for the notion that there was some tension between the parties.

5.26 In January 2019, the new contractual annual leave year started. Under the terms of her contract, the claimant was entitled to 21 days plus bank holidays. She booked 7 days leave in January. She was able to take them. We record this because of its significance to the later references to "accrued" and leave being taken "proportionally". There is no contractual term or other relevant agreement dealing with leave being taken proportionally or

as accrued. If there was, the rate of accrual did not give her the right to take the 7 days she in fact took. Whether one starts with an annual entitlement of 21 days or the statutory entitlement of 28 days (5.6 weeks), in January the claimant had not accrued 7 days leave. She was nevertheless able to take that leave.

5.27 At some unidentified point in time between 17 December and 28 February, the likely plan to finish work on 28 February came to be a settled plan. Whatever happened to turn the probable plan into an actual plan, Mrs Baszkowska was left understanding that her proposal in her email of 17 December was now what was going to happen. She had not been asked again about her plans in detail nor given any information about her entitlements. From the respondent's perspective, we have found the claimant's request to take holiday point was positively ignored and it unilaterally decided that she would simply start her maternity leave the next day. We find this to have been a conscious decision as opposed to it being simply overlooked or forgotten.

5.28 That the last day in work as being 28 February became settled and well known is seen by the fact that not only did the claimant receive well-wishes and gifts from colleagues but also from clients. They must have become aware this was her last day at work. Of course, the fact it was the last day of work does not answer the question as to whether the following day would be the first day of maternity leave or the start of a period of holiday. We find the claimant trusted the respondent to pay her the leave first. She still did not know how much she would be entitled to but was expecting a payment for a period approaching 20 days. One consequence of delaying the start date of her maternity leave was that the intervening period would be paid at full pay for the annual leave, as opposed to 90% for her Statutory Maternity Pay. It is not necessary for there to be a material loss for there to be unfavourable treatment, but in this case there is a tangible consequence to the claimant at least in the timing of when her money was received. We put it in those terms as over the course of the year there is no dispute that she did not lose pay or holiday entitlement, all of which was eventually paid at the appropriate rate at some point, the timing of the payments is something we accept is of material concern to an expectant mother used to earning a wage and having to plan the financial implications of a period of maternity leave.

5.29 We find the claimant had been chasing Mrs Godzisz to discuss the details of maternity leave and provide her benefits and obligations in writing. This did not happen. We have rejected Mrs Godzisz's account that this was discussed on the claimant's last day when she says they explored the various options for obtaining payslips and other information whilst she was on maternity. The claimant denies there was such a conversation. We prefer her account. We are reinforced in that conclusion by the fact this very point was raised by her in an email to Mrs Godzisz dated 18 March 2019 soon after her last day in work. We do not regard it as likely that she had forgotten a conversation covering the very same topics only 18 days earlier. The fact she raises them in writing is more consistent with the fact that this is something she had been chasing and was still yet to receive an answer. In that email she wrote: -

Hey, I have a question, how will I get payslips, is it by email or should I come to you for them?

> ***I would also like to know when approximately I will get any Maternity letter and whether it will come by post or email and for how many days of annual leave I will be paid this month?***

5.30 She also queried her life assurance quote which Mrs Godzisz had not yet provided.

5.31 The tone of the email is friendly. It conveys a genuine belief about what is happening with the start of her annual leave. It did not prompt any response whatsoever. We found the absence of a reply to be significant in a number of aspects of the case. First, it gave insight into the suggestion that Mrs Godzisz had distanced herself from the claimant. Secondly, one might think that an employer that had had an explicit discussion with an employee about an ambiguous request to take annual leave but who had then explicitly confirmed they did not want to take it would immediately respond saying words to the effect of "hang on a moment, you agreed back in December that you did not want to take annual leave before starting maternity leave". The absence of any contemporary reference to what that alleged discussion has not been explained by the respondent. It has formed another point of reinforcement in our findings of fact.

5.32 The fact of the employer failing to reply is also a significant factor in itself again reinforcing the notion that the claimant's maternity leave had meant she was no longer viewed as part of the business and that maternity leave was a burden for the business. A week went by until the claimant was compelled to message her employer again on 25 March 2019 chasing a reply. At 9:28 she wrote:-

> ***HI Zbyszek. HI Agnieszka***
>
> ***I wrote an email to you a week ago, but I didn't get any reply.***
>
> ***if you both have a moment let me know how things are with payslips, Annual Leave and Maternity because March is already over and I still don't know anything.***

5.33 Again, she also chased the insurance quote, this time saying if Agnieszka did not have time she would leave things as they were. Again, the email is written in friendly terms with a polite salutation and in a tone which is almost apologetic, despite the fact it was her that had been ignored by her employer. This time a reply was sent to her by Mrs Godzisz at 15:14. It said: -

> ***Attached email for February, I'm sorry, I though Zbyszek sent it. The next payslip will be sent with the Maternity Pay. If you want us to pay you for holiday, let us know, we will check how much proportionally you are due.***

5.34 We were told that the respondent was by now seeking advice on its obligations to the claimant. We suspect that the advice it got on taking annual leave and an employer approving it was either erroneous or confused in respect of the context and the facts of what had actually happened between the parties. We do not accept that the word "proportionally" is a word that would have been used by the respondent and, as we have identified already, there was no relevant agreement limiting the taking of leave to an amount in proportion to that which was accrued or any other reference. Nor was such a policy applied to the leave taken in January. It is telling, again, that there is no reference to the alleged explicit agreement of 21 December 2018.

5.35 The claimant responded within 5 minutes. She wrote: -

> ***Thank you for your payslip, Agnieszka, when you asked for a decision (it was probably in December 2018) about when I want to go for Maternity Leave, I wrote to you that I want to work until the last day of February, later I want to use Annual Leave for the Maternity Leave period then start Maternity Leave itself. I don't understand this change now. If you want me to send you a copy of this email again, I can do it. In addition, I would like to know when I will receive any letter in this situation regarding how you account for my Maternity Leave.***

5.36 This is yet again powerful evidence that the claimant's intention was to take leave first and, significantly, wholly inconsistent with the respondent's suggestion that she and Mrs Godzisz had not only discussed but expressly agreed that the holiday would be taken after the Maternity leave.

5.37 Mrs Baszkowska again restated the need for documentation about her maternity. The respondent's explanation for not sending anything to her in writing was because she did not send anything in writing to them.

5.38 Mr and Mrs Godzisz continued with obtaining further advice. We find it hard to accept that the instructions given in that advice were in line with the case that has now been advanced before us. A reply was sent later that night, at 21:29. It said: -

> ***Maternity pay will be paid in accordance with the regulations, and regarding your leave, I have received information form the lawyer as well as from ACAS that as an employer we do not have to agree to annual leave before leaving for maternity leave if it is unfavourable for business. We currently have the grounds to change our decision, which is in accordance with the law. Therefore, the leave will be calculated after the end of Maternity leave.***

5.39 We note that the tone of the emails sent by Mrs Godzisz did not match the friendly tone of those sent by the claimant. They do not even have the courtesy to address her in any personal terms. They appear curt or terse and belie a sense of entrenched conflict. They are certainly a long way from what one might think was the friendly working environment that the respondent presented was the case in evidence.

5.40 By the time of this second email, the initial offer of looking into taking annual leave had been retracted. There was a dispute before us as to what was meant by "change our decision". Mrs Godzisz says this was a change of the suggestion made in her previous email reply to look into paying some of the claimant's annual leave before maternity. The claimant argued that this was indicative of a change of what she thought she had agreed with her employer following her indicative email on 17 December 2018. Once again, we found the claimant consistent and credible in her account and we prefer that interpretation. However, even if we approach the change on the basis of the respondent's explanation, it does little to improve the picture for him. The industrial members of this tribunal have drawn on their experience to explain how such a change could have easily taken place where there was willing on the part of the employer. The claimant was not yet in the compulsory maternity leave period and there was no other reason to compel her to start maternity leave, they were still in the reference period of the first pay period after 28 February and there is nothing before us to conclude that the accounting and PAYE processes could not have been varied to allow

for the inclusion of a period of holiday, if there was a will to do so. We find there was no such will.

5.41 Faced with this stance being taken, on 27 March 2019 the claimant lodged a formal grievance. She was invited to a hearing by the employer, who was by now being fully advised by lawyers albeit, we think, different to his current representation. We accept that Mrs Godzisz was advised that the allegation of discrimination contained in the grievance was a "really big issue" and advised her to step down from any role in the grievance. We accept it is that which explains why she did not therefore have any further contact with the claimant. Mr Godzisz conducted the investigation. We have already stated that we find that the "statement" in respect of 8 January was prepared for this purpose.

5.42 We note that the 17 December 2018 email is translated into English and in this version, the wording is slightly different to that contained in the agreed version although, frankly, the same ambiguity remains. Whilst acknowledging the scope for ambiguity even on this version we are satisfied the basic thrust still leans more naturally towards an interpretation that she was stating an intention to take annual leave and then maternity leave.

5.43 The grievance hearing date was changed due to the proximity of the claimant's due date and in fact took place on 16 May 2019.

5.44 The claimant set out her concerns were not financial nor was she seeking compensation, she simply wanted to restore some trust in a job she had done for many years and so she could return to work for this employer. The issues raised in the grievance were essentially the issues raised in the claim before us. That is, her stated desire to take holiday first, that this should put the start of her maternity period back to around 1st April, that she did not receive any confirmation in writing within 28 days of her declaration, that her duties had been limited due to her pregnancy.

5.45 There are significant differences in the response to the grievance compared to the case put before us on the same points. In respect of the desire to take annual leave before maternity leave, it was stated not that the claimant had explicitly changed her position to take the leave after the maternity instead, but only that:-

> ***Agnes informed you that you could start you maternity leave on 1 March 2019, that you last day at work would be 28 February 2019 and your statutory maternity pay will be paid accordingly. You did not raise any issues with this.***

5.46 Whilst that is a position that could have explained some of what later happened, it is significant that it is not the position put before us. The position adopted in this case goes much further than Mrs Godzisz conveying information to the claimant, it was that Mrs Baszkowska positively and explicitly changed her position. In any event, even if we were to accept as a fact this account of the December discussion, what is being conveyed here is tantamount to the respondent refusing the claimant's request to take some leave starting on 1 March and imposing a start date of her maternity leave. We are satisfied there was a decision to refuse annual leave due to the claimant starting her maternity leave. Even looking at these facts as benevolently as we can, the best that could be said was that Mrs Godzosz did not

engage with the holiday issue and the reason for this was because she had already disengaged with the claimant in advance of her taking maternity leave.

5.47 The complaint of lack of consultation and being pushed to provide a date was dismissed on the ground the respondent felt the claimant had not provided evidence. The allegation that the claimant did not receive written confirmation of her maternity at all or within 8 days was accepted and blamed on an administrative oversight. It was upheld.

5.48 The fourth allegation was held to be in essence the same as the third (as indeed it is before us) There was a separate allegation of not being sent payslips which was upheld. The sixth allegation, changing the maternity to 1 March was not upheld, it being felt to be part of the same allegation as the first as, indeed, is essentially the case before us. The final allegation, that Mrs Godzisz had stopped talking to the claimant was rejected although in setting out the position, the issue of Polplan was, as we have already noted, not said to be wrong but was found to make no difference to the claimant's duties.

5.49 We have already recorded that the respondent was being advised at this stage. We find the terms of this letter originate with that advice and not Mr Godzisz. The level and detail of the correspondence is seen in no other correspondence originating from the employer. It is around this time in May that Mr Baszkowska receives the information that should have been provided months earlier concerning her rights and obligations in respect of maternity leave and maternity pay.

5.50 The claimant was given a right of appeal. She did not appeal. On 9 October she resigned with effect from 31 October. There are no claims before us concerning the end of employment.

6. Discussion and conclusions

6.1 This is a case in which it is convenient to take each of the 5 discrete claims in turn. We deal with any necessary elements of law together with any further findings of fact under each heading.

The law

6.2 Section 18 of the Equality Act 2010 provides: -

> ***(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.***

6.3 It can be seen that the structure of how this form of prohibited conduct is made out contains the following elements: -

a) That the woman is subject to unfavourable treatment

b) That that unfavourable treatment occurs during the protected period

c) that the reason for that unfavourable treatment, that is the answer to the causal "because of" question is any one of the four prohibited grounds, namely pregnancy (s.18(2)(a)); illness suffered as a result of the pregnancy (s.18(2)(b)) being on compulsory maternity leave (s.18(3)) or a desire or attempt to exercise her rights to ordinary or additional maternity leave (s.18(4)).

6.4 There is no dispute the allegations in this case take place in the protected period as defined and the further deeming provision under subsection 5 is not needed.

6.5 The term "*treats…unfavourably*" is not defined in the 2010 Act. However, the guidance given in the Equality and Human Rights Commission's Code of Practice (2011) ("the Code"), states that it means that the disabled person '*must have been put at a disadvantage*' (see para 5.7). The Code further explains that *"[a] disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently*" (see para 4.9). Although considered in the authorities separately to detriment, the concept arises in practice in a similar way. That is, would a reasonable person think the treatment was to their detriment (see *MOD v Jeremiah 1980 ICR 13* and *Shamoon v CC of Royal Ulster Constabulary [2003] UKHL 11*). In broad terms, an unjustified sense of grievance will not engage protection but, as long as a claimant's opinion that the treatment was to her detriment is a reasonable one to hold, that ought to suffice.

6.6 As with all discrimination where the causal link is based on a test of "because of", the question is to identify what it was that consciously or subconsciously caused the alleged discriminator to act. The protected characteristic must in some material way influence the actions or decisions. That can sometimes be difficult in pregnancy cases as the fact of pregnancy is causally relevant but not in itself causally determinative. What we mean by that is that it is not a "but for test". If it was, the proof of unfavourable treatment during the protected period would be enough to succeed. Unless it is obviously the reason for the treatment because an overtly or inherently discriminatory criterion has been applied,

consideration must be given to whether the fact that she was pregnant, or one of the other prohibited factors, influenced the mind of the relevant decision maker. (See *Interserve FM Ltd v Tuleikyte [2017] IRLR 615*; *South West Yorkshire Partnership NHS Trust v Jackson UKEAT/0090/18*).

6.7 The burden of making out those essential elements rests with the claimant. She may discharge that burden by satisfying us outright that the elements of the prohibited conduct, in particular the "because of test", are proved in the ordinary way. Alternatively, she may rely on s.136 of the Equality Act 2010 so far as that shifts the burden in certain circumstances. It provides: -

> ***136.Burden of proof***
>
> ***(1)This section applies to any proceedings relating to a contravention of this Act.***
>
> ***(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3)But subsection (2) does not apply if A shows that A did not contravene the provision.***

6.8 In short, the claimant need only prove a prima facie case. If she does prove facts from which we could conclude, in the absence of any other explanation, that the reason for the treatment was a prohibited ground, we turn to the respondent to prove that the treatment was in no way whatsoever for that reason. If the respondent fails to discharge that burden, we are left with the conclusion that the protected characteristic, in this case the claimant's pregnancy, illness or maternity leave as the case may be, is the reason why the treatment occurred and the claim would then succeed.

The Allegations

6.9 It is necessary to consider the constituent elements of each allegation (or group of like allegations). However, in claims such as this, the critical part of any treatment found to amount to unfavourable treatment is the reason why it happened. We do not see any material difference between the timing or nature of the allegations which has any bearing on that question. We therefore have considered the reasoning in the round.

6.10 **Allegations i. & v.** We consider the treatment in these allegations together. They are 'The decision to pay her holiday entitlement after her maternity leave' and that the claimant 'was informed on 25 March 2019 that she was on maternity leave from 1 March 2019 and that her maternity start date was changed without her agreement'. The treatment complained of and said to be unfavourable is first a decision and then the communication of that decision. The first part must be fixed at some point prior to 1 March 2019, on balance we conclude it was soon after 17 December when the claimant set out her position. The second is fixed in time on the communication of that state of affairs on 25 March 2019. For practical purposes, this is one and the same act, continuing from the decision until its implementation and up to the point the decision was conveyed to the claimant on 25 March 2019. Although identified as two separate matters, it is essentially two sides of the same coin.

6.11 We are satisfied that the alleged acts are made out. We are satisfied that these acts amount to unfavourable treatment. In fact, whilst we are satisfied it is unfavourable in itself and in isolation, it becomes more unfavourable when seen in the full context of our findings as the decision was not communicated to the claimant until after the event.

6.12 **Allegation ii.** That is 'That the respondent did not consult her about maternity leave and she felt that they pushed her to decide when she would like to start her maternity leave.'

6.13 This allegation arises in the period from 4 December 2018 and continues until 28 February 2019. On one level there is something of a conflict in this allegation, apparently stating the employer did not do enough at the same time as saying it went too far. However, understood properly, that is not what the claimant is complaining about. Her complaint is that the only interest from the employer was a series of pressured enquiries about her plans which she felt to be too early and oppressive and culminating in her giving an indication in December. Thereafter, she was left in the dark about what was actually going to happen after 28 February and what her entitlements and obligations were in respect of her continuing employment whilst on maternity leave.

6.14 We are satisfied that each of those aspects of her complaint amounts to unfavourable treatment. The actions clearly happen because of the pregnancy and the future desire to take maternity leave in the sense that, but for that they would not have happened. Once again, that is not enough to make out the prohibited conduct under s.18. We must be satisfied that the unfavourable treatment that occurred was motivated or influenced by the pregnancy or maternity leave. For the reasons set out below, we have come to the conclusion that it was.

6.15 **Allegation iii. & iv.** We take these allegations together. They are 'That she did not receive written confirmation of her maternity leave within 28 days of her declaration' and that she 'made a request that she wanted to work until 28 February 2019 and then take holiday entitlement and then take her maternity leave but did not receive a response to this request'.

6.16 Once again, these two allegations are essentially restatements of the same complaint that she was left in the dark. We do accept that there must have been some confirmation informally provided to the claimant in respect of her last day of work being 28 February as that is a day all parties worked towards and this date was made publicly known to customers. However, in the circumstances of this case, the last day of work was only one small part of the total array of facts and information the claimant should have received in order for her to make fully informed decisions and for her to understand what her status, rights and obligations were immediately after 28 February. She did not receive written confirmation until May 2019. We are satisfied that this amounts to unfavourable treatment.

6.17 **Allegation vi.** That is ' The respondent stopped talking to her and limited her duties once she announced her pregnancy'.

6.18 The treatment alleged is said to occur from October 2018 and continue until her maternity leave. For the reasons given in our findings of fact, we are satisfied this treatment did occur and amounts to unfavourable treatment.

6.19 **The reason why**. In all cases, the alleged treatment did occur and we have found it to amount to unfavourable treatment. In all cases we have then to consider the reason why that treatment occurred.

6.20 Pregnancy and maternity leave is the opportunity for the treatment to arise and we have had to carefully consider whether the treatment arises simply 'but for' those factors. If so, that would not be enough. To meet the test we must be able to conclude, either directly or through the operation of s.136, that it was in some material way the reason why it occurred.

6.21 This is a case where we have rejected a number of factual matters advanced by the respondent. Not only does that have the obvious consequence that we prefer the claimant's evidence on the individual points in question, but it also means we are left with gaps in the real thought processes influencing the respondent's actions. In the case of the claimant's email of 17 December 2018, it means the respondent cannot advance a positive case based on a mere misunderstanding or confusion about the request. In particular, our rejection of an explicit discussion with the claimant concerning her email of 17 December 2018 in which it is said she positively changed her mind about the desire to take leave before starting maternity leave is a significant pivot point in this case. Something caused Mrs Godzisz to unilaterally decide when the maternity leave would start. Something caused her to decide that Mrs Baszkowska could not take leave before starting maternity. Something caused her to simply ignore Mrs Baskowska's requests for information about her maternity leave. We know that she was able to book and take leave in January without issue and without reference to the leave accrued at that time. The manner and circumstances in which the employer dealt, or rather chose not to deal, with her request for leave after 28 February occurs against a background where we have accepted there was already a change in attitude towards the claimant following the announcement of her pregnancy. Those facts are such that are satisfied we can infer the pregnancy and/or the planned maternity leave were material factors operating on the mind of the employer, in particular through Mrs Godzisz as the manager.

6.22 We are satisfied that this goes further than the fact that pregnancy or maternity gave the opportunity for these decision to arise but that the protected characteristic was material to the unfavourable treatment conveyed in those decisions. It can be seen further in what was, at best, an indifference towards the employer's obligations towards an expectant mother's employment rights, the absence of any written explanation of her rights, or even informal discussion. That the view of the claimant changed can be seen in the circumstances of the Polplan induction. It may seem a small point in the chronology but we found it illuminating to the true attitude of Mrs Godzisz that the claimant's pregnancy or maternity leave was operating on her decision making and that the claimant was seen as not being part of the team. We do not say there was malice or intent in that, but it is enough if the attitudes are operating on the decision making at a subconscious level which we are satisfied they were. This attitude is repeated in the way her complaint was dismissed at her grievance as not affecting her duties.

6.23 The pregnancy and maternity leave meant a disruption to the respondent's business and also to Mrs Godzisz plans for her new venture. It is the effect that this disruption has on

the subconscious that first leads the employer to chase the claimant for a decision before she is ready and able to give one and, once the employer has what it wants, namely the last day of work of 28 February, he then disregarded the obligations he has to this employee.

6.24 On balance we are satisfied we can reach a positive conclusion that the claimant's pregnancy and/or maternity leave was a material factor influencing the employer's decision making. In any event, if we are wrong to reach that absolute conclusion, we are nonetheless satisfied that the same factors entitle us to draw an inference sufficient to shift the burden to the respondent to show that the claimant's pregnancy and maternity leave was in no way whatsoever material to its decisions.

6.25 We would then have to look to whether it has discharged the burden it would then carry. We have had regard to the fact this is a very small employer with informal systems such that it could advance ignorance as a non-discriminatory explanation. That, however, does not arise in this case. In fact, at times it has suggested there was some experience and knowledge, at least in respect of Mr Godzisz and his work in his other employment. The employer's approach has been pretty poor, even for a small and informal employer like this. There are lots of stages at which one might reasonably expect things to have happened. The overall handling of the process and the delays were unreasonable and that has not been adequately explained other than by reference to the claimant's pregnancy and maternity leave. Not only has the positive factual case advanced been rejected, but there is confusion in the respondent's case as to whether and why leave could or could not be taken. There was no reference in the later contemporary documentation to what was alleged before us was an explicit agreement in respect of the timing of annual leave to the contrary. Once that had fallen away, there was nothing of substance left for it to rely on. We are not satisfied the respondent has shown these decisions were in no way whatsoever because of pregnancy and maternity leave.

6.26 For all those reasons, we are satisfied that the fact of the claimant's pregnancy and/or the maternity leave she would be taking became material factors led to an adverse view of the employee which in turn led to the decision not to let her take leave after 28 February. The consequence of that decision then manifested in a unilateral decision that her maternity leave would start on 1 March. The failure to discuss the implications of that decision with the claimant or inform her of the full position deprived her of the opportunity to consider whether, if she could not take leave, she wanted to work beyond 28 February or not. She may well have decided not to change her last day of work, but that was a decision for her not her employer.

7. Conclusions

7.1 All claims succeed. A remedy hearing will be listed unless the parties are able to reach agreement on compensation.

7.2 In that regard, and pursuant to our duty under the rules to assist alternative dispute resolution, we can give some broad indications based on the evidence we have already heard. We stress our comments in this section are not settled conclusions and the parties

will, of course, be entitled to adduce evidence and make submissions on the point should that be necessary. Equally, however, we hope what we can say will help narrow the issues between the parties sufficient for them to be able to reach agreement without the need for a further hearing.

7.3 In respect of financial loss. The claimant confirmed she has not suffered any financial loss and we can therefore be confident in saying there will be no award for financial loss.

7.4 In respect of non-financial loss, there is a claim of injury to feelings. That is the only claim. We provisionally agree that the appropriate Vento band appears to be the lower band. We have had regard to the nature and extent of the discrimination, that the subsequent termination of employment is unrelated to it and the factors contained in Vento. We also keep in mind that the award in compensatory and intended to compensate the injury. On that basis, what we have heard so far would suggest to us that the appropriate award would be somewhere in a narrow band straddling the middle of the lower Vento band.

7.5 Similarly, we are provisionally of the view that the adjustments available to us under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 seem unlikely to be engaged in this case.

7.6 Finally, we should remind the parties of the flexibility they have on settlement which we do not have on making an award of compensation. We must apply the law. We cannot order terms that the law does not permit us to order but the parties are free to agree any terms. Conversely, we must at least consider statutory provisions such as the Employment Tribunals (Interest on awards in Discrimination Cases) Regulations 1996.

7.7 We hope these preliminary observations help the parties reach an agreed conclusion.

EMPLOYMENT JUDGE R Clark

DATE 21 December 2020

JUDGMENT SENT TO THE PARTIES ON
22/12/2020……..……..

AND ENTERED IN THE REGISTER
……...…….

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FOR SECRETARY OF THE TRIBUNALS