EMPLOYMENT TRIBUNALS

Claimant: **Mrs L M Farnworth**

Respondent: **Althams Travel Service Ltd**

HELD by **CVP** **ON:** **7 and 8 July 2021**

BEFORE: **Employment Judge Rostant**
Members: **Mrs N H Downey**
Mr I W Taylor

REPRESENTATION:

Claimant: **Mr M S Sachdev of Counsel (Leeds Free Legal Representation)**
Respondent: **Mr S Profitt of Counsel**

JUDGMENT

The claims of indirect discrimination, and of harassment or direct discrimination in relation to the emails of March and September 2020 are dismissed upon withdrawal

All of the claimant's remaining claims fail and are dismissed.

REASONS

Introduction and procedural history

1. By a claim presented to the Tribunal on 16 November 2020, the claimant brought claims of discrimination and harassment, where the protected characteristics were sex and/or pregnancy and maternity, against her employer, the respondent.

2. There was a preliminary hearing for case management before Employment Judge Shulman on 3 February 2021. At that hearing and in subsequent correspondence the following complaints were identified:

   2.1. A claim of direct discrimination because of sex, repeated as a claim of unfavourable treatment because of pregnancy and/or maternity. The alleged unfavourable treatments were:

      (a) Requiring the claimant to take holiday whilst on maternity leave as opposed to having to work;

      (b) The sending of emails to the claimant chasing her maternity leave request form;

      (c) The send of emails to the claimant whilst on maternity leave pertaining to her employment status (the emails of 23 and 24 March and 15 September 2020).

   2.2. A claim of harassment related to sex where the alleged unwanted conduct was as follows "emails from the respondent to the claimant on 23 and 24 March and 15 September 2020 relating to her furlough worker status".

   2.3. A complaint of indirect discrimination.

   2.4. Two money claims.

3. In pre-hearing correspondence the money claims were withdrawn and subsequently dismissed.

4. The claim was set down for hearing by CVP over two days. The Tribunal had the benefit of witness statements from the claimant and also Ms Handley, a witness on her behalf, who did not attend. In the event, although the Tribunal read Ms Handley's witness statement, we did not find it of assistance. For the respondent we had a statement from Mrs Mason, administrative director with responsibility for human resources and she attended and gave evidence. There was an agreed file of documents.

5. The claimant's witness statement asserted that the complaint of harassment in fact referred to her being asked repeatedly for her form indicating the start of her maternity leave. This appeared to contradict the harassment identified in pre-hearing correspondence by the claimant's email of 4 March 2021 provided in response to EJ Shulman's Order that the harassment complaint be particularised.

6. At the outset of the hearing the parties discussed the issues with the Tribunal. The claim of indirect discrimination was withdrawn and is dismissed as part of this Judgment. During the course of that discussion, Mr Sachdev also withdrew any complaint of harassment or of direct discrimination pertaining to the emails of 23 and 24 March 2020 and of 15 September 2020.

7. Thus the parties agreed that the following complaints remained:

   7.1. A complaint of harassment related to sex pertaining to the emails and other contact sent to the claimant in the lead up to the start of her maternity leave. This was articulated as two separate complaints. The first concerned the number of the emails and/or other contacts (a total of six) and the second was the fact that the emails were sent using ordinary office

email thus revealing to the claimant's co-workers the fact of her pregnancy and of complications related to it.

7.2. A complaint under section 18(4) of the Equality Act pertaining to the same emails.

7.3. A complaint of direct discrimination about the requirement to take annual leave upon the claimant's return to work. This was pursued in the alternative either as sex discrimination under section 13 of the Equality Act or a pregnancy and maternity discrimination under section 18(4) of the Equality Act.

As to that latter complaint Mr Sachdev confirmed that to the extent that he needed comparators he relied upon the respondent's handling of holidays for other workers, not on maternity leave but on furlough. He asserted that both as to the quantity of leave the claimant was required to take and as to the notice or rather lack of notice that the claimant was given, she was treated differently to the treatment of those colleagues.

The detriment to the claimant in being required to take leave on return to work (albeit returning on to furlough) was that she could not carry all her accrued leave (17 days) over into the following leave year commencing January 2021 thus reducing her ability to use leave to cover childcare.

8. Mr Profitt noted the issue of jurisdiction raised by the harassment and direct discrimination claims pertaining to those emails but said that he would take no particular issue over it. In the event, as will be seen, that matter was not dealt with by the Tribunal.

9. The parties helpfully agreed a list of facts which were sent to the Tribunal and which are repeated here by way of providing an outline of the factual matters.

9.1. Mrs Farnworth is employed as a part time travel advisor with the respondent at the Morley branch. Her first day was on 15 March 2018. She is entitled to 28 days annual leave pro-rata to her four-day week. (See page 45).

9.2. Mrs Farnworth discovered that she was pregnant in the last week of July 2019.

9.3. Mrs Farnworth informed her line manager, Victoria Harpin, of her pregnancy on 6 August 2019. Ms Harpin and Ms Mason corresponded about Mrs Farnworth's pregnancy via email on the same day (see pages 90 and 91).

9.4. Ms Mason and Mrs Farnworth exchanged emails about completing the notification of maternity leave form (the form) through the Morley branch email on 21 August 2019 (see pages 92 and 93).

9.5. Ms Mason emailed Ms Harpin about Mrs Farnworth completing the form on 18 September 2019 (see page 94).

9.6. Mrs Farnworth submitted the completed form to Ms Mason via her personal email on 26 September 2019 (see page 95).

9.7. The completed form states Mrs Farnworth's expected date of confinement would begin on 3 February 2020. She intended to commence her maternity leave on 26 January 2020 (page 96).

9.8. Mrs Farnworth went on maternity leave on 18 January 2020.

9.9. Whilst on maternity leave, she received the following relevant emails from Ms Mason on:

(a) 21 April 2020 (page 103);

(b) 13 May 2020 (page 104);

(c) 1 September 2020 (page 115).

The emails stated that all furloughed employees were required to take one weeks' annual leave in May, June and September 2020.

9.10. Mrs Farnworth and Ms Mason exchanged emails on the following dates:

(a) 27 October 2020 (pages 119 to 120);

(b) 31 October 2020 (page 121);

(c) 4 November 2020 (page 125 to 127);

(d) 6 November 2020 (page 125);

(e) 10 November 2020 (page 124);

(f) 17 November 2020 (pages 122 to 124);

(g) 18 November 2020 (page 143)

The emails related to Mrs Farnworth's furlough status and annual leave allocation.

9.11. Ms Mason emailed all furloughed staff stating that any outstanding leave for 2020 would be carried over to the next two years, with five days maximum for 2021 and 2022 respectively on 12 November 2020 (page 134).

9.12. Mrs Farnworth had accrued a total of 17 days annual leave between January and October 2020. These holidays were carried over to 2021.

9.13. Mrs Farnworth has been certified unfit for work from 12 November 2020.

9.14. Mrs Farnworth obtained an early conciliation certificate from ACAS on 6 November 2020. She filed a claim with the Employment Tribunal on 16 November 2020.

9.15. On 18 November 2020, Ms Mason informed Mrs Farnworth that she was not required to take any holiday in November 2020 (page 143).

9.16. The respondent instructed Forbes solicitors to undertake a grievance investigation concerning Mrs Farnworth's email on 17 November 2020 (see page 200).

9.17. A grievance investigation report was published on 13 January 2021.

10. Following the initial discussions, the Tribunal adjourned at 10.50 on the first day to allow for the reading of the claimant's witness statement. On resumption, Mr Sachdev advised the Tribunal that he wished, contrary to his earlier withdrawal at the outset of the proceedings of all complaints of harassment and direct discrimination based on the March and September 2020 emails, to revive those claims. Mr Sachdev told the Tribunal that there had been a

misunderstanding between himself and his client and that he ought not to have made the withdrawals.

11. Mr Profitt opposed any application for revival. He pointed out the effects of Rule 51 of the Tribunal Rules of Procedure 2013 and submitted that in any event it was not proportionate that the claims be revived.

12. The Tribunal considered the matter and concluded that the withdrawal was made in clear and unambiguous terms. At the time the withdrawal was made the Tribunal had no reason to doubt that it was made on instructions. Indeed, the withdrawal was made twice in the course of opening discussions as Mr Sachdev withdrew the harassment complaint relating to the March and September emails and later confirmed that the March and September emails also formed no part of his case of direct discrimination. The Tribunal having discussed the matter concluded that it was bound by the provisions of Rule 51 of the Rules of Procedure 2013 and would not consider those emails as the basis of a claim of harassment or of direct discrimination. We announce that Judgment. Subsequently, on day two, Mrs Farnworth expressed her unhappiness at not being able to rely on those emails but following a break Mr Sachdev informed the Tribunal that he and his client had discussed the matter and that he was content that there had been no misunderstanding and that the matter was not being pursued any further.

The claim of harassment

13. The remaining claim of harassment therefore centred around the events leading up to the start of maternity leave in 2019.

The law

14. Section 26 of the Equality Act 2013 provides as follows and as far is relevant.

Subsection 1 A person A harasses another person B if A engages in unwanted conduct related to any relevant protected characteristic, and

Subsection 2 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

Subsection 4 In deciding whether the 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.

Section 40 of the Equality Act makes harassment of an employee by an employer unlawful.

The relevant facts

15. In early August 2019 the claimant advised her line manager Ms Harpin that she was pregnant with a due date in February and that she was willing to work until the end of January (page 91).

16. That fact was then communicated by Ms Harpin to Ms Mason who looks after HR matters for the respondent. The respondent is a firm of travel agents with a number of branches and approximately 200 employees. Ms Harpin asked for advice from Ms Mason as to what forms would be needed to be completed with the claimant.

17. In response, Ms Mason sent to the claimant on 6 August a request that she, the claimant, download from the company's website a maternity leave form and complete it. Evidently the claimant did not at that point complete the form.

18. At some point between 6 and 21 August Ms Mason emailed the claimant asking her to complete a maternity leave form. She got no reply to that email and sent a follow up on 21 August (see page 93) asking for the form to be returned and completed as soon as possible. That email was sent to the claimant's branch on the branch email marked for her attention.

19. The claimant responded from that same email address on the same day saying that as she was to have a planned caesarean section she would not know its date until September and that she would wait for that date before she decided the date of the start of her maternity leave.

20. Ms Mason responded on the same day to the same email address saying that all she wanted was an approximate date for the start of maternity leave for planning purposes and that the date could be altered once the exact date was known. (In fact, the claimant had already supplied an approximate date of the end of January, albeit not on the prescribed form).

21. The claimant replied from the same address. The email included the following words "please can you send any emails addressed to here as I am not getting copies of them if they are sent to Vicky Harpin". This was a reference to the fact that Ms Harpin was the only person employed in the branch who had a personalised email address for work. The claimant went on to say that she would send the maternity leave form not later than 15 weeks before the planned start of maternity leave. This was in accordance with the requirements of the respondent's maternity leave policy.

22. Whilst Ms Harpin was on holiday the respondent asked the relevant area manager, Mrs Hargreaves to chase the form. That Mrs Hargreaves did in a conversation with the claimant when she visited the branch. The claimant explained to Mrs Hargreaves why she had not yet returned the form.

23. On 18 September Ms Mason asked Ms Harpin to chase the claimant for her form.

24. On 26 September the claimant sent her completed form, this time using her Hotmail personal email address and asking that all future maternity related emails be sent to that address so that she could maintain confidentiality.

25. That request was complied with thereafter.

Breach of confidentiality

26. The claimant's case is that Ms Mason ought to have known that communications with her over her pregnancy should never have been sent to her via the branch email address. This was because the emails sent to the branch email address were accessible to all employees. The sending of the emails via the branch email address was unwanted conduct and it was alleged it created the prohibited atmosphere set out in section 26(1)(b).

27. The majority of the facts in relation to the harassment complaint as with most of the facts in this case are not disputed. One matter of fact however did arise which the Tribunal was required to decide since Mr Profitt challenged the claimant's evidence on that point. The claimant's case was that when she responded to the email on 21 August asking Ms Mason to send correspondence to "that address" she believed that she was replying not from the work email address but from her own private Hotmail address.

28. That is something which the Tribunal considers inherently improbable and we do not accept the claimant's evidence on that point. The email in question was clearly sent to the branch address and it was marked for the attention of the claimant, something which would have been unnecessary if it had been sent to the claimant's Hotmail account. Furthermore, it was not the first email that the claimant had responded to in relation to maternity and all the previous emails had been sent to the branch address without any protest from the claimant.

29. Be that as it may, the claimant accepted in evidence that there was no way until the email of 26 September that Ms Mason could have known what the claimant's preferences were in relation to correspondence.

The Tribunals conclusions on the issue of breach of confidentiality

30. The conduct complained must in the first instance be unwanted. Although the claimant now says that the conduct was unwanted from the very first email, on 6 August, there is no evidence to support that in the documents and we find that the claimant has failed to prove on the balance of probabilities that the conduct was indeed unwanted. The claimant engaged in correspondence with Ms Mason using the branch emails. She could at any stage have put a stop to that but did not until 26 September at which point the claimant's request was complied with immediately. The claimant's explanation for failing to do so which was that the felt intimidated by Ms Mason is not one that we accept and we will return to that matter later. We conclude that the claimant has failed to satisfy us on the balance of probabilities that the sending of the emails via the branch email was unwanted conduct at the time.

31. On the basis of that finding the claim must fail. However, in our deliberations we nevertheless dealt with the rest of the matters required for section 26 for the sake of completeness.

32. We have little difficulty in concluding that the conduct related to the claimant's pregnancy and therefore sex. The next question therefore is logically whether Ms Mason set out to harass the claimant and that the conduct therefore had the purpose of achieving the effects set out in section 26(1)(b). In fairness to Mr Sachdev, at no point has it ever been suggested that Ms Mason's conduct here was deliberately harassing and indeed there is no evidence to suggest that Ms Mason set out to create the prohibited atmosphere or to violate the claimant's dignity. That leaves the Tribunal with the question as to whether the conduct had the effect of creating the prohibited atmosphere and therefore we must consider the provisions of section 26(4).

33. The only evidence that we have now for the claimant's perception of the events at the time is her oral evidence to the Tribunal. We have taken the view that that evidence is not persuasive. We note that the claimant now says that she had that perception, that is to say that her dignity was being violated or that the environment at work was intimidating, hostile, degrading, humiliating or offensive

as a result of the emails being sent to the work email address, from the outset. However the documentary evidence far from supporting that appears to be contrary to that. In paragraph 20 of her witness statement the claimant says that she did not raise the issue of confidentiality because it was not until at some unspecified time later that she realised that the emails ought not to have been sent to the branch evidence. In the view of the Tribunal the evidence suggests that that realisation could not have come until about 21 September when the claimant first asked Ms Mason to use her private Hotmail address. Although S26(4) requires consideration of all three aspects it is our view that if the claimant did not perceive the conduct as having the prohibited effect the matter ends there. Nevertheless we considered all the matters in the round.

34. In considering the question of reasonableness we bear in mind the history of the email correspondence. We now know that the use of the branch email address for this type of communication was standard practice. It was also however in breach of the respondent's own procedures in relation to data protection and privacy and that was agreed by Ms Mason in her evidence. In that context it was wrong of Ms Mason to contact the claimant in that manner. Ms Mason's explanation that she understood that the claimant's pregnancy was common knowledge to the branch does not mitigate that. In the first place the respondent's own procedure does not allow for any exception and secondly Ms Mason could not have known what the claimant had disclosed to her colleagues and to which of her colleagues any disclosure had been made. There may have been some staff that knew of the pregnancy, the health complications and the planned caesarean. Others may have known nothing at all and still others may have known some of it. Furthermore the claimant was obliged to discuss the matter with her area manager which conversation included an explanation of the circumstances in which she had not returned the form. Had the claimant had the relevant perception we would have regarded it as reasonable in the circumstances.

35. However the fact that Ms Mason chose to breach the respondent's own policy is not decisive on this point. It is apparent to the Tribunal that the claimant's understanding of the proper approach to communication was only arrived at after the event. This is borne out by the two lines from paragraph 20 of the statement we have already quoted. There is no evidence in the documentation to suggest that the claimant perceived that the use of the office email was wrong in any way let alone creating the relevant atmosphere. As to the conversation with Mrs Hargreaves she Mrs Hargreaves was in a management position and the claimant's witness statement contains no evidence that she was surprised or concerned that Mrs Hargreaves should know about her pregnancy or that she was obliged to explain her reasoning for the absence of the form. Therefore although the circumstances of the case here include an incorrect use by the respondent of an office email address taken all in all and including the question of the claimant's perception and any reasonableness the Tribunal finds that the requirements of section 26(1)(b) are not made out.

36. Mr Profitt's further submission, which was that even if the claimant did have that perception reasonably held she could not show that the conduct met the bar set by section 26(1)(b) is not one that we have felt it necessary to address in the light of our findings above.

The frequency of the contacts

37. The complaint here is that on six occasions within seven weeks, some by email and some by conversation the claimant was requested to complete her maternity leave form. The claimant's case is that there was no good reason for the requests, they were out with the respondent's own maternity leave policy since they were requesting the form to be completed earlier than was necessary and in any case the claimant had already given an approximate date for the start of her maternity leave.

38. The claimant on at least two occasions during the toing and froing between her and Ms Mason said that she did not feel able to complete the form. In fact she delayed the completion of the form until 26 September. The Tribunal infers from that that at the time the claimant did not welcome the repeated requests for the form. We therefore find that there is evidence on the balance of probabilities to suggest that having to deal with repeated requests for the form was unwanted on the part of the claimant.

39. The next issue is whether the conduct relates to sex or pregnancy or maternity. Just as in the case in relation to secrecy, the Tribunal finds that that must also be decided in favour of the claimant.

40. This leaves us with a consideration of the requirements of section 26(1)(b). Again, and for the same reasons, we find no evidence that Ms Mason set out with the intention of harassing the claimant and that leaves us with the question in subsection (1)(b)(i) and (ii) as to whether that unwanted conduct had the prohibited effect. The Tribunal finds that it did not.

41. We have concluded that the claimant did not perceive that that was the atmosphere created by the correspondence and the repeated requests despite the fact that her evidence is to that effect now. The contemporaneous evidence lacks even any suggestion of irritation let alone a feeling of being humiliated etc.

42. The claimant provides the same explanation for that as she did in relation to the secrecy aspect. This is that she did not feel able to complain to Ms Mason that the repeated requests for the maternity leave form were violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal does not accept that. Once the claimant decided that she wanted correspondence to go to her Hotmail account she immediately asked for it. Furthermore, the tone of the earlier email correspondence is cordial in both directions. There is no earlier history that we are aware of, of any animosity or difficulty between the claimant and Ms Mason that might have led the claimant to feel unable to approach Ms Mason and make clear her concerns. Finally, and importantly we note that Mrs Farnworth had no trouble at all in expressing strong disagreement to Ms Mason over the later handling of her holiday issue when that time came. On balance of probabilities therefore the Tribunal concludes that the claimant did not perceive that the relevant atmosphere was created. The other circumstances of the case do include the fact that Ms Mason was requesting the form earlier than was necessary but the claimant has made it clear to the Tribunal that she understood the policy at the relevant time and indeed the contemporaneous evidence shows reference to the fact that she understood the policy requirements and it is apparent that the claimant was able to calmly assert her insistence on completing the form only once the policy required her to do so and she felt able to complete the form as requested. Had the Tribunal considered

that Mrs Farnworth did have that perception we might well have considered that the perception was reasonable but we have not had to in the circumstances. It is not in our mind as clear cut as in the issue of privacy since it seems to us to be a matter of a somewhat different order to be chased officiously for the completion of a form earlier than was strictly necessary as opposed having private matters revealed to colleagues.

43. For the above reasons the complaints of harassment fail.

Unfavourable treatment because of sex

44. The Tribunal is now obliged to consider the alternative claim relating to the matters set above namely a claim pursued under section 18(4) of the Equality Act.

Was the treatment unfavourable?

44.1. Mr Sachdev drew the Tribunal's attention to Williams v Swansea University Pension and Assurance Scheme [2018] UKSC 65. That Judgment contains the observation that the term unfavourable treatment requires a broad reading and a low threshold of disadvantage. This contrasted with Mr Profitt's observation that an unjustified sense of grievance was not sufficient.

44.2. Given our earlier findings in relation to harassment the Tribunal observes the evidence for unfavourable treatment here is largely retrospective. The claimant now says that she did not welcome the repeated public requests but was unable to show any evidence that that was the view that she had at the time. Nevertheless, at least in respect of the frequency of the requests, given that they were not in accordance with the respondent's own policy the Tribunal is prepared to conclude (as we have in the context of the harassment claim) that the repetition was at least irksome.

44.3. However, even give that conclusion and assuming irksome requests were sufficient to meet the bar for unfavourable treatment the Tribunal would still have to find evidence that that unfavourable treatment was because of the fact that the claimant was proposing to take maternity leave or was pregnant.

Was the treatment because of sex or pregnancy or maternity?

45. The Tribunal now has to tackle the question of causation.

45.1. We remind ourselves that evidence of unreasonable conduct on the part of a respondent does not necessarily equate to evidence of discriminatory conduct. The Tribunal must be satisfied that either the conduct was inherently discriminatory on the grounds of sex or was motivated by sex or pregnancy.

45.2. In the James v Eastliegh Council(1990 ICR 554) sense there is nothing inherently discriminatory about the conduct complained of. Ms Mason told us in unchallenged evidence that she liked to have the paperwork done properly and early and that she habitually chases paperwork which is not done when initially requested. This is her attitude to all paperwork not just maternity leave forms. In other words she treats all employees who have not complied with administrative requests in the same way. She also told us and again this was unchallenged that she habitually requested

paperwork and chased it through the office emails and this was for everything and everybody except for communications about pay where the respondent used private email addresses. In the view of the Tribunal this is not a system of communication or an approach to bureaucracy which is inherently discriminatory.

45.3. As to whether the claimant's pregnancy was the operative reason for the manner and frequency of the contracts over the form we conclude that it was not. Of course, it is a fact that the contact was occasioned by the claimant's pregnancy. But for the pregnancy there would have been no request for the form at all. However the reason for the manner and frequency of the conduct is to be found in the unchallenged evidence of Ms Mason that she was following standard practice. The complaint is not about the fact of contact at all but about this manner and this frequency. We take the view that the cause of the conduct was Ms Mason's attitude to bureaucracy and her desire to get the information properly signed and dated from the claimant. What we think about that practice is neither here nor there.

The claims about holiday

46. The primary claim here is pursued under section 18(4) of the Equality Act albeit run in the alternative under section 13 where the protected characteristic is sex. It is alleged by the claimant that the respondent's ultimate decision to treat the claimant as having taken 12 days' leave in November (albeit later rescinded) was unfavourable treatment because of the fact that she had taken maternity leave.

The relevant facts

47. The Tribunal now sets out the key facts.

47.1. During the time that the claimant was on maternity leave, the bulk of the respondent's staff had been on furlough.

47.2. For furloughed staff, the respondent adopted the policy of requiring that they all take three weeks leave (see agreed findings of fact above).

47.3. Those three weeks were required to be taken in May, June and September, a week at a time and on each occasion the appropriate notice had been given by the respondent in accordance with the requirements of the Working Time Regulations.

47.4. The claimant was employed to work four days a week and for her three weeks holiday was therefore 12 days. By the end of October, the claimant had accrued 17 days untaken leave.

47.5. On 27 October the claimant wrote to the respondent indicating her wish to return to work in January 2021 and her desire that her accrued leave up to that point be paid as a lump sum (see page 125).

47.6. Ms Mason replied on the same day to say that it was not normal to pay accrued leave but that in the unusual circumstances (a reference to the pandemic and the furlough scheme) seven days would be paid with the balance to be carried over to the next year.

47.7. Shortly after this exchange the government announced the extension of the job retention scheme to the end of November.

47.8. The claimant wrote to the respondent on 31 October asking if she could be processed as returning to work, earlier than her original date, in November. This was so that she could come back to work on furlough and receive 80% of her pay. By this stage the claimant's entitlement to statutory maternity pay had expired.

47.9. The respondent agreed, waiving any notice requirement of an earlier return. By an email of 4 November Ms Mason said that the claimant would be treated as returning to work on 2 November and would be placed on furlough.

47.10. In that email Ms Mason proposed that all 17 days of the claimant's accrued leave would be taken in November. This would require the respondent to top up the claimant's furlough pay by the remaining 20% but would have meant, conversely that the respondent saved 80% of the claimant's pay which would otherwise have been taken as holiday on full pay in the next year.

47.11. The claimant replied at once vehemently disagreeing with that proposal. After further email exchanges during which there was a counter proposal as to holidays by the claimant, Ms Mason sent an email on 6 November. In it she said inter alia "we therefore give notice that 12 days holiday pay will be classed as taken in November … the remainder … to be taken some time in the future".

47.12. The claimant was not content with this and wrote an email, which the respondent treated as a grievance, on 17 November (see page 135).

47.13. Although it is not entirely clear as to how important it is for the Tribunal to determine the question of when the maternity leave period ended the Tribunal has nevertheless done that. We note of course that any claim under section 18(4) does not necessarily have to be made about events which took place during the course of the protected period.

47.14. We now know that the claimant received pay in November on the basis that she had been at work or been furloughed for the entire month. The claimant received that pay at the end of November and appeared to make no objection to that. The claimant now says that she did not end her maternity leave until 17 November. This she says is because she never signed any document agreeing to be furloughed. The relevance of the date of 17 November is that that is the date that she signed off work on the sick and in her email to the respondent on 17 November the claimant indicated that she now expected to be paid full pay albeit it perhaps modified by being on furlough.

47.15. The claimant's case is that not until that point was she unequivocally accepting her furlough status. The respondent's case is that the claimant asked in her 31 October email to be placed on furlough and that on 4 November the respondent indicated its agreement to that. In view of the respondent that therefore meant that the claimant's return to work was agreed as from 2 November and the protected period ends at that point.

47.16. The Tribunal's conclusion is that although subsequent correspondence appeared to raise a question as to whether the claimant had withdrawn her request to be furloughed she never did. There is no email which

unequivocally says from the claimant that she did not wish to start her furlough on 2 November. Accordingly, furlough began and maternity leave ended on 2 November. For the sake of completeness it should be noted that the claimant was never in fact required to take any leave in 2020 and carried over her full accrual into 2021. She remains on sick leave.

Our conclusions in the claims of discrimination

48. The Tribunal finds that the requirement from the respondent that the claimant take 12 days leave in November was unfavourable treatment. The claimant explained in evidence, which was not challenged, that she wished to use accrued holiday to offset against her requirement to find childcare once she returned fully to work and came off furlough at the ending of the furlough scheme. Therefore, to be required to take such a large amount of accrued leave in November, and at such short notice at that, was unwelcome and unfavourable to her as compared to the alternative which was the ability to carry it over.

49. It is clear that the claimant was treated differently to other staff on furlough. Mr Sachdev has made a point of observing that those other staff although they too were required to take 12 days during their furlough had the benefit of having those requests spread out over the course of several months and had the benefit of proper notice on each occasion. The Tribunal however does not find those comparisons particularly helpful. It should be observed that the circumstances of those furloughed staff were rather different to those of the claimant. For all of those furloughed staff the respondent had the whole of the year in which to oblige staff to take leave whereas in this case the claimant was returning to work with only two months of the holiday year left and on very short notice at that.

50. The question for the Tribunal really centres on the question of causation. Was the unfavourable treatment because the claimant had exercised her right to maternity leave or because of the claimant's sex. Those claims are effectively the same since the connection to sex is the fact of the claimant's pregnancy and subsequent maternity leave.

51. Mr Sachdev puts the issue of causation as follows "the fact of the claimant's maternity leave was operating on Ms Mason's mind because the claimant was returning from maternity leave and had accrued holidays during it."

52. The Tribunal asked Ms Mason to explain her decision to require the claimant to take 12 days leave in the month of November. We did this because Mr Sachdev did not ask that question. Ms Mason replied that she viewed this as essentially a cost saving measure. We note that Mr Sachdev was happy in his submissions to adopt that explanation. Ms Mason pointed out that the claimant's holidays, if taken on furlough, could be taken at minimal cost to the respondent. Ms Mason said that she felt able to require the claimant to do this because the claimant had signalled her willingness in the email of 26 October to take all her leave in that month albeit in the form of a lump sum and furthermore that the 12 days being required of her in the final email was the same three weeks for the claimant which had been required of all of the other furloughed staff. Inn those circumstances she did not feel that she was being unfair to the claimant.

53. Mr Sachdev's failure to put those questions we believe is because he was operating on the basis that the connection which he identified, and which we set out above was sufficient. Our view is that it is not. Mr Sachdev's approach is on the basis of a "but for" test. But for the claimant having taken maternity leave she would not have been required to take three weeks leave, without proper notice, within the first month of her return to work. In our view however that is not the correct approach. The maternity leave, the accrued holiday and the return to work were the context for the conduct not the cause of it. The proper approach is to ask the following "is the treatment of the claimant inherently discriminatory on the grounds of sex, if not what was the reason for the treatment?"

54. Our view is that there is no inherently discriminatory treatment here. We consider that, applying Ms Mason's logic, the same approach to holiday would for instance have been adopted for a person of either sex returning after a period of sickness absence. Ms Mason's logic when she says that she believed she was treating the claimant as she had others is obviously flawed. However that's not to say that was not what was on her mind. Once we conclude the answer to the first question in the negative, we have to ask ourselves whether the fact of the claimant having taken maternity or the fact of the claimant's sex was an effective cause of the treatment. It is tolerably clear that there was a significant financial benefit to the respondent in paying the 12 days holiday at 20%. We accept that the respondent, as with many other business but certainly businesses operating in the travel and leisure sector had gone through a difficult financial period and that saving money was at the forefront of the minds of the Board. The Tribunal has no reason to doubt that that was not just the primary motive but the only motive for the imposition of 12 days leave in November 2020. Ms Mason's mistaken belief that she was treating the claimant equitably is exactly that, a mistaken belief. But once again we observe that unreasonable conduct is not evidence of discriminatory conduct. This is not a claim of constructive unfair dismissal but of a breach of the Equality Act by treatment that does not include dismissal. There are no factors in the evidence that would allow us to draw inferences or to conclude that the explanation provided by Ms Mason is not the correct one. In our view it is an explanation which has nothing to do with sex and we conclude that the reason why the claimant was treated as she was, was the respondent's desire to save money once it understood the claimant was returning to work.

55. Before leaving this Judgment it is important that the Tribunal acknowledges the circumstances of the claimant. We have evidence that, at least since the birth of her child, she has struggled with significant mental ill health. We do not doubt that her unhappiness with what she considers to be discriminatory treatment by her employer has contributed to that. We do not find that the treatment breached the Equality Act but that is not to suggest that it was not distressing to the claimant. To Mr Profitt's credit he at no point suggested that the claimant was exaggerating her ill health or her distress. The question for the Tribunal on the issue of liability however is not whether the claimant was upset or distressed by these matters, which she doubtless was, but whether these matters were matters which fall within the prohibitions and the Equality Act 2010 and we find that they were not.

56. For these reasons the claims are all dismissed.

Employment Judge Rostant

Date 15 July 2021