EMPLOYMENT TRIBUNALS

Claimant: **Mrs A. Thompson**
Respondent: **Scancrown Ltd, trading as Manors**

London Central Remote Hearing (CVP)
On: 22,23, 26,27 April 2021. Panel in discussion 28-30 April 2021.

Before: **Employment Judge Goodman**
Mr D. Shaw
Mrs J. Griffiths
Representation
Claimant: Ms. R. Barrett, counsel
Respondent: Ms. P. Hall, Peninsula Business Systems Ltd

JUDGMENT

1. The claim of discrimination because of pregnancy or maternity leave fails.

2. The claim of harassment related to pregnancy and maternity fails.

3. The unauthorised deductions claim (referral fees) fails.

4. The unfair dismissal claim fails.

5. The claim of indirect sex discrimination succeeds.

CASE MANAGEMENT DIRECTIONS

1. Remedy for indirect discrimination will be decided at an online hearing on **12 August 2021.**
2. The claimant is ordered to file an updated schedule of loss, and send the respondent documents in support thereof by **16 July.**
3. The respondent is to file a counter-schedule by **23 July.**
4. If ether side desires to rely on additional evidence at the remedy hearing, the written statement(s) of evidence must be exchanged on **30 July.**
5. Any additional material must be sent to the tribunal by **6 August,** with the hearing date and judge's name in the subject line.

REASONS

1. The claimant was employed as a sales manager by the respondent, a small independent estate agent. In May 2018 she announced her pregnancy. She was absent on maternity leave from October 2018 to October 2019. On her return to work, she made an unsuccessful application for flexible working, and lodged a grievance about her treatment when pregnant; on learning both had been rejected she resigned. She claims pregnancy and maternity discrimination, harassment related to sex, indirect sex discrimination in respect of the flexible working request, unfair dismissal, and unlawful deduction of commission payments from wages.

2. The claim is disputed. The respondent also argues that much of the claim is out of time.

3. There was an agreed list of issues, which is attached to this judgment.

Evidence

4. The tribunal heard evidence from:

   Alice Thompson, the claimant
   Hannah Kerr, PA and sales negotiator
   Alexander Hebditch, residential lettings manager
   Jennifer Purchase, recruited as maternity cover for the claimant.
   Paul Sellar, director.

5. There was a hearing bundle numbered between 1 and 1,173 pages, although as there were only 1,060 pages in it, finding the page references on the electronic bundle was troublesome. The respondent's representative was unable to supply any electronic page numbers, and was prompted throughout the hearing by counsel for the claimant. The 11 page index referred only to paper page numbers. The witness statements were cross-referenced to the paper page numbers. The electronic bundle was not bookmarked, and many of its page numbers were not machine-readable, so it could not be searched. These difficulties consumed much time in pre-reading, in the course of the hearing, and in discussing our findings and conclusions. We take time to complain about this because both Peninsula and Slater Gordon solicitors are frequent flyers in the employment tribunal. They should know of the tribunal's directions on electronic bundles, which are required even if the hearing is to be in person (as this hearing was until the week before).

6. The case was listed for 7 days including remedy, but the parties wanted remedy to be heard after judgment was given on liability issues. On concluding the evidence on day 4 we had hoped to give judgment and hear remedy on day 7. With regret the tribunal informed the parties on the afternoon of day 6 that this would not be possible, and a date for a contingent remedy hearing was agreed by email. We did not need to use the remedy bundle of another 60 pages.

Conduct of the Hearing

7. The hearing was open to the public. Counsel for the claimant arranged at the start of the hearing for the bundle and statements to be hosted on her chambers' website, as the parties had made no other arrangements for public access and the tribunal's premises are still closed to the public.

Findings of Fact

8. The respondent is a small firm of estate agents in Marylebone with one office and around 10 employees, covering both sales and lettings. Many customers live overseas and may communicate by email; Middle East customers are more likely to be in London in the summer. There is some walk-in trade; much depends on good local relationships and long-term personal contacts.

9. The claimant was hired from Foxtons, a large corporate chain of estate agents, and started work on 24 October 2016. Her first year's salary as sales manager was a flat rate of £120,000. On 17 October 2017 her salary was £60,000 +12% of sales commission. In addition she was paid a bonus if she achieved a sales target.

10. The claimant and the lettings manager were required to record when staff arrived. If they were more than 20 minutes late for work their pay was docked. Working hours were from 9 a.m. to 6 p.m. The contract provided for statutory sick pay only, and was silent on maternity terms.

11. It is common ground that she was very successful in building sales income, and was well thought of. In the spring of 2018 Paul Sellar, the owner and director, said: "down to you, the office is doing well".

12. At around this time the claimant became pregnant. In April 2018 she asked for time off to attend a hospital appointment; when asked if she could move it, she explained that in fact it was for a 12 week antenatal scan. After the scan when the pregnancy became common knowledge, on 1 June Mr Sellar took the staff to a private members club for the evening and the staff celebrated the pregnancy.

13. The claimant says that over the dinner table Paul Sellar commented to a colleague's partner "I thought, for fuck's sake, why is she pregnant when we are doing so well? I was warned about employing a married woman of her age". This is denied. The tribunal notes this is a sentiment shared by many employers on learning that a valued employee will be leaving work for 6 to 12 months, though few express it so frankly. We understand the claimant did not hear it herself, rather she had it reported to her.

14. Next day the claimant took Mr Sellar to task for this remark; according to her, he explained that his brother-in-law was the source of the warning. He denies this conversation too. Mr Sellar says that he used to run the business jointly with his brother; in the past female staff had gone on maternity leave. Two administrative staff had returned to part-time hours.

15. It is difficult to decide which witness is accurate, because the claimant did not take this further at the time, nor complain about other events during her pregnancy that are the subject of this claim, until she lodged a grievance in October 2019, 17 months later. It is unsurprising if others cannot remember. We were also concerned that the claimant's feelings about what happened on return from leave may have influenced her later account of past events, and she may have reviewed what happened during the pregnancy in the light of later events to achieve a narrative of a series of hostile events. This makes it hard to decide who is right. An example was that she said she was asked to move appointments. In fact she had already booked appointments that were early or late in the day to minimise time away from the office. We know that when Mr Sellar asked her to move the scan appointment, he did not know she was pregnant. He did ask if she could change another scan in June, and a blood test in August, which were in the middle of the day, but she did not in fact change them. On many other occasions she left the office early for antenatal appointments. At the end of September she left soon after lunch, at a couple of hours' notice, for an appointment she had overlooked. Ante natal appointments do not feature in the discrimination and harassment claims, but they did in the grievance, and in the claimant's evidence about Paul Sellar's attitude to her pregnancy.

16. On 20 June Mr Sellar bought tickets for the team to go to the Portman Square garden party, Portman Square garden being adjacent to the office. The claimant left before other staff. She complains that the next morning others were late, apparently with permission, and she had not been told, and that this undermined her authority. The evidence tends to suggest that one employee, the sales negotiator in her team, arrived on time but but promptly went home to change, returning at 10.30 a.m. There is some gossip in texts between staff that Mr Sellar and the sales negotiator may have been in a relationship. If so, we understand the claimant's fears that her authority with her was undermined, but do not conclude that one such event was anything more than oversight.

17. There is complaint about a second such event, after another party on 23 August. We can see that late that evening Mr Sellar had emailed the claimant to say that he given permission for staff to come in late, but she had gone to bed early and had not noticed this when she arrived at 9 a.m. and found most people missing. She and those who had attended work on time went out for breakfast and returned when the others arrived. On this occasion Mr Sellar had kept staff out late, but he had informed her; we cannot find that this is undermining her authortity- she had just not noticed the email. The claimant complained she had had to use one and a half a days of annual leave to avoid coming in to the office on the days of travel to and from New York (see next). She resented other staff being given a late start without having to take leave.

18. Mr Sellar took the staff, a party of seven in all, to New York for a trip from 9 to 13 August 2018. It had been planned for November, when the office would be less busy, and moved back to August so the claimant could join in – there were checks to see when was the latest she could fly. We heard conflicting evidence about the reasons why she did not join the other six on a boat trip. We concluded that her exclusion was innocent:

larger boats were far more expensive, there was a proposal to book two 6 seaters, it was all decided last minute before leaving London because of difficulty finding one the right size, and importantly the claimant volunteered to drop out, saying she had been on a boat in New York before, and would go shopping instead. In our finding, she was not told to drop out, nor was she told that the boat company's insurance did not cover pregnant women. She did go shopping and then back to the hotel. In our finding she was upset that the others had had a good time drinking and were late back. She may have felt excluded, but it was not because of any action on the part of the respondent. There is a more general complaint that the trip involved too many late nights and drinking, which a pregnant woman was unlikely to enjoy. However, Hannah, who had organised it, had consulted with everyone about their preferences for activities, and tried to accommodate a mix. It was a busy programme, with several other activities, at a time of year when New York is hot, with the initial days inevitably affected by jetlag, and no doubt the claimant did find it tiring. The photographs show her smiling and confident at group meals.

19. On the return journey (Mr Sellar had booked himself into first class, the claimant paid for an upgrade to first because of her condition) he commented that she had not seemed to enjoy the trip; she replied that she had felt isolated, and became tearful. Resuming the discussion a few days later, he suggested she should not have gone to New York. We can understand that Mr Sellar may have found her response ungrateful when the group trip had cost him £25,000.

20. The claimant herself agreed that relations between them had been fine until the New York trip, another reason why we think she read back hostility into earlier events.

21. With Mr Sellar's approval, the claimant had recruited a former colleague from Foxtons, Jennifer Purchase, to cover for her maternity absence, and she started work on 23 August so as to learn the respondent's business over the next few weeks. She shadowed the claimant on market appraisal visits to get to know the area and the clients. It is suggested that Mr Sellar put pressure on the claimant to undertake visits out of the office which Ms Purchase could have done in stead. In our finding this was not the case.

22. There is a complaint that the respondent did not carry out a risk appraisal. He did not carry out risk appraisals for any staff at any stage of employment. The claimant reports having to walk upstairs at some buildings, that at least one unoccupied apartment was very dusty, and that she had to visit a client who was a chain smoker. She became physically uncomfortable as her pregnancy progressed. She used the office key to gain access to Portman Square garden to walk around during office hours; it is not suggested that the respondent objected. It was noted by Hannah Kerr at the end of August that the claimant was picking on people.

23. The claimant began to suffer pelvic pain, and was referred by her GP for physiotherapy. The claimant emailed the appointment card for 3 September as an attachment when notifying the time off. Paul Sellar's

evidence is that he did not know she was suffering pelvic pain until she told him on 1 October. Having reviewed the email and card, we cannot find that he should have concluded that she was in pain. There was nothing to suggest that this was not another routine antenatal appointment or that he should have noticed it was for a physiotherapy clinic. At the end of September the claimant ordered a Pilates ball to sit on in place of an office chair. There is no evidence that Mr Sellar noticed or objected. He had offered her use of an office car to commute to work to avoid the crowded tube, concerned she might be knocked.

24. There were a number of CCTV cameras in the office. According to Mr Sellar, this is because many tenants pay rent in cash, and he needs to check that no members of the public are in the building when he wants to open the safe. He also used it to check if a staff member was at their desk before he buzzed them through to his office. The claimant has alleged that he used this on one occasion to follow her into the kitchen when she went for a snack, and that he was monitoring her. The alleged exchange ("You can't deny a pregnanct woman a snack", "I can deny you anything"), sounds like banter. In our finding, he was not monitoring CCTV to check her movements. Staff were free to use the kitchen at any time. Early in pregnancy he had bought her 60 bags of monster munch, her favourite snack, and as noted she was going out for walks when she wanted.

25. On 1 October the claimant sent Mr Sellar a long message with the dates of remaining antenatal appointments which she would need to leave work early. There was a yoga class for the pain, and with other antenatal appointments she was going to need leave early on 2,3,4,9 and 10 October.

27. The claimant wanted to organise a baby shower (a leaving party for a pregnant woman) and Mr Sellar agreed both to time off in the working day and to bear the cost. On Friday 5 October the claimant took the staff out to breakfast, and the office was by agreement closed until 10.30 In fact it was closed until 11). On return there were photographs taken against a background of balloons and confetti. On Monday 8 October, when Mr Sellar arrived to work, there was still balloons and confetti in the office, and he asked for it to be cleared up. It is suggested that this shows bad temper and hostility. In our finding, it was a plain remark, and it is not unreasonable for the owner to want the premises to be clean and tidy for business on Monday morning.

28. On Tuesday 9 October the claimant took the sales team out for lunch. On her own evidence they overstayed the lunch hour by 30 minutes. Later that day Paul Sellar took the claimant to task about the late return.

29. The claimant says that on the 10 and 11 October when Mr Sellar came into the office at lunchtime he left as soon as the claimant returned. She also says that he called staff up by name one by one a new coffee machine, but blanked her. We are sceptical that he did call everyone else up, but there was a conversation on 11 October to the effect that she had been rude in returning late on the Tuesday, (when she was also leaving early for an antenatal appointment), and that things were getting lax,

which ended with the claimant in tears.

30. Friday 12 October was the claimant's last day. (It was to have been later, but at some earlier date it had been brought forward by two weeks. By this point Jennifer Purchase had been in post eight weeks and could be considered fully trained).

31. At some point during those last days, possibly as late as that morning, (the letter she sent on the afternoon of 12 October outlined "the maternity pay agreement following our conversations") they finally had a conversation about her pay during maternity leave period. It was taken for granted that she would be on statutory maternity pay (SMP) terms, and the conversation focused on commission, bonus and referral fees.

32. The claimant had asked Paul Sellar about her maternity terms when she told him about her pregnancy. It seems she had in mind that he might pay her more than statutory maternity pay, as happened at Foxtons, but it is not clear to us that she actually asked for this. He replied that he would speak to her about a package, but as the weeks wore on, she had no news. We can see that in September she contacted the payroll administrator to ask what lower rate SMP was, and the minimum that could be deducted from that for pension contribution. She must also have been concerned about commission on deals she had booked up till leaving, that being a very substantial element of her pay, and she was uncertain whether she had yet reached target to be paid a bonus.

33. In the 12 October letter she confirmed she would be on the maternity pay at the higher rate for 6 weeks and the lower rate for 33 weeks, "including commission for deals worked on". She attached a copy of Excel spreadsheet with a list of 11 deals on which she expected commission on completion. She listed another 7 deals (some being sales of multiple flats) which were likely to agree in the near future. She asked for confirmation on whether she had now met target for her £15,000 bonus, payable in November. Finally she referred to referral fees due for referring buyers to Base Interiors, a related business carrying out refurbishment, namely 9 Orchard Ct, for which she was due £1,000, (a split with the sales negotiator), and £2,000 on flat 19, 15 Portman Sq, where the owner "might be using" Base Interiors for refurbishment. There was also a query about outstanding holiday pay, and thanks for the loan of the office car for the coming weekend.

34. Mr Sellar replied half an hour later "I have briefly looked through your letter and don't agree with a number of your points. I will respond to you when I have a moment".

35. It took him some time to respond. On 23 October he replied that commission would be paid on deals registered in the sales spreadsheet up to and including 12 October, subject to completion. On future deals, none had concluded in the past 10 days, and he had decided that they were to be allocated to Jennifer Purchase acting in her absence. The claimant would only get commission on deals agreed and registered after her return from maternity leave. On bonus, he had not yet looked at sales figures in detail, and was asking accounts to do so now. On referral fees, he pointed

out this was a payment from Base Interiors, not from the respondent, so he could not confirm when payment would be made.

36. He attached a more generic letter, which we assume was drafted by Peninsula, his advisers on employment matters, on rights during the period of maternity leave, notice of return, and so on.

37. The claimant was paid commission up to 12 October, and later (1 December) the bonus.

38. The claimant had to chase to get some of her payslips during maternity leave, and in July she followed up on an unpaid commission. Mr Sellar checked, found it had been overlooked, and it was paid.

39. The referral fees were not paid, and now form part of this claim.

40. Shortly after the exchange of emails on 12 October about remuneration during maternity leave, Mr Sellar said to the claimant as he was leaving: "well that's it then, Jenny are you ready, as Monday you're in charge. Leave your mobile phone and office keys with Hannah". The claimant experienced this request as rejection, as if she were leaving the firm. The following Monday she went to the office to return the keys for the car she had borrowed for the weekend and a colleague asked her to take her mug home, which made her feel like a leaver. (The mug is not pleaded as conduct).

41. The tribunal does not understand why a request for the office keys is objectionable, as she could have no use for them, while her colleagues would. Mr Sellar says that he needed the phone as a spare. We know the claimant had a personal phone. It seems she did not know how to set up her own phone through Microsoft 365 to receive office email, as could have been done to maintain contact, and no one explained this to her. The result was that she was not in general touch with office life while away. It was the coldness of her leaving that she complains of, and the sense of exclusion.

42. She did keep in touch: she and Jennifer Purchase exchanged messages about customers and deals. She also assisted the respondent as a witness in litigation about a disputed sales fee in December and January.

43. On 25 October 2018, six weeks into her leave and before the baby was born, the claimant came into the office, and spoke to Mr Sellar, hoping, she says, to clear the air about the conversation on 11 October. When she asked whether they were good, he replied that she had cried because she was emotional because pregnant. Initially the claimant placed this conversation on 31 October, then conceded Mr Sellar had been away that day. Mr Sellar denied his presence on 31 October, and did not answer on the content of the conversation if it happened on a different day. We conclude there probably was such a conversation.

44. The claimant gave birth on 21 November 2018 after a difficult labour. At the time she was still worried whether the bonus would be paid.

45. In January 2019, while on leave the claimant heard from Alex Hebditch, the lettings manager, that he had been promoted to lettings director. After hearing evidence from Mr Hebditch and Mr Sellar on this, our finding is that Mr Hebditch approached Mr Sellar to ask for a pay increase, and increased commission, and for payment of bonus although he had not in fact made target. Mr Sellar had not agreed to any increased payment, but did concede the fall-back request that his job title be upgraded from manager to director, on the basis that it would assist in winning clients when the competition entitled his equivalent a director. Several months later the claimant was informed by a colleague that Mr Hebditch had received a pay increase with this promotion; we conclude that her informant was misled.

46. While on maternity leave the claimant decided to explore a flexible working arrangement (shorter hours) on her return to work. On 7 May 2019 she emailed Paul Sellar to say that she proposed to extend her maternity leave by three months, and return to work on 12 October 2019. In the meantime, without mentioning whether there was anything in particular to discuss, she said it would be "good to come in and chat" about her return to work. She suggested a date in May or June. On 12 June she asked if he would be around tomorrow, and he replied, not for several weeks, because he was having treatment (we understand that in this period he was in and out of hospital and attending the office only for brief periods). On 9 July she asked about commission on a sale, and he replied he thought she had been paid but would check. On 19 July he wished her a nice holiday, (she was going away).

47. On 9 August they met at last. Mr Sellar said that she must be enjoying her break. The claimant objects that this suggests he viewed maternity leave as an extended holiday, he says only that it was a general expression of goodwill and referred to her recent holiday. The claimant then asked how much leave she had accrued, and said that she would like to return to work four days a week only. Paul Sellar said that if she wanted flexible working, there would have to be a formal request. The claimant took that as a no, referring to his failure to tell her anything about her maternity leave terms until the very last minute. She then suggested she use her accrued holiday leave all at once at the end of the maternity leave, Mr Sellar said that was fine. Next she asked, in the alternative, to use up her annual leave one day a week, so as to obtain in practice the four-day working week. He replied that he would not allow other employees to do this, but he would agree to do it over a four-week period, to ease her back into full-time work, which would take them to mid-January. She also asked to finish work at 5 p.m, not 6 p.m., because the nursery closed at 6 p.m. and was an hour's drive away in the rush hour. She said that if she worked a four day week, the fifth day could be covered by Jenny Purchase; Mr Sellar objected that she (Jenny Purchase) might leave.

48. At the beginning of August the claimant logged on to Lonres, a website where estate agents share market information, to prepare for her return to work. She found her subscription had, and believes it had been cancelled by the respondent. The respondent denies taking action to cancel. There is an email from Lonres to Paul Sellar in November 2019 confirming they had no record of any request for deactivation from the respondent, while

they did carry out "random proactive checks" to check that registered users still worked for the subscribing firm. In our finding it is likely she was deleted in March 2019 when Lonres checked who worked there and was informed she was not there. We have no evidence on when subscriptions were renewable, whether they related to the number of staff registered. She did not query it with Mr Sellar when they met on 9 August.

49. Following this meeting there was some correspondence about the exact calculation of the accrued leave, and on 11 September the claimant said that as she could not use accrued leave to phase in the return to work in four-day weeks, she would add them on to her maternity leave and return to work on 23 (later recalculated as 28) November 2019. Mr Sellar responded, as she asked, with a note of how many further days she would accrue between then and the end of the year.

50. The claimant then consulted solicitors, who wrote to the respondent a without prejudice letter which the respondent understood to be a grievance. It is not in the bundle, but we understand it included a complaint about being refused flexible working. A week later the respondent replied setting a grievance meeting for 4 October 2019 to be conducted by "an impartial face-to-face consultant from Peninsula". The claimant was also asked to make a formal request flexible working request. The solicitors replied that the letter had not been a grievance, in any case Peninsula was not an impartial investigator, and there was too little notice of the meeting. On 9 October the solicitors made a data subject access request.

51. The claimant then lodged a formal grievance on 10 October. The letter of grievance takes matters from the start of her pregnancy onward, covering antenatal appointments, lack of clarity on maternity payment terms, risk assessment, workload, monitoring, hostility during the last few weeks of her working, the confrontation on 11 October, exclusion from group activities in New York, the dates when staff arrived late for work, exclusion during her absence, the remark on 2 June 2018, removal of company property on the final day, removal of her Lonres account, and rejection of an informal request to work flexibly. All but the antenatal appointments form part of the discrimination and harassment claims before us. Within the grievance there then followed a formal request for flexible working on four days a week instead of five, proposing that Jenny Purchase cover her management duties on day five. This would make a team of three in sales – the claimant, Ms Purchase, and the negotiator. She then asked for the early finish, because she proposed to use a nursery near her home in Brixton which closed at 6 pm and was an hour's journey from the office.

52. On 12 October the claimant's maternity leave period ended and she continued absent, using outstanding annual leave. On 15 October she notified a dispute to ACAS to commence early conciliation. On 18 October the respondent invited her to grievance hearing, which took place on 28 October. Grant Pegg, appointed by Face-to-Face as investigator, interviewed the claimant, and produced detailed typed notes from a recording of the interview. He had a telephone discussion with Paul Sellar, of which there are no minutes, and sent Mr Sellar the minutes of the discussion with the claimant. Mr Sellar inserted his responses on each

point in red.

53. On the flexible working request, on 15 November the claimant and Mr Sellar met to discuss the formal request, with Hannah Kerr taking notes. The claimant objects that Mr Sellar read a series of questions from a script, and that it was not necessary to insist on a face to face meeting lasting only nine minutes when she had asked for it to take place by telephone. They discussed Jenny Purchase covering on the day off. The claimant said she could be available by mobile phone if necessary, but would not be able to work from home on the fifth day. Any day would do, but it should be the same day each week. The claimant would also be happy with two half days instead, so that she would work five days a week but fewer hours. She was told there would be a pro rata reduction in her salary, annual leave and commission; she replied she had not thought of that, but understood. On finishing an hour earlier, the claimant said she would be available by mobile, her colleagues would manage in that hour, many were out on viewings at that time. She was not able to get anyone else to collect her daughter from nursery, as her husband worked until 7 pm, and her family were not in London. Paul Sellar then clarified whether she wanted an early finish as an alternative to 4 days. She confirmed that she wanted both. The meeting concluded.

54. A week later, on 25 November, the claimant was sent a letter turning down her request for flexible working. It is a short letter, first reciting the reduction in hours she had requested, then continuing:

> "I have considered your request for a new flexible working pattern carefully. I regret to inform you that, on this occasion, we are unable to accommodate your request for the following business reasons: (1) the burden of additional costs; (2) detrimental effect on ability to meet customer demand; (3) inability to reorganise work among existing staff; (4) inability to recruit additional staff; (5) planned structural change."

He added:

> "as you know, building and maintaining client relationships is an essential feature of sales. For continuity purposes, our clients expect consistency in the sales manager they deal with, which is a further reason why would not be suitable to recruit additional staff to cover the proposed hours."

55. She was offered the right to appeal, and did, by letter of 28 November 2019. She complained that none of the grounds relied on had been explained. In particular, with the new assistant sales manager, there was no burden of additional costs or detriment to meet customer demand, inability to arrange work among existing staff, nor impact on or need for additional staff. As for the planned structural change, she asked what it was, as, if notified to staff, she had been excluded. As to consistency in dealing with clients, she had always encouraged teamwork in sales - information was shared, and customers knew the whole team. As for the handling, she pointed out that the ACAS guidance on flexible working requests provided for discussion, but there had been no discussion or clarification. The response was "no", without explanation.

56. On 4 December the claimant presented a claim to the employment tribunal for harassment, direct and indirect discrimination, and failure to pay referral fees.

57. A flexible working appeal hearing was set for 5 December 2019. The claimant met Graham Hall from Peninsula face-to-face. She explained to him the nature of her job and in some detail how she thought it would work with early leaving, and that Jenny Purchase knew the sales manager role so well she could cover the extra day. Mr Hall then also obtained the views of Paul Sellar, though it is not apparent from his report or Mr Sellar's witness statement whether this was in writing, by telephone, or at a face-to-face meeting. He did not put Mr Sellar's views to the claimant. Mr Hall then prepared a report dated 13 December 2019. On structural change, he said that Mr Sellar could not state what was planned because he had yet to make an announcement to the staff. On the other points, he accepted Paul Sellar saying that about 30% of the claimant's working time had to be covered by others, which would result in the cost of additional commission to staff, and that they would not be able to carry on their own work at that time. He would have to pay commission to the sales negotiator who was covering as well as to the sales manager. This would increase costs. If he changed the commission structure he would have to consult about it, and he did not find this a practical solution. He had never planned that Jenny Purchase should continue as interim sales manager after the claimant's return, and if she was covering for the claimant, then she would not be able to show properties and sell on her own account. As for the claimant pointing out that most of their international clientele did business during core hours, rather than later in the afternoon, Mr Hall accepted Mr Sellar's view that between 5-6 p.m. potential customers might be lost because the staff available could not answer their queries adequately. The claimant had volunteered to be available by phone but there was no guarantee that she could respond. It was not practical to recruit a part-time replacement for the claimant. If she were absent, he anticipated lower instructions, as she would not be available to promote to sellers. If the sales team were all out, the administrator could only pass on messages. Mr Hall accepted that sellers would want to rely on the experienced sales manager, and if she were not available that would have an effect on the business. On the complaint about process, Mr Hall noted that Peninsula had provided advice to the respondent for the meeting and the written response had covered everything that was legally required, but did not deal with the complaint that there was no discussion.

58. By the time the claimant got this, she had already resigned. A few days later, on 23 December 2019, she applied to amend the employment tribunal claim to add unfair and discriminatory dismissal.

59. Shortly before the flexible working meeting, on 22 November 2019 the claimant had gone to see her doctor complaining of sleep loss and stress, and was signed off work for one month. On 28 November, the day her annual leave expired and she was due to return to work, she emailed the doctor's note to the respondent, saying that she was unable to return to work because she was certified unfit. In consequence of this, the respondent did not pay all her November wages (holiday pay) in the bank

transfer payment at the end of the month. On 2 December 2019 the claimant queried why there was a deduction of wages in her November payslip and received a reply from Lidia, the respondent's finance administrator, next day explaining it was for the six working days covered by her fit note, whereby she was not to be paid for the first three days of sickness and thereafter had statutory sick pay. The claimant replied that she was on annual leave, so the deduction must have been made in error. Lidia responded:

> "the purpose of entitlement to paid annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure. The purpose of entitlement to sick pay is different, since it enables the worker to recover from illness that has caused them to be unfit for work. The holidays will be available for you to rebook in line with request procedures. However, if you wish to have the current period of sick leave as annual leave then please confirm this in writing and this will be considered. Please confirm how you wish to proceed".

Employment lawyers will readily recognise the language of the European Court in the first sentence in this letter. The claimant responded that employees could nominate a period of sick leave as a period of holiday and that was what she wanted. Lidia then replied on 9 December 2019 with a long letter beginning:

> "to confirm, an employee can request that sick leave is taken as holiday but this is a request and not a given. Where sick workers make a request for annual leave whilst on sick leave, employers may either allow then to take annual leave when our sick (which workers who have finished entitlement contractual sick pay may choose to do), or employers should allow them to take leave on the return to work, even if this means it must be taken in a subsequent leave year".

There is then an extensive passage on the Spanish case C – 278/11 ECJ, on what happens when a worker is sick when on holiday, in which it was observed: "it would be arbitrary and contrary to the person entitled to be paid annual leave to grant the worker that right only if he or she is already unfit for work when the period of paid annual leave commences". Lidia did not say explicitly the respondent would pay the missing November days, but neither did she say they would be paid, the latter will have left the claimant none the wiser, but fearing the worst.

61. While the claimant was off sick and in correspondence with Lidia, she was sent the grievance outcome on 6 December. (The investigator's report which accompanied it, which runs 63 pages, is dated 2 December). The report largely takes the format of quoting verbatim from the claimant's evidence on each grievance issue, followed by Paul Sellar's comments on that evidence, and on every point he finds in employer's favour. There is no reference to other investigation, such as checking any point with others or against documents and emails; where there may have been witnesses, as with the remark on 1 June 2018, he relied on Paul Sellar's telling him they (Alex Hebditch and his partner) had supported his view. He did however conclude that although the grievances were not upheld: "I do note that there is some damage to the employer/employee relationship

and that this may cause disturbance to the workplace and therefore would recommend that (the claimant) and (Paul Sellar) consider workplace mediation in order to build a professional workable relationship between both parties". He also recommended the introduction of a policy for carrying out risk assessments for pregnant employees.

62. For the claimant, Lidia's "legalistic and adversarial" letter of 9 December, closely following what she saw as a one -sided decision on her grievance by the person she complained of, the last straw in her relations with her employer. On 12 December she resigned. She referred to the grievance outcome she had received on 6 December as "an overwhelming effort to find against me". Her grievance had been decided by the person against whom it was made and the report was "fundamentally flawed". As a result of that, and the matter she was complaining about in the grievance, and the "unreasonable response to my holiday pay query", she wished to resign with immediate effect. She was not going to appeal the grievance outcome because she saw no prospect of the appeal being handled fairly. There was no mention of flexible working, save that her grievance had included a complaint about the discussion of it on 9 August.

63. For completeness, the respondent did investigate the appeal against the refusal of the flexible working request. Graham Hall of Face2Face met the claimant on 5 December(before the resignation) and reported on 13 December, with the claimant being told on 16 December, after resignation, that the appeal did not succeed. As with the grievance, there is a verbatim note of Mr Hall's conversation with the claimant at the appeal meeting, but no notes of a conversation with Mr Sellar, although unlike the grievance, the report records that there was one. There is no claim in respect of this appeal, but the account there of the respondent's reasons for not agreeing to flexible working informs our decision on the indirect discrimination claim.

Relevant Law

Direct Discrimination

64. By section 18 of the Equality Act 2010:

> (2) a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably
>
> (a)because of the pregnancy, or
>
> (b)because of illness suffered by her as a result of it.
>
> (3)A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4)A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5)For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

The protected period is during pregnancy, and during the periods of ordinary and additional maternity leave.

63. The word ”because” requires the tribunal to examine the reason why an employer acted as he did, and whether the protected characteristic had ”a significant influence on the outcome” – **Nagarajan v London Regional Transport (2001) AC 501**. It is not “but for” causation – **Amnesty International v Ahmed (2009)UKEAT 0447/08**. In discrimination claims based on protected characteristics other than pregnancy and maternity, the tribunal can consider how the employer treats or would treat others without the protected characteristic. Because pregnancy is unique to women, there is no provision in section 18 for an actual comparator. However a male comparator can be a relevant hypothetical comparator for considering an employer’s reason for the *treatment* of a pregnant employee, or one who has exercised maternity leave – **Madarassey v Nomura International 2007 EWCA Civ 33**. A reason is a set of facts known to the employer or beliefs held by him which operate on his mind and cause him to act as he does – **Abernethy v Mott Hay and Anderson 1974 IRLR 213.** If there is more than one reason for the employer’s treatment, the tribunal must consider whether the protected characteristic was the “effective cause” **-O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School (1996) IRLR 372.**

64. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof for all claims brought under it. Section 136 provides:

> “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

65. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is “in no sense whatsoever” because of the protected characteristic. Tribunals are also to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.

Harassment

66. Harassment is defined in section 26, but by section 212(1), acts cannot be *both* detriment and harassment.

67. By section 26 (1):

> A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant (b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

On "effect", section 26(4) provides;

"in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

68. Where a series of actions is relied on, a tribunal should look at the totality to decide to decide if there was harassment related to the protected characteristic, rather than by taking each action separately **– Reed v Stedman 1999 IRLR 299**

69. Pregnancy and maternity are not protected characteristics for harassment, but sex is, and pregnant women are a subset of women.

70. In this case many of the events relied on occurred more than three months before the first claim was presented. The Equality Act provides at section 123 that claims must be presented within three months of the act complained of. By section 123(3)(a), "conduct extending over a period is to be treated as done at the end of the period". A series of similar acts on the part of the same person *may* amount to conduct extending over a period. It is also provided that a tribunal has discretion to allow a claim to proceed out of time where it is just and equitable, and that discretion must be exercised having regard to the effects of delay on the balance of prejudice to each side in achieving a fair trial- **British Coal Corporation v Keeble (1997) IRLR 336**.

Indirect Discrimination

71. By section 19 of the Equality Act:

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory if

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

72. Sex is a relevant protected characteristic for indirect discrimination, but not pregnancy and maternity.

73. The indirect discrimination claim concerns the claimant's request for flexible working, and so it should be noted that there is statutory framework on how employers should handle such requests (not limited to people seeking altered working arrangements for childcare) set out in section 80F- 80I of the Employment Rights Act. In summary, an employee has no right to be given flexible working on request, and must explain how the requested change in contract terms would affect the employer and how that could be dealt with, but an employer must consider the request in a structured way, and give reasons for refusing a request which fall into the business reasons categories listed in section 80G. They are (in full) - (i)the burden of additional costs,(ii)detrimental effect on ability to meet customer demand,(iii)inability to re-organise work among existing staff,(iv)inability to recruit additional staff,(v)detrimental impact on quality,(vi)detrimental impact on performance,(vii)insufficiency of work during the periods the employee proposes to work,(viii)planned structural changes, and (ix)such other grounds as the Secretary of State may specify by regulations. An employee has a statutory right to appeal a refusal. ACAS publishes guidance on how an employer should deal with such a request, which includes having a meeting and discussing it before responding in writing.

74. When deciding whether a provision is a proportionate means of achieving a legitimate aim, the tribunal must consider four points, as analysed in **MacCulloch v ICI (2005) IRLR 846.** The burden of proof is with the respondent. The means chosen must correspond to a real need on the part of the undertaking, and be both appropriate and reasonably necessary with a view to achieving the objective - **Bilka-Kaufhaus GmbH v Weber von Hartz (1986) IRLR 317**. The discriminatory effects of the provision must be balanced against the objective needs of the undertaking, and the more disparate the impact, the greater the weight of the objective needs. Lastly, the tribunal must itself weigh up the needs and make its own assessment, rather than relying on whether the employer's decision was within range of reasonable responses – **Hardy and Hanson plc v Lax (2005) IRLR 720.**

75. There is a claim that the failure to carry out a risk assessment was discrimination or harassment. The Management of Health and Safety at Work Regulations 1999 provide for a "suitable and sufficient assessment of the risks to the health and safety of its employees to which they are exposed while they are at work", with risk assessments of hazards to the health of all employees at regulation 3. Regulation 16 further states that where women of childbearing age work in an undertaking and the work is "of a kind which could, by reason of her condition, involve risk to the health and safety of a new or expectant mother or to that of her baby", the risk assessment must include an assessment of that risk. **Hardman v Mallon [2002] 2 CMLR 59,** where there was no risk assessment for a care assistant who wanted work that did not involve heavy lifting and was offered only cleaning instead, makes plain that as the provision applies only to women, if a woman suffers detriment in not having a risk assessment, discrimination cannot be assessed by comparing how men are or would be treated. However, that that does not mean that a failure to make a risk assessment must have been on grounds of pregnancy. As

with other discrimination matters, the tribunal must examine the reason why the employer acted as it did, not conclude only that there must have been discrimination because the need to make as assessment would not have arisen but for the pregnancy -**Indigo Design Build and Management Ltd v Martinez UKEAT/0021/14,** where the lack of a risk assessment was one of many acts and omissions alleged as discrimination..

Unauthorised Deductions

76. Sections 13 to 23 of the Employment Rights Act 1996 provide a right to claim for deductions from wages which have not previously been authorised in writing. A tribunal must assess what was "properly payable" and subtract what was paid from that in order to make a finding. The definition of wages in section 27 (1)(a) covers: "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

Constructive Unfair Dismissal

77. This is a case where the employee resigned and so must establish that in law this amounts to a dismissal. By section 95 of the Employment Rights Act 1996, a dismissal can occur where:

> (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.

As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer's repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

> "implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

78. Where there are a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself but prove the last straw – **Omilaju v Waltham Forest (2005) ICR 481**.

79. The reason for the dismissal may be discriminatory as well as unfair. Guidance on deciding whether the employer's conduct leading to dismissal amounts to a discriminatory dismissal is given in **De Lacey v Wechseln Ltd UKEAT/0038/20**:

> "Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory

matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply".

Discussion and Conclusions

Discrimination and Harassment

80. As there is considerable overlap in the list of matters alleged as discrimination and harassment, so we propose to take item by item in the alternative, still bearing in mind that we must consider whether a course of conduct as a whole was harassment.

81. Working from the list of issues, we start with the alleged remarks on first June 2018. It is plausible that this was said as an unguarded remark after an evening of eating and drinking. It was not said to the claimant's face, and possibly not in her hearing. It is not discriminatory of itself; it might be evidence of the reason for unfavourable treatment. In our finding, it was not harassment. If not said to her face, that was not its purpose; as an isolated remark, it lacked the strength to be intimidating or hostile, though it might put the claimant on her guard. It should be viewed as part of the whole.

82. On undermining, only 21 June was undermining conduct, and when taken as part of the whole pregnancy working period, there were many other examples of the claimant being trusted, not undermined – in hiring her replacement, for example – and the June slip was not repeated in August.

83. Delaying confirmation of her maternity package is potentially more serious. As we understand it, there was no ambiguity about the underlying contractual position, which was statutory maternity terms only. On this, at best the claimant complains that Mr Sellar did not volunteer additional payment during leave, and we have no clear evidence that she asked for more in fact. Leavig aside her hope for continued salary payment, we were all concerned about the delay in informing her about the position with regard to commission and bonus, delaying for over 10 days to confirm the listed commission deals, and apparently not telling her about bonus at all until it was due. An obvious reason for delay is that the answer was not easy and required some work. We must decide in the context of the whole whether the reason for the delay was because she was pregnant and about to go on maternity leave, which was of course the context, or some other factor.

84. On risk assessment, the reason for not making an assessment is that the respondent was unaware of its duties with regard to risk assessment, for any employees. This was a breach of the regulations, but in isolation, not omitted because she was pregnant. We are not satisfied that she suffered detriment thereby. There was no evidence of the length of dust and smoke exposure on any site visit, nor was it even clear that she was so exposed, rather than considered she might be. She had the use of a car, and only had to negotiate short flights of stairs.

85. We have already found that there was no increase in workload, and no exclusion from social activity on the New York trip that cannot be explained. In this, the respondent took steps to include the claimant by

being the trip forward, trying to arrange a programme in which she could participate, and in our finding it would not have been reasonable to require a programme of activity that excluded all late evening drinking when there were plenty of daytime and early evening trips and meals which included her. There was no discrimination. As for harassment, the claimant perceived it as exclusion from the group, and so hostile; in our finding, having regard to the other circumstances, it was not reasonable for the conduct to have this effect. She had volunteered to go shopping, when efforts were being made to find two boats for the party of seven, although she later regretted her choice. As for Mr Sellar saying she should not have gone, it was a tactless reply to what he perceived as a lack of gratitude, which might form evidence of a discriminatory or harassing course of conduct, but is neither of itself.

86. The conduct during the last week at work shows a relationship that was in our view correct, but not friendly as it had been before the return up from New York. Mr Sellar was a hands-on owner who cared a great deal about timekeeping. We concluded he was not hostile to the claimant's pregnancy, or to the fact that she was about to go on leave – he had agreed to close the office for the baby shower, as much a cost to the business as actually paying for it – but he resented the team being late back from the team lunch, without permission, the following week, which he also paid for. He would accommodate agreed alterations to working time, but not a general slippage in standards, which he saw here. Some employers might have remained tight lipped, and let it go, as she was leaving soon. He had had, as shown in texts and messages, a frank and open working relationship with the claimant, and on this occasion spoke his mind about things becoming 'lax'. The fact that she tried to reopen the issue on 25 October shows the relationship it was. We accept that the claimant perceived it as hostile, but conclude that the hostility was not because she was pregnant or about to go on leave, but because of slack timekeeping, and he would have done the same for any employee who brought the team back half a hour late. The claimant in the grievance complained he permitted others to arrive later after late night office social activity in June and August, but this differs firstly that he was participating in the late night, so to some extent encouraged it, secondly that he gave the permission before the staff came in late; he was not being expected to condone it after.

87. On exclusion during maternity leave, we did not think the conduct unfavourable save with respect to general emails. Here, the reason seems genuinely to have been oversight, and had the claimant mentioned it at the time, she could have been shown how to set up her phone to receive office email. She was in fact able to keep in touch with colleagues, on business and social matters, just missing anything on a general distribution. The real objection was to the coldness on parting. This relates, in our finding to the timekeeping issue. Without that, there would have been a friendlier parting, but she would still have had to leave her keys and phone. As for relations during the leave, Mr Sellar was reasonably friendly, and there was no apparent difficulty until she asked for flexible working.

88. Looking back from 9 August 2019, we do not conclude that events up to that date, complained of individually or taken as a whole, amounted to harassment related to pregnancy or maternity leave. Nor were they

unfavourable treatment because of pregnancy or maternity leave. The reason, where there was conduct to be explained, was timekeeping. This means we need not address whether they were in time. Had we had to exercise discretion, we would have been concerned about the effect of delay on the cogency of the evidence, when so much of it was oral.

89. The remaining discrimination and harassment allegations in respect of flexible working we take together, other than the referral fees, which we discuss separately.

90. The discrimination allegation concerns the meeting on 9 August, not the formal flexible working request in October. The harassment claim includes the 9 August meeting, the meeting on 15 November, the rejection of the grievance on 6 December, and the response to the holiday pay query on 7 December.

91. The complaint about 9 August meeting is that the respondent unreasonably refused her suggestions, and pressed her to decide between remaining full-time or leaving. On this, we observe that Mr Sellar may not have known what was coming, although many employers are aware that such requests may be made, and it was not unreasonable to play for time when asked without notice for a variation in contract terms by one of the employees most important to the success of his business. Nor, in our view, was it unreasonable to ask for a formal request. It was not reasonable to conclude from the lack of encouragement in his response that she was being refused, or that she must return full-time or not at all. The contract required full-time working, she was seeking to change it. Many employers do agree to some form of flexible working, but it poses more difficulty for small employers with fewer staff resources than larger organisations. There are some signs she had not thought through how this would work, for example, the effect on remuneration. In our finding, not agreeing to flexible working at this meeting was not unfavourable treatment, because of maternity leave or sex. The only man we know of who asked for a change in terms (Alex Hebditch) was firmly turned down on all points which would have cost the respondent money, and was allowed the title he sought because it could assist in gaining business. All the signs are that a person who asked for flexible working other than for child care would have been treated the same way. Staff had returned to part time working after maternity leave in the past, but only to administrative roles, suggesting no inherent hostility to altered hours because of maternity leave.

92. As for harassment related to sex, it was reasonable to want time to consider how and whether the proposal would work. There was no overt hostility or intimidation, only lack of encouragement. As it happens, the claimant was right to conclude the eventual decision would be full-time or nothing, but that was not was said, and failing to agree at that stage was not harassment.

93. On the grievance, we understand the claimant's disappointment. The ACAS Code requires the grievance to be considered by someone other than the person complained about. The respondent's options for this were very limited; the only other director at the time was his sister. Paying an outsider is a solution often adopted by small employers. The grievance handling was lacking, in that the investigator seems never to have met, let alone interviewed, Mr Sellar, nor checked any point with others, and in

every complaint accepted Paul Sellar's account. He did however conclude there should be mediation, and risk assessment. The panel as a whole concluded the handling of the grievance was not best practice, but it was "good enough", as an attempt to examine the complaints in detail, which we, with more evidence, have largely held unfounded.

95. On the response to the holiday pay query, we found this extraordinary. This tribunal observes that the cited ECJ authority permits an employee to take holiday later if unfit for work during annual leave, but does not appear to enable the employer to compel the employee to take annual leave later, on which **Kigass Aero Components Ltd v Brown 2002 IRLR 312,** permitting annual leave to be taken by sick workers, appears to be good law after the ECJ decision in **Stringer**. But even if Lidia, the payroll administrator, got the law wrong (we do not know who composed the letter; she may well have been trying to follow some general direction), we can understand the claimant's bafflement at receiving a letter which did not answer her request directly, and was written in language a non-lawyer would find hard to follow, even if she had already engaged solicitors. An employee should not have to seek legal advice to understand an answer from payroll on whether they can be paid for annual leave already booked. But whether it is harassment related to having taken maternity leave is difficult. The response is legalistic, but holiday pay law is not always straightforward, and a finance administrator, who seemed at first to understand that the claimant could choose, may well have misunderstood it. There is a real possibility, but no more, that an instruction not to pay annual leave when certified unfit came from Paul Sellar. It is more possible that it came from Peninsula, by now engaged directly or indirectly in the grievance and the flexible working request. We cannot find the purpose of this odd an unhelpful reply was to subject the claimant to an intimidating environment. In the circumstances it had that effect. But we cannot find it was related to sex or having been on maternity leave. It arose, we concluded, from the flexible working request, and the claimant not returning to work full-time in accordance with her contract.

Indirect Sex Discrimination

96. The provision of neutral effect is the requirement that the sales manager work full-time, 9-6, Monday to Friday.

97. It is not as obvious now, as it was a generation ago, that such a requirement places more women with children at a substantial disadvantage than men with children. The claimant argues that it is still the case. She relies on a report of a 2018 survey carried out on behalf of Direct Line Insurance, headed: "Battle of the sexes – Mums still bearing the brunt of childcare", reporting that 64% of mothers, compared to 36% of fathers, are the primary carer for their children, despite workplaces increasingly offering flexible working hours, homeworking options, and shared parental leave. The research is said to be based on a nationally representative sample of 2,011 adults over three days in March 2018. In the absence of any other evidence, and against a background of our own anecdotal knowledge of current childcare arrangements, the tribunal accepts that notwithstanding an encouraging shift in societal attitudes, it is still the case that mothers are more likely to carry primary responsibility than fathers. The difference shown by the survey, just under two thirds of mothers as against just over one third of fathers, is not negligible.

98. We next considered whether the claimant was at this disadvantage. The tribunal asked whether the child's father had explored flexible working, but the claimant was not otherwise asked whether she had looked for a nursery closer to her place of work, or with longer opening hours, or whether she could hire a childminder to collect the baby until her return. We do not know if her husband earned more than her, or had a longer commute, or did not consider he should disrupt his career to look after the baby. Nevertheless, nursery closing at 6 pm aligns with standard office hours, and a requirement to work until 6 pm each day did place her at a disadvantage, as she would not be able to get there in time. As for four day working, we do not know if that was wanted because of the long commute (up to 2 hours per day) or the cost of nursery care, but all told we accept that the requirement did put *her* at a disadvantage.

99. Thus we come to consider justification. The respondent has not pleaded the legitimate aim in so many words. We take it to be the success of his business, having regard to the reference in the refusal letter to the importance of consistency and continuity in client relationships for successful sales. We therefore considered the extent to which the respondent's reasons for refusal showed the response was proportionate to this aim.

100. Of the reasons given to explain why the change she wanted could not be accommodated, we do not know what to make of the reference to planned structural change. Mr Sellar declined to enlarge on this in the appeal, and he has not said very much about it to the tribunal. There are no documents. At best we consider he had in mind (as he mentioned to the tribunal) the considerable uncertainties in October and November 2019 about the terms on which the UK would leave the European Union, and the depressing effect it is likely to have had on foreign buyers of London property, waiting to see what would happen. It is possible that Mr Sellar had in mind that he should keep his options open in case he needed to make staff redundant, but there is no evidence of a plan, and we give very little weight to this factor. If it did weigh on his mind, he could have said so, or could have offered a change in hours for a limited term to see all how the market reacted.

101. By contrast, in our assessment, the ability to meet customer demand had some significance. It is relationships with vendors that are significant for success in sales, rather than with buyers, though that is not unimportant. Vendors might obtain a market appraisal from two or three agents before making a decision. Their assessment of the people they will be relying on to sell at a good price and to a reliable buyer is an important feature. Some of the evidence suggested that vendors dealt serially with a number of properties, and also arranged for the respondent to let their property, making long-term relationships especially important. The importance of the sales manager in a small sales team, compared for example with administrative staff, is great, and all the more so in a small business with limited options for cover among its other staff. Working 9-5 four days a week might damage relationships, for example if customers wanted instant answers and became frustrated that others could not answer them, but it is not inevitable. It might depend whether the backfill from the rest of the team was reliable. Mr Sellar did not deal with the claimant's statement that most of their customers used the early evening

as family time, or provide evidence on the times of day that market appraisals occurred.

102. With this in mind, we considered the other factors relied on by the respondent: the costs of the proposal, the inability to reorganise work among existing staff, and the inability to recruit additional staff.

103. Here we found it more difficult to understand the respondent's assessment. He had made a calculation that having to pay commission to the claimant as a sales manager, and also having to pay commission to the negotiator substituting for her on the day off, would add 30% to the wage cost. There appeared to be no discount for the 20% (more than that in fact, if adding the four hours early leaving) reduction in the claimant's salary and commission that would follow her working fewer hours, as discussed by them at their meeting. Following through into the inability to reorganise work among existing staff, Mr Sellar in evidence considered the difficulty of allocating commission on sales between staff in the event of any part-time working to be insuperable.

104. We could understand that this might be a difficult issue, requiring care, but not insuperable. In Ms Purchase he already employed someone who knew the sales manager job and had been doing it for over a year. She had been hired as maternity cover interim sales manager, thereafter to revert to sales negotiator. We know from correspondence between the claimant and Ms Purchase during the maternity leave that Ms Purchase had explored another job, but rejected it because it paid too little, because she was concerned that if the claimant returned to work she might become superfluous to the team. There is nothing to suggest that Ms Purchase was dissatisfied with her role or intended to leave of her own volition if the claimant returned. Nor is there is anything to suggest that the respondent intended to dismiss Ms Purchase on the claimant's return. She was a satisfactory employee, and it was always intended she should continue. We can also see that the third person in the team, the sales negotiator, had left in the summer of 2019, her replacement having been hired in good time before her departure. There had also been a hire of another negotiator, split between sales and lettings. It would not therefore have been necessary to retain a recent hire and let Ms Purchase go, had there been any reduction in business. It is hard to see how Ms Purchase would turn down an option to remain sales manager on a one day a week basis, and continue as negotiator, as had always been planned, for the other four days, if she was remunerated appropriately, the obvious solution being to split sales manager commission 80/20 and adjust the basic salary. The two had worked cooperatively in the past. There was a small risk that she might leave if she saw an opportunity as sales manager, but all employers face the risk that staff may leave for better opportunities elsewhere.

105. We tend to accept the claimant's evidence that the team worked as a whole, and was small enough to know and keep abreast of all potential customers and sales. There must already have been times when customers could not reach the claimant straight away, for example, if she was engaged on a market appraisal, or otherwise out on site, though we accept that the chance of reaching her by phone when out of office will have gone down. . Market appraisals themselves are, in our experience, set by appointment (though in a day or so) rather than a spontaneous response to a call. If other staff are well informed and helpful, in our

experience, most customers, clients or patients accept that a named individual may not be immediately available. The success of this depends on a close-knit and cooperative team. The evidence of past working indicates that the claimant had been able to achieve this. So we attached relatively only some weight to the cost and inability to reorganise.

106. In this context we considered the respondent's concern about inability to recruit additional staff. At the appeal stage he stated that he had spoken to a recruitment consultant who said there was a vanishingly small chance of recruiting a sales manager for one day a week. We accept this word-of-mouth evidence, but do not understand why, with Ms Purchase already in his employment, he would need to recruit a sales manager. If by Ms Purchase (or if she had departed, another sales negotiator) stepping up to cover part of the claimant's duties, he needed to increase the sales team's resources to meet demand, the obvious place to recruit was with another sales negotiator, or even additional administration support, where there are more likely to be suitably experienced people looking for part-time work.

107. Taking these factors together, while we can understand the respondent's caution about changing the make-up of a team that worked, in a time of commercial uncertainty, so that we give some weight to the reasons he advanced for not making any changes, we did not follow his reasoning for holding that the difficulty of making adjustments to who did what in the claimant's proposed solution was such that it convincingly outweighed the discriminatory impact on her. Our conclusion is that the respondent has not shown that refusal of the proposed reduction in hours of work was proportionate to the real need of the business to maintain successful relations with customers. The indirect discrimination claim succeeds.

Unfair Dismissal

108. The claimant has to establish that the reason for resignation was loss of trust in the respondent dealing fairly with her. Explicitly, she relied on past discrimination and harassment, the rejection of the grievance, and the legalistic letter responding to her request for holiday pay despite being sick. She did not rely on being refused flexible working, except in relation to the meeting on 9 August when she first raised it informally.

109. The claimant did perceive Paul Sellar to be against her on grounds of pregnancy and maternity leave, but as found we held, she was mistaken. Rather he was an employer who liked to be generous to staff and appreciated gratitude in return, and, as is common among owners of small businesses open to the public between set hours, he had always attached importance to timekeeping. In our finding, the claimant overlooked this factor in the cooling of their relations in the last week before maternity leave. She had also stated in evidence to the tribunal that she would have put all this difficulty in their relations in the past on her return to work. In our assessment the crucial factor in her decision to leave was the lack of encouragement when she explored a request for flexible working. This prompted the grievance, bringing with it the complaints about earlier events. The respondent however had "reasonable and proper cause" when asking her to make a formal request for a change in terms. Such a request of itself is not a rejection; he acted correctly. She held on in the hope he could be persuaded to change his mind. When her

annual leave ran out, still waiting to hear about flexible working, she went sick, with the result that she did not have to return full-time. There is no doubt that the grievance outcome, following so soon after the rejection of her flexible working request, was a blow, and that it did appear one-sided, and the sick pay response must have been exasperating, but in our finding the real reason she decided to resign was she was not prepared to return to work on her old hours and did not expect that to change. That was not one of her reasons given for resignation. Nor do we think the failure to grant flexible working, meaning a decision to uphold the contract (not to repudiate it) was so unreasonable, (however unforthcoming Paul Sellar in in the formal meeting and his Delphic lack of explanation in his response about the needs of the business), as to evince an intention no longer to be bound by the contract.

110. We conclude that the reason for resignation was not any breach of the implied term to act with mutual trust and confidence, but that she did not want or was not able to work the contracted hours. Trust and confidence had, as a matter of fact, been weakened by the series of events, including the arms-length dealing with the grievance and flexible working request, but any failings in this on the part of the respondent were not so serious as to cause her resignation.

Referral Fees

111. Base Interiors is a business run by Mr Sellar's sister, though he was a director. Base Interiors paid a fee for referrals to Manors (the respondent business), Manors in turn paid a fee to those staff responsible for the referral. There is nothing in writing on the terms, in particular on when it was to be paid, specifically on payment of deposit, or on payment of the final sum by the client. There is no evidence that Manors staff had ever discussed the detail with Mr Sellar, though some evidence that some had been paid, for example that initially they had been asked to invoice for it. The claimant argues for a fee being payable on the client paying the deposit on starting work, on the basis of house sales, where a vendor and purchaser are contractually bound on exchange of contracts, although we understood that in practice sales staff were not paid commission until completion, when the estate agent was paid from the proceeds of sale. We observed only that it is not uncommon in busines of all kinds for commission arrangements to include some provision for bad debts. In the absence of evidence of express terms to the contrary, it is more likely that the referral fee was payable once the customer paid for the refurbishment, and the claimant has not established that it was payable any earlier.

112. The payment meets the statutory definition of wages as one "referable to the employment", though not under the contract of employment

113. As for whether the customer has paid up in the two cases for which claim is made, in the case of Orchard Court the respondent is frank that there is a dispute but payment will be made when Base Interiors is paid. In our finding, on the evidence, the fee is not (yet) properly payable

114. In the other, Portman Square, on the evidence, we cannot find that it is due. The claimant suspects work was carried out, but relies for this on an informant who has not given evidence and such information has not

always been reliable. The respondent says there was a quick resale and the values shown for the asking price and the price agreed on each sale do not support a substantial refurbishment. Of itself this is not convincing, as market price can be affected by sentiment as much as rationality. Disclosure has not been requested. The refurbishment is denied by Mr Sellar, who in matters of commission has otherwise been reliable. We conclude the claimant has not established that there was a refurbishment for which commission should be paid..

115. Nor, because it was not payable, do we find that any failure to pay was harassment or discrimination

Remedy

116. Remedy for indirect discrimination must be decided at a further hearing if the amounts cannot be agreed. Directions are given to ensure adequate preparation of the issues for the tribunal.

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Employment Judge Goodman

Date: 4th May 2021

JUDGMENT and REASONS SENT to the PARTIES ON

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05/05/2021.

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FOR THE TRIBUNAL OFFICE

AGREED LIST OF ISSUES

Pregnancy / maternity discrimination – s.18 EqA

1. Did the Respondent treated the Claimant unfavourably in the following respects:

a. Mr Sellar's comment on 1 June 2018 "I thought for fuck sake, why is she pregnant when we're doing so well? I was warned about employing a married woman of her age" as detailed at paragraph 5 AGoC;

b. Mr Sellar reiterating and defending the AGoC comment in conversation with the Claimant a day or two later as detailed at paragraph 7 AGoC;

c. Undermining her management role in the sales team on 20-21 June and 23-24 August 2018 as detailed at paragraphs 8 and 19-20 AGoC;

d. Delaying confirmation of her maternity leave package as detailed at paragraphs 10-12 AGoC;

e. Failing to undertake a pregnancy risk assessment or accommodate the Claimant's pregnancy-related pelvic pain as detailed at paragraphs 13-14 AGoC;

f. Increasing the Claimant's workload and insisting she attend site visits as detailed at paragraphs 15-16 AGoC

g. Excluding her from social activities during a trip to New York in August 2018 and Mr Sellar telling her she should not have gone as detailed at paragraphs 17-18 AGoC;

h. Monitoring her movements in the office, including admonishing her for snacking on or around 3 September 2018 as detailed at paragraphs 21-22 AGoC;

i. Criticising and 'blanking' the Claimant during her final week in the office before maternity leave as detailed in paragraphs 23-27 and 29 AGoC;

j. Excluding the Claimant during maternity leave including by removing access to her work keys, phone, email and LonRes account, as detailed at paragraphs 28-32 AGoC;

k. Commenting on 31 October 2018 that the Claimant had cried because she was emotional because she was pregnant as detailed at paragraph 33 AGoC;

l. Failing to promote the Claimant to Sales Director when Alex Hebditch was promoted to Lettings Director in January 2019 as detailed at paragraphs 35-37 AGoC;

m. Delaying discussing the Claimant's return to work as detailed at paragraphs 39-42 AGoC;

n. At a meeting on 9 August 2018, commenting that the Claimant "must be enjoying [her] break", unreasonably refusing her suggestions regarding her return to work, and pressing her to decide between returning full-

time or leaving as detailed at paragraphs 43-46 AGoC;

o. Withholding referral fees as detailed at paragraphs 47-48 AGoC?

2. Was any such unfavourable treatment done because of the Claimant's pregnancy and / or illness suffered by her as a result of it and / or because she was on compulsory maternity leave and / or because she exercised or sought to exercise the right to ordinary or additional maternity leave?

Harassment – s.26 EqA

3. Was the Claimant subjected to unwanted conduct by the Respondent by:

a. Mr Sellar's comment on 1 June 2018 "I thought for fuck sake, why is she pregnant when we're doing so well? I was warned about employing a married woman of her age" as detailed at paragraph 5 AGoC;

b. Mr Sellar reiterating and defending the AGoC comment in conversation with the Claimant a day or two later as detailed at paragraph 7 AGoC;

c. Undermining her management role in the sales team on 20-21 June and 23-24 August 2018 as detailed at paragraphs 8 and 19-20 AGoC;

d. Increasing the Claimant's workload and insisting she attend site visits as detailed at paragraphs 15-16 AGoC;

e. Excluding her from social activities during a trip to New York in August 2018 and Mr Sellar telling her she should not have gone as detailed at paragraphs 17-18 AGoC;

f. Monitoring her movements in the office, including admonishing her for snacking on or around 3 September 2018 as detailed at paragraphs 21-22 AGoC;

g. Criticising and 'blanking' the Claimant during her final week in the office before maternity leave as detailed in paragraphs 23-27 and 29 AGoC;

h. Commenting on 31 October 2018 that the Claimant had cried because she was emotional because she was pregnant as detailed at paragraph 33 AGoC;

i. At a meeting on 9 August 2018, commenting that the Claimant "must be enjoying [her] break", unreasonably refusing her suggestions regarding her return to work, and pressing her to decide between returning full-time or leaving as detailed at paragraphs 43-46 AGoC;

j. Insisting the Claimant attend a face-to-face flexible working meeting which lasted 10 minutes and consisted of Mr Sellar reading from a pre-prepared script as detailed at paragraphs 52-53 AGoC;

k. Refusing the Claimant's flexible working request in the manner and circumstances details at paragraph 54 AGoC;

l. Responding to the Claimant's holiday pay query in a legalistic and adversarial manner as detailed at paragraph 57A AGoC;

m. Rejecting the Claimant's grievance in circumstances where the subject of the grievance was the decision maker and the investigation process

was one-sided, as detailed at paragraph 58A AGoC?

4. Was any such unwanted conduct related to the Claimant's sex in that it related to her being a pregnant woman and / or having taken maternity leave?

5. Did the unwanted conduct individually and/or cumulatively have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Indirect discrimination – s.27 EqA

6. Did the Respondent apply a provision, criterion or practice ('PCP') of requiring sales staff and / or managerial staff to work full-time and / or until 6pm on weekdays and 5.30pm on Fridays?

7. Did or would the PCP put women at a particular disadvantage when compared with men as women are more likely to bear primary caring responsibilities which entail working fewer and / or more flexible hours in paid employment?

8. Did or would the PCP put the Claimant to that disadvantage?

9. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent relies upon the aim of the requirements of the business (paragraph 40 GoR) specifically:-

a. the burden of additional costs;

b. detrimental effect on ability of the Respondent to meet customer demand;

c. inability to reorganise work among existing staff;

d. inability to recruit additional staff;

e. planned structural changes.

Unauthorised deduction from wages – s.13 ERA

10. Has the Respondent failed to pay the Claimant referral fees she is due namely:

a. referral fee for 19, 15 Portman Square in the sum of £2,000;

b. referral fee for 9 Orchard Court in the sum of £1,000?

Constructive unfair and discriminatory dismissal

11. Did the Respondent constructively dismiss the Claimant?

a. It was an implied term of the Claimant's employment contract that the Respondent would not without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

b. Did the Respondent's acts set out at paragraphs 1, 3, 6 and 10-11 above individually and / or cumulatively breach the implied term of trust and

confidence?

c. Did the Claimant resign in response to said repudiatory breach by email of 12 December 2019 as detailed at paragraph 58B AGoC? The Claimant says the 'last straw' prompting her resignation was the grievance outcome on 6 December 2019 and the response to her holiday pay query on 9 December 2019.

d. Did the Claimant waive the breach by remaining in employment until 12 December 2019?

12. If the Claimant was constructively dismissed, was her dismissal unfair for the purposes of s.98 ERA?

a. What was the reason for dismissal? The Respondent asserts that that the dismissal was for some other substantial reason, specifically the breakdown of the implied term of mutual trust and confidence between an employer and an employee (paragraph 70 GoR).

b. Did the Respondent act reasonably or unreasonably in all the circumstances in treating this as sufficient reason for its actions amounting to dismissal of the Claimant?

13. If the Claimant was constructively dismissed, was the dismissal an act of discrimination?

Jurisdiction – s.123 EqA

14. Did the matters alleged to have contravened the EqA amount to conduct extending over a period for the purposes of s.123(3) EqA?

15. Alternatively, insofar as any matter complained of is found to have occurred outside the primary limitation period, it would be just and equitable to extend time pursuant to s.123(1)(b) EqA?

Remedy

16. If the Tribunal concludes there have been unauthorised deductions from wages, what sum is owed to the Claimant?

17. If the Tribunal concludes there was an unfair dismissal, what damages should the Claimant be awarded in respect of:

a. A basic award;

b. A compensatory award:

i. Was the dismissal caused or contributed to by culpable conduct on the part of the Claimant, and if so would be it be just and equitable to adjust the award?

ii. Was there a chance the Claimant could have been fairly dismissed in any event, and if so should the award be adjusted under the principles in Polkey v AE Dayton Services Ltd [1987] ICR 142?

18. If the Tribunal upholds the Claimant's claim under the EqA, what damages should the Claimant be awarded in respect of:

a. Injury to feelings;

b. Personal injury;

c. Aggravated damages; and

d. Interest?

19. Has there been a failure to comply with the ACAS Code, and if so what uplift should be awarded in respect of this failure?

1 April 2020