EMPLOYMENT TRIBUNALS

Claimant: Ms F Dolcy

Respondent: Beautiful Body Company UK Limited

Heard at: London Central **On:** **14, 15, 16, 17 June 2021 and 29 June 2021 (in chambers)**

Before: Employment Judge Joffe
Ms D Olulode
Mr J Ballard

Appearances
For the claimant: Mr K Harris, counsel
For the respondent: Ms P Hall, litigation consultant

JUDGMENT

1. The claimant's claims of race discrimination are dismissed on withdrawal.
2. The claimant was constructively dismissed on 11 March 2020.
3. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is upheld.

4. The respondent discriminated against the claimant contrary to section 18 of the Equality Act 2010 by:

   a) Being critical of the claimant's clothing and makeup whilst she was pregnant;
   b) Ms Hewitt ignoring the claimant, excluding her from tasks and duties and dealing directly with Ms Chaves;
   c) Not taking action in relation to the claimant's grievance of 12 January 2019;
   d) Failing to review the claimant's salary and/or award her a salary increase;
   e) Appointing Ms De Leon to the claimant's role in September 2019.

5. The remaining claims of discrimination contrary to section 18 Equality Act 2010 are not upheld and are dismissed.
6. The respondent indirectly discriminated against the claimant contrary to section 19 of the Equality Act 2010 in applying PCPs that:

a) the Front of House manager role could only be carried out full time;
b) The Front of House manager role could not be carried out part time on a temporary basis.

7. The PCPs were not objectively justified and the claimant's claim of indirect sex discrimination is uheld.
8. The discrimination complaints were all presented in time because they amounted to conduct extending over a period ending with claims which had been presented in time.
9. The claimant's claims of victimisation are not upheld and are dismissed.
10. The respondent did not reject the claimant's flexible working request on the basis of incorrect facts and her claim under section 80H Employment Rights Act 1996 is not upheld and is dismissed.
11. The respondent unlawfully deducted 1.5 days of holiday pay from the claimant's wages.

REASONS

Claims and issues

1. The claimant brought claims of discrimination due to pregnancy and maternity, indirect sex discrimination, unfair dismissal and victimisation. The claim for holiday pay was conceded by the respondent in the amount of the claimant's salary for 1.5 days. A race discrimination claim had been withdrawn in correspondence between the parties and we indicated that it would be dismissed.

2. The parties had largely agreed a list of issues but it required some refinement on discussion, in particular to fully set out the legal tests for indirect discrimination. The list as finalised was workable if not perfect and was as follows:

Unfair Dismissal

i) Was the claimant's employment terminated by the respondent on 6 February 2020?
ii) If she wasn't dismissed on 6 February 2020, was she constructively dismissed on 11 March 2020?
iii) Did the respondent carry out the following acts:

a. Did not consider the claimant's requests for flexible / part time working and alternative roles, promptly, fairly or at all;

b. Attempted to demote the claimant to the role of Senior Receptionist;

c. Did not allow the claimant to work part-time on a temporary basis until her grievance / childcare issues were resolved;

d. Gave the claimant a rota with working days that had previously been her rest days;

e. Discriminated against her as set out below.

iv) Do the acts, either singularly or combined amount to repudiatory breach of the term as to mutual trust and confidence.
v) Was the claimant's decision to resign caused or contributed to by any breach?
vi) Did the claimant do the following acts and do they amount to affirmation of the contract: requesting a rota; advising that she wanted to work part time, confirming that she was arranging childcare; delay in tendering her resignation.
vii) If the claimant was dismissed, what was the reason for dismissal.
viii) Was it a potentially fair reason under s.98 ERA 1996.
ix) Was the dismissal fair in all the circumstances.

Maternity Discrimination

x) Did the respondent treat the claimant unfavourably, contrary to s.18(2)(a) EqA 2010 by:

a. Being critical of the claimant's clothing and makeup whilst she was pregnant;

b. Promoting Ms Chaves to take over the claimant's role;

c. Ms Hewitt ignoring the claimant, excluding her from tasks and duties and dealing directly with Ms Chaves;

d. Not taking action in relation to her grievance of 12 January 2019

xi) Did the respondent treat the claimant unfavourably, contrary to s.18(3) and / or (4) EqA 2010 by:

a. failing to review her salary and / or award her a salary increase; If so was the award/review contractual or discretionary?

b. Not taking action in relation to her grievance of 12 January 2019;

c. Appointing Ms De Leon to the Claimant's role in September 2019

d. Not considering her requests for flexible / part time working and alternative roles, promptly, or fairly or at all.

xii) Was any unfavourable treatment because of the claimant's pregnancy or the fact that she was exercising or had exercised her right to maternity leave or was seeking to do so?

xiii) If they there are acts of discrimination, do the acts at paragraphs 10 and 11a-c (which are prime facie out of time) does the ET have jurisdiction as the claims are:

a. Part of an act extending over time; or

b. It is just and equitable to extend time.

Indirect discrimination (Equality Act 2010 section 19)

xiv) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

i) The Front of House Manager role could only be carried out full time;

and / or

ii. The Front of House Manager role could not be carried out part time on a temporary basis?

xv) Did the respondent apply the PCPs to the claimant? The respondent accepted that it had applied these PCPs.

xvi) Did the respondent apply the PCPs to persons with whom the claimant does not share the characteristic, i.e. men, or would it have done so? The respondent accepted it applied these PCPs to men or would have done so.

xvii) Did the PCP put women at a particular disadvantage when compared with men in that women are more likely to be primary carers for children than men? The respondent accepted the PCPs put women at a particular disadvantage compared with men.

xviii) Did the PCP put the claimant at that disadvantage? The respondent's case was that it did not and Ms Hall said that the respondent's position was that: 'the claimant made clear in her in her email and application for flexible working that she could not undertake the responsibilities of the Front of House Managers' position and sought alternatives such as Clinical Support and Treatment Coordinator – neither of which had any managerial content and in the case of the Clinical Support role, a junior position below Senior Receptionist.'

xix) Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

a. To avoid the burden of additional costs
b. To meet customer demands – by having an FOH Manager on site to allow access / facilitate access to therapists/staff and deal with any matters arising

xx) The Tribunal will decide in particular:

a. was the PCP an appropriate and reasonably necessary way to achieve those aims;
b. could something less discriminatory have been done instead;

xxi) How should the needs of the claimant and the respondent be balanced?

Victimisation

xxi) It is agreed that the claimant's grievance of 28 January 2020 was a protected act within the meaning of s.27(2)(d) EqA 2010.

xxii) Did the respondent subject the claimant to the following detriments because she had done the protected act:

a. Denied the claimant's appeal for flexible working / part time working;

b. Failed to consider the claimant's request for flexible / part time working fairly;

c. Wrote to the claimant on 6 February 2020 saying that she would no longer be working for the respondent;

d. Attempted to demote her to the role of senior receptionist;

e. Not allowing the claimant to work part time on a temporary basis until her grievance / childcare issues were resolved;

f. Gave the claimant a rota with working days that had previously been her rest days;

g. Dismissing the claimant/causing the claimant to resign.

Flexible Working

xxiii) Did the respondent reject the claimant's flexible working request on the basis of incorrect facts contrary to 80H ERA 1996, the alleged incorrect facts are that:

a. The claimant agreed the role could not be done part time;
b. The claimant agreed that she could not guarantee that she would be able to start work on time.

Findings of fact

<u>The hearing</u>

3. We were provided with a bundle of documents of some 401 pages. We received witness statements and heard oral evidence from the claimant and her mother, Ms L Nash, on her behalf. For the respondent, we heard evidence from Mr R Fieldgrass, a director of the respondent, Ms L Gabriel, formerly a clinic manager and then assistant regional manager of the respondent and Ms V Negrea, regional manager of the respondent, subsequently general manager.

4. At the outset of the hearing, we discussed with the parties the fact that there seemed to be insufficient evidence in front of us to deal with what appeared to be a Polkey argument from the respondent relating to reductions in staff

consequent on the pandemic. It was agreed that we would consider Polkey arguments at the remedy stage, if the claimant's claims relating to her dismissal were successful.

5. The respondent is a company which runs clinics which provide skin treatments and other aesthetic medical procedures. At the relevant time it had four clinics in London, each with a clinic manager. These clinics were in Chelsea, Kensington, St John's Wood and Richmond. The clinic managers were line managed by a regional manager. The company was founded by Mr R Fieldgrass' mother, Mrs E Fieldgrass. Four members of the Fieldgrass family act as directors.

6. Each clinic would have a front of house team of receptionists as well as therapists. A front of house ('FOH') manager would manage the FOH team.

7. We heard some evidence about keyholding arrangements. Clinics could be opened and closed by a keyholding member of FOH staff or the FOH manager or a clinic manager. Issues would arise if a member of FOH staff due to open the clinic on a particular day was unwell or otherwise absent and the FOH manager or clinic manager or possibly the regional manager might have to attend. Ms Gabriel's evidence was that this happened a couple of times per month across the clinics.

8. The company had no one internally performing an HR function; it utilised the services of employment consultants, Peninsula.

9. The business had some 52 staff as at September 2020, of whom all but one were female.

Chronology

10. On 22 September 2015, the claimant started employment with the respondent as a senior receptionist at the St John's Wood clinic.

11. There was no provision for pay rises in the claimant's contract. The claimant in fact received a pay rise each year up until and including 2018.

12. The respondent has a staff handbook with the following relevant section:

STANDARDS OF DRESS

1. General Principle

As you are liable to come into contact with clients and members of the public, it is important that you present a highly professional image with regard to appearance and standards of dress. Where uniforms are provided, these must be worn at all times whilst at work and ensure they are laundered on a regular basis. Where uniforms are not provided, you should wear clothes appropriate to your job responsibilities, and they should be kept clean and tidy at all times.

…

FOH Managers and Assistant Managers

- Dress uniform provided
- Elegant and business like black blazer or cardigan can be worn
- Name badges worn
- Shoes – must be smart and business like, kitten heel preferred – no trainers (purchase price not to exceed £30)
- Well cared for nails, hair neat, cared for and professional
- Make up worn daily - neatly

13. There was no section of the handbook relating to pregnancy and maternity save for this:
MATERNITY/PATERNITY/ADOPTION LEAVE AND PAY

You may be entitled to maternity/paternity/adoption leave and pay in accordance with the current statutory provisions. If you (or your partner) become pregnant or if you are adopting, you should notify your Manager at an early stage so that your entitlements and obligations can be explained to you. The 'Equality, Inclusion and Diversity Policy' made no reference to pregnant women and new mothers.

14. In April 2017, the claimant was promoted to FOH manager.

15. In May 2018 the claimant became pregnant with her first child and in August 2018 the claimant informed the St John's Wood clinic manager, Ms Y Addo, about her pregnancy.

16. At this time Ms G Hewitt was regional assistant manager.

17. By summer 2018 the claimant could not wear the makeup required by the dress code as she could not take her prescription medication for hay fever during pregnancy. Pollen stuck to makeup and exacerbated her hay fever symptoms.

18. She was not provided with a maternity uniform, which for an FOH manager would have been a dress and initially reverted to wearing her previous uniform of a tunic. When that did not fit, she wore clothing which was the same colour as the uniform.

19. After a number of conversations with Ms Hewitt, the claimant was supplied with second hand uniform which did not fit. She eventually purchased maternity trousers and tops which the company reimbursed her for. Ms Hewitt told the claimant that Mrs Fieldgrass was critical of her appearance and had asked Ms Hewitt to speak with her about it. The claimant said that this made her feel vulnerable, self-conscious and anxious.

20. The claimant was told by Ms Hewitt that she looked scruffy. The claimant said that there were nit-picking remarks every time Ms Hewitt saw her. Ms Hewitt said the claimant looked tired all the time because she was not wearing makeup and that if she could not be bothered to do her makeup, she could at least do her hair, although the claimant told the Tribunal her hair had not changed. Her clothing was criticised and she explained to Ms Hewitt about not having a uniform which fitted.

21. We did not hear from Ms Hewitt but Mr Fieldgrass reported in evidence a discussion he had had with Ms Hewitt about these matters after the claimant presented her claim:
She was doing her job to make sure people in clinics following dress code. That would apply to anyone looking dishevelled. Front desk is the first impression; if a first time client sees someone looking dishevelled – poor impression, the client might walk out, so Georgia in charge of making sure all staff looked right – shirt ironed, shoes wrong, adhere to dress code. What is the issue, why answer back? Hewitt was surprised.

22. We had no reason to reject the claimant's evidence about what was said to her about her appearance during her pregnancy. Ms Hewitt did not appear to give evidence and what Mr Fieldgrass related Ms Hewitt as having said, even if we felt it was safe to give it any weight, was very generic and appeared to have been an account of how Ms Hewitt would deal with uniform and dress code issues in general rather than specific evidence about her dealings with the claimant.

23. In December 2018, a senior receptionist at St John's Wood, Ms V Chaves, was given additional duties which involved training staff at head office. Changes to the rota at the last minute would lead to shortages of FOH staff. Although the claimant was responsible for managing the rota, she told us that Ms Hewitt would make arrangements with Ms Chaves directly, the two would ostracise the claimant at work and were hostile to her. The claimant said that when Ms Addo was on holiday in January 2019 and Ms Hewitt was covering her work, Ms Hewitt did not speak to her but instead liaised directly with Ms Chaves about tasks which fell within the claimant's responsibility.

24. The claimant told the Tribunal that Ms Chaves told other members of the team that she had been given a new title of supervisor and that title had been created especially for her but the job was in fact FOH manager. She reportedly said that she had to be given a different title to stop the claimant suing the company for giving away the claimant's role whilst she was on maternity leave.

25. There was no relevant contract for Ms Chaves in the bundle, apart from her original senior receptionist contract. Mr Fieldgrass' evidence was that Ms Chaves was given the opportunity to train front of house staff and have more responsibility with a small pay increase. He said that had nothing to do with the claimant.

26. It was suggested to the claimant in cross examination that Ms Hewitt might have said to her that clients had made complaints about her hygiene and that she had been disgruntled by these complaints, Ms Hewitt had then blanked her because the claimant was disgruntled and Ms Hewitt feared confrontation.

27. It appeared on questioning by the Tribunal that Ms Hall had no instructions from Ms Hewitt and what she said about why Ms Hewitt was 'blanking' the claimant was speculation on her part. There was no evidence adduced that clients had complained about the claimant's hygiene and it was wholly unclear where that suggestion had come from.

28. Ms Hewitt and Ms Chaves were not called to give evidence. Neither was still employed by the respondent. Mr Fieldgrass' evidence was that he had spoken with Ms Hewitt at some point about the allegations. He had not asked her at that time to give evidence. He said he had then tried to contact her a month or so before the hearing but had not succeeded.

29. Ms Chaves herself went on maternity leave in November 2019. The Tribunal was given no information about why she was not called to give evidence.

30. Ms Negrea said that Mrs Fieldgrass visited the clinics. She was very particular about the dress code. We were not told why Mrs Fieldgrass was not called to give evidence.

31. On 12 January 2019 the claimant sent an email to Ms S Lund, then regional manager, copied to Ms Addo which raised a grievance. It said in part:
Since my last email to you regarding Georgia's ongoing conduct she has been extremely rude, cold and unprofessional. This had now resulted in her ceasing all forms of communication with me. I was completely ignored by her at the works Christmas party and blocked from her social media accounts (which I do not particularly care about but highlight to show the level of childness she has reached). This has now been escalated further to not even being acknowledged when working with her while she covers Yvonne's annual leave and effectively isolated from my duties as Front of House Manager. Her decision to openly ignore me and directly address my team is undermining and creates an uneasy, stressful and hostile environment for me to such an extent that I have decided not to work today to ensure that the stress and destructive energy does not impact negatively on my pregnancy. I feel that throughout my pregnancy, as previously advised, that this particular member of the management team has done nothing but cause me unneeded and unnecessary stress. I am concerned that I have two more days of work with her and am now not sure what to do, her past and current behaviour has demonstrated that she will intentionally cause more stress if you highlight her behaviour to management.

32. The email went on to raise issues about Ms Chaves, including setting out what Ms Chaves had reportedly said about effectively being FOH manager.

33. The claimant did not receive any response to this email. Mr Fieldgrass' evidence was that he had not seen it and did not know why it had not been responded to.

34. The claimant told us the following in oral evidence about what action she took in relation to issues arising during her pregnancy prior to her going on maternity leave:
I phoned a maternity helpline to see what my rights were around the dress code and not being provided with a uniform and what I could do about the comments and I escalated up to Sofia. There were other emails to Sofia.

35. The claimant said she was not aware at that time that she could complain to an employment tribunal. She could not remember the name of the maternity helpline she spoke to, but it had been something like a Citizens Advice Bureau for pregnancy. She told the Tribunal that she is studying criminology, which gives her some familiarity as we understood it with legal language, although not with employment law.

36. On 1 February 2019, the claimant went on maternity leave.

37. Staff appraisals would have been carried out in spring / summer 2019. The claimant did not have an appraisal. Mr Fieldgrass' evidence was that the respondent had no arrangements at the time for appraisals to be carried out where an employee was on maternity leave.

38. Mr Fieldgrass told the Tribunal that he assumed the claimant would not have done well in her appraisal because of issues about dress code and appearance and because she was not managing Ms Chaves well. These observations were based on the claimant's complaints to the Tribunal about the treatment by Ms Hewitt and Ms Chaves, not on any first hand knowledge Mr Fieldgrass had about the claimant's appearance or interactions with Ms Chaves.

39. Mr Fieldgrass gave some evidence about how pay rises were linked to appraisals - 'if someone had gone above and beyond in their role' - but also to the financial performance of the company. There was no documentary evidence provided to the Tribunal about the respondent's financial performance at the relevant time. Mr Fieldgrass said that St John's Wood was the worst performing clinic. There was no evidence provided as to which staff got a pay rise in 2019 at St John's Wood or elsewhere.

40. Between February and September 2019, there appears to have been no FOH manager at St John's Wood. Ms Chaves was present until November 2019 when she went on maternity leave.

41. There was no evidence before the Tribunal that there were any particular issues with opening and closing the clinic / keyholding during this period.

42. In September 2019, Ms S De Leon, a senior receptionist, was appointed to an FOH manager role at the St John's Wood clinic.

43. Mr Fieldgrass' evidence about this appointment was that the respondent had a high level of staff turnover and it was hard to find good staff. In Chelsea the FOH manager was struggling and might be leaving. There was no FOH manager in Richmond. Ms De Leon was very good and deserved promotion. The clinic manager in St John's Wood was being transferred so more support was needed in St John's Wood to support the new inexperienced clinic manager, Ms H Johal. He said that if the claimant had come back to the FOH manager role in St John's Wood, the respondent would have moved Ms De Leon to the Richmond clinic.

44. Ms De Leon's contract said that she was FOH manager and that her place of work was St John's Wood. The contract did not refer to the appointment being temporary or maternity cover although Ms Gabriel did have a contract for one of the roles she did which referred to that position being maternity cover.

45. There was no offer letter or any documentation which recorded that Ms De Leon had been told she would be moved to a different clinic on the claimant's return from maternity leave.

46. Ms De Leon was appointed to the FOH manager position on a salary of £25,000 which was more than the claimant's salary by about £500. Mr Fieldgrass' evidence was that the respondent was trying to streamline salaries. We were not entirely clear what he was saying but it appeared to be that at some point salaries were not consistent with each other and the respondent was seeking to introduce something like pay bands.

47. In October 2019, the claimant's mother experienced some serious health problems and the claimant became concerned over her fitness to look after the claimant's baby as had been planned.

48. On 5 November 2019, the claimant received a WhatsApp message from Ms Negrea asking for confirmation of the claimant's return to work date; the claimant replied saying that she wanted to take one year of maternity leave.

49. In November 2019 Ms Negrea sent a response in the form of what was said to be a standard letter used by the respondent:
You were also informed that we required at least 12 weeks' notice of the date that you wished your maternity leave to end.

It is now 9 months into your maternity leave, if you would like to return to role at EF MEDISPA before the 12 months ends please let us know. We also require you to let us know at this stage if you will be retuning back after the full year.

Alternatively, if you wish to hand in your notice for termination of employment please also let me know in writing on receipt of this letter.

We would love to have you back and look forward to your return. But if you do not wish to return, we also understand and wish you all the best in the future.

50. On 21 November 2019 the claimant emailed Ms Negrea explaining that she had childcare problems at that time because her mother was ill and could not provide childcare whilst she was recovering. She said that she had some proposals to return on reduced hours:
As a family, and whilst my mum is still in recovery, we have decided that we can only maintain childcare arrangements for two days each week.

Regrettably, I do not feel that I can continue to meet the expectations of my previous managerial role whilst working on a part-time basis or satisfy the expectations of a reception role since I would need to return on a set hours premise with flexibility meaning I can no longer be part of a rota or maintain key holder responsibilities.

I have thought carefully about the Medispa business model and have some ideas on how I could return to work and support its continued success whilst reducing my working hours. I would welcome the opportunity to discuss these, as well as my change in circumstances and what this means for my return to work with you at your convenience.

51. The claimant's evidence to the Tribunal was that her views subsequently changed as to whether she could do the FOH manager role.

52. On 27 November 2019 Ms Negrea met with the claimant to discuss proposals. There were some brief typed notes of the meeting produced by the respondent which incorrectly recorded the date of the meeting as 25 November 2019. The claimant did not see the notes until disclosure of documents.

53. The typed notes record that the claimant advanced two proposals for potential roles: treatment coordinator or clinic support at head office.

54. The claimant's evidence about the meeting was that she said she would need to be part time on a temporary basis until her mother's situation was clear. She said that she said could do the FOH manager role on a part time or job share basis or the other roles she proposed. She said that she said this would be short term. She said that so far as the FOH manager role was concerned, she said that the keyholding and flexible rota would be difficult.

55. Ms Negrea accepted in evidence that that claimant had said the situation was temporary. Ms Negrea did not know how long was meant by temporary and did not ask the claimant.

56. Ms Negrea's evidence about the typed notes was that she wrote notes on the agenda and typed them up later. She did not type them up in November; it might have been in December. It might have been significantly later.

57. We were provided during the course of Ms Negrea's evidence with a page from her work notebook, in which there were some brief handwritten notes of the meeting but no date against the notes. The notes record some brief details of what appear to be the two proposed roles. This section from the typed notes did not appear at all in the notebook:

    Frances discussed previous email and explained why the full-time role and front of house responsibility would be too much of a commitment due to changes of circumstances.

58. Ms Negrea's evidence was that she did not enter into a dialogue with the claimant about her proposals. She listened to the proposals and then presented them to Mr Fieldgrass with her recommendations. She did not recommend either proposal of the two she said were presented by the claimant because neither role was required. The business under her direction had been slimming down unnecessary roles.

59. We concluded that the meeting had largely been about the two proposed roles the claimant put forward. She said to Ms Negrea that she needed a part-time role on a temporary basis. Looking at the tenor of the 21 November 2019 email and at the subsequent formal flexible working request, we did not accept that the claimant said at this meeting that she wished to do the front of house manager job on a part time or job share basis. We think the documentary evidence showed that her views on what was feasible changed over time but had not changed at this point. She thought the other roles she was proposing would work and Ms Negrea appeared to be positive about them. Had Ms Negrea indicated to the claimant in the meeting that she was not going to recommend either of the two roles proposed by the claimant, we think that a dialogue might have ensued, during which, for example, the possibility of undertaking the FOH manager role on a part-time basis might have been discussed.

60. On 29 November 2019, the claimant wrote to Ms Negrea asking for a decision about her reduced hours proposal.

61. On 30 November 2019, the claimant emailed Mrs Fieldgrass and Mr V Fieldgrass about the situation and about the fact that she had not received holiday pay. The claimant said that she had had an agreement with Ms Addo about receiving holiday pay during her maternity leave once her Statutory Maternity Pay ran out:

    I wrote to [Ms Negrea] on 21 November explaining that due to difficulties at home that I would be, at this time, unable to commit to returning to work on a full-time basis, as I had always intended to, at the end of my maternity leave. I explained that my mum had suffered five heart attacks at the beginning of October, two of which were major and resulted in incidents of cardiac arrest. Additionally, I advised her that my nan who was diagnosed with Alzheimer's 18 months ago was rapidly deteriorating and therefore required more care and support from the family unit which affected the amount of consistent

childcare that I could rely on. During our meeting on 27 November I also advised Violetta that this situation was fluid and open to review once my mother's recovery had progressed. At this time, she seemed keen and positive about the prospect of me returning to work on this basis.

The claimant enquired as to what was happening about her request for part-time working.

62. On 5 December 2019., the claimant emailed Ms Negrea, Mrs E and Mr V Fieldgrass:
I trust that this email finds you well. I still have not received a response to my emails of 29th and 30th November. Nor have I heard the outcome of the planned meeting between yourselves on 4th December. Consequently, I continue to be unable to make an informed decision regarding my return to work. I have still not been paid and as a result continue to face financial hardship.

As previously advised, I feel strongly that the issue of my pay and my return to work are distinct and separate considerations. The arrangement made with Yvonne, as my line manager, constitutes an agreement with the business and as such should be honoured. Failure to do so represents a breach of trust. I also believe that there has been a dereliction in your duty of care by neglecting to notify me, in a timely fashion, that payment in lieu of accrued annual leave would not be forthcoming at the end of November. I had been in contact with Violeta prior to payday highlighting that this arrangement was in place and despite ample opportunity to advise me of your new HR Policy, Violetta insisted (when we met on 27th November) that a processing difficulty existed, and that payment would be made in the December 2019 pay-run. At no point did she advise that my maternity leave would need to finish earlier than anticipated in order to facilitate this payment.

My return to work is a separate issue. In order to facilitate these discussions, and in accordance with my initial request sent to Violeta on 21st November, I attach a formal request for flexible working hours pursuant to the right provided under section 80F of the Employment Rights Act 1996.

63. The claimant attached a formal flexible working request, which included the following sections:
Describe the working pattern you would like to work in future (days/hours/times worked):

2 fixed days, full time hours without keyholder responsibilities.

Impact of the new working pattern

I think this change in my working pattern will affect my employer and colleagues as follows:

I can no longer met the expectations of my managerial position managing a team two days a week. I will no longer be able to hold maintain key holder responsibility [sic].

Accommodating the new working pattern

I think the effect on my employer and colleagues can be dealt with as follows.

As the business does not currently have a Treatment Co-ordinator on Sunday and Monday across the business. Therefore, it is restricted in generating sales from new clients. Having previous experience with assisting the sales process and the requirements to reach a set sales target set by the business, I believe that I can met the expectations of this role. This position does not only support the business providing an ability to generate additional profit, it also matches my request of two fixed day a week. I have also expressed the ability to move across the business and supply this service at all central London locations (St Johns Wood, Kensington and Chelsea).

Alternately

I can provide a clinic and business support based in head office. Taking on administrational duties that could be inclusive of orders, training and any additional business support, which would be in accordance to Ann Ortiz's post from 2018. Having already suggested the hours of 9-5, Tuesday and Wednesday because of being available for the start of the clinic mangers week and on the day of business meetings. I have also maintained and indicated that I am open to suggestions from the business and willing to discuss other options.

64. We note that at the point when she submitted the formal flexible working request, the claimant had not yet taken the view that part-time FOH manager work might be possible, although she was open to discussions.

65. On 6 December 2019, Ms Negrea wrote to the claimant rejecting the flexible working request, saying amongst other things:

Option 1

To return as a sales role (treatment coordinator) in the clinic working Sunday and Monday and do consults.

Option 2

Clinical support at head office (Tuesday and Wednesday 9-5) and possibility to work from home or bring the baby in.

Can start 1st February but willing to start end of January for training.

Unfortunately, I feel that that agreeing to this change/these changes would:

Option 1: Have a detrimental impact on the quality of service delivered because initially you would have to train and learn the job and we have no certainty that you would succeed in this role. As far as we are aware you have no background or experience in conducting Consultations and the job is completely different to your current post.

Option 2: Would impose an unreasonable burden of additional costs because we don't need that role.

Option 1 and 2

Be inappropriate as we have recently undertaken a review of all our posts, and we are keeping a strong focus on ensuring that our posts are directly relevant to the needs of our customers and clients. Creating an additional Clinical support role or a Sales role is not in line with our needs and requirements at this moment in time. I also note that Ana's role was deleted when she left and there has been no requirement to backfill this position.

66. On 14 December 2020, the claimant wrote to appeal the decision to reject her flexible working request:

I would like to clarify that during the meeting between Violetta and myself on 27 November I suggested, as a starting point for discussion, two potential roles that I felt could fulfil my need to reduce my working hours whilst supporting your business model. I did not, at any time, indicate that these were the only positions that I would be willing to consider or accept. it is disappointing that the business does not seem to have investigated alternative roles, especially given that I highlighted that my situation was open to constant review as my mother's recovery progressed.

<u>Would impose an unreasonable burden of additional costs because we don't need that role.</u>

Again, during our face-to-face meeting Violetta appeared the be enthusiastic about the potential of this option. Her demeanour, in this regard, appears now to have been completely disingenuous. Notwithstanding this the additional cost of this would be negligible, given that it was only intended to be of a temporary nature; significant cost would only occur if you were to back-fill the position of FOH Manager at St Johns Wood immediately rather than support me in my time of need.

67. We note that the claimant was continuing to emphasise the temporary nature of the proposed part-time working.

68. On 20 December 2019, Mr Fieldgrass wrote to the claimant to invite her to an appeal hearing on 15 January 2020. The claimant confirmed on 23 December 2019 that she would attend that meeting.

69. On 8 January 2020 the claimant emailed to ask for a change in the date of the appeal meeting due to her mother having a hospital appointment.

70. Having received no response to that email, the claimant emailed again on 14 January 2020 and again on 20 January 2020.

71. Mr Fieldgrass' evidence was that he missed the emails; he was busy and he had thousands of unread emails.

72. On 28 January 2020, having not heard any further about her appeal and with her date for return from maternity leave fast approaching, the claimant submitted a grievance. She said:

To date there has not been an appeal hearing to discuss the matters of the flexible working request submitted to yourselves. There equally remain an expectancy, in law, for employment to resume on previous engagement terms, due to the conclusion of maternity leave as of the 1st of February. It should be noted that, irrespective of the company's anticipated decision of this employee's appeal, failing to communicate effectively and in a timely fashion has now left inadequate time to fully arrange or to even go through the process of settling appropriate childcare arrangements.

The continued perceived failings on your part to make efforts to resolve matters or to communicate with your employee with due diligence, are grounds for discrimination under section 18 of the Equality Act 2010 specifically in relation to the protection of a woman who has become a new mother and is therefore on maternity leave.

73. The respondent suggested to the claimant in cross examination that someone else had written this document for her because of the references to the claimant in the third person. The claimant said that was not the case and that she had done some research. In submissions, Ms Hall suggested that the claimant had been trying to create a case against the respondent. We observe that we cannot see how taking legal advice about a difficult employment situation, which we understood the claimant had done by this point, was anything other than a sensible course. It would be fairly standard advice for a solicitor to suggest pursuing a grievance in order to try to resolve the employment issues.

74. On 31 January 2020, the claimant sent Mr Fieldgrass an email containing further information about her grievance.

75. She said in the email that Ms Negrea had not told her she was only going to put forward the two roles that they had discussed and not seek to explore managing reduced hours in her current role. She said:

…I have always maintained that I am happy to discuss and negotiate other options, including changes that could be implemented in my current role such

as a managed change in hours, temporary reduction in responsibilities or job sharing.
She said that was an addendum to her flexible working request which she would like to be considered at the appeal.

76. She said that the request arose due to her mother's health issues and the impact of those on her childcare arrangements:
That this situation was one that was fluid in nature and able to be reviewed as early as March following my mother's Consultant appointment at the end of February… the first full assessment [following the health problems] in October 2019…we would not truly comprehend her condition in its entirety, and therefore the implications this could have for the future, until this appointment.

77. She said that the primary reason for her appeal was the failure by the respondent to make suggestions for alternative solutions to her 'fluid and dire current situation'.

78. On 3 February 2020, there was an appeal meeting with Mr Fieldgrass which started at 10:30. There was also a note taker present and we saw some typed notes. These were not provided to the claimant to approve after the meeting.

79. The notes say amongst other things:

• As a keyholder, she can't promise she will be able to open clinic on time, due to childcare and mother's illness. In case of emergency she will attend to her family first before work
• Rudi asked how long she thinks she will be late for; she answers she doesn't know how long because she wouldn't know what the situation will be. E.g. Mother's Health or Childcare.

• Rudi asked what she meant by flexible hours: she replied regarding the hours she will be given/working.

• Rudi asked what she meant by reduce hours: she replied part time (From Full timer to part time)

• Her best days will be Sundays and Monday because she will have someone to take care of the child

…

• Was meant to work half day today (03/02/2020) however she will not return work after the meeting. Because she thinks that will cover her half day, Rudi asked what's the shift for half day. She replied, "do you want me to go back to 2 hours, I didn't arrange for childcare today so I can't".

80. The claimant told the Tribunal the notes were not accurate. She said that she discussed with Mr Fieldgrass that her mother was seeing her consultant at the end of the month. If she had to source alternative childcare, the changing shift pattern would be a problem; she would need a set rota and not to be on the opening rota on her own in case there were unforeseen circumstances

involving a childcare problem or child sickness. The claimant told the Tribunal that she did not say she would not be able to get to work on time in normal circumstances or that the FOH manager role could not be done on a part time basis. She repeatedly asked for a rota so she could organise childcare.

81. We accepted the claimant's account of what she said (and did not say) at the meeting which is reflected in the documentary evidence from around this time. The claimant had been considering the matter further once the two roles she suggested for herself had been rejected. We considered that the claimant was being frank about the fact that there could be times when there was child illness or a childcare issue when she would not be able to open the clinic if there was a problem with a member of FOH staff and was looking to have a dialogue with the respondent about how that eventuality could be managed.

82. The claimant's oral evidence was that that she needed a rota because if she had to organise childcare from a child minder or nursery instead of from her mother, she would need to know which days she was working.

83. She said she asked for minutes of this meeting and the meeting with Ms Negrea at the end of the meeting. Mr Fieldgrass accepted she had asked for minutes He said that he did not mark it as urgent as she had a recording. He also said that he thought that the claimant was trying to trip him up with the minutes – his assumption was to 'attack' the company. He said that he was busy or forgot.

84. The claimant had asked to record the meeting, for reasons she told the respondent were due to her neurodiversity. She told us that this was done through an app she subscribed to but she no longer had access to it after she ceased to subscribe to the app. The respondent had never asked her for a copy of the recording.

85. We were unable to draw any conclusions from the failure to produce a recording or transcript in circumstances where the respondent had not requested it and the matter was not fully explored.

86. At the end of the meeting, Mr Fieldgrass asked the claimant to finish a half day shift. The claimant had asked for a half day of holiday that day. The meeting was at Hammersmith and St John's Wood was an hour's travel away. Mr Fieldgrass said that as he had told the claimant in an email that she would be expected to work the rest of the half day and she had not said she could not, he assumed that she would. He said in oral evidence:

It was on my time - I could ask her to take things to St John's Wood. I am allowed to say that as paying for those hours, I could have paid for a taxi if I wanted. I am allowed to do that. The meeting didn't last long, I have still three hours that I'm paying for. If I tell her to sit in the corner for three hours, it's my time, surely I'm allowed to say that.

87. We comment in passing that these remarks revealed a disturbing attitude on Mr Fieldgrass' part to the employer / employee relationship.

88. The claimant had understood that the half day was for the meeting and the remainder of the day she was taking holiday. She pointed out that the meeting was in part to discuss the fact that she had childcare issues.

89. Mr Fieldgrass told the Tribunal in oral evidence that the meeting was: *For her to show to me and sell why she is a superstar, not for me to justify anything. The appeal meeting was for her to say I can do this and I am fantastic and sell herself, for me to consider those great points, not a forum to have a conversation - for her to get her points across and for me to go away and think about it, not to discuss merits of how business is running. This is an appeal meeting to tell me what you can do.*

90. It was clear that Mr Fieldgrass did not see the appeal meeting as an opportunity for a dialogue about how the claimant's needs, arising from being a new mother, could be accommodated. His expectation that she should perform work after the meeting was wholly unreasonable given the reason why the meeting was required.

91. From the emails the claimant had sent, Mr Fieldgrass would have been aware that the claimant had an interest in a job share or part time FOH manager role, or other roles and that her need to work part-time was temporary and might change as early as March.

92. He was cross examined about why he never referred to the fact that the claimant had said that it would be a temporary situation in his own emails nor explicitly said that he had considered her working part time on a temporary basis. He said that he did consider that possibility but did not document everything. It was put to him that he never considered the claimant doing the FOH manager role part time and he said, 'We don't have any managers part time'.

93. Mr Fieldgrass told the Tribunal that the claimant's emails were so long and wordy and there were certain things he did not understand, perhaps because his command of English was not as good as the claimant's. He said the claimant was 'like John Grisham' and perhaps she should be working in publishing. It was clear to the Tribunal that he was annoyed by the claimant's emails in which she asserted rights and asked for accommodations.

94. On 6 February 2020 the claimant emailed Mr Fieldgrass asking for an outcome to the appeal and also asking for a rota.

95. That same day, Mr Fieldgrass emailed the claimant with four attachments. Two concerned her request for a grievance hearing and one was the outcome to her appeal.

96. In respect of her appeal, he said amongst other things:

I have set out my reasons for declining your request below:

- *You indicated that you could not come back to the full time position, which has been held for you throughout your maternity leave, as it would not be fair to the team to be in a manager role (front of house manager), because you could not do the position justice if working on a part time basis. Which I agree with.*
- *You also implied that you would struggle to work in the front of house position and have key holding responsibilities as you could not guarantee that .you would be able to begin your job on time. This would also apply across the board no matter what the role was. A business cannot function efficiently if members of staff do not show up for their shifts when expected. You proved that punctuality would be difficult for you by arriving 30 minutes after the meeting was scheduled.*
- *Another explanations behind why you could no longer work the front of house position and wanted to work in a completely different role was based on four former employees, two of which were successful in their request for a part time role and two that weren't. It should be worth noting that Kirsten and Lucy who you mentioned in your appeal letter, had already preformed the roles they would take on in a part time manner with considerable success, more importantly, at the time, there was a genuine business need for those two part time positions. You failed to recognise that many other members of staff have come back to their normal roles on reduced days.*
- *Moreover, when considering creating new roles for the company, a lot of things have to be taken into consideration namely the cost implications to the business, and whether the company can justify creating a new position especially if it would create an unreasonable burden of additional costs.*

I have given careful consideration to your appeal of the original decision and stand by the original decision. I appreciate that this will mean that you will no longer be working for the company based on the fact you could no longer carry out a front of house position to an acceptable or appropriate standard.

97. So far as Mr Fieldgrass' account that the claimant had said she could not do the FOH manager role part-time to an acceptable standard, we did not accept that that was what the claimant had said in the appeal meeting. Mr Fieldgrass was in effect harking back to what the claimant had said in her initial emails. What the claimant was saying at this stage was that she might need some support in carrying out the FOH manager role part time for a temporary period.

98. There was no mention in the letter of Mr Fieldgrass considering the part time FOH manager role as a temporary possibility or job share. Nothing in the letter acknowledges that the claimant's difficult childcare situation was temporary.

99. Mr Fieldgrass said that if the claimant had job shared the role, he would have had additional expense recruiting another FOH manager. He said that could be up to £4000. He said there were other costs, which he described as PAYE,

pension, uniform and holiday pay. He did not quantify these costs, nor did he give evidence that he had done so at the time although he said he knew what they were.

100. The Tribunal raised with Mr Fieldgrass whether one way of managing a period when the claimant was temporarily working part-time would have been a job share with Ms De Leon, who could have been utilised in Richmond the days when the claimant was working at St John's Wood. He agreed that might have been a possibility although not one he had explored and that it 'made sense' although he said that the claimant was seeking to have the FOH manager role 'without responsibility'.

101. On 9 February 2020, the claimant emailed Mr Fieldgrass saying that it was not appropriate for Mr Fieldgrass to hear her grievance. She also said:

I did not say that I could not do my role part time and believe that you have taken my efforts to mitigate my current situation out of context. I think I could, with a job share and some agreement regarding rotas and key-holding continue to fulfil my job responsibilities as efficiently and professionally as I did prior to commencement of my maternity leave. Especially since I have always maintained that this is a temporary and fluid measure. Neither did I say that I could not guarantee being on time for work. I have a good record for attendance and punctuality. I feel that you have also used my efforts to explain company policies and their impact on emergency and unexpected scenarios against me.
At the end of your letter you say that the outcome of your appeal means that I will no longer be working for the company as I could not carry out a front of house responsibilities to an acceptable or appropriate standard. You have also not sent me a rota following the end of my maternity leave. I take this to mean that you have dismissed me for capability on 6 February 2020.

102. There was never any substantive response from Mr Fieldgrass to the points the claimant made in this email about being able to carry out the role of FOH manager on a part-time basis and the fact that the situation was temporary.

103. On 10 February 2020, Mr Fieldgrass emailed the claimant:
I would firstly say that I note your postponement of the grievance meeting today and will consider your request for a different person to Chair this meeting and get back to you on this.
Please also note that your existing full time job is still available for you to return to after your holiday has finished and please let me know if you want me to issue you with a rota for this?

104. On 12 February 2020, the claimant emailed Mr Fieldgrass to say that her childcare issues were hopefully temporary, depending on her mother's medical appointment on 26 February 2020. She asked for a temporary adjustment to her hours and a rota so she could plan childcare:
As we have discussed and as I have explained in my emails, I cannot return full time at the moment, though this may change. My mother's appointment with her consultant is on the 26th February 2019. My grievance is still

outstanding. I hope we can agree a permanent solution after that. I will be sending further information relating to my grievance prior to the meeting.

I have looked into childcare and it will be difficult to find childcare unless I have a set rota. If you can send me a part time rota for 2 days a week for next month, I can try and arrange childcare. This may be difficult at short notice. It would have been easier to arrange if we had agreed flexible working when I originally asked.

105. The claimant was cross-examined about why she was emailing in this vein if she seriously considered that she had been dismissed. Her evidence was that she did consider she had been dismissed but 'I thought we had moved past that as he had responded to me'.

106. On 14 February 2020 the respondent sent the claimant a contract for a part-time senior receptionist role, working Friday and Saturday. This was said to be accommodating the claimant's proposal. She would receive her existing salary pro rata and there would be no other changes to her terms and conditions.

107. The days offered were Friday and Saturday. Ms Negrea had spoken with Ms Johal as to whether there were days when it might be useful to have an FOH manager and these were the days Ms Johal suggested.

108. On 19 February 2020, the claimant emailed Mr Fieldgrass:
Thank you for your email. In my last emails I said that I wanted to work part time temporarily in my role, which is a manager. This was until I knew more about my mum's health and whether she could look after my child or if I would have to make alternative long term arrangements. You have sent me a contract which is permanent for a receptionist role, which would be a demotion. You have also scheduled me to work the two days which were my days off before maternity. I don't think this is an accident. I believe you were hoping that I would not be able to take those days, as they had been my rest days. This is a further issue to be discussed at the grievance.

109. The claimant's evidence was that if she had been told the part-time senior receptionist role was temporary, she would have accepted it. Her evidence about keyholder responsibilities was that she had never said she could not be on time for work regularly. She was concerned that there could be emergency situations. So far as team management was concerned, she would need to share the responsibilities if it was a job share or would need some support from higher management if she was doing the role part time.

110. On 20 February 2020, the claimant emailed Mr Fieldgrass to say that as she had not been provided with a rota she could not put childcare in place. There were also emails in which a possible date for a grievance hearing was discussed.

111. On 24 February 2020 Mr Fieldgrass emailed the claimant about the current position. That email set out a chronology of events and correspondence which

made no reference to the claimant asking for a temporary change to part-time working. It went on:

If we are of the assumption that the days I thought you were on holiday were actually work days then I propose that the period from 05/02/2020 onwards is marked down as unpaid until we agree one of the following:

- *You resume on your full time working hours*
- *You resume in the part time position offered*
- *Or you resign*

In principal [sic] you should have returned to work on 05/02/2020 but you have indicated that you were expecting to get a rota for either the part time or full time position then please advise me accordingly and no later than by Wednesday 26/02/2020, 12:00 noon.

On this basis I am happy to agree that you are unpaid from 05/02/2020 until we agree on one of the three options above.

112. Mr Fieldgrass was cross-examined on the fact that he set a deadline of noon on the day that the claimant had told him her mother was seeing her consultant. He said that he did not deliberately set a deadline which coincided with the claimant's mother's appointment.

113. In February 2020, the claimant's mother had a revision to her pacemaker. Whilst she was recovering from the operation she was unable to lift the claimant's baby. Ms Nash told us that this was the case until the end of March 2020. The claimant and her mother share a flat.

114. On 26 February 2020, the claimant's mother met with her consultant and the consultant confirmed that the pacemaker and medication were working effectively and it would be safe for her to provide childcare.

115. The claimant's evidence was that at this point there would only be a few more weeks when she would have to work part-time whilst her mother recovered fully and became physically capable of lifting the baby.

116. On 3 March 2020 Mr Fieldgrass emailed asking the claimant asking if she was returning to the senior receptionist role or her full time role and giving her a deadline of 11 March 2020 to inform the respondent.

117. Some time around 9 March 2020, Ms De Leon resigned to pursue another job opportunity.

118. On 11 March 2020, the claimant wrote to the respondent saying that she had been constructively dismissed:

I am writing in response to your email of 3rd March 2020 giving me the choice of returning to my fulltime post or a part-time post as a receptionist and which asks me to reply by 11th March 2020.

I emailed you on 19th February 2020 explaining why I did not agree to a demotion and that I was looking to work part time as a manager until I was able

to arrange long term childcare. Your email does not suggest working as a receptionist would be temporary until my childcare is resolved. You are asking me to accept a permanent demotion before my grievance regarding how the way the company has handled this is resolved. From your email it looks as if you have made no effort to consider a job share, flexible working or any way that you can help me, even on a short-term basis.

You emailed me on 24th February 2020 setting out a timeline of events. I do not think it was an accurate or fair summary of events. In the email you said that the company 'did not have any part time front of house managers or clinic managers.'

You did not explain or justify this and from my experience of the company I do not think there is any reason for this to be an issue. I was only asking for it on a temporary basis until was able to arrange childcare. I cannot return to my full-time role at short notice as I need to arrange childcare, which will also mean agreeing rotas, so I know when to get childcare for.

I have tried for long before my return to work to resolve my flexible working request, but the company was slow to respond, which contributed to the issue not being resolved in time. I know other staff who have worked full time who wanted to return to work part time and the company has found a way to accommodate them. This was not an option for me, and I believe that my request for flexible working and appeal were not properly or fairly dealt with or considered. I believe that I was bullied by Violetta Negrea, and subsequently by yourself, during the process. I believe that there is an element of racial discrimination in the refusal of the company to help me in comparison to white employees who have been able to return part time.

Given the way the company has treated me and the way my return to work has been handled I believe that I have no other option but to resign immediately. I believe that I have been constructively dismissed for the reasons set out above and in my grievance.

119. The claimant was cross-examined about why she did not update the respondent as to the fact that her mother would be able to provide full time childcare within a few weeks and ask to extend the period of unpaid leave. She said she felt she was being forced into unpaid leave. She had wanted to return to paid work since 1 February 2020 and the respondent had made no effort to help her come back to paid work. She did not believe Mr Fieldgrass would start to make an effort at this point.

120. We accepted the claimant's evidence about her thinking. She had repeatedly made efforts to engage with Mr Fieldgrass about returning temporarily to a part time FOH manager role and M Fieldgrass had not engaged with the proposal.

121. On 12 March 2020 Mr Fieldgrass emailed the claimant asking her to reconsider her resignation:

I believe you may have reached this decision in the heat of the moment and I am now writing to ask whether this is really what you want to do.

In your email you outlined a number of issues and concerns as the underlying reasons for your decision to resign. In order not to delay addressing these concerns I am happy to arrange a grievance meeting to address your concerns as previously advised If you wish to exercise this right, then I would ask you to provide me with a suitable date and I can make the necessary arrangements for Victor to meet with you and discuss your concerns in more detail. Please let me know if you want to meet and discuss your concerns by Wednesday 18/ 03/ 2020.

122. Thereafter there was correspondence between the parties about setting up a grievance hearing but ultimately there was no grievance hearing.

Law

Was there an express dismissal?

123. Where there is ambiguity as to whether there has been a dismissal, the Tribunal should apply an objective test. The interpretation 'should not be a technical one but should reflect what an ordinary, reasonable employee… would understand by the words used' and 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter': Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT.

124. In general an express dismissal can only be withdrawn by agreement between the parties: Harris and Russell Ltd v Slingsby 1973 ICR 454, NIRC. In exceptional circumstances, a dismissal or resignation issued in the heat of the moment may be considered to have been withdrawn: Martin v Yeomen Aggregates Ltd 1983 ICR 314, EAT.

125. An employee may agree to the withdrawal of a dismissal. Usually there will need to be an unequivocal statement to that effect but sometimes agreement to withdrawal may be inferred from an employee's conduct: Brock v Minerva Dental Ltd 2007 ICR 917, EAT.

Constructive dismissal

126. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "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".

127. It is established law that (i) conduct giving rise to a constructive dismissal

must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

128. If a fundamental breach is established, the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

129. In this case the claimant asserts a breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

130. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer: Malik v BCCI [1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher Education Corporation 2010 IRLR 445.

131. In Tullettt Prebon v BGC Brokers LP and others 2011 IRLR 420, the Court of Appeal explained the legal test: "The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon or altogether refuse to perform the contract..." "All the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. That means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person."

132. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In Omilaju v Waltham Forest LBC [2005] ICR 481 the Court of Appeal said that the final straw may be relatively insignificant but must not be utterly trivial; the test of

whether the employee's trust and confidence has been undermined is objective.

133. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract: Morrow v Safeway Stores 2002 IRLR 9 and Ahmed v Amnesty International 2009 ICR 1450.

134. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;

134.1 what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

134.2 Has he or she affirmed the contract since that act?

134.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

134.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed together, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

134.5 Did the employee resign in response (or partly in response) to that breach?

135. As to affirmation, mere delay by itself does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of implied affirmation. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign: Chindove v William Morrison Supermarkets plc EAT 0201/13.

136. The reason for a constructive dismissal will be the reason why the employed acted in repudiatory breach of contract: Genower v Ealing, Hammersmith and Hounslow Area Health Authority 1980 IRLR 297, EAT.

Pregnancy discrimination

137. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends, if the employee has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; if she does not have

that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

138. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

139. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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. "

140. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

141. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

142. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

143. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

144. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Indirect discrimination

145. Under section 19 Equality Act 2010, indirect discrimination occurs when a person (A) applies to the claimant a provision, criterion or practice ("PCP") which (a) A applied or would have applied to those with whom the claimant does not share this protected characteristic, (b) put, or would have put those sharing the claimant's protected characteristic at a particular disadvantage when compared with those not sharing the claimant's protected characteristic, (c) put, or would have put the claimant at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

146. The burden of proof is on the claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

147. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in Essop v Home Office [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that section 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

148. As to the question of justification, a respondent must normally produce cogent evidence of justification: Hockenjos v Secretary of State for Social Security [2004] EWCA Civ 1749, [2005] IRLR 471.

149. The question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: Bilka-Kaufhaus GmbH v Weber von Hartz (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable

responses' test: Hardy and Hansons plc v Lax [2005] IRLR 726, followed in MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334 at paragraphs 10-12.

Time limits

150. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

151. In considering whether it is just and equitable to extend time, the factors set out in S.33 of the Limitation Act 1980[1] are a useful guide for tribunals, but should not be followed slavishly: Southwark London Borough Council v Afolabi 2003 ICR 800, CA,

152. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

153. In determining whether there is a continuing act a relevant but not conclusive factor is whether different individuals are responsible for acts which are said to be linked: Aziz v FDA 2010 EWCA Civ 304, CA.

Victimisation

154. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

155. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

[1] the prejudice which each party would suffer as a result of the decision reached, and all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

156. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

157. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

158. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

Flexible working requests under ERA 1996

159. Employees may apply for a change to certain terms and conditions such as hours of work, by making an application under section 80F Employment Rights Act 1996.

160. An employee who has made such an application may complain to an employment tribunal on certain grounds, including that a decision to reject her application was made by her employer on the basis of incorrect facts: section 80H Employment Rights Act 1996.

Conclusions

Unfair Dismissal

Issue: Was the Claimant's employment terminated by the Respondent on 6 February 2020?

161. We considered that Mr Fieldgrass' statement in the appeal outcome: 'I appreciate that this will mean that you will no longer be working for the company based on the fact you could no longer carry out a front of house position to an acceptable or appropriate standard' was sufficiently unambiguous to constitute an express dismissal of the claimant.

162. However, when we looked at the subsequent course of events, we considered that on 10 February 2020. Mr Fieldgrass retracted the dismissal: 'Please also note that your existing full time job is still available for you to return to after your holiday has finished and please let me know if you want

me to issue you with a rota for this'. The claimant did not expressly accept the retraction of the dismissal but her conduct thereafter seemed to us to amount to an implied acceptance. She carried on corresponding with Mr Fieldgrass as if the employment relationship was subsisting until she resigned on 11 March 202.

Issue: If she wasn't dismissed on 6 February 2020, was she constructively dismissed on 11 March 2020?

Issue: Did the Respondent carry out the following acts:

Issue: a. Did not consider the Claimant's requests for flexible / part time working and alternative roles, promptly, fairly or at all;

163. In considering this assertion, we concluded it was necessary to distinguish between the formal flexible working request process, for which a mechanism is created by section 80F of the Employment Rights Act 1996, and broader obligations which employers have to try and accommodate employees who may have particular needs, such as disabled employees and new mothers. The statutory flexible working request process imposes certain substantive and procedural requirements on employers and provides for remedies where those requirements are not fulfilled. However an employee may ask for some flexibility outside of that statutory mechanism and, in order to comply with other obligations to the employee (such as obligations not to discriminate), the employer may need to entertain such requests.

164. Looking at the process in this case, the claimant had made a formal flexible working request which was dealt with by the respondent on its own terms. As drafted, it was essentially a request to be considered for one of two potential part-time roles the claimant proposed.

165. However, grafted on to the formal process, was the claimant's subsequent request to be accommodated part-time on a temporary basis in her existing FOH manager role. This was a proposal she was putting forward by 31 January 2020.

166. We were not able to conclude that this request was not dealt with 'promptly' in the sense that Mr Fieldgrass held the appeal hearing with the claimant shortly after that. Although he has not explained his failure to rearrange the appeal hearing throughout January in a satisfactory way, we were hesitant to reach a conclusion that he was not acting promptly in circumstances where the statutory framework for flexible working requests allows the employer total period of three months from the date the request is made to reach a conclusion.

167. What we did find is that he did not consider the request fairly. He went in with the attitude which he expressed in evidence that the respondent does not have part-time managers and did not entertain the claimant's proposal to the extent that he failed to properly reflect in his outcome what she had in fact been saying and failed to acknowledge in any subsequent correspondence that what she was asking to have considered was a part time FOH manager role on a temporary basis. He simply blanked that suggestion in his correspondence and it was apparent from his evidence that he had not given it any consideration at the time. He did not treat the appeal hearing as any sort of dialogue but as a forum in which the claimant had to 'sell herself'

168. Mr Fieldgrass gave no consideration to any costs of the claimant job sharing the role on a temporary basis or as to how it might have been accommodated without any recruitment being necessary - for example by Ms De Leon being shared for that temporary period between St John's Wood and Richmond or by a member of staff acting up. The only cost he sought to quantify was the cost of recruitment but there would have been no recruitment costs if the job was shared with an existing staff member and, of course if the claimant left employment, there would be recruitment cost in replacing her.

Issue: b. Attempted to demote the Claimant to the role of Senior Receptionist;

169. The claimant was told that if she wished to work part time, her role would be a senior receptionist role. When she asked whether that role would be permanent, she was not told it would be temporary whilst she was working part- time and it was not suggested in evidence that the respondent regarded the change in role as temporary.

*Issue: c. Did not allow the Claimant to work part-time on a temporary basis until her grievance / childcare issues were resolved***;**

170. The claimant repeatedly explained that her requirement to work part time was temporary and Mr Fieldgrass repeatedly declined to engage with that issue. He offered her what appeared to be a permanent part time contract in the role of senior receptionist and did not respond to her 19 February 2020 email to say that the change was not permanent.

Issue: d. Gave the Claimant a rota with working days that had previously been her rest days.

171. This happened as a matter of fact but we did not find it was anything other than innocuous. We had not reason not to accept the evidence that those were the days identified by the clinic manager at St John's Wood as being days it would be helpful to have an additional member of FOH staff.

Issue: e. Discriminated against her as set out below

172. We have upheld some of the claimant's claims of discrimination as set out below.

Issue: Do the acts, either singularly or combined amount to repudiatory breach of the term as to mutual trust and confidence.

173. There may be occasions when acts of discrimination can be said not to destroy or seriously damage the relationship of trust and confidence but we did not consider this was such a case. Looked at together, the matters we found proven were that the claimant had been discriminated against by Ms Hewitt prior to her maternity leave, her grievance had not been addressed, she had not a pay review or pay rise because she was on maternity leave, her request for part-time working was not fairly considered and she was offered a demoted role on an apparently permanent basis rather than the respondent making any effort to accommodate her in her actual role for what she explained would be a temporary period. Even had the claimant not been a new mother trying to return to work after maternity leave, that catalogue of matters seemed to us more than ample to destroy the relationship of trust and confidence.

174. We considered whether the respondent had reasonable or proper cause for its actions. There was nothing put forward on the evidence before us apart from the matters which we rejected as defences to the discrimination claims. The exception was the offer of part-time work in the senior receptionist role on what had previously been the claimant's rest days which we found to be an innocuous act in itself and for which the reasonable and proper cause as the clinic manager's assessment that those were the days on which cover would be most useful.

Issue: Was the Claimant's decision to resign caused or contributed to by any breach?

175. We were satisfied that the facts we found showed that the claimant had persevered for a significant time in attempting to return to her role but the

resistance by Mr Fieldgrass to engage with her request for temporary part time working eventually drove her to the conclusion that the respondent was not going to change its position and help her to return to work in her existing role.

176. The respondent sought to persuade us in submissions that the claimant was in some way 'setting the respondent up' so that she could bring an employment tribunal claim, that she framed her flexible working request in such a way that it would be rejected and was in effect conducting what the respondent said was a 'charade' of wanting to return to work. The respondent pointed to the fact that she had obtained legal advice prior to the termination of her employment and the fact that she did not request to take a few weeks of paid leave when she was aware that her mother would soon be able to provide full time childcare.

177. We were not persuaded by that narrative. Employees who seek legal advice on their employment rights whilst still employed are usually looking for a way of resolving a difficult situation rather than advice on how to set themselves on the unattractive, lengthy, uncertain and often costly path to a tribunal claim. There is nothing on the facts of this case that points to any other desire on the claimant's part. The claimant was not obliged, given all that had gone before, to offer to stay on unpaid leave for a further period because the respondent had refused to accommodate her return to her role part time for a very limited period.

178. It seemed to us that the reason for the claimant's resignation was overwhelmingly the matters which we have found to be culpable conduct by the respondent leading to a breach the implied term of trust and confidence.

Issue: Did the Claimant do the Claimant do the following acts and do they amount to affirmation of the contract: requesting a rota; advising that she wanted to work part time, confirming that she was arranging childcare; delay in tendering her resignation.

179. We looked with care at the matters which the respondent suggested amounted to an affirmation of the contract. The claimant did not resign after the matters which occurred during her pregnancy and the matters which occurred during her maternity leave and there might have been a strong argument for affirmation of the contract if those matters had been relied on alone. However, looking at the last month or so of the claimant's employment, the situation is that when her request for temporary part time working was rejected, she continued to seek to persuade the respondent to rectify the breach. She was not accepting the breach; she was protesting it. She had an outstanding grievance and waiting a reasonable period to try and resolve it did not amount to affirmation. What happened was that the respondent continued to maintain the breach by giving the claimant deadlines to accept one of the options – the demoted part time position or the full time FOH manager's position - and the claimant resigned when it became apparent that the breach would not be resolved. The limited period

of delay did not of itself amount to affirmation in circumstances where the claimant was seeking throughout to persuade the respondent to rectify the breach.

Issue: If the Claimant was dismissed, what was the reason for dismissal?

Issue: Was it a potentially fair reason under s.98 ERA 1996.

Issue: Was the dismissal fair in all the circumstances?

180. The respondent did not put forward any potentially fair reason for the dismissal, nor could we see one. This was not a case falling into the relatively rare subset of fair constructive dismissals.

181. We accordingly upheld the claimant's clam of unfair dismissal.

Maternity Discrimination

9. Did the Respondent treat the Claimant unfavourably, contrary to s.18(2)(a) EqA 2010

by:

Issue: a. Being critical of the Claimant's clothing and makeup whilst she was pregnant;

182. We accepted the claimant's evidence that these incidents occurred. It was clearly unfavourable treatment; the claimant was being criticised for matters that were not her fault – the fact that she was unable to wear makeup and did not have appropriate uniform.

Issue: b. Promoting Ms Chaves to take over the Claimant's role;

183. We considered that we did not have a sound evidential basis to conclude that Ms Chaves had been promoted to take over the claimant's role. There was no contract showing that Ms Chaves was promoted to FOH manager or any equivalent role. The claimant had heard that Ms Chaves had said that she was going to be doing the claimant's role but we felt unable to give that evidence much weight. Ms Chaves might have been boasting or misrepresenting the situation; the unnamed staff members who told the claimant what Ms Chaves had allegedly said might be unreliable. We bore in mind that Ms De Leon was placed in the FOH Manager role in St John's Wood in September 2019 and it was hard to understand how there would be a need for Ms De Leon to fill that role if Ms Chaves was effectively doing the role with another title.

*Issue: c. Ms Hewitt ignoring the Claimant, excluding her from tasks and duties and dealing directly with Ms Chaves***;**

184. We accepted the claimant's evidence about these incidents in the absence of any evidence from the respondent. Her account was given some support by the fact that she complained contemporaneously about theses issue sin her January 2019 grievance.

185. This was clearly unfavourable treatment which made the claimant feel uncomfortable and threatened at work.

Issue d. Not taking action in relation to her grievance of 12 January 2019

186. No action was taken by the respondent to address the claimant's grievance. In circumstances where she was looking to have her concerns resolved because she was about to go on maternity leave, this was plainly unfavourable treatment.

11. Did the Respondent treat the Claimant unfavourably, contrary to s.18(3) and / or (4) EqA 2010 by:

Issue: a. failing to review her salary and / or award her a salary increase; If so was the award/review contractual or discretionary?

187. The respondent did not review the claimant's salary nor did it award her a pay rise. That was clearly unfavourable treatment.

188. The respondent provided no evidence as to who received a pay rise in 2019 and why or why not. The evidence we had was that the claimant received a pay rise every other year. We had no evidence that her performance during the part of the relevant year she was in work was any less good than her previous perfromance. We had no evidence that the performance of the respondent or the St John's Wood clinic was less good in the relevant year than in previous years. We concluded that had she not been on maternity leave, the claimant would have received a pay rise.

Issue b. Not taking action in relation to her grievance of 12 January 2019;

189. There was a continued failure to deal with the claimant's grievance once she commenced maternity leave. This was unfavourable treatment because the claimant continued her maternity leave and faced a return to work with the issues unresolved.

Issue c. Appointing Ms De Leon to the Claimant's role in September 2019

190. Ms De Leon was given what appeared to be a permanent appointment to the role of FOH manager at St John's Wood in September 2019. There was nothing in the documents to suggest that Ms De Leon was informed that her position in St John's Wood might be temporary or that she had indicated a willingness to move to Richmond in due course.

191. We considered that this was unfavourable treatment of the claimant because we were not convinced of the respondent's bona fides as to the claimant returning to the full time role in St John's Wood. We are not sure what would have happened had she said that she was ready to return to the full time FOH role. Putting another employee into her role without reservation certainly created a risk for the claimant as to whether she would be able to return to her role and we concluded that made it unfavourable treatment.

Issue d. Not considering her requests for flexible / part time working and alternative roles, promptly, or fairly or at all.

192. We have already found that there was no fair consideration of the claimant's request to perform her FOH manager role on a temporary part-time basis. This was clearly unfavourable treatment because it deprived the claimant of the opportunity to be properly considered for such an arrangement.

Issue: Was any unfavourable treatment because of C's pregnancy or the fact that she was exercising had exercised her right to maternity leave or was seeking to do so?

193. We looked at each of the occasions of unfavourable treatment we found to have been made out.

Ms Hewitt's remarks about the claimant's appearance

194. The claimant was unable to wear makeup and to wear her usual uniform in a way which presented a smart appearance because of her pregnancy. We were able to make a positive finding that the remarks made by Ms Hewitt were because of the claimant's pregnancy and its physical effects. We therefore upheld this claim, subject to issues of time which we consider below.

Ms Hewitt ignoring the Claimant, excluding her from tasks and duties and dealing directly with Ms Chaves;

195. The claimant's evidence was that this treatment started during her pregnancy. She pointed to that connection in her contemporaneous grievance.

196. The claimant's account of the timing of the treatment together with the evidence we accepted of Ms Hewitt's remarks about the claimant's appearance during her pregnancy seemed to us to be sufficient facts from which we could reasonably conclude that the claimant's pregnancy had played a material role in the treatment. The impression given is that Ms Hewitt was viewing the claimant as someone who was unlikely to be returning to her role.

197. We therefore had to consider the respondent's explanation. There was no explanation. So the burden of proof shifted and the respondent has failed to prove that the treatment was not because of the claimant's pregnancy.

198. We therefore upheld this claim, subject to issues of time which we consider below.

Not taking action in relation to her grievance of 12 January 2019

199. It was unreasonable for no one at the respondent to have taken any action to look into the claimant's concerns and seek to provide some sort of resolution to her grievance. There was no explanation given for that unreasonableness. A possible explanation is that the someone at the respondent considered that because the claimant was going of on maternity leave so shortly, there was no need to devote any resource to looking into her grievance.

200. We considered that the unexplained unreasonableness taken in this factual context was sufficient to shift the burden of proof. Having proffered no explanation for that treatment or any tangible evidence as to how it arose, the respondent has failed to satisfy us that the treatment was not because of the claimant's pregnancy and subsequently her maternity leave.

201. We therefore upheld this claim, subject to issues of time which we consider below.

Failing to review her salary and / or award her a salary increase; If so was the award/review contractual or discretionary?

202. The salary review and potential increase were clearly discretionary rather than contractual but that did not of itself answer the question of whether the failure to conduct a review and give the claimant a pay rise were because the claimant was on maternity leave.

203. It was clear on Mr Fieldgrass' own evidence that the claimant did not receive an appraisal whilst on maternity leave because she was on maternity leave, The appraisal was one of the factors which would be considered in reviewing

the claimant's salary. There was no evidence to suggest that any other employee not on maternity leave had not had a salary review that year and we were left wholly in the dark as to which employees then received a pay rise.

204. In those circumstances there was ample evidence from which we could reasonably conclude that it was the fact that the claimant was on maternity leave which led to her not having her salary reviewed and not receiving a pay rise. The respondent, in failing to adduce any evidence as to how other employees fared or any explanation as to why the claimant did not receive a pay rise, has failed to satisfy us that there was no discrimination.

205. We therefore upheld this claim, subject to issues of time which we consider below.

Appointing Ms De Leon to the Claimant's role in September 2019

206. It seemed to us that we could make a positive finding that Ms De Leon was appointed at least in part because the claimant was on maternity leave. Had the claimant not been on maternity leave, there would have been a FOH manager in place to support the new inexperienced clinic manager.

207. That would not have been problematic for the respondent had they taken steps to put Ms De Leon in place as maternity cover because the treatment of the claimant would not in those circumstances have been unfavourable.

208. We therefore upheld this claim, subject to issues of time which we consider below.

Not considering her requests for flexible / part time working and alternative roles, promptly, or fairly or at all.

209. In respect of this aspect of the respondent's unfavourable treatment of the claimant we were unable to find facts from which we could reasonably conclude that the claimant's absence on maternity leave was a material reason for the treatment. This was largely because we concluded that Mr Fieldgrass simply had a fixed view that the respondent should not have part-time managerial staff.

Indirect discrimination (Equality Act 2010 section 19)

Issue: A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

ii) The Front of House Manager role could only be carried out full time;

and / or

ii. The Front of House Manager role could not be carried out part time on a temporary basis?

210. The respondent accepted that it had those PCPs.

Issue: Did the respondent apply the PCPs to the claimant?

211. The respondent accepted that it applied those PCPs to the claimant

Issue: Did the respondent apply the PCPs to persons with whom the claimant does not share the characteristic, i.e. men or would it have done so?

212. The respondent accepted that it would have applied the PCPs to male staff.

Issue: Did the PCP put women at a particular disadvantage when compared with men in that women are more likely to be primary carers for children than men?

213. The respondent accepted that the PCP put women at a particular disadvantage compared with men.

Issue: Did the PCP put the claimant at that disadvantage?

214. The respondent denied that the PCP put the claimant at that disadvantage although the respondent's case on the point was confusing. It said: 'The Claimant made clear in her in her email and application that she could not undertake the responsibilities of the FOH Managers position and sought alternatives such as Clinical Support and Treatment Coordinator – neither of which had any managerial content and in the case of the Clinical Support role, a junior position below Senior Receptionist.'

215. It is correct to say that in her initial communications with the respondent, the claimant was expressing doubt about being able to do the FOH manager role on a part-time basis. It is equally clear that her reservations were themselves connected with the fact that she was a new mother. Ultimately she was asking to do the FOH manager role on a part-time basis for a temporary period and the application by the respondent of the PCPs meant that they did not allow her to return on that basis. She was clearly put at a disadvantage because, like many other women who are primary carers for children, she required a period of part-time working.

Issue: Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

a) To avoid the burden of additional costs
b) To meet customer demands – by having a FOH Manager on site to allow access / facilitate access to therapists/staff and deal with any matters arising

The Tribunal will decide in particular:

- *was the PCP an appropriate and reasonably necessary way to achieve those aims*
- *could something less discriminatory have been done instead;*
- *how should the needs of the claimant and the respondent be balanced*

216. We bore in mind that it was for the respondent to satisfy us on the basis of cogent evidence that the PCPs were justified.

217. Looking at the issue of cost, the evidence we had from the respondent was vague and lacking in particularity. The only evidence we had about the respondent's financial position overall was that due to the pandemic it had had to sell one clinic (an event which post- dated the claimant's employment). We were told by Mr Fieldgrass that in 2020 the St John's Wood clinic was barely breaking even but again most of that period was after the claimant's employment terminated and coincided with the pandemic. The only hard financial information we were provided with were profit and loss accounts for the St John's Wood clinic for the period October 2019 – February 2020 and for the respondent as a whole January 2021 – March 2021. The former supported the view that the clinic was 'breaking even' during that limited period but did not tell us anything about the respondent's business as a whole. The latter appeared to show that the whole business was loss making in 2020 - early 2021 but did not assist us with an understanding of the position pre-pandemic.

218. The respondent did not adduce any clear evidence as to any additional costs of allowing the claimant to work part time in the FOH manager role on a temporary basis. Mr Fieldgrass accepted in evidence that it would have been a sensible option to job share the role between Ms De Leon and the claimant, with Ms De Leon being available to work in Richmond part of the time. Ms De Leon resigned after the point at which the respondent had declined to allow the claimant to return temporarily on a part-time basis to the FOH manager role so her resignation was not relevant to our assessment of whether the PCPs were justified but even if we factored it in we were not persuaded that there would be significant additional cost. Given what appeared to be some flexibility in the use of managers and staff and the fact that it appeared that St John's Wood had not an FOH manager in position at all for a period of many months during the claimant's maternity leave, we were not persuaded that the respondent would have had to hire a three day a week FOH manager to cover the days the claimant could not do during the limited period when the claimant would have needed to work part-time, so the recruitment costs Mr Fieldgrass referred to seemed to be unlikely to have been incurred.

219. The suggestion that employing a part -time FOH manager would affect the ability to meet customer demand seems to have arisen from the concerns raised by the claimant about keyholding responsibilities in her original flexible working request. The claimant's concern was a concern that in instances of child illness or childcare failure she might not be able to attend if the member

of FOH staff who was rotaed to open the clinic was also unavailable. That concern applied whether the claimant was working full or part time and is a matter which would be an issue for anyone with primary childcare responsibility.

220. The only reason for there to be an effect on the ability to meet customer demand would be if the respondent did not employ anyone to cover the remaining three days so that there would not be the backup of a keyholding FOH manager if a member of FOH staff who was due to open the clinic did not attend. However the respondent had Ms De Leon in place so that there was no reason why the FOH manager role could not be covered on the remaining days.

221. We also noted that on the respondent's evidence there was no FOH manager at all in St John's Wood for the bulk of the claimant's maternity leave and there was no evidence produced to us of any impact on the ability to meet customer demand during that period. Ms Gabriel's evidence of the incidence of difficulties in opening across all the clinics also suggested that in the relatively short period the claimant was asking to work part-time, even if the respondent had not provided cover for the other days, the issue was unlikely to have arisen.

222. We accepted that the aims the respondent put forward were legitimate ones but there was no cogent evidence produced to us that the PCPs were a means of achieving those aims, much less a proportionate means. There was therefore nothing very concrete for us to weigh against the very significant discriminatory effect on the claimant of the application of the PCPs which was that the claimant was unable to return to her employment as an FOH manager.

223. For these reasons we upheld the claimant's claim of indirect sex discrimination.

Victimisation

Issue: It was agreed that the Claimant's grievance of 28 January 2020 was a protected act within the meaning of s.27(2)(d) EqA 2010.

Issue: Did the Respondent subject the Claimant to the following detriments because she had done the protected act:

a. Denied the Claimant's appeal for flexible working / part time working;

224. A notable feature of Mr Fieldgrass' evidence was the annoyance he manifested about what he described as the claimant's long emails. It was clear to us that he disliked being challenged by employees, particularly if his

time was being taken up by long and articulate emails. What we did not detect was any material difference in the level to which he was offended by the claimant's emails in which she did not do a protected act and the email in which she did. Mr Fieldgrass was so unguarded with the Tribunal about the level of his annoyance at the emails in general and that response was of itself so unhelpful to his case that we did not consider we were being misled or that he was seeking to mislead us as to the effect of the protected act on his thinking. His evidence in this respect was particularly unvarnished.

225. In relation to his denial of the appeal, it was clear to us that Mr Fieldgrass had an entrenched view that managers should not be part time. Apart from the coincidence in timing (the fact that the protected act occurred shortly before the appeal hearing), we could see no facts from which we could reasonably conclude that the protected act played a material role in Mr Fieldgrass' decision to reject the appeal.

226. We accordingly did not uphold this claim.

Issue: Failed to consider the Claimant's request for flexible / part time working fairly;

227. So far as the appeal hearing itself is concerned, we did not find that the protected act played a material role. So far as the ongoing failure to consider the request was concerned, we could see no further facts from which we could draw an inference that the protected act was materially influencing Mr Fieldgrass' decisions. There was much evidence which showed that Mr Fieldgrass did not understand his responsibilities as an employer of a new mother and that he had an autocratic attitude towards his employees and it seemed to us that this was the explanation for the failures in his approach to the claimant's request.

228. We did not uphold this claim.

Issue: Wrote to the Claimant on 6 February 2020 saying that she would no longer be working for the Respondent;

Issue: Attempting to demote her to the role of Senior receptionist;

Issue: Not allowing the Claimant to work part time on a temporary basis until her grievance / childcare issues were resolved;

229. Essentially the same reasoning as we have outlined above applies to these claims and we do not uphold any of them.

Issue: Gave the Claimant a rota with working days that had previously been her rest days;

230. We have found as a fact that there was an innocuous reason for offering the claimant these particular working days.

231. We did not uphold this claim.

Issue: Dismissing the Claimant/causing the Claimant to resign

232. We understood this issue in essence to be posing the question whether the claimant's constructive dismissal was an act of victimisation. We have not found that any of the matters of complaint were materially caused by the protected act and so did not uphold this complaint.

Issue: Does the ET have jurisdiction over the acts which are prime facie out of time as the claims are:

a. Part of an act extending over time; or

b. It is just and equitable to extend time.

233. We looked carefully at whether there was a feature or state of affairs which linked acts and omissions of various different individuals which we found amounted to discrimination.

234. We noted that there was no separate maternity policy and nothing in the equality and diversity policy about the treatment of pregnant women and new mothers. This is an employer who employs mostly women of childbearing years.

235. So far as the remarks to the claimant about her appearance during pregnancy were concerned, we noted that the respondent had no policy about how to adjust dress code and uniform for pregnant employees. That was the context in which the criticisms of the claimant were enabled to occur.

236. There was no policy or process in place to appraise women on maternity leave in order to ensure that they did not miss out on a possible pay rise. There seemed to be no consistent practice in terms of appointing individuals to provide maternity cover which resulted in Ms De Leon's appointment to the claimant's role on what appeared to be a permanent basis.

237. The failure to deal with the claimant's grievance seems most likely to have arisen out of a sense that there was no need to attend to the issues of a person who was not at work to complain because she was on maternity leave.

238. What we found linked all of the matters we found to constitute discrimination of some sort was an underlying attitude that pregnant women and new mothers were expendable. The respondent had no particular desire to retain them and did not put in place policies and processes whether formal or informal which would prevent discrimination of the sort the claimant experienced from occurring. We considered that there was a continuing act such that all of the claims we found proven were presented in time.

239. In the alternative we would have considered it to be just and equitable to extend time in relation to any of the matters which were on their face out of time. The claimant had not had formal legal advice prior to maternity leave although she had approached an advice line. She was unaware of her rights but started a grievance to try and address some of the matters which arose during her pregnancy. She was then at home with her new baby. Once further issues arose when she was trying to return she made concerted efforts to resolve them internally. She took legal advice and appears to have received the sensible advice that she should pursue a process which might lead to retention for her employment. There seemed to us to be a good explanation for the claimant's delay in bringing proceedings.

240. The respondent did not suggest that it had been unable to call witnesses or that there was loss in cogency of evidence in relation to earlier matters because of the claimant's delay in bringing proceedings in relation to those matters. Its failure to investigate the claimant's first grievance deprived it of evidence it might otherwise have had.

Flexible Working

Issue: did the Respondent reject the Claimant's flexible working request on the basis of incorrect facts contrary to 80H ERA 1996. The alleged incorrect facts are that:

h. The Claimant agreed the role could not be done part time;

i. The Claimant agreed that she could not guarantee that she would be able to start work on time.

241. The mechanism of a formal flexible working request is that an employee asks for a specific variation to her contract and her employer responds in accordance with the procedure to that particular request.

242. The claimant's formal flexible working request was not for a variation so that she could work part-time in her existing FOH manager role; it was for one of two specific alternative part-time roles. The allegedly incorrect facts put forward by the respondent were not the basis for rejecting the formal flexible working request.

243. We therefore did not uphold this claim.

Conclusion

244. There will be a remedy hearing on 8 October 2021 unless the parties are able to agree remedy. The parties will receive a notice of hearing for a telephone case management preliminary hearing to give directions necessary for that hearing.

Employment Judge Joffe
27th July 2021
London Central Region

Sent to the parties on:
27/07/21.

For the Tribunals Office