EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101181/2020

Held in Glasgow on 26, 27 and 28 January 2021

Employment Judge M Robison
Tribunal Member N Elliot
Tribunal Member J Gallacher

Ms S Davis	**Claimant** **Represented by** **Mr J Campbell -** **Family Friend**
Wm Donnelly & Co Limited	**Respondent** **Represented by** **Mr S A McCormack -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the claims are not well-founded and therefore are dismissed.

REASONS

1. The claimant lodged a claim with the Employment Tribunal on 25 February 2020, claiming unfair constructive dismissal, discrimination because of pregnancy/maternity, discrimination because of sex and harassment related to sex.

2. Following three case management preliminary hearings, the following issues were identified for determination at this hearing:

a. Whether the claimant was constructively dismissed

b. If she was constructively dismissed, was she unfairly dismissed under the Employment Rights Act 1996 (ERA)?

c. Was the claimant unfavourably treated because of pregnancy or maternity contrary to section 18 of the Equality Act 2010?

d. Was the claimant less favourably treated because of her sex contrary to section 13 of the Equality Act?

e. Was the claimant harassed for a reason relating to her sex contrary to section 26 of the Equality Act?

f. Were any of the Equality Act claims lodged out of time?

g. If any of the Equality Act claims were lodged out of time, was it just and equitable to extend time?

3. Following the hearing of evidence, the claimant's representative, Mr Campbell withdrew the harassment claim, quite properly given that there was no evidence to support such a claim.

4. During the hearing, the Tribunal heard evidence from the claimant and for the respondent from Mr Liam Donnelly, CEO; Mr Paul Bell, managing director; and from Ms Fiona Harris, former accountant/bookkeeper.

5. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These documents are referred to by page number.

6. One matter which required to be determined during the course of the hearing, to which there was objection, was Mr Campbell's application to amend.

7. Mr Campbell sought to lead evidence about events on or around 19 February 2019. Mr McCormack objected to the line of questioning on the basis that he did not have fair notice of this issue; that it was not in any way foreshadowed in the claimant's written case; that on the contrary the claimant specifically references events from 28 March onwards; it was a totally new issue; that he would require to investigate it and may need to bring additional witnesses to speak to it; it was in any event out of time; and that any amendment has not been articulated with any particularity. Further, when this matter was referenced in a request by the claimant for a witness order, he raised this point then and specifically asked the

claimant's representative if he intended to make an application to amend and he said that he did not.

8. In response, Mr Campbell said that he thought that this was already covered by what was stated in the ET1 and the further particulars and that he did not think that any amendments were needed, or that he had to include "chapter and verse" in his pleadings. He explained why he was late in bringing this to the attention of the Tribunal, which related to the fact that the claimant had initially forgotten which is understandable given the trauma which she suffered after the loss of her baby.

9. The Tribunal retired to consider the matter and we decided that the claimant's application to amend should be refused. We made that decision applying the principles laid down in the case of *Selkent Bus Co Ltd v Moore* UKEAT/151/96, for the reasons advanced by Mr McCormack, and in particular because it came so late in the day, because it was not in any way foreshadowed in the ET1 or further particulars, and because this matter had been brought to the claimant's representative's attention and he had made a conscious decision not to amend. While we appreciated that Mr Campbell is not legally qualified, he is acting in the role of representative, and it would have been incumbent on him to research the point at the time it was brought to his attention.

10. Further, during the course of case management hearings, it had been understood that the claimant's evidence would be that she was too ill to resume employment after the termination of her employment with the respondent. Contrary to what had been expected, the claimant gave evidence that she had obtained alternative employment very quickly following the termination of her employment with the respondent. Consequently, the claimant's representative was requested to lodge a schedule of loss and vouching. As vouching was not available during the hearing, Mr Campbell was invited to lodge the relevant vouching following the hearing, which he did, and Mr McCormack was given an opportunity to give his comments thereon, which he did not.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

7. The claimant commenced employment with the respondent as an administrative assistant on 13 March 2014.

8. In or around June 2015, following an offer of alternative employment, the respondent agreed that the claimant could move to work on accounts and the claimant's role changed to accounts assistant and she was given a pay rise. She was to be working under the accounts manager. She then completed an HNC in accounting at night school (page 101). The claimant really enjoyed doing accounts and saw it as a career path. Latterly the claimant worked under Fiona Harris who commenced in the role of accountant/bookkeeper in July 2017.

9. Around this time, the claimant was undertaking IVF. She was open about this with her colleagues.

10. In or around July 2019, the claimant became aware that she was pregnant, and she advised Ms Harris very shortly after. Thereafter she told her colleagues in admin and subsequently Mr Bell. She did not tell Mr Donnelly until around September. When she told him his response was warm and he gave her a hug and congratulated her.

11. The claimant handed in her MATB1 on 31 October 2019. Nothing was said to the claimant about the respondent's maternity procedures and policies.

12. The claimant had a good relationship with Ms Harris who undertook on the job training with her. She was given more tasks by Ms Harris, including bank reconciliations and trial balances. She said she worked well together with her and her colleagues.

13. Ms Harris was on sick leave from around October returning in December 2018. During this time the role of Ms Harris was undertaken by external accountants, although the claimant assisted with her work, including paying weekly and monthly wages.

14. The claimant was due to give birth by caesarean section on 25 February 2019. She had intimated an intention to work until 14 February 2019 with the intention of taking most of her maternity leave after the baby was born.

15. The claimant met with Mr Donnelly in or around December 2018. She asked if she could do work from home 20 hours each week from around three months after the baby was born. Following discussion with Ms Harris, he agreed in principle but thought that it was best for the claimant to wait until after the baby was born to make firm arrangements.

16. The claimant was under the impression (either at the time or subsequently) that she would do these 20 hours while remaining on maternity leave and that she would get paid "cash in hand" for doing so, although that "nothing was set in stone" and "no time frame" agreed.

17. The respondent did not take any steps to engage maternity leave cover. The claimant's work would therefore require to be covered by others. Prior to going on maternity leave the claimant created a procedure book. She also sat with Ms Harris and with Jessica O'Donnell, an admin assistant, to show them the work that she did.

18. On 13 February 2019, during the claimant's final scan it was discovered that she had lost the baby. She texted Jessica O'Donnell, with whom she was friendly. Later that same day, she sent Mr Donnelly a text to inform him.

19. Mr Donnelly responded as follows (page 39), "Oh my darling girl. Words fail me. Can't imagine how you must feel. For my part I'm devastated. Anything I can do please let me know. Just take some time and get well". He added a green heart emoji.

20. The claimant's maternity leave commenced on 14 February 2019.

21. Mr Donnelly contacted Ms Harris at that point to advise that the claimant should continue to receive full pay while absent on leave. Ms Harris left on or around 22 February 2019 to join a new company closer to home.

22. On or around 28 March 2019, Ms O'Donnell texted the claimant to ascertain whether it would be permissible for Mr Donnelly to text her, and she agreed.

23. Mr Donnelly sent a text to the claimant that same day, which states: "Hi pal it's shite bag here [smiley face emoji]. I was wondering if I could come and see you

for a wee chat. There's a couple of things I want to make you aware of and some things I want to ask you. Nothing big dealish and there of course is zero pressure if you're not ready for that yet. You can let me know" (page 40).

24. The claimant responded as follows: "Hey thanks for texting. I've been wanting to text you too so makes me a shite bag too! [laugh out loud emoji] Of course I was gonna see if you want to go for a coffee or something? I don't think I can face coming into the office just yet!" (page 40).

25. The meeting took place on 3 April 2019 in Starbucks in Hamilton (page 41). Mr Donnelly advised her that the person who had replaced Ms Harris (a Ms S Brydon) was found to have committed fraud in past employment and that the arrangement was not working out as expected. The claimant said that she was not ready to come back into work yet. Since one of her colleagues was then pregnant, she did not think it would be fair for either of them. There was no suggestion that the claimant would return to work at that point. Home working was not raised at this meeting. There was no suggestion at the meeting that the claimant would or could take over the role of Ms Harris.

26. On 8 May 2019, Mr Donnelly sent a text to the claimant to say "Hi pal let me know when it would be OK to give you a quick call X". The claimant responded, "yeah good to call" (page 44). During that call, Mr Donnelly asked her to attend training on a new accounts package which was being introduced and which she would require to use on her return. She agreed to but asked if another member of staff could attend with her because she did not feel comfortable going on her own.

27. On 10 May 2019, Mr Donnelly texted the claimant as follows: "I need another quick chat for a second if you can" (page 44). Although the claimant did not respond, he telephoned for advice about putting invoices on Sage. She spoke with Ms Brydon and explained how to find invoices on their previous software.

28. On 11 and 12 June 2019, there was an exchange of texts between Mr Donnelly and the claimant regarding attending the training on the new accounts package (page 45-47).

29. In or around 17 June 2019, Mr Bell contacted the claimant by text: “Hi Stacey. How r u doing. R u able to do anything in the way of invoicing this week? Jessica is off this week and would be a help. Only if you are up for it! Speak soon. Paul x” (page 52).

30. The claimant’s reply that same day was “Yeah that’s fine, I’ll get the printer from the office tonight at some point I’ll take franked envelopes also! Can you say to Davie to make sure I can log on from my laptop please” (page 52).

31. The claimant went that evening to get the printer and commenced work on invoices sent to her thereafter. The claimant then realised that there were over 900 invoices to be raised and it was apparent that her work had not been done from the time she went off on maternity leave.

32. Although the claimant did not indicate an intention to return to work in writing or formally intimate that her maternity leave had ended, the claimant’s maternity leave ended by operation of law on 17 June 2019 when she returned to work, part time on full pay.

33. The claimant attended training on the new accounts package which took place over two half days on 24 and 25 June 2019.

34. On 26 July 2019 Mr Bell asked the claimant to meet with him in the office after hours. A meeting took place after 5 pm on 1 August 2019. When she arrived she asked Jessica O’Donnell to join her in the meeting.

35. At this meeting, Mr Bell asked how she was getting on and whether she had capacity to increase her hours. The claimant said she was not ready to come back into the office and that she was not sleeping well. It was agreed that she would continue to work 20 hours from home. The claimant asked if she would be paid overtime and Mr Bell agreed.

36. There was a mismatch of understanding about what was agreed at this meeting. The claimant thought that Mr Bell was agreeing to pay overtime for any work she did over 20 hours. She was of the view that she was still on maternity leave, and that she was entitled not to work for the hours which were covered by SMP. Mr

Bell thought that he had agreed to paying overtime after full time hours, not after 20 hours.

37. In or around mid August 2019, the respondent placed an advert on the recruitment site Indeed for an accountant/bookkeeper. The respondent intended that this role would be for an accountant with greater qualifications and experience than the role which had been occupied by Ms Harris. Interviews took place and a John Whyte was recruited.

38. On 21 August 2019 Mr Bell texted the claimant to say, "Your doing great. Just keep up the updates and pop your head in now and again……". She replied, "I [am] just trying to get my confidence back to come in now and then then get back to actually working in the office but doesn't help when another round of IVF has just failed. I don't want Liam to know I have had IVF again cause I don't want him thinking I'm not in the office and trying to get pregnant again if that makes sense!....." (page 56).

39. On 28 August 2019, the claimant sent an e-mail to Mr Bell around 9 pm, setting out the hours she had worked that month. It stated, "total hours worked = 134. Total agreed = 80 (as still entitled to mat pay, this away from my wage would be 20 hours per week). Total overtime to be paid in wage 30 August = 54" (page 58)

40. This email was sent after the payroll figures had been finalised for that month.

41. Mr Bell was very surprised to receive this claim for overtime because he had not understood this to be the agreement which had been reached at the meeting on 1 August.

42. On 29 August 2019, Mr Bell contacted the claimant by text to ask if it was ok to call for a chat. The claimant advised that she had an impacted wisdom tooth and could only text (Page 66). She advised that she had not been paid her overtime, and he said that's what he wanted to talk about and that text would be difficult. He said he could not approve the amount sought and would need to speak to Mr Donnelly. He asked whether she was on full pay or reduced pay (page 66).

43. The subsequent text correspondence on 29 August was as follows:

SD: “Full pay but by law I should be getting between £600/700 depending on many weeks are in the month so since I was getting paid a full wage I agreed with you to work 20 hours to make up for the rest of my wage and anything above you actually agreed I would get overtime hence why I have worked it, that’s fine if youse decide not to pay it, but I’m not going to be working from home no more. I am more than aware that Fiona is getting paid her full wage and not expected to work a single hour. Also Jessica was in the meeting when you agreed to it, should have said then that I wouldn’t be paid it” (Page 76)

PB “I said I would look into it but I didn’t expect 54 hours. I happy to come to agreement but 54 hours out the office can not continue anyway. In overtime I meant over the 40 hours a week not over 20. I am happy me and you come to agreement on hours but I need to speak to your in person. And I can not put through mat leave and overtime that’s why I need to speak to you in private” (Page 77)

SD: “I genuinely can not talk. I am entitled to maternity pay and thought youse paying my full wage I would be good back to you by working 20 hours a week and agreed anything above that you would pay in overtime, that’s fine if you think 54 hours is too much but you should have said before I worked them not after. Youse haven’t put me on mat leave so I don’t understand that but like I said I am aware another employee who is currently off with her baby is getting full pay with no hours expected. I will be seeking advice on this though as I feel am…..(page 65)

The text continues (lodged at page 78) “… being discriminated. Not gonna lie this has totally set me back. I didn’t have to work while off on maternity/bereavement

SD: “Also shocked at not able to pay 54 hours which is £513 when we have another member of staff writing off £11k in outstanding debt” page 79

PB: “That’s [why] I need to talk to you. If I get sorted off the books as such. I need you to calm down and [hear] me out (page 80)

SD: “I am not being awkward when I say I can’t talk I can’t open my mouth” (page 64)

PB “I will sort you out Stacey but I honestly thought if you done 200 hours then I can authorise 30 overtime for instance. Give me a text when you can talk. But for now just go back to old arrangement. Between me and you I will sort….. (Page 64)

The text continues on page 81: “….That’s why I needed to speak to you in person” (page 81)

SD: “So while off on my maternity I am expected to work 40 hours a week even though I am still entitled to my mat pay. I don’t understand why I would be expected to work 40 hours a week when youse aren’t paying me my mat pay plus 40 hours? Can you confirm what the old arrangement is (page 81)

PB: “Whatever you had with Liam. I am not saying your not entitled to anything. I need not to get upset (sic). I can not explain correctly over text message. Nor [am I] saying your expected to do anything” (page 82)

SD: “You have said you thought if I worked 200 hours (40 hours a week in this 5 week month) you would pay 30 overtime so that’s expecting me to work full time hours!” (page 82)

PB: “I am sorting out wages just now. But I can’t personally authorise that amount again. So whatever you discussed with Liam go back to…..”(page 63)

PB: I sorted out and will show on next months payslip. Money will be in bank tomorrow. (page 63).

44. On 30 August 2019 Mr Bell texted the claimant to ask, “ Did the money go in? Can I talk to you today I want to clear the air” (page 63). The claimant replied, “Hi sorry I am waiting for an emergency app for my tooth, once I can actually open my mouth to talk I will! I think it’ll be in haven’t checked! Thanks” (page 83).

45. On 3 September 2019, the claimant agreed to speak to Mr Donnelly on the phone, but waited until her partner returned from work and put the call on loudspeaker.

46. During the call, Mr Donnelly told her that it was their intention to terminate the employment of Ms Brydon (the replacement for Ms Harris), and that they had taken on a more experienced accountant, a Mr John Whyte, who would be her

boss. He also advised that the new software was more efficient with regard to the invoicing of jobs. There was a discussion about the claimant's current situation, and she asserted that she was still entitled to maternity pay. Mr Donnelly advised that he would look into whether she was entitled to maternity pay.

47. The claimant had not prior to this told her family that she was working; but after this call she spoke to her father in law and he said that she should take advice about her situation.

48. The claimant continued to fulfil her same role which she had undertaken prior to that telephone call, working 20 hours but getting full pay.

49. On 17 October 2019, the respondent sent an employment handbook covering the majority of staff conditions of employment. Employees were referred to an additional document which was described as personal terms and conditions. Mr Donnelly's intention was that he would go over this in a meeting with each employee (page 84). The claimant was sent particulars of employment for her consideration which she did not discuss or sign.

50. On or around 31 October 2019, the claimant lodged a formal grievance claiming that she had suffered discrimination and a unilateral variation of her contract of employment (page 85). She did not provide details to support these claims, but said that she was not fit enough to attend a face to face meeting and asked for the matter to be dealt with by written communication.

51. Mr Bell responded by letter dated 5 November 2020 (page 86). He sought further information from the claimant.

52. The claimant e-mailed and posted a letter of resignation to Mr Bell dated 11 November 2019, in the following terms:

"Please accept this letter as notice of my resignation for the position of accounts assistant at Wm Donnelly & Company Ltd. I would like to reduce any notice period to zero, completing my employment on 8 November 2019. This is due to believing that I've been bullied and harassed as well as discriminated against, as documented in my outstanding grievance, and I trust that you can accept this

request. I hope that I can rely on you for a positive reference in the future. Please also find attached an SAR".

53. The claimant set out details of her grievance in a letter dated 13 November 2019.

54. Mr Bell responded by letter dated 20 November 2019 to her detailed allegations, and did not uphold her grievance.

55. The claimant started looking for a new job in October. She got an interview for a post dealing with accounts with the NHS, which she commenced on 18 November. She remained in post for around six weeks, but found it difficult to cope in the office environment. She was then on sick leave for around six months, and in receipt of ESA. She obtained employment as a home carer from July 2020.

Relevant law

Employment Rights Act – Unfair Constructive Dismissal

35. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) states than an employee has the right not to be unfairly dismissed by their employer. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".

36. In *Western Excavating Ltd v Sharp* 1978 IRLR 27, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose

his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

37. The question whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by the range of reasonable responses test (*Tullett Prebon plc v BGC Brokers* [2011] EWCA Civ 131; *Bournemouth Higher Education Corporation v Buckland* 2010 ICR 908 CA). The EAT has since confirmed in *Leeds Dental Team v Rose* 2014 IRLR 8 that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

Equality Act 2010

38. Section 13(1) of the Equality Act 2010 sets out the provisions relating to direct discrimination, which is where an employer treats or would treat an employee less favourably because of a protected characteristic, in this case sex.

39. Section 18(2) and (4) of the Equality Act 2010 relate to pregnancy and maternity discrimination in the employment context, and state that an employer discriminates against a woman if, during the protected period, that is while the claimant is absent on maternity leave, he treats her unfavourably because of the pregnancy or because she is exercising maternity leave. Section 18(5) makes it clear that if the treatment is in implementation on return of a decision taken in the protected period, the decision is taken to have been made in that period.

40. Section 123 of the Equality Act 2010 states that a complaint must be made to the employment tribunal before the end of three months starting with the date of the act of discrimination, or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the period in question decided upon it.

Claimant's submissions

41. Mr Campbell argued that the claimant's maternity rights under section 18 of the Equality Act had been breached. He argued that she had never been informed of

her maternity rights by her employer, and she was given no documentation regarding her maternity rights.

42. The respondent had a need at the time that the claimant went off for work to be done on invoicing, but the respondent had no contingency plan to deal with that gap while the claimant was expected to be on maternity leave. There had been an agreement, between the claimant and Mr Donnelly, before the tragedy, for the claimant to undertake 20 hours working from home.

43. When the claimant was on ordinary maternity leave, the accounts function was falling behind, which caused Mr Donnelly to contact the claimant. At the subsequent meeting on 3 April, he informed her that he was paying her full wages, and although he denied it, he asked her when she could come back into the office; and she said that she would look into working from home if she felt up to it. He said that events in the accounting department were the catalyst for him contacting the claimant, which further amplified the need for the claimant to return to work during ordinary maternity leave.

44. Ms Harris told Mr Donnelly about Ms Brydon on 11 March, but he chose to wait until the 28 March to contact the claimant. It is more than a coincidence that that is six weeks to the day that the claimant commenced maternity leave, and the date on which her maternity pay would reduce from 90% of pay to the flat rate. The respondent would qualify for small employers relief on the statutory maternity pay. Making contact with her at this point shows that he wanted his pound of flesh, having made no contingency plans to cover her work.

45. During the exchange with Mr Bell on 17 June, when he contacted her to carry out work because Jessica was off, he disclosed that she was getting paid her full wage, and this prompted the claimant to feel obliged to comply. Even after telling Mr Bell that she was not sleeping well, that she was uncomfortable going into the office, he still asked her to work, having no consideration for the claimant's state of mind. This is compelling evidence that the claimant was coerced or guilt tripped into carrying out work for the respondent during a period when she should have been resting and recovering as well as grieving.

46. The claimant's maternity rights were breached because she gave no express confirmation of any wish to return to work from maternity leave. Although he denies it, Mr Donnelly said "what are you women like taking maternity leave".

47. The claimant did not find Mr Donnelly approachable, and Mr Bell confirmed that she had asked that he not be in the office when she came to meet him on 1 August.

48. The claimant's rights under section 13 of the Equality Act were breached when she was given no opportunity to apply for the post which was subsequently given to Mr Whyte. This was not even mentioned to her until she had the meeting with Mr Donnelly on 3 September when he was already appointed. He should have brought this to her attention while she was on maternity leave. This failure was because of her sex and because of her IVF treatment.

49. With regard to the respondent's time bar argument, it took the claimant some time to come to terms with what had taken place. Even at the meeting on 3 September, Mr Donnelly said that he would look into her maternity rights. The claimant did not grasp what was taking place since she believed that she was on maternity leave, and it was clear that she was on maternity leave.

50. Mr Bell said in evidence that the claimant could have applied for the job. The claimant suffered less favourable treatment by the failure of the respondent to give her the opportunity to apply for the job (by reference to the case of *Visa International v Paul*).

51. Mr Campbell submitted that Mr Whyte had "trumped up his own ability"; that what Mr Donnelly says about the role being a higher level even to Ms Harris is not reflected in the role advertised; that the job is still being done and the claimant could have done the job.

52. The claimant was not given the opportunity to apply for this position because of her sex; because she had been on maternity leave, because she was still on maternity leave, and because she had the potential to go on maternity leave again.

53. During the telephone call on 3 September, the claimant was advised that the role she was to return to after maternity leave was to be an administrative role. He said that it was a matter for the Tribunal to determine whether the terms and conditions of her role had changed in the absence of supporting evidence.

54. He accepted that it was not in dispute that the claimant had never at any point objected to any work she was being asked to do. He relied on the letter which had been lodged written by her doctor, and in particular that "Stacey [has] a lovely, co-operative and compliant personality, who I am sure, would endeavour to do what a boss told her to do, even if this did not seem reasonable and even if she was not medically fit to do it…..her personality would make her susceptible to coercion as she is eager to please and always tries to do her best".

55. Mr Campbell referred to a number of decisions of the Employment Tribunal to support his submissions. These included a case where the ET allowed an extension of time on a just and equitable basis; where comments made by a respondent relating to pregnancy and maternity were found to be discrimination; and a case where a claimant who had not got a promoted post was considered to be sex discrimination.

56. After some discussion, Mr Campbell confirmed that he was not pursuing the harassment claim, which he withdrew.

Respondent's submissions

57. Mr McCormack dealt first with the time bar argument in regard to the Equality Act claims, by reference to section 123. With regard to the last act of discrimination, on the evidence in this case, he submitted that any maternity leave ended on 17 June 2019. However, even if the last act of discrimination took place on 3 September, the claimant notified ACAS about early conciliation on 28 November, and the certificate was issued on 28 December 2019. The claim was lodged on 25 February 2020, therefore out of time.

58. Any claim which pre-dates 29 August, specifically the non-payment of overtime, is out of time because then the EC certificate was sought after the three month

period, and therefore she was not entitled to rely on the EC extensions because she was already out of time.

59. Any claims relating to maternity failures are well out of time, because they end at the end of the maternity leave period, and section 18 claims only apply to the protected period. He argued that there was no evidence to support a just and equitable extension; specifically, that there was no evidence given about why she had not lodged the claim in time, given that she was taking advice.

60. Mr McCormack accepts, with regard to the constructive dismissal claim, where the act of resignation was 11 November, that claim is in time.

61. With regard to the direct discrimination claim, and specifically the argument that the claimant was not offered the John Whyte role, the reason for this was not because of sex or maternity leave, but because of experience, or lack of experience. He asked the Tribunal to accept the evidence of the respondent that they were looking for someone to fill a role above that of accountant/bookkeeper. This was not the role the claimant had been doing and it was not a role which she was capable of. The claimant may consider herself able to fulfil the role, but this is to over-estimate her capabilities. However it was her lack of experience which was the reason why there was no offer to her to apply.

62. With regard to the unfavourable treatment, Mr McCormack said that he could not defend the lack of documentation in relation to her maternity rights or maternity leave, but the claimant herself had expressed an interest in returning to work early. In any event, any failure to advise her of her maternity rights was well out of time, as discussed above.

63. With regard to whether, in light of the relationship which she had with the respondent, the claimant would be able to bring things up which were a concern to her, she said in evidence that her colleagues were like “family” and that when she informed Mr Donnelly of her pregnancy, he gave her a hug and warm congratulations. When the texts are considered, the claimant does not present as if she was intimidated. When she did wish a matter to be addressed, then she would raise it, for example when she raised the issue of overtime with Mr Bell, the e-mail to him is not the action of someone who is a shrinking violet.

64. While he accepted that the claimant's return to work could have been better handled and could have been better documented, the texts indicate that she had no issue with returning to work. They show that she came back to work willingly and undertook overtime, for which she chased payment over and above her full wages. The texts suggest she was happy to return to work, working hours which suited her.

65. Although it is not documented, the claimant had expressed a desire prior to going on maternity leave to get back to work early, and to work from home within three months. Although it is accepted that plans changed due to tragic circumstances, there was a verbal agreement, supported by the texts, for the claimant to return to work from 17 June. The claimant continued to work in the same role, following the discussion on 3 September, for a further two months.

66. With regard to the constructive dismissal claim, Mr McCormack submitted she had made up her mind by 3 September to leave as she clearly stated in evidence in chief. While she retreated from this certainty in cross examination, the onus is on the claimant to establish that her contract was breached. He accepted that demotion would be a material breach but the evidence does not support that.

67. In any event, by continuing to work for a further two and a half months after the alleged breach, he submitted that she could not be said to be resigning in response to any breach. There was no change to her work during that period, which was at a time when John Whyte was there; so it is clear that her own position was there and was not taken away. By the time of her grievance, she was told by the respondent that there was to be no change in her terms and conditions in the letter of 5 November.

68. The claimant did not resign in response to the breach, but rather because she had obtained new employment with NHS, which she started one week later, but for which she had an interview in October.

69. Although there was a lack of evidence about her earnings in the NHS, he argued that even if the Tribunal were to find that she had been unfairly dismissed, that any losses would relate to only one week of wages from 11 November to 18 November, and would stop on that date.

70. With regard to injury to feelings, this was a case which fell at the high end of the lowest Vento band or the low end of the middle Vento band.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

71. We accepted the evidence of the claimant about the events surrounding the tragic situation and her subsequent actions and emotional response as genuine. However, as discussed later, we believed that her answers, though she may have believed them to be the truth, were coloured by a fundamental misunderstanding of the situation and her legal rights.

72. Indeed, we got the impression that she had constructed her own interpretation of events, which we did not find to be reliable. For example, she incorrectly understood that she was both on maternity leave and back at work after 17 June; she misunderstood the status of the discussion which she had with Mr Donnelly in December; she misinterpreted what happened at the meeting on 3 April in Starbucks, when we have found that there was no suggestion that she would take over the role of Ms Harris; she misunderstood the agreement regarding overtime; she misinterpreted what was intended to be communicated to her during the telephone conversation with Mr Liam Donnelly on 3 September, and we did not accept that she was told that she would have a substantive role in the admin department on her return.

73. Further, while the claimant now says that she felt pressured and coerced into returning to work, or at the very least she felt that she ought to return to justify the fact that she was getting full pay, we have found that she gave no impression at all that she was anything other than entirely willing to return to work on the basis that was agreed, not least because of the responses we see that she gave in the text communications which have been lodged. Further we did not accept that there was any pressure put on her to do overtime, which we have found was a proposal which she made and which was accepted by Mr Bell. There was no suggestion that she was coerced into doing that, or even expected to do it, despite her own concerns about the backlog of invoicing to be done. While she may well

have felt under some pressure to return, we accept that sentiment was certainly not communicated to the respondent.

74. While we accept that the loss of the baby will have had a significant impact on her, including her self-confidence, we did accept from the evidence we heard that the claimant was the type of person who would not allow herself to be taken advantage of. For example, we heard that she raised her concerns about running upstairs to collect paper off the printer for Ms Harris, and that a printer was obtained for her. Indeed Ms Harris said in evidence that she was "not shy about coming forward if there was something she was not happy about".

75. While Mr Campbell relied on a doctor's letter which was lodged, that was clearly composed on the basis of what the claimant had told her, and in ignorance of the overall context.

76. We did not find Mr Donnelly to be an impressive witness. His answers were often vague and his memory unreliable. He did not come across as candid and his answers were evasive and he was apt to go off on tangents in response to questions which were suggestive of a yes or no answer. Further, although Mr Donnelly was clearly a compassionate man, he gave an impression in the way that he gave evidence of an aptness to react to situations he did not like, when he might display an autocratic style of management. We got the impression from the way that he gave evidence that he was not the kind of man who liked to be crossed. We did not therefore find his evidence to be entirely reliable.

77. Mr Bell on the other hand gave his evidence in a straightforward and clear way. We accepted his evidence as credible and reliable. We also found Ms Harris to be credible and reliable. Where there was a conflict of evidence, we preferred the evidence of these witnesses.

78. One further comment for future practice. We did not find it easy to make findings in fact on the text conversation between the claimant and Mr Bell because selective texts were lodged out of order.

Constructive dismissal claim

79. In order for the claimant to succeed in her constructive dismissal claim, she must show that there was a breach of contract by the respondent. The claimant argued that there had been a fundamental breach in her employment contract when the respondent advised her, as she claims, that she was no longer to undertake the role of accounts assistant but her role would be primarily an administrative role.

80. The difficulty for the claimant is that the evidence which we heard did not support that assertion.

81. While there may have been some evidence to suggest that the move to different accounting packages might mean that there was less for an accounts assistant to do, and that one of the administrative officers may not be replaced, there was otherwise no suggestion that the claimant's role was to change. Indeed from the date that she spoke to Mr Donnelly when she appears to have understood him to be telling her of the change, by her own evidence, her work did not change, and her salary did not change. Again although she may have formed some impression that the updated draft particulars of employment sent out to her in October might have signalled a change in her role, the evidence we heard does not support that. Indeed in the letter from Mr Bell dated 5 November 2019 he specifically confirms that there is no change in her role. So even if there were to be a change in her role, that had certainly not materialised yet, so that she would in any event be said to have resigned too early, and before any breach had crystalised. We find therefore that there was no breach of contract.

82. Even if we had found that there was a fundamental breach of contract, we would have found that the claimant did not act in response to the breach, which she said was on 3 September. After that date, she continued to work until 31 October at least, not handing in her notice until 11 November. Further evidence which would support the view that she did not resign in response to the alleged breach is that she commenced alternative employment on 18 November, having had an interview for that job in October.

83. We find therefore that there was no breach of the terms of the contract of employment by the respondent so that it could not be said that the claimant's

resignation amounts to a dismissal in terms of the relevant provisions of the Employment Rights Act. Her claim for unfair dismissal cannot succeed and the claim is dismissed.

Equality Act claims

84. We should say before considering these claims that we came to believe that there was a fundamental misunderstanding in this case which led to parties being confused about the position taken by the other, caused, we believe, by ignorance (as in lack of understanding) of both parties. This is clearly demonstrated by the text conversation between Ms Davis and Mr Bell on the overtime question, set out in full in the findings in fact.

85. In particular, we noted that the claimant understood the circumstances which pertained after 17 June to be a mixture of maternity leave and return to work, and that it was her inappropriate understanding, and only hers, that her maternity pay was covering 20 hours of maternity leave when she did not require to work, and that her maternity pay was being "topped up" by pay for the 20 hours of work that she was doing. We did not find this to have been agreed by the parties either before or after the commencement of her maternity leave.

86. Indeed, whatever her understanding, the claimant could not have been on both maternity leave and have returned to work because such positions are mutually exclusive. The fact that the claimant agreed to return to work, albeit working from home and at hours which suited her, signalled the end of her maternity leave. While "KIT" days were introduced precisely to deal with the legal requirement that as soon as an employee returned to work, even for one day, she would be deemed to have automatically terminated her maternity leave, such provision is to deal with situations where an employee might have good reason to attend work for a few days during maternity leave (up to ten), such as to attend a training course, as the claimant was asked to do initially in this case.

87. We have also found that no agreement was in fact reached in the meeting which took place in December, although there appears to have been reliance placed on it by both the claimant and the respondent. We have found that the claimant thought that it was agreed that she would, after three months of maternity leave,

do 20 hours a week of work at home and be paid “cash in hand”. Mr Donnelly says no such agreement was reached, although he approved her returning to work early but thought that it would be reconsidered after the baby was born. Notwithstanding the fact that Mr Donnelly said no agreement was reached at that meeting, and in any event that meeting was before the claimant had commenced maternity leave, and circumstances turned out to be very different than envisaged, it seems that the claimant relied on what she understood that agreement to be once on maternity leave. Although Mr Donnelly claimed to have nothing to do with any agreement reached about her return to work, saying that was a matter for Mr Bell, Mr Bell himself sought to defer to the agreement reached between Ms Davis and Mr Donnelly, as is evident from the text messages. But instead Mr Donnelly sought to deflect responsibility for that onto Mr Bell. It is not surprising therefore that there was a lack of understanding about the circumstances. However the claimant laboured under the assumption that part of her pay was SMP.

88. It follows also, and crucially for the claimant, that the claimant’s entitlement to maternity pay would end as soon as she returned to work. The fact that the claimant was doing the work at home is nothing to the point. The claimant was doing work and was being paid for it, in what could only be classified as a phased return to work.

89. Given the findings in fact, specifically that the claimant’s maternity leave ended on 17 June, the claimant would have no further entitlement to maternity pay on that date and had given up her right to remain on maternity leave. The claimant indicated in evidence that she had initially just agreed to help out for the week while Jessica was off, and then that she just continued working. The fact is that she did continue working, so that the work she did could not be categorised at KIT days and in any event there was no suggestion that such an agreement was reached.

90. The claimant was of the view that she was on maternity leave from the date of the commencement of maternity leave, which would have commenced the day after the claimant’s baby tragically died, until the termination of her employment. This explains much of her take on events.

91. We have however made as a finding in fact that the claimant's maternity leave endured from 13 February to 17 June, that is for approximately four months, during which time she was paid full pay, but after which she had returned to work on a phased basis. This question is a mixed question of fact and law, which might explain the claimant's misunderstanding, but that finding is crucial to the outcome in this case, as discussed below.

92. On the other hand, the respondent made no effort at all to try to understand the claimant's position or to set out clearly what her position was. While we understand that a relatively small family business may not be aware of the detail of the complex maternity rights regime, it was incumbent on them to find out in the relatively unusual circumstances in which they found themselves.

93. We got the impression that the respondent did not appreciate at all that after the claimant's baby died that she would thereafter be on maternity leave, and she would be entitled to the full 52 weeks. We got the impression that the respondent may have understood the claimant to be on sick leave or special leave or bereavement leave, but it did not appear that they appreciated that she was on maternity leave. Mr Donnelly took immediate steps to ensure that she was on full pay. While this was a generous act given the respondent did not pay contractual maternity pay, without clarity about the agreement which was reached, it inevitably resulted in misunderstandings.

94. Our impression is supported by the fact that we heard no evidence that the claimant was at any time in receipt of statutory maternity pay. There was no entry for such a payment on the claimant's pay slips, which is where we would expect to see it, if the respondent had reclaimed that through HMRC as was their right. Although there was some discussion about whether they would have been entitled to small employer relief at 103% (which they would where, as we now understand it, they paid over £45,000 in NI contributions) and it would appear that the respondent may well with a workforce of around 38 employees not have been entitled to the small employer relief, the respondent would have been entitled to 92% refund even as a large employer (although Ms Harris did not appear to appreciate that).

Discrimination because of pregnancy or maternity

95. The claimant argues that the employer's conduct amounts to unfavourable treatment because of pregnancy and maternity. In such cases, no comparator is required, and the focus of our enquiry is the reason why the claimant was treated the way she was treated. Was it because of pregnancy or maternity?

96. We understood the claimant to argue that the following events amounted to unfavourable treatment because of pregnancy/maternity:

    a. The failure of the respondent to advise the claimant of her maternity rights prior to going on maternity leave;

    b. The fact that the claimant felt pressurised/coerced into returning to work when she had at no time intimated in writing of her intention to return to work early;

    c. The comments made by Mr Donnelly about women taking maternity leave;

    d. The failure of the respondent to offer her the opportunity to apply for the role which was given to Mr Whyte;

    e. The decision by the respondent that she should return to work after maternity leave in the demoted post of administrative assistant.

97. With regard to the claim that the failure of the respondent to advise the claimant of her maternity rights prior to going on maternity leave amounts to unfavourable treatment because of pregnancy or maternity, this is not a matter which was specified in pleadings. In any event, clearly the provision of such information would be intended for those employees who were pregnant or about to go on maternity leave. These provisions however relate to the protected period, that is the period after maternity leave has commenced.

98. It is very common for small employers to fail in their obligations to pregnant employees, and that criticism must be leveled at this respondent. We note that in the updated employee handbook there is a one page reference to all maternity and parental leave policies, and a link to the relevant gov.uk guidance, but otherwise no guidance at all beyond adopting the statutory scheme. While this is

not good practice, we find no breach of section 18 based on the facts in this case. In any event, we accepted Mr McCormack's submissions, discussed later in this judgment, that any claim in that regard being lodged on 25 February 2020 when her pregnancy was announced in July and at the latest in October 2019, would have been out of time.

99. The claimant relies on the fact that she was pressurised and coerced into returning to work early from maternity leave. While that may well have amounted to unfavourable treatment because of pregnancy, the evidence in this case did not support that submission. We got no impression at all that the claimant was forced to return early. It was quite clear to us that the claimant very willingly returned to work when she did. She was being paid full pay, and she says she felt she had to commence work to justify that, but she would have had every right to have remained on maternity leave after June 2019. Instead she chose to return and was paid full pay by the respondent for a phased return to work. The fact that there was no written intimation of her intention to return early is beside the point where agreement was reached.

100. Again while we had no difficulty in accepting that pejorative comments about an employee availing themselves of their maternity rights may well amount to unfavourable treatment because of pregnancy, we did not accept that there was any evidence to support that submission in this case. The claimant alleges that Mr Donnelly had said something about women taking maternity leave, by reference to her request and the information that another employee was pregnant. Mr Donnelly was rather indignant that he should say such a thing about his niece, but we accept these comments were not made. Further and in any event, the claim would be out of time, and the claimant did not apparently suffer any detriment which flowed from any such comments.

101. The claimant also argues that the failure of the respondent to bring to her attention and give her the opportunity to apply for the accountant role was unfavourable treatment because of pregnancy/maternity. Mr Campbell relied on the decision of the EAT in the case of *Visa International v Paul* 2004 IRLR 42. Again we readily accepted that the failure of an employer to bring vacancies to the attention of women on maternity leave could amount to pregnancy discrimination. However

in this case by the time of the advert, in August 2019, the claimant was no longer on maternity leave so strictly speaking would not have any more right than others for such vacancies to be brought to her attention. However and in any event, as Mr McCormack submitted, the failure of the respondent to bring the vacancy to the attention of the claimant was because the claimant lacked the experience required for the job. We heard evidence from Mr Donnelly that he had been advised that he should look to engaging an accountant with more experience and qualifications than the accountant/bookkeeper role. We accepted that evidence, not least because it was corroborated by Mr Bell, although it seems that the company no longer have an accountant role in the organisation. We noted that however much potential the claimant might have, she had limited accounts experience, having completed an HNC only in 2017 and working in an accounts role for only around two years, in addition to the time at Evans Halshaw. Ms Harris said that she was undertaking on the job training with her, but there were a large number of aspects of even her job which the claimant was not yet trained to do. Although Mr Bell said that Ms Davis had applied for the job she would have been given an interview, we take the view that the respondent did not think to bring this job to the claimant's attention because she lacked the experience and qualifications necessary to do the job, and had she applied she would not have been successful.

102. A decision by the respondent that she should return to work after maternity leave in the demoted post of administrative assistant would almost certainly amount to unfavourable treatment, and indeed a fundamental breach of contract. However, as discussed we have found that the facts do not support that conclusion in this case since we have found that there was no change to her terms and conditions after the 3 September phone call or up to her resignation.

103. There was some suggestion that the claimant also relied on the delay in paying overtime as unfavourable treatment because of pregnancy. Again there were no specific pleadings to this effect, but we have found in any event that the claimant was by this time not on maternity leave, and any delay, which was negligible, was explained by other factors.

Direct discrimination

104. The claimant also argued that she had suffered direct discrimination, that is that she was less favourably treated because of her sex and that related to the appointment of Mr Whyte. As discussed above, we have accepted that the failure to advise the claimant or not to interview her was not an act of unfavourable treatment because of pregnancy. We find that to fail to interview her and indeed to appoint Mr Whyte was not less favourable treatment because of sex either. Although Mr Donnelly apparently could not remember anything about Mr Whyte or his experience or qualifications or why he had appointed him, we did accept taking account of Mr Bell's evidence that a decision had been made at least in principle to engage a person with more senior experience to the accountant/bookkeeper role, even if that did not materialise in that way. Mr McCormack's position, which we accepted, was that evidence pointed to the reason being that the claimant was not sufficiently experienced to be able at this stage to undertake that role, and not because of her sex.

105. There was some mention, but only in submissions, that the claimant relied on the assertion that the reason for her treatment was also related to IVF. Again this was not specifically referenced in pleadings and whether case law would in any event support such a claim in principle is debatable. However, we have found in any event that any treatment of the claimant is explained by other factors unrelated to her sex.

Time limits

106. While we have found in this case that the claims under the Equality Act are not well-founded, we went on to consider, in any event, whether these claims were lodged within the appropriate time frame.

107. Claims under the Equality Act should be lodged within three months of the date of the act of discrimination, and where there is conduct extending over a period, at the end of that period.

108. The test in regard to extending time for Equality Act claims is of course different from the unfair dismissal claims, and that is that claims can be lodged late in circumstances where it was just and equitable to do so.

109. The claimant resigned on 8 November 2019. She notified ACAS of early conciliation on 28 November 2019 and an EC certificate was issued on 28 December 2019, which adds 30 days to the time limit, and thus a claim lodged on 25 February 2020 would be lodged in time, taking the starting point from the date of resignation.

110. Mr McCormack accepted that the unfair dismissal claim was lodged in time, and his focus in submissions was on the Equality Act claims. His position is that the claimant returned from maternity leave on 17 June and would require to have lodged a claim within three months of that date. No claim was lodged and ACAS was not notified within that time. However, even accepting that the last date of any discrimination was 3 September 2019, any claim should have been lodged within three months of that date, that is by 3 December. Although ACAS was notified on 28 November and the certificate issued 28 December, that would give her a further 30 days, that is by 28 January, but the claim was not lodged until 25 February. It is apparent then that the claim was lodged out of time.

111. We turned then to consider whether it was just and equitable to allow the claim to be lodged late. We accept that our discretion to extend time is broader than under the "not reasonably practicable" formula (*DPP v Mills* 1998 IRLR 494), and that we can take into account any matters which we judge to be relevant (*Hutchison v Westward Television Ltd* 1977 IRLR 69). However we were aware too that time limits are however exercised strictly in employment cases, and the onus is on the claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

112. Mr McCormack argued that there was no evidence to support a just and equitable extension. The only evidence that we heard was that the claimant was in receipt of advice following the telephone call on 3 September. The claimant gave no evidence otherwise to explain the delay or to support a claim that it was just and

equitable to extend time. During that time she was working from home, and although she was not coming into the office, she was taking advice.

113. We were however of the view that in this case the fact that the claimant had obtained advice immediately after the meeting on 3 September but did not lodge the claim until 25 February must weigh heavily in our deliberations. This was not a case where the claimant could be said to be ignorant of her rights and there appears to be no reason given for the delay. Indeed, the evidence we heard was that following 3 September meeting she was looking for another job, which she had secured before she intimated her resignation.

114. While there might be prejudice to the claimant in not allowing her claim to be heard at all, in this case consideration has already been given to the claimant's claims under the Equality Act, and we have decided that they are not well-founded.

115. In the circumstances of this case, we have concluded that it was not just and equitable to extend time to lodge the claim, and therefore the claim was in any event lodged out of time.

Conclusion

116. We have decided that the claimant's claims under both the Employment Rights Act and the Equality Act fail (the latter in any event being out of time).

117. It may be helpful to record here that even if we had found for the claimant in the Equality Act claim or the unfair dismissal claim, we would have found any compensation to be limited.

118. The claimant obtained a job before she intimated her resignation. While it is entirely admirable that the claimant sought to mitigate her losses in that way, and indeed no doubt she felt that she could not afford to give up employment at that time, the claimant's evidence was that she commenced employment on 18 November, that is only seven days after she intimated her resignation on 11 November. The wage loss therefore amounted to one week of wages, given that she was earning the same or similar in that role.

119. Further, in so far as the claimant argued that her decision to leave the NHS should lie at the door of the respondent, we entirely reject that submission. There was no evidence at all to suggest that the respondent should be held responsible for any continuing concerns that the claimant might have in working in accounts in the office environment. We would have found then that losses would have stopped running as at 18 November in any event.

120. It is perhaps too appropriate to state that we consider that Mr Campbell entirely overstated any injury to feelings compensation to which the claimant would have been entitled, even if the claimant had been successful, and we would have been much more attracted to the submissions of Mr McCormack.

121. In any event we have found that the claimant's claims of unfair dismissal and discrimination are not well-founded for the reasons set out above, which are therefore dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 10th February 2021
Entered in Register: 17th February 2021
Copied to Parties