EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123396/2018

Held in Glasgow on 2 and 3 October, 3 December 2019 and 6 January 2020 (Members' Meeting)

Employment Judge: Mrs M Kearns
Tribunal Members: Mrs J Ward
Mr J Burnett

Ms A Plunkett	**Claimant** **Represented by:** **Mr S Smith** **Solicitor**
Auchinbee Care Limited	**Respondent** **Represented by:** **Mr D Jaap** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was that:

(1) The claims under sections 55 and 56 Employment Rights Act 1996 are time barred and the Tribunal has no jurisdiction to hear them;

(2) The claimant was unfairly constructively dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **£1,344 (One Thousand, Three Hundred and Forty- Four Pounds)**.

The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 do not apply to this award.

(3) The claims under section 99 Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave Regulations 1999 are dismissed.

(4) The claims made under the Equality Act 2010 are dismissed.

(5) The claimant's application for expenses is refused.

REASONS

1. The claimant worked for the respondent as a finance administrator from 18 January 2016 until 13 August 2018, when she resigned. On 30 November 2018, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in which she claimed breach of the right to time off for antenatal appointments; constructive unfair dismissal; automatically unfair dismissal; pregnancy and/or maternity discrimination; sex discrimination; notice pay; holiday pay and arrears of pay.

Issues

2. The issues for the Tribunal were originally set out in an agreed list of issues being a list of specific acts complained of (A to J). The Tribunal agreed to a joint application by parties at the end of the Hearing for submissions to be lodged in writing and we received the parties' written submissions on 3 January 2020. It is fair to say that the written submissions received from the claimant had become significantly more complicated, in that the acts complained of (A to J) were presented under no fewer than seven different legal heads of claim, hence the length of this judgment and the time it has taken to draft. As no objection was received to this in principle and to avoid further delay, we have determined the issues as set out in the claimant's written submissions.

3. The final issues for determination were as follows:-

(1) Whether the claims for breach of the right to paid time off for ante-natal appointments were time-barred.

(2) If not, whether the respondent breached sections 55 and 56 Employment Rights Act 1996 ("ERA") (right to time off for ante-natal care and right to remuneration for same).

(3) Whether the claimant was dismissed, and if so, whether the dismissal was unfair under section 95(1)(c) ERA;

(4) If the claimant was dismissed, whether her dismissal was automatically unfair under section 99 ERA because the reason or principal reason for

dismissal was past or future pregnancy or the consequences of being pregnant in having antenatal appointments;

(5) If the claimant was dismissed, whether her dismissal was a breach of Regulation 20 of the Maternity and Parental Leave Regulations 1999 ("MAPL Regs");

(6) Whether the following were acts of unfavourable treatment of the claimant because of her pregnancy contrary to section 18(2) Equality Act 2010 ("EqA"):

a. Placing restrictions on when the claimant could attend antenatal appointments;

b. Denying her paid leave to attend antenatal appointments;

(7) Whether the claims at (6) above are time barred. If so, whether it would be just and equitable to extend time.

(8) Whether the respondent discriminated against the claimant because of her sex contrary to section 13 EqA by:

a. Placing restrictions on when the claimant could attend antenatal appointments;

b. Denying her paid leave to attend antenatal appointments;

c. Selecting her role as likely to become redundant without proper justification;

d. Asking her to take part in a redundancy consultation which was a sham as the outcome was pre-determined;

e. Denying her information she was entitled to as part of that process about the criteria for selection, scoring systems and company policy on redundancy;

f. Refusing to postpone or delay the consultation process to allow for this information to be provided;

g. Giving her misleading and incorrect information about her rights in a potential redundancy situation;

h. Refusal to investigate her grievance;

i. Accusing her of deleting office files without proper foundation;

j. Delaying in paying her notice pay/holiday pay for 11 months.

(9) Whether the following points were "distinct acts of direct discrimination under s.13" EqA:

h. Refusal to investigate her grievance;

i. Accusing her of deleting office files without proper foundation;

j. Delaying in paying her notice pay/holiday pay for 11 months.

(10) Remedy (if appropriate).

(11) Expenses.

4. The claims for notice pay and holiday pay were withdrawn at the start of the hearing, payment having latterly been made.

Evidence

5. The parties produced a joint bundle of documents and referred to them by page number ("J"). The claimant gave evidence on her own behalf and called her partner David McLuckie as a witness. She also called Mr Faisal Mohammed, the respondent's Director. The respondent called its Manager Ms Lauren Davie and its HR Support Adviser Mr Roberts.

Findings in Fact

6. The following material facts were admitted or found to be proved:-

7. The respondent is a limited company engaged in running the Auchinbee Children's nursery in Cumbernauld. Its Director is Mr Faisal Mohammed. The nursery was managed by Ms Lauren Davie with the assistance of supervisors and childcare practitioners who worked in each of the playrooms. The nursery

has around 140 children on its books. It comprises four playrooms in the main building and a separate out of school care building.

8. The claimant started work with the respondent's predecessor company, Carechoice Ltd on 18 January 2016 as a finance administrator. She worked in the office. Her main tasks were processing the fees, booking extra sessions, logging data into the childcare voucher account, printing the room registers and general administration. The claimant received a written employment contract on her start date (J1). Her employment transferred to the respondent in August 2016. The claimant has a degree in business management. She has many years' experience of office work. The claimant's role with the respondent involved book-keeping and finance. She worked 30 hours per week; Monday to Friday 12 until 6pm when she started. At that time, the claimant had one son, Joseph, born 12 June 2015. When the respondent took over Auchinbee the claimant agreed to change her working hours to 24 hours worked over three days; Tuesday, Thursday and Friday. Her son thereafter attended the nursery on Thursday and Friday only.

9. Towards the end of 2017 the respondent began to use the claimant as a childcare assistant for lunch cover in its playrooms. Initially the claimant was told that she was needed to cover the odd lunchbreak or pick-up from school. The claimant was not pressured into this and she agreed to do it so as to help out. However, the respondent began to ask her to undertake these duties more and more frequently until it grew to be at least a couple of times in her three-day week. In or about December 2017 a Care Inspector visited and asked the claimant whether she had or was undertaking a childcare qualification. The claimant said "no" and this was commented upon in the inspector's report. After that, the claimant agreed to do the qualification so that the respondent would not get into trouble if she provided cover again. (The claimant did not complete the course. Childcare was not a career she wanted to pursue.) Thereafter, the claimant began to find that she was being used more and more for childcare cover, sometimes for full days. She was also asked to drive the respondent's minibus to collect children from school and bring them back to the nursery or

to take children out on trips. The claimant began to find that she did not have sufficient time to do her finance work and she began to fall behind with it.

10. In February 2018 the claimant discovered that she was pregnant. She informed Ms Davie of this on 13 February 2018. The claimant said that her [antenatal] appointments were going to be sent out to her and she would bring the notification in to show Ms Davie when she received it. On 28 February or 1 March 2018, the claimant received two letters from the Princess Royal Maternity Hospital. The first letter (J16) notified her of her booking appointment with the midwife on Friday 16 March 2018 at 11:30. The second letter advised her of the date of her first scan on Tuesday 20 March 2018 at 13:40. The claimant brought the letters into work the next working day after she received them and showed them to Ms Davie. She indicated that she would need time off to attend the appointments. Ms Davie said she would need to speak to the respondent's HR adviser, Mr Roberts and to Mr Mohammed and come back to her. In the meantime, the claimant checked her rights with ACAS, who told her that she had the same rights as a full-time employee in relation to attending antenatal appointments during working time.

11. Ms Davie discussed the appointments with Mr Mohammed and then reverted to the claimant to say that he was happy to honour those two appointments being on working days, but that any further appointments would have to be on the claimant's days off (Mondays and Wednesdays). Ms Davie told the claimant that Mr Mohammed would also charge an hourly rate to the claimant for her son to attend the nursery while she went to the appointments. Ms Davie said that because the claimant had no control over the dates and times of the appointments, if they were booked for a date the claimant was scheduled to work then they would swap her working days. This meant that if the appointment was fixed for a Tuesday she would work Wednesday, Thursday and Friday that week instead of Tuesday, Thursday, Friday.

12. The claimant told Ms Davie that she was not 100% sure of her employment rights, but she thought that they could not refuse her paid time off for ante-natal appointments or make her take appointments on a day she was not working.

13. After work that evening the claimant called ACAS again about her employment rights and they confirmed that she had the same rights to paid time off for ante-natal appointments as a full-time employee. The claimant relayed this to Ms Davie on her next working day. Ms Davie said she would check with Mr Roberts and Mr Mohammed and come back to her.

14. The claimant attended her booking appointment on 16 March 2018. However, when she went for her first scan on 20 March she was told that they could not find the baby's heartbeat. They asked the claimant to come back the following week. The claimant was extremely distressed. She went back to the hospital for a further scan the following week on or about Tuesday 27 March 2018. It was after this scan that the claimant was told that the pregnancy had failed and that she would require an operation. The hospital then telephoned her and booked her in for the surgery on Tuesday 3 April 2018. At this time Ms Davie herself was on maternity leave and Amy Smart had taken over as acting manager. Ms Davie was keeping in touch by coming in one day per week. The claimant dealt with Ms Smart in Ms Davie's absence. The claimant kept Ms Davie and Ms Smart informed of what was happening. When the claimant told Ms Smart that the pregnancy had failed and that she had been booked in for an operation on Tuesday 3 April Ms Smart said she would need to check with Mr Roberts and Mr Mohammed about time off for that as it would involve a full day. Ms Smart checked with Mr Roberts and spoke to Mr Mohammed and then came back to the claimant to say that she would have to work the time back for that day as flexitime. The claimant was extremely distressed at the time and did not want to argue with her, so she agreed that she would do so. Ms Smart and Ms Davie acted in this way because they were mistaken about the legal position.

15. The claimant had the operation on Tuesday 3 April. The following day was a Wednesday, which was a non-working day. On the Thursday she phoned in sick due to pain, tiredness from the general anaesthetic and emotional stress. She returned to work on Friday 6 April. The claimant was paid for her first two antenatal appointments on 16 and 20 March 2018. She was not paid for the

other appointments, but was instead made to take the time as flexitime and work it back.

16. One day, shortly after the claimant's loss Mr Mohammed's brother Anil came into the nursery. He had been told about the claimant's pregnancy by Mr Mohammed but did not know that she had lost the baby. He congratulated the claimant on her pregnancy. The claimant was very distressed and also annoyed that her confidentiality had been breached. She had only told Amy Smart, deputy manager, Ms Davie and Mr Mohammed in confidence about her pregnancy and had not announced it more widely at that time.

17. The claimant was on friendly terms with Amy Smart and Lauren Davie and she told them that although she and her partner were devastated about their loss, they were going to continue trying to have another baby. The claimant went on to have a second child in April 2019.

18. The claimant generally kept in touch with Mr Mohammed by text message. In July 2018 the claimant was in contact with him concerning the approaching new school year in August when the nursery normally reviewed the parents' fees. She was anxious that she was not getting time to email the parents to let them know what their fees would be for the year beginning in August because she was constantly being asked to cover childcare in the nursery. On Tuesday 3 July 2018 (J1A) the claimant texted Mr Mohammed in the following terms in response to a message from him telling her that the fees were all updated: "*Thanks, I've not even had a chance to look at outstanding fees or put any payments on yet. I'm struggling to get through the out of school care fees for 2018/2019 as I'm constantly covering in rooms, lunch cover, making children's dinners etc so there is likely to be a delay in fees coming in next month."* Mr Mohammed responded to say that he would contact Amy Smart to see if they could get agency staff in.

19. On Monday 9 July 2018 the claimant sent Mr Mohammed a text in the following terms: *"Hi Faisal sorry to bother you I've just noticed on the rota for this week I'm on for being in the holiday club all day on Thursday is there any chance of getting agency staff in for this as I'm falling way behind on my own workload?*

I haven't even put any payments on for this month yet so don't know who or what is outstanding plus I've still got some out of school care fees to be sent to parents. Last week I ended up getting only 10.5hrs of my 24hr week to do my own job. Thanks" Mr Mohammed replied to say that he was at a wedding and would try and sort something out the following morning.

20. The claimant began to feel stressed because she was not getting time to cover her own workload. She was worried that the parents would not know what their fees would be for the coming year and that this could cause a delay in payments coming in. Mr Mohammed did get agency staff in for that week following the claimant's texts and she did manage to get caught up. However, on the Friday of that week (Friday 13 July 2018) the claimant was handed a letter (J3) just before 5pm. The letter was from Lauren Davie and was dated 13.07.2018. It stated:

"*Dear Aimee*

We are finding it necessary to reappraise our staffing levels, reduce costs, and reorganise some administrative processes in line with the plans for moving Auchinbee Nursery forward.

Regrettably these economic and organisational changes within the Nursery are likely to result in your job role being made redundant.

I am therefore inviting you to a consultation meeting, when you will have the opportunity to contribute any views, suggestions or proposals you may have regarding the situation. You are entitled to be accompanied at this meeting by either a current work colleague or an accredited Trade Union representative.

I will discuss with you when the meeting will take place (it will be scheduled within your normal working time).

You should also be aware at this stage that you would have the right of appeal should your compulsory redundancy be the outcome of this process."

21. When Ms Davie handed the claimant the letter she told her that the meeting would take place the following Tuesday 17 July at 10am, which was the claimant's next working day. The claimant was shocked by the content of the letter but she did not say anything to Ms Davie. She went onto the computer and looked up how to permanently delete files. The computer she used at work was a shared computer and the claimant had a number of personal files including family photographs and her assignments for the childcare qualification on it. She did not want the respondent to have access to these files after she left. She also deleted some of the respondent's files.

22. In reality the respondent had already decided on a reorganisation of their management structure which meant that the claimant's post of finance administrator would not continue. It was Mr Mohammed's view that her 'admin role' did not take much time, but that the respondent required and was recruiting more child carers. Both Mr Mohammed and Ms Davie were of the view that although the claimant was working 24 hours a week, the amount of finance administration work was not normally anywhere near that.

23. The only point of the consultation meeting as far as the respondent was concerned was to find out whether the claimant would accept the role of childcare practitioner. If not, she would be dismissed. In that sense, the outcome of the consultation was predetermined. When Lauren Davie had gone on maternity leave on 4 December 2017 Amy Smart had become acting manager to cover her leave. Ms Davie had been working one day a week during the latter part of her leave and was due to return from her maternity leave in the summer of 2018. The plan the respondent had decided on was that on Ms Davie's return from maternity leave Ms Smart would revert to Deputy Manager until her own maternity leave began a few weeks later, at which point the other Deputy Manager would cover for her. On Ms Davie's return in August 2018 the finance administration work being done by the claimant was to be done exclusively by Ms Davie. Thus, the catalyst for the claimant's redundancy was the impending return of Ms Davie from maternity leave and the planned absorption of the claimant's role into hers.

24. The claimant went home very distressed and was anxious about her situation all weekend. At 19:01 on Saturday 14 July the claimant emailed the respondent a message headed: "*Redundancy Consultation 17/07/2017"*. She stated: "*Ahead of my meeting on Tuesday I require the information below to enable me to properly consult and prepare to ensure a fair process: Criteria for selection and scoring systems, All current vacancies within the company, my full job description, my application form and starter pack, Company policy on redundancy…"* There followed a list of 21 further items, some of which were relevant, though many were not. Finally, the claimant asked for: "*Details of who will be chairing the meeting, their job title and who else will be in attendance along with their job title."*

25. The redundancy consultation meeting was scheduled for 10am on Tuesday 17 July 2018, which was the claimant's next working day after Friday 13 July. The claimant was conscious that as at 9am on Tuesday 17 July she had received no acknowledgement of or reply to her email of 14 July requesting information to enable her to prepare for the consultation meeting. She shared an office with Ms Davie. During the hour before the meeting Ms Davie never mentioned the email to her or said that they had received it and would the claimant like the information and some time to go over it? The claimant waited to see whether, even at this late stage the respondent would provide the information she had requested. They did not. She therefore felt that this was the last straw and that she had lost all trust in the respondent. At around 9.50am on Tuesday 17 July the claimant typed up a letter of resignation (J6). The claimant's reasons for doing so were cumulative: she had been badly treated in relation to not being given proper paid time off for antenatal appointments and being made to use non-working time for the operation on 3 April despite it having been scheduled by the hospital on a working day; The claimant was not being given time to do her finance role because she was continually asked to provide childcare cover. She had been happy to help out by providing cover on occasions, but she was increasingly being asked to do childcare work she was not qualified to do, such as collecting children from school on her own in a minibus. The claimant had been overstretched the week ending 13 July 2018 and had finally managed to

complete her finance tasks. No sooner had she done so than she was presented with a letter late on Friday 13 July 2018 telling her that it was likely that her job role would be made redundant and that there would be a consultation meeting. She was told verbally this this would be on her next working day at 10am. The claimant believed (correctly) that the outcome of this redundancy consultation was predetermined and that if she did not accept a childcare role she would be dismissed. The final straw was that when she had asked for information to enable her to prepare for the redundancy consultation meeting she did not even receive any acknowledgement or response. Indeed, her request for information had been ignored and Ms Davie had completely failed to even mention it despite being in the same room with her prior to the consultation meeting. The claimant accordingly typed a letter of resignation in the following terms:

"*To whom it may concern,*

LETTER OF RESIGNATION

This letter serves as my formal resignation from my position of Finance Administrator with Auchinbee Care Ltd based at the above address.

As required by my contract, I am hereby giving 4 weeks notice therefore my last working day with the company will be Tuesday 14th August 2018."

26. Just before the meeting the claimant handed Ms Davie her letter of resignation. She told Ms Davie what was inside the envelope and said she did not want to go ahead with the meeting as the process was unfair due to the information she had requested not being supplied. Ms Davie then handed the claimant a letter from Dave Roberts, Director of Magenta Moon Limited, the respondent's HR adviser, containing a response to her email of 14 July. Ms Davie had been instructed by Mr Roberts to hand this to the claimant immediately before the meeting. Mr Roberts had advised Ms Davie not to provide the documents the claimant had requested. As she handed over the letter, Ms Davie said to the claimant: "*This is a letter from Dave. I think you should read it before you make any decisions."* The claimant opened the letter which stated; "*I am happy to*

respond to your email on behalf of the Nursery, but in general terms. I have also asked that this letter be given to you immediately before commencement of the meeting." The letter went on to say that Mr Roberts was not in a position to comment on the respondent's documentation currently in place. "*However, the documentation (or lack of it if that is the case) should not and cannot be a reason for delaying a redundancy consultation process when such a process has been deemed necessary."* Mr Roberts informed the claimant that a number of the documents she had requested were irrelevant to the redundancy consultation process. Of the remaining items he stated that some were *"for management to appraise and, if decisions are made based upon them, to explain that to you when a decision is made"*. The letter stated: "*I am concerned that you may be approaching this process from a negative perspective. No-one tries to pretend that these processes are pleasant (they are not); but at the same time I believe that the consultation meeting fulfils a crucial purpose, and should be seen for what the law has designed it to be – an opportunity for the employee to understand options and contribute to the process.// One final point I would like to make is that you should be aware that, if you are chosen for redundancy, you would be given the right to appeal. If you did appeal, that is the point, in my opinion, when you would be able to 'home in' on why the decision had been made."*

27. After she had read the letter the claimant told Ms Davie that she was no further forward and still wanted to hand in her resignation. Ms Davie said they could still go ahead with the redundancy meeting, but the claimant said she did not think it was a fair process. She was the only person who had been selected for redundancy; there was plenty of work for her position. She was concerned about the timing of the process coming just after she had sent texts to the Director earlier the previous week saying she was struggling to get her own work done. The claimant had been informed by her mother that her son was unwell and when she finished speaking to Ms Davie she left.

28. On Thursday 19 July 2018 the claimant went in to work to start her shift. Ms Smart handed her a letter confirming acceptance of her resignation and informing her that she would not be required to work her notice period and

would receive statutory notice pay. The letter stated: "*However, may I take this opportunity to remind you that the content of any favourable reference requested in relation to your employment at Auchinbee Nursery, will be dependent on your conduct and comments in relation to the Nursery and its officers (whether directly, indirectly or via social media) following the voluntary termination of your employment."*

29. The claimant went home. Later that day (19 July 2018) the claimant sent a formal letter of grievance to the respondent (J7). In it the claimant raised the issues in relation to paid time off for antenatal appointments; the breach of confidentiality; her struggle to complete her own workload due to having been asked to cover so many hours in the nursery; and the fact that four days after she had brought up the latter issue she had been given a letter inviting her to a redundancy consultation. In relation to the consultation itself the claimant stated that she had not been given a reasonable time to prepare for the meeting, and had had no response to her email of 14 July requesting information, nor had she been given the information she had requested. She stated that given all the above matters, she had had no option other than to hand in her resignation on Tuesday 17 July.

30. On receipt of the claimant's grievance it was passed to Mr Roberts to deal with. On 1 August 2018 Mr Roberts sent the claimant a letter by recorded delivery mail (J10) stating that he intended to undertake the process in relation to her grievance in writing and that he intended to provide his findings and recommendations within approximately four weeks. However, the claimant did not accept delivery of the letter and Mr Roberts received no reply to it. He did not take the grievance investigation any further for that reason.

31. On 3 August 2018 Mr Mohammed discovered that a number of files were missing from the nursery computer system. On further interrogation of the computer he discovered that on Friday 13 July 2018, the claimant had searched how to permanently delete files. He concluded that the claimant had deleted the nursery files. He sent the claimant a letter (J11) in which he stated: "*I am writing to inform you that it has proved necessary to delay final payment*

to you following your recent resignation from your employment at Auchinbee Children's Nursery". Mr Mohammed went on to say that it had come to light that a number of crucial files had been deleted from the respondent's computer systems immediately prior to the claimant's departure. He stated that the attempt to recover the files had disclosed a browser history showing internet searches for ways to delete files and records in a way that would prevent them being recovered. Mr Mohammed asked the claimant whether she had copied the files onto a mobile device and might be able to restore them to his system. He stated: "*Until I receive a response from you, I am unable to reconcile your final remuneration as, from the advice we have taken, we may have a legal right to automatically deduct an amount corresponding to our losses. I stress that no deduction has taken place at this point; simply that any payment is delayed as being unreconciled as a result of these issues."*

32. The sums withheld from the claimant by the respondent were £1,134.37 in notice pay and £363 in respect of holiday pay. These sums were not paid to the claimant until July 2019. The reason for non-payment related to the file deletions and advice received from Mr Roberts.

33. At the time of her resignation and the termination of her employment on 13 August 2018 the claimant was earning £200 gross per week (£170 net). She started working for her father doing his books on 2 September 2018 earning net pay of £140 weekly. Following the end of her employment the claimant suffered two weeks' loss of wages at £170 per week (£340). Thereafter, her on-going loss was the difference in pay between her new work with her father and her work for the respondent. This amounted to a loss of £30 per week. The claimant's date of birth is 3 March 1989. The claimant did not claim Jobseekers' Allowance.

Observations on the Evidence

34. There was a conflict in the evidence between Ms Davie and the claimant regarding what had been said about the antenatal appointments. Ms Davie said that there had only been one conversation between herself and the claimant about antenatal appointments, during which the claimant had mentioned ACAS. Ms Davie testified that she had agreed to the two original appointments on Friday 16 and Tuesday 20 March 2018 but had asked that if possible, future appointments could be arranged for the start or end of a shift instead of at core/busy hours, but that she realised there was no guarantee. The claimant's evidence was that she spoke to Ms Davie on two occasions about antenatal appointments. On the second occasion Ms Davie told her she had spoken to Mr Mohammed and he was happy to honour the two original appointments being on her working days, but that any further appointments would have to be on her days off, Monday and Wednesday and that Mr Mohammed would charge an hourly rate for her son to attend the nursery while she went to the appointments. The claimant said that Ms Davie told her that because the claimant had no control over the appointments, if they came out on a day she was working, Ms Davie would swap her working day, so that if the appointment was on a Tuesday, she would work a Wednesday, Thursday Friday that week instead of Tuesday Thursday Friday. Ms Davie denied that this was said.

35. On balance, we preferred the claimant's evidence on this exchange. Ms Davie's evidence was somewhat vague, whereas the claimant recalled a number of corroborating details. The Tribunal was referred to an email Ms Davie had sent to Mr Roberts on 20 July 2018. Although Ms Davie stated in the email that she had asked the claimant four months previously to try and get her appointments at the beginning or end of her shift, under the heading "Pregnancy and Maternity Rights" Ms Davie stated: "*Aimee decided to use 'timeback' on her own accord to save having to lose out on wages. (I am not sure the legalities behind us needing to pay this day as a pregnancy appointment?) return to work after the operation on the Friday at her own choice. Amy S gave her the opportunity to put a holiday through…"* [sic]. The reference to 'losing out on wages' suggested that Ms Davie did not, at the time,

understand the claimant's legal right to paid time off for antenatal care under sections 55 to 57 ERA. This supported the claimant's version of the conversations.

36. Ms Davie accepted that the claimant had mentioned having spoken to ACAS. If all Ms Davie had asked was for the claimant to try and arrange her appointments for the beginning or end of a working day, there would have been no need for the claimant to check her rights with ACAS.

Applicable law

Automatically Unfair Dismissal

37. Section 99 Employment Rights Act 1996 ("ERA") provides so far as relevant as follows:

> ***"99 Leave for family reasons***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –*
>
> *(a) the reason or principal reason for the dismissal is of a prescribed kind, or*
>
> *(b) the dismissal takes place in prescribed circumstances.*
>
> *(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.*
>
> *(3) A reason or set of circumstances prescribed under this section must relate to –*
>
> *(a) pregnancy, childbirth or maternity,…..*
>
> *(b) ordinary, compulsory or additional maternity leave…"*

38. Regulation 20 of the Maternity & Parental Leave Regulations 1999 ("the MAPL Regs") provides, so far as relevant as follows:

> ***"20 Unfair dismissal***

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

(a) The reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

(b) …….

(2) ……..

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) The pregnancy of the employee;

(b) ……

Pregnancy/ Maternity Discrimination:

39. Section 18 Equality Act 2010 provides as follows:-

"18 Pregnancy and Maternity Discrimination: Work Cases

(1) This Section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –

(a) Because of the pregnancy, or

(b) Because of illness suffered by her as a result of it.

……..

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends –

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) *if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy*."

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

(a) *It is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or*

(b) *It is for a reason mentioned in subsection (3) or (4)."*

Direct Sex Discrimination

40. Section 13 Equality Act 2010 prohibits direct discrimination in the following terms:

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Burden of Proof

41. Section 136 of the Equality Act 2010 deals with the burden of proof and provides as follows:-

"136 Burden of Proof

(4) This section applies to any proceedings relating to a contravention of this Act.

(5) 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;

(6) But sub-section (2) does not apply if A shows that A did not contravene the provision."

Discussion and Decision

Breach of right to time off for ante-natal care under sections 55 and 56 ERA

(1) Whether the claims for breach of the right to paid time off for ante-natal appointments were time-barred.

(2) If not, whether the respondent breached sections 55 and 56 Employment Rights Act 1996 ("ERA") (right to time off for ante-natal care and right to remuneration for same).

42. Section 55 ERA provides that an employee who is pregnant and has an ante-natal appointment is entitled to time off during her working hours to keep the appointment. Section 56 sets out the right to remuneration for time off under section 55. The remedy against an employer who refuses to permit this (or fails to pay the whole or any part of the amount to which the employee is entitled) is under section 57(1)(a). However, a complaint under Section 57 must be presented within three months beginning with the date of the appointment concerned, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within three months. Mr Smith acknowledged that these claims were presented out of time. The latest of the ante-natal appointments was on 3 April 2018. The complaint was presented on 30 November 2018. Even allowing for the effect of the early conciliation rules, the claim was lodged many weeks after the time limit.

43. Mr Smith made a number of points on time-bar. Firstly, he submitted that the claim was made as part of another claim (concerning dismissal) which was in time. Whilst that is true it does not go to the issue of whether it was not reasonably practicable for the section 55 claim to have been raised within three months of the appointment(s). Mr Smith also submitted that the claimant had raised the matter with the respondent at the time and had also raised a grievance. He argued that the respondent had had access to employment law advice, whereas the claimant had only had access to general advice from ACAS. Again, with respect, these points do not really help with the issue of

reasonable practicability, other than to show that the claimant knew of her rights and had access to advice at the time. Finally, Mr Smith submitted that as the claimant had remained in the respondent's employment for the entire three-month limitation period, the Tribunal should recognise that this would be a powerful disincentive to raising proceedings. Whilst that may be so, it does not, without more, meet the test of showing that it was not reasonably practicable for the claimant to present the complaint in time. We therefore find that the claimant has not shown either that it was not reasonably practicable for her to present these claims in time or that they were presented within a reasonable further period. It follows that the claims under sections 55 and 56 of ERA are time barred and the Tribunal has no jurisdiction to hear them.

44. Mr Smith also submitted that these acts were part of a course of conduct which, taken as a whole amounted to pregnancy discrimination on the one hand and a breach of trust and confidence on the other. Where relevant, we have considered limitation in relation to those arguments separately below.

Constructive Unfair Dismissal

> *(3) Whether the claimant was dismissed, and if so, whether her dismissal was unfair under section 95(1)(c) ERA;*

45. In a claim for constructive dismissal the onus rests on the claimant to establish that she has been dismissed. Section 95(1)(c) of ERA provides that an employee is dismissed if:

> *"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

46. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer's conduct are judged according to the common law. The claimant must establish a repudiatory breach of contract by the respondent. In essence, the claimant requires to prove:

(i) that there was a breach of a contractual term by the respondent;

(ii) that the breach was sufficiently serious to justify her resignation;

(iii) that she resigned in response to the breach and not for any other reason; and

(iv) that she did not delay too long in resigning.

47. The claimant's case was that the respondent was in breach of the implied term of mutual trust and confidence. The latter term was described by the House of Lords in Malik v BCCI [1997] IRLR 462 HL as a term that:

> "*The employer shall not, without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*."

48. In order to establish a breach of the implied term the claimant requires to prove that the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. Furthermore, there must be no reasonable and proper cause for the conduct.

49. In this case the claimant resigned by letter dated 17 July 2018 (on notice set to expire on 13 August 2018). The onus is on her to establish that she resigned in response to a repudiatory breach of her contract of employment. The claimant submitted that the following course of conduct of the respondent amounted to a repudiatory breach/ breach of the implied term of trust and confidence:

(a) Placing restrictions on when the claimant could attend antenatal appointments;

(b) Denying her paid leave to attend antenatal appointments;

(c) Identifying her role as being redundant;

(d) Asking her to take part in a redundancy consultation which was a sham as the outcome was pre-determined;

(e) Denying her information she was entitled to as part of that process about the criteria for selection, scoring systems, and company policy on redundancy;

(f) Refusing to postpone or delay the consultation process to allow for this information to be provided;

(g) Giving her misleading and incorrect information about her rights in a potential redundancy situation;

50. In relation to (a), the Tribunal found as a fact that the respondent did try to make the claimant take her antenatal appointments in non-working time, even when they fell within her working time. In relation to (b) on balance the Tribunal preferred the claimant's evidence. We accepted the respondent's evidence that the claimant was paid for two of her ante-natal appointments. In relation to the other appointments, and in the absence of any evidence to the contrary from the respondent, we accepted the claimant's evidence and found as fact that she was not paid for them, but was made to work "time back" for them even though they fell within her normal working time. Indeed, this was implicit from Ms Davie's email to Mr Roberts dated 20 July 2018 (A11) in which she stated: "*Aimee decided to use 'timeback' on her own accord to save having to lose out on wages"* apparently in reference to the date of the claimant's operation. This was a breach of the claimant's employment rights. Whilst the right to claim under section 57 ERA is subject to limitation, it is permissible to take the respondent's actions into account as part of a course of conduct said to cumulatively amount to a breach of the implied term.

51. With regard to (c), the Tribunal considered that this was not conduct which was capable of amounting to a breach of the implied term or part of one. An employer is entitled to manage its business as it sees fit and in principle to identify a role as potentially redundant. The claimant started the childcare certificate training course and did the work without complaining for 6 months. In a way, she created a rod for her own back by voluntarily undertaking more and more childcare work, thereby leading the respondent to question whether they needed someone three days a week on finance administration.

52. Turning to (d) and (e), the Tribunal concluded that these were largely supported by the findings in fact and proven. We concluded on balance that the decision to dismiss the claimant for redundancy was predetermined prior to the

consultation taking place for the following combination of reasons: (i) The letter of invitation to the redundancy consultation meeting said: "*Regrettably these economic and organisational changes within the Nursery are likely to result in your job role being made redundant".* In the context of the other facts and circumstances of the case, the Tribunal lay members regarded this wording as going beyond the normal 'at risk' letter and giving an impression that a decision may already have been taken. (ii) Mr Jaap asked Ms Davie: "*Was the redundancy predetermined?*" She replied: "*There had been discussion about it yes and as you can see I have taken that role"*. We inferred from her frank response that the matter was indeed predetermined. (iii) With regard to Ms Davie's evidence, Mr Smith submitted that "*she was unable to articulate to the Tribunal what her role was, what the process of consultation would or may involve, and what the outcomes might be…her hesitancy only gave weight to the fact that this was a "fait accompli" which is how the claimant had described the decision".* We agreed with this submission. Ms Davie was asked about the redundancy consultation exercise in cross examination. She said that she had no prior experience of redundancy consultation but had received training from Mr Roberts. However, she seemed not to be clear about what was involved in the process or how many consultation meetings it would involve. She testified that she had had discussions early on with Mr Mohammed and that it was agreed that she would conduct the consultation and said that the decision would be taken by Mr Mohammed and herself. She was asked what the decision was going to be based on and was initially unable to answer. After some hesitation she replied: "*Everybody's view…the nursery's needs".* (iv) Mr Mohammed was quite frank in his evidence: "*The advice was to invite her to the consultation meeting and speak to her about taking on another role at the nursery."* As Mr Smith submitted, it was clear from the totality of this evidence that the possible outcomes of the process were either the claimant's redundancy or her taking on the role of a childcare worker. However, the invitation letter did not mention the latter.

53. With regard to (e), Mr Smith asked Ms Davie about the documents requested by the claimant in her email of 14 July to enable her to prepare for the

consultation meeting which were not provided by the respondent. He asked Ms Davie whether there was a company policy on redundancy. Ms Davie replied: "*I believe so, yes"*. She said that she had not read Mr Roberts' letter to the claimant before passing it over. Mr Smith asked Ms Davie what she had been intending to do at the meeting. She said: "*To discuss with Aimee her thoughts on it"*. Mr Smith asked: "*She hasn't got a lot to work with has she?"* Ms Davie replied: "*I'm not sure how a redundancy consultation requires a lot".* She suggested she was looking for "*Her views and suggestions of what a redundancy process would have meant for her".*

54. The respondent's HR adviser Mr Roberts accepted in cross examination that the claimant had not been given any of the documents she asked for. He made it clear that this had been a deliberate decision on his part. He testified that he had advised Ms Davie not to provide the documents the claimant had requested and had instructed her to give the claimant his letter immediately before the meeting. Some of the documents requested were clearly irrelevant, but others, such as those mentioned at (e) above would have contained information the claimant needed in order to prepare for the consultation. Mr Roberts conceded in cross examination that the claimant was entitled to information on the criteria for selection and the possible alternatives to dismissal. The Tribunal also felt the claimant was rushed into the consultation without the documentation she had requested and inferred from the facts set out above that the outcome was a fait accompli. The lay members observed that the respondent did have a professional HR consultant on hand to provide advice, so this was not an employer working without professional support.

55. We did not find (f) to be established. The claimant did not ask for the consultation process to be postponed or delayed to allow for the information she had requested to be provided, although it is true that the respondent did not offer to delay it. The claimant had also prepared her resignation letter by the stage that the respondent failed to do this, so the failure was not part of the conduct that caused her to resign.

56. With regard to (g), Mr Smith submitted that the second and third last paragraphs of Mr Roberts' letter (J4) are in contradictory terms and misled the claimant that it was only after the decision to dismiss had been taken and she had chosen to appeal that she would have the right to ask questions. It is true that the letter does give this misleading impression, however, by the time the claimant read it she had already taken the decision to resign and she did not testify that this was part of the reason for her resignation.

57. In summary, the Tribunal found the conduct of the respondent set out in (a), (b), (d), and (e) above to be established as fact and to amount cumulatively to a breach of trust and confidence. A breach of the implied term of trust and confidence is repudiatory. It follows that the claimant has established a repudiatory breach of the employment contract by the respondent.

58. We accepted the claimant's evidence about her reasons for resigning and these are set out in the findings in fact above along with some background facts. The claimant's reasons were cumulative. The final straw had been that when she had asked for information to enable her to prepare for the redundancy consultation meeting, she did not receive any acknowledgement or response and was not provided with any of the information she had requested. Indeed, her request for information had been deliberately ignored and Ms Davie had completely failed to even mention it despite being in the same room with her prior to the consultation meeting. We considered that taken cumulatively, the respondent's conduct was likely to destroy or seriously damage the relationship of trust and confidence and that there was no reasonable and proper cause for it. It follows that the claimant resigned in response to the breach of the implied term and that she has established that she was constructively dismissed.

59. A constructive dismissal is not necessarily unfair. However, in this case we found it to be so. Even if the respondent had been able to establish redundancy as a potentially fair reason, their predetermination of the outcome and deliberate withholding of the information requested for the consultation meeting would have taken the procedure outside the band of reasonable responses.

The importance of following proper procedures in relation to redundancy dismissals was made clear by the famous speech of Lord Bridge in Polkey v AE Dayton Services Ltd 1988 ICR 142 HL: "*In the case of redundancy ..the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."* The band of reasonable responses in relation to redundancy dismissals does suggest a minimum standard for warning and consulting the employee which was not observed in this case.

60. The claimant seeks a basic award of £400. With regard to the compensatory award, she seeks two weeks' loss at £170 net per week, making £340, plus 54 weeks' loss at £30 per week, making £1,620 as set out in her Schedule of Loss. She has been employed by her father since 2 September 2018 in a role paying £30 less per week than her employment with the respondent, so her ongoing loss is £30 per week.

61. Section 123(1) ERA provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. There comes a point at which the claimant would be expected to have sought employment at a rate comparable to the sum she was earning from the respondent. We have accepted Mr Smith's assessment, expressed on his updated schedule of loss at page J66, which takes this to the date of the start of the Tribunal hearing, giving 56 weeks' difference in pay. In our view this represents the point by which the claimant could reasonably be expected to have mitigated her loss, so that the continuing loss thereafter can be regarded as arising from the claimant's choice to continue working for her father rather than seeking better paid employment. The claimant also seeks £400 for loss of statutory rights, making a total compensatory award of £2,360.

62. In determining what sum would be just and equitable in the circumstances under section 123(1) we have considered the likelihood that the claimant might have been fairly dismissed in any event per Polkey v A E Dayton Services Ltd 1988 ICR 142 HL. We have assessed the likelihood of this at 60% on the basis that, on the facts found, it was more likely than not that a fair procedure would have reached the same result. However, there was, in our view a 40% chance that genuine consultation might have resulted in some sort of arrangement whereby the claimant kept some finance and administration duties and also helped out with childcare in a more formalised way, thereby formalising what was happening already.

63. The total compensatory award of £2,360 falls to be reduced by a Polkey deduction of 60% or £1,416. £2,360 - £1,416 = £944. Thus, the compensatory award is £944. The basic award is £400, giving a total award for constructive unfair dismissal of £1,344.

64. Although we found that the claimant did delete certain of the respondent's files when removing her own from their computer, we did not conclude that she did so maliciously or deliberately. It was, in any event incumbent upon the respondent to have its critical files properly backed up and secured. We did not conclude that there was contributory fault in these circumstances.

Automatically Unfair Dismissal and Regulation 20 MAPL Regulations

(4) If the claimant was dismissed, whether her dismissal was automatically unfair under section 99 Employment Rights Act 1996 ("ERA") because the reason or principal reason for dismissal was past or future pregnancy or the consequences of being pregnant in having antenatal appointments;

(5) If the claimant was dismissed, whether her dismissal was a breach of Regulation 20 of the Maternity and Parental Leave Regulations 1999 ("MAPL Regs");

65. Section 99 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a

prescribed kind or the dismissal takes place in prescribed circumstances. Section 99(3) sets out the "prescribed" reasons and circumstances and expressly states so far as relevant here that they must relate to pregnancy, childbirth or maternity and maternity leave. The prescribing regulations for present purposes are the Maternity and Parental Leave Regulations 1999 ("MAPL Regs"). Regulation 20(1) of the MAPL Regs is headed "unfair dismissal" and provides that an employee who is dismissed is entitled to be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a kind specified in paragraph 20(3) or the reason or principal reason is that the employee is redundant and Regulation 10 has not been complied with. Regulation 10 concerns redundancy during maternity leave and requires an employee to identify a suitable alternative vacancy. It is not relevant here. We therefore understand Mr Smith to be arguing that the reason or principal reason for dismissal is (per regulation 20(3)) a reason connected with – (a) the pregnancy of the employee, including attendance at antenatal appointments. (Though section 57 ERA is not specifically mentioned, a reason connected with pregnancy would almost certainly cover this). Mr Smith submits that this is wide enough to cover wishing or expressing the wish to have future pregnancies and "the consequences of being pregnant in having antenatal appointments". We are not sure he is correct about that because regulation 20 refers to "the" pregnancy of the employee. However, we have given him the benefit of the doubt on that point and we consider below whether the claimant's past or possible future pregnancy or the fact that she had taken or might in future take time off for antenatal appointments was the reason or principal reason for the dismissal.

66. Before turning to that question, we should also record that Mr Jaap argued that section 99 and regulation 20 do not apply in the circumstances of this case because the claimant resigned and was not dismissed. Again, for present purposes we have given the claimant the benefit of the doubt on that point and we address Mr Jaap's primary position that even if the Tribunal finds that the claimant was constructively dismissed, there is no evidence to support the submission that the principal reason that the claimant's role was selected for

redundancy was the disruption caused by her previous pregnancy and the likelihood of a repeat with further pregnancies. Mr Jaap stated that the evidence of all three of the respondent's witnesses was that the redundancy situation had arisen because the manager Lauren Davie was returning from maternity leave and the claimant's duties were going to be absorbed into the manager's role, a state of affairs which now exists. We agreed with this submission.

67. We did conclude that the outcome of the redundancy consultation process was predetermined, in the sense that the respondent had already decided that if the claimant did not accept the childcare role she would be dismissed for redundancy. We also concluded that the process had been badly mishandled. However, we did not conclude that the claimant's past pregnancy, possible future pregnancy, or past or possible future antenatal appointments were the reason or principal reason for the respondent's conduct in this case. Indeed, we did not consider that they were any part of the reason for the respondent's conduct in relation to the intended redundancy. We concluded that the respondent had genuinely decided to restructure its management and to absorb the finance and administration work the claimant was undertaking into the manager's role. We simply did not conclude that this had anything to do with the claimant's pregnancy or antenatal appointments, whether past or future. It was clear from the evidence we accepted that pregnancy is a common occurrence among the respondent's workforce. Indeed, both the manager and deputy manager were pregnant during the relevant period. It is true that the respondent failed to deal with the claimant's grievance within four weeks. However, we concluded that this was firstly because a dispute ensued about deleted files and secondly because delivery of Mr Roberts' letter was not accepted by the claimant and he did not make any further attempt to contact her. We concluded that the respondent acted as they did because of the deleted files and because they were following Mr Roberts' advice.

68. On the evidence we accepted, these claims therefore do not succeed and are dismissed. We were concerned about Mr Mohammed breaching the claimant's

confidentiality by revealing her pregnancy to his brother, but the indication from this was that the pregnancy was regarded entirely positively.

Maternity Discrimination

(6) Whether the following were acts of unfavourable treatment of the claimant because of her pregnancy contrary to section 18(2) Equality Act 2010:

(a) Placing restrictions on when the claimant could attend antenatal appointments;

(b) Denying her paid leave to attend antenatal appointments;

(7) Whether the claims at (6) above are time barred. If so, whether it would be just and equitable to extend time.

69. As Mr Jaap submits this claim is time barred. The latest antenatal appointment was 3 April 2018. The claim was presented to the Employment Tribunal on 30 November 2018. Notification was made to ACAS on 18 October 2018. Even allowing for early conciliation the claim was presented months out of time. The argument that these acts were part of conduct extending over a period does not work in relation to these claims because they are discrete pregnancy-based claims under section 18. For present purposes, section 18 only has effect in relation to unfavourable treatment done or in implementation of a decision taken "in the protected period in relation to a pregnancy of hers". The protected period begins when the pregnancy begins and ends in this case at the end of the period of 2 weeks beginning with the end of the pregnancy. We considered whether it would be just and equitable to hear the complaint notwithstanding it having been presented out of time.

70. The onus rests upon the claimant to show that it would be just and equitable to extend time. In Robertson v Bexley Community Centre [2003] EWCA Civ 576 the Court of Appeal stated that the exercise of the discretion to extend time should be the exception rather than the rule.

71. Although there is no exhaustive list of the factors to be considered, per British Coal Corporation v Keeble and Others [1997] IRLR 336 a tribunal requires to consider the prejudice each party would suffer as a result of the decision to extend or not extend time, having regard to all the circumstances of the case which may include:

(a) The length of and reasons for the delay;

(b) The extent to which the cogency of the evidence is likely to be affected by the delay;

(c) The extent to which the respondent co-operated with any requests for information;

(d) The promptness with which the claimant acted once she knew of the facts giving rise to the claim; and

(e) The steps taken by her to take or obtain appropriate professional advice once she knew of the possibility of taking action.

72. The early conciliation notification ought to have been made by 2 July 2018. It was made on 18 October. The length of the delay was approximately three and a half months. Mr Smith suggested that the fact that the claimant had remained in the respondent's employment for the entire three-month period would be a powerful disincentive to raising proceedings. However, the claimant did not testify that this was the reason why she had not done so. The claimant clearly knew of the facts giving rise to the claim in April 2018. She took appropriate advice from ACAS at that time, but she did not raise the claim timeously.

73. The factors put forward by Mr Smith in support of an extension of time were that the claimant had raised the matter with the respondent at the time, and they had failed to accept that she was correct even though they had access to employment law advice. Mr Smith states that the claimant "*had access to only general advice from phoning ACAS".* We would observe, however, that it was ACAS who delivered the correct advice and that this argument would appear to 'cut both ways'. We understood the claimant's distress in April 2018 and

could understand why she might not have felt able to bring the claim immediately. When considering whether to extend time, it is the later part of the limitation period we should focus on. However, there was very little evidence from the claimant about her reasons for delay at that stage. As the claimant had access to competent advice, on the facts found, we concluded that she could have brought the claim in time. She did not act promptly once she knew of the facts giving rise to the claim. Weighing up the respective prejudice of allowing or refusing an extension of time, we did not consider that the claimant had discharged the onus of showing that it would be just and equitable to extend time and we therefore find that these claims are out of time and the Tribunal has no jurisdiction to hear them. With regard to Mr Smith's submission (page 13) that the acts at A) to G) of the List of Issues were unfavourable treatment for the purposes of section 18, that section only has effect in relation to unfavourable treatment done or in implementation of a decision taken "in the protected period in relation to a pregnancy of hers". The protected period begins when the pregnancy begins and ends in this case at the end of the period of 2 weeks beginning with the end of the pregnancy. Thus, only A) and B) could be considered under section 18. The other acts are section 13 claims of discrimination because of sex. (Sections 18 and 13 are mutually exclusive under section 18(7)).

(8) Whether the respondent discriminated against the claimant because of her sex contrary to section 13 Equality Act 2010 by:

(a) Placing restrictions on when the claimant could attend antenatal appointments;

(b) Denying her paid leave to attend antenatal appointments;

(c) Selecting her role as likely to become redundant without proper justification;

(d) Asking her to take part in a redundancy consultation which was a sham as the outcome was pre-determined;

(e) Denying her information she was entitled to as part of that process about the criteria for selection, scoring systems, company policy on redundancy;

(f) Refusing to postpone or delay the consultation process to allow for this information to be provided;

(g) Giving her misleading and incorrect information about her rights in a potential redundancy situation;

(h) Refusal to investigate her grievance;

(i) Accusing her of deleting office files without proper foundation;

(j) Delaying in paying her notice pay/holiday pay for 11 months.

74. Section 13 Equality Act 2010 provides (so far as relevant for present purposes) that a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others. The less favourable treatment complained of by the claimant is set out above. We accepted Mr Smith's analysis of the law as set out at page 11 of his submissions. The claimant's pregnancy and her treatment in breach of the Employment Rights Act 1996 by the respondent is not enough in itself to shift the evidential burden to the respondent under section 136 EqA. 'Something more' than a difference in treatment and a difference in sex or, a feature of sex - in this case pregnancy/ expressing the intention to have further pregnancies is required, that would tend to suggest that the pregnancy/ expressed intention to have further pregnancies is the reason for the treatment.

75. Mr Smith also submitted and we accepted that in law, a finding in fact that treatment by the employer was unfair does not necessarily mean that it was discriminatory (Glasgow City Council v Zafar [1998] IRLR 36, HL). He referred us to Law Society v Bahl [2003] IRLR 640 and to Nagarajan v London Regional Transport [2000] 1 AC at 501 in which Lord Nicholls held that if the protected characteristic had a significant influence on the outcome, discrimination is made out. Mr Smith referred us to a case from earlier this year in which the

EAT President reviewed the relevant authorities. Mr Smith cited Page v Lord Chancellor (UKEAT/0340/18) at paragraphs 47 to 50 quoting Lord Nicholls of Birkenhead in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065. The key question, in summary is: "*why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."* We agree with Mr Smith's analysis of the relevant legal test. The key question of fact in a direct discrimination claim is 'the reason why' in respect of the less favourable treatment complained of.

76. At page 13 of his written submission, Mr Smith put forward the following points from which he submitted that an inference of discrimination could be drawn:

I. "*The hostile exchange between the claimant and Ms Davie regarding the antenatal appointments, in particular the annoyance felt by Ms Davie regarding how the claimant had conducted herself in this;*

II. *The failure by the respondent to change their stance on this point;*

III. *The failure by the respondent to pay the claimant retrospectively for the leave she had used up;*

IV. *The fact that Mr Mohammed had been told of the claimant's pregnancy, and had then discussed this with his brother, in the context of a discussion about their respective businesses;*

V. *The claimant's evidence that she and her husband intended to try for another child;*

VI. *The cavalier treatment of the claimant in making her admin role redundant, which rendered the consultation process meaningless, with the only decision to be made whether she was going to [be] retained as a childcare worker, or not;*

VII. *The respondent's unwillingness to provide any of the information requested by the claimant prior to the redundancy meeting, or delay matters in order that this be provided;*

VIII. *The content of the claimant's grievance letter immediately following her dismissal, asserting that she felt unfairly treated during her pregnancy;*

IX. *The respondent's failure to answer any of the claimant's points in the grievance regarding her treatment;*

X. *The respondent's failure to pay the claimant's holiday and notice pay for 11 months*

XI. *The respondent's assertion in the ET3 that the claimant was being dishonest in her claim as she knew of another opportunity during the redundancy, and subsequent failure to ask her about it or provide any substantiation for this."*

77. With regard to (I), (II) and (III), Mr Smith asserted that the exchange between the claimant and Ms Davie about the antenatal appointments had been hostile and that Ms Davie had felt annoyance regarding how the claimant had conducted herself in this. We did not find as fact that the exchange had been hostile, nor did we detect annoyance. The claimant did not testify that that was the case, nor was it the tenor of her evidence. Ms Davie was, herself off on maternity leave at the relevant time, though she was coming in to work one day per week. Ms Smart, who was acting manager in Ms Davie's absence was, herself pregnant. The claimant was still on friendly terms with both Ms Davie and Ms Smart at this point. Although Mr Roberts could not remember giving advice to the respondent about the antenatal appointments, the claimant testified that both Ms Davie and Ms Smart told her they would check the position with him and we inferred from the evidence we accepted that it was likely that they did so. In the absence of any written record of the advice Mr Roberts gave the respondent, we inferred on balance that the respondent did contact him to check the position. They thereafter proceeded in error until the

painful events of the claimant's pregnancy overtook matters. We did not conclude there was hostility or malice either in this, or in the respondent's failure to change their stance and pay the claimant retrospectively for the leave she had used up. We concluded from the facts found that this was down to error, possibly based on erroneous advice. Ms Davie did not appear to know, even by the time of the hearing, whether the claimant had been paid or not and Ms Smart did not give evidence.

78. Mr Smith submitted (IV) that an inference of discrimination could be drawn from the fact that Mr Mohammed had discussed the claimant's pregnancy with his brother in the context of a discussion about their respective businesses. Taking this evidence in a context where it was clear that it was quite normal for those managing the claimant to take maternity leave themselves, we did not conclude that this gave rise to an inference of discrimination. With regard to Mr Smith's fifth point, (V) we accepted the claimant's evidence that she had told Ms Smart that she and her husband intended to try for another child. That fact indicated that the respondent was aware of the claimant's intention. Nothing more. It was not, on its own an indication of discrimination. With regard to the redundancy process, (VI) and (VII), we agree that the claimant was badly treated, and that the redundancy 'consultation' was mishandled. However, we concluded that this had nothing whatsoever to do with either the claimant's pregnancy or her intention to try for another child. Nor did we conclude that the fact that a future pregnancy would involve ante-natal appointments was any part of the reason. We accepted that the respondent had decided that going forward, the finance administration work being done by the claimant was to be done exclusively by Ms Davie on her return from maternity leave in or about August 2018. Thus, the catalyst for the claimant's redundancy was the impending return of Ms Davie from maternity leave and the absorption of the claimant's role into hers.

79. We concluded that this had come about because the claimant had been increasingly prepared to help out as a childcare assistant following the visit of the Care Inspector in 2017. Furthermore, she had shown a willingness to undertake a childcare qualification. Doubtless, the claimant was a diligent and

capable worker. She was also a parent and the respondent clearly had confidence in her for responsible tasks like picking children up from school in the nursery minibus or taking children out on trips. She found herself being used more and more for childcare cover. Mr Mohammed testified that the finance administration role did not take much time, but that the respondent was recruiting child carers. Ms Davie's evidence was that the claimant was working 24 hours a week and there was no need for that amount of administration. We concluded that the respondent genuinely decided that the claimant's finance duties could be absorbed into Ms Davie's role and that they hoped to move the claimant into a childcare role.

80. With regard to the claimant's grievance and the respondent's failure to answer it (VIII) and (IX), the key issue is whether the less favourable treatment was because of the claimant's pregnancy or sex. We concluded that it was not. The grievance had been sent to Mr Roberts and left with him to deal with on the basis that he would undertake the HR function in relation to it and he would deal with it and respond appropriately. Mr Mohammed's evidence was that he did not know whether the grievance had been responded to. Mr Roberts' evidence, which we accepted on the point was that on 1 August 2018 he wrote the claimant the letter at J10 and sent it by recorded delivery. However, the claimant did not accept delivery of the letter. Mr Roberts received no reply from her and did not take the matter any further.

81. Turning to the respondent's failure to pay the claimant's holiday and notice pay for eleven months, (X) we considered that while this was likely to have been an unauthorized deduction from the claimant's wages, the reason for it was that expressed in Mr Mohammed's letter to the claimant of 3 August 2018, namely, the claimant's deletion of a number of files from the respondent's computer system. Mr Mohammed testified that the claimant had deleted crucial files from the respondent's computer system and that it had taken many hours for management to recreate the files as they could not be recovered. The claimant denied doing this deliberately but accepted that she might have done so accidentally. She testified that she had indeed looked up how to delete files and had deleted her personal files, including photographs and her childcare

qualification work from the respondent's computer. We accepted that the claimant did delete these files, as recorded by Mr Mohammed in his letter of 3 August 2018 and that this, and not her sex or pregnancy was the reason for the respondent's failure to pay her notice and holiday pay within a reasonable period. We record here that we did not find that there was no proper foundation for the accusation that the claimant had deleted office files (see point SEVEN at page 15 of Mr Smith's written submissions). The claimant conceded in her evidence that she might have done so.

82. Finally, with regard to (XI), we could not find the assertion referred to as contained in the ET3. If the submission at XI is a reference to paragraph 3 of the paper apart to the ET3 response, we did not conclude that the averment gave rise to an inference of direct sex discrimination.

83. In a claim of direct discrimination, the key issue is whether the less favourable treatment was <u>because of</u> the claimant's pregnancy or sex. We concluded without hesitation that the treatment of the claimant was not to any extent because of pregnancy, past or future or because of her sex but that it was for the reasons set out above. That does not mean that the Tribunal concluded that these were necessarily good or fair reasons for the conduct in question, only that they were not discriminatory reasons. In relation to the redundancy, whilst it was poorly handled, there was, in our view a genuine intention to restructure and reallocate the claimant's finance and administration duties. As we have found that the claimant's sex and/or pregnancy etc were no part whatever of the reason for the treatment, the claim under section 13 EqA fails and is dismissed.

<u>Application for expenses</u>

84. Finally, the claimant makes an application for expenses under rule 76 of the ET Rules of Procedure on the basis that she claims that the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way in which the proceedings have been conducted.

85. Rule 76(1) sets out a general power to award expenses:

*"**When a costs order or a preparation time order may or shall be made***

***76**(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -*

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted.

(b) any claim or response had no reasonable prospects of success."

86. It is important to bear in mind that expenses are the exception and not the rule in the Employment Tribunal. Rule 76(1) provides that a tribunal *may* make a costs order but *must* consider whether to do so where it finds that a party has acted in the way described in the Rule. There is a two-stage test. We must first consider whether the respondent acted unreasonably etc in its conduct of the proceedings as submitted by Mr Smith. If so, then we must then consider whether it is appropriate to exercise discretion in favour of awarding expenses.

87. The relevant test of unreasonable conduct was helpfully set out by the Court of Appeal in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78. *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

88. Mr Smith identifies the following conduct by the respondent as unreasonable. We have summarised the submissions here, but took account of the full submissions when reaching our decision:

(a) The production by the respondent of 17 pages of documents not previously seen by the claimant on the morning of the hearing which delayed the start of the hearing by an hour;

(b) A particular line of cross examination of the claimant by the respondent's agent which resulted in her becoming upset so that further time was lost at the end of the first day of the hearing.

(c) The decision by the respondent's agent to change witnesses, with the result that Mr Mohammed was not available for questioning as Mr Smith had understood he would be and Mr Roberts was called as an additional witness, involving Mr Smith in additional preparation.

(d) The night before the third day, Mr Jaap disclosed that Mr Mohammed would not be attending due to a family emergency. This led to Mr Smith making an ultimately unnecessary application for a witness order, which again involved Mr Smith in preparation and could have been avoided.

(e) The respondent has made a positive assertion in the ET3 (J62, paragraph 3) that "*the claimant acted dishonestly in bringing this claim in respect of a material fact, making reference to 'documentary evidence', but have not produced any such evidence or asked the claimant about it in her evidence*." Mr Smith submitted that this was a vexatious act aimed at deterring the claimant from proceeding with her case.

89. With regard to (a) this is the sort of irritation that litigation solicitors generally take in their stride. It is sadly not particularly unusual for a representative to identify additional documents missing from the joint bundle and to request their incorporation at the last minute. We assess its effect as part of the whole conduct of the case below. With regard to (b) the Tribunal were shocked at the callous nature of a particular question asked of the claimant by Mr Jaap and he was reprimanded for it. However, it appeared to be a momentary lapse in judgment on his part, rather than a feature of his conduct of the case and it was not repeated. The case took the same length of time in total. With regard to (c) and (d) it is for parties and their representatives to present their own cases and that involves making decisions about whether to call or not call particular witnesses. It is not at all uncommon for decisions of that sort to be taken during the hearing. Whilst the conduct Mr Smith describes may have been discourteous to him, it does not sound in expenses.

90. Finally, it will be necessary to quote here paragraph 3 of the paper apart to the ET3 of which Mr Smith complains:

> "*Although the scenario is now somewhat hypothetical due to the Claimant's resignation, there was a possibility of suitable alternative employment being offered to the Claimant at another Nursery (owned and operated by a family relation of the Respondent's Director Mr Mohammed) if redundancy had proved to be the eventual outcome. There is documentary evidence that the Claimant was aware of this potential opportunity. This hardly suggests an underlying motive connected with any issue of gender or pregnancies, but does indicate a prior knowledge by the Claimant of the potential consultation process that unfortunately stalled and was subsequently curtailed by the Claimant's resignation."*

91. Mr Smith submits that the above paragraph makes a positive assertion that: "*the claimant acted dishonestly in bringing this claim in respect of a material fact, making reference to 'documentary evidence', but have not produced any such evidence or asked the claimant about it in her evidence*." We do not understand Mr Smith's submission. Paragraph 3, quoted in full above appears to refer to the claimant being aware of a possible job opportunity at Mr Mohammed's brother's nursery and possibly having prior knowledge of the potential consultation. The suggestion seems to be that the reason for the redundancy was unlikely to have been discriminatory if alternative employment within the family was likely to be offered. It is not a very good point, (presumably that is why Mr Jaap did not bother with it) but it does not appear to bear Mr Smith's interpretation that the claimant acted dishonestly in bringing the claim.

92. Looking at the whole picture painted by Mr Smith's points (a) to (e) above we see the 'slings and arrows' of ordinary litigation practice, and in relation to (b), one ill-considered and thoughtless question. Even when taken together this does not, in our view reach the threshold of vexatious, abusive, disruptive or otherwise unreasonable conduct. With regard to the failure to pay notice and holiday pay earlier, Mr Jaap submits that this was the subject of a contract of compromise, which the claimant now seeks to reopen. The claims have been

withdrawn. Furthermore, there was no specification or breakdown of how the conduct referred to in failing to pay the relevant claims earlier resulted in expenses amounting to four hours' work. We agree with that submission. The application for expenses is refused.

Employment Judge: M Kearns
Date of Judgment: 23 April 2020
Entered in Register: 29 April 2020
and copied to parties