# THE EMPLOYMENT TRIBUNAL

**BETWEEN**

| Claimant | and | Respondent |
|---|---|---|
| **Ms B Djagbo** | | **Women's Health Dulwich Limited** |

**Held at London South (By CVP Video)** **On 28 29 and 30 June 2021**

**BEFORE:** **Employment Judge Siddall**
**Ms Y Walsh**
**Mr D Green**

**Representation**

**For the Claimant:** **In person**

**For the Respondents:** **Ms B Tezcan, Director**

## JUDGMENT

The unanimous decision of the tribunal is that:

1. The claim of unfavourable treatment because of the protected characteristic of pregnancy and maternity brought under section 18 of the Equality Act 2010 succeeds in part.

2. The Claimant is awarded a sum of £3459.99 representing three months net earnings (plus interest of £758.75) and a sum of £12,000 representing injury to feelings (plus interest of £1517).

3. The Claimant is awarded an uplift of ten per cent on this figure as the Respondent failed to deal with the Claimant's grievance in breach of the ACAS Code of Practice on Grievance and Disciplinary Proceedings (£1773).

4. It is declared that the Respondent made unlawful deductions from the wages of the Claimant in relation to holiday pay and she is awarded the sum of £288.45 net.

5. The total sum awarded to the Claimant is £19,797.76.

# REASONS

1. The Claimant claims pregnancy/maternity discrimination and unlawful deductions from her wages. The issues were recorded by Judge Jones at a case management hearing on 3 August 2020 and we refer below to his Order which starts at page 42 of the bundle.

2. The hearing took place by video. It was not possible to hold a face to face hearing as a result of pandemic restrictions. None of the parties objected to this format. We heard evidence from the Claimant herself, from Ms Victoria Ita, Ms Sydney Amakye, Ms Berrin Tezcan and Mr Gokhan Tezcan.

3. Reasons for the decisions set out above were given on the day. After the Judgment had been sent out to the parties, the Respondent made an application for reconsideration dated 14 July 2021. That application has been refused under rule 72(1). However in light of the matters raised, these written reasons (requested by both parties) provide further detail about the tribunal's deliberations upon certain issues. As such they will differ in some respects from the oral reasons given on the day.

**Background**

4. The facts that we have found drawn from the evidence of both parties are as follows.

5. The Respondent is a private outpatient women's health clinic. Ms Tezcan is the owner and a director. She is a consultant obstetrician and gynaecologist. Her husband Mr Gorkhan Tezcan is a fellow director and he looks after the finances of the business.

6. The Claimant was employed as a medical secretary from 1 October 2018. She answered the telephone, booked appointments for clients, issued invoices, kept the clinic clean, sent off blood samples and provided other administrative support. She was initially employed for 55 hours a week, working six days a week from 8.30am to 8pm (although she could go home after 6pm if no clients were booked in. The question of whether the Claimant was required to be available for work or work calls between 6pm and 8pm on these occasions was unclear but is not ultimately of great significance).

7. In April 2019 the Claimant tendered her resignation, informing Ms Tezcan that she was going to look for a role with more flexibility. Ms Tezcan persuaded her to stay by offering to reduce her hours and employ a second medical secretary. Her hours reduced to 30 per week on a salary of £15,000. Her new contract states that she was entitled to 9 days paid holiday (plus the Christmas and New Year bank holidays) and that the holiday year would run from 1 May to 31 April. She was entitled to statutory sick pay.

8. In addition it is not in dispute that in practice the Claimant was paid for the two Easter bank holidays when the clinic was closed as there were no appointments, but that the clinic remained open for the two May bank holidays and the August bank holiday. These were treated as normal working days.

9. Ms Tezcan employed two other part time secretaries for short periods but neither worked out. The Claimant recommended a friend of hers, Ms Victoria Ita. Ms Tezcan agreed to employ her and she commenced work on 28 August 2019. The two women were expected to cover for each other during periods of absence. We have noted that Ms Ita's contract states, under the heading of 'Holidays' that 'you are required to cover your job share colleagues when he/she is on holidays/absence and extra days you will work will be paid at your

salary levels per day'. There is nothing else in the contract to state that she was required to cover periods of a colleague's sickness absence. In practice we accept that the Claimant and Ms Ita frequently swapped their days around and provided cover to each other on an informal basis. However we find that Ms Ita was not obliged under the contract to cover any unplanned absences that arose at short notice such as sickness absence.

10. It is the evidence of both the Claimant and Ms Ita which we accept that they were required to take holiday when Ms Tezcan was away, as this meant that there would be no clinics. We have seen the Respondent's holiday record (p194) which records that the Claimant took three days holiday in June 2019, three days in July and three days in November. We accept this as an accurate record of holiday taken.

11. The Respondent asserts that holiday had to be accrued on a month by month basis before it can be taken. This is not covered in the contract. It is their case that the Claimant had been told that she would have to take her November holiday as unpaid because she had not yet earned it and she agreed to this. An email dated 14 October 2019 from the Claimant to Ms Tezcan indicates that she and Ms Ita had agreed that the Claimant would take holiday in the week beginning 18 November and that Ms Ita would be off in the week of 16 December. There is no reply to this email in the bundle or other evidence suggesting that it had either been proposed or agreed that the holiday was to be unpaid. Mr Tezcan says that his wife had told the Claimant that her November holiday would be unpaid. Ms Tezcan does not deal with this in her witness statement. In light of the lack of evidence from the Respondent on this point we do not accept, on the balance of probabilities, that the Claimant had been told that her leave in November would not be paid.

12. It appears, from their oral evidence and from copies of Whatsapp messages provided in the bundle, that relations between the Claimant and Ms Tezcan were very good from the point at which she started work until the events of late 2019.

13. The business was due to move to a new and larger clinic in 2020. Both the Claimant and Ms Ita were aware of this. The Claimant says that she was told only positive things about the move and that there was no suggestion that her current job share arrangement could not continue after the move. Ms Ita stated that Ms Tezcan told her that she was looking to recruit a total of five medical secretaries, all of whom would work part time. Ms Tezcan asserts that she had indicated to both of them that when they moved she would be looking to recruit full time medical secretaries but there is no evidence of any such discussion taking place before December 2019. We prefer the evidence of the Claimant and Ms Ita on this point because we find that they would naturally be concerned about what would happen to their jobs following the move and would have raised this matter if there had been a suggestion that their existing arrangement was at risk.

14. In July 2019 the Claimant discovered that she was pregnant with her second child. She informed Ms Tezcan of this on or around 1 October 2019.

15. Ms Tezcan carried out two ultrasound scans for the Claimant without charge on 15 October 2019.

16. The Claimant's evidence is that after this Ms Tezcan's attitude towards her changed and she made comments like 'you will find it so hard' and 'we don't need this in payroll'. However we have also seen some cordial exchanges between the Claimant and Ms Tezcan over this period.

17. Ms Tezcan asserts that the Claimant told her that she might not return to work as she would have two small children. The Claimant denies this – she agrees that Ms Tezcan asked her about when she was likely to return but says that she told her that it was too early for her to decide. We find it more likely than not that the Claimant refused to commit herself at this point.

18. Ms Ita gave evidence. She stated that after the Claimant informed the Respondent that she was pregnant, Ms Tezcan spoke to Ms Ita on a number of occasions commenting that the Claimant was only 25 and was pregnant with her second child and that this would affect the business especially as the

second clinic was being prepared to open. We found Ms Ita to be a credible witness. She did not support the testimony of her friend, the Claimant, wholesale but was quite clear as to what she accepted and what she did not. We find it more likely than not that Ms Tezcan would have made these comments. Ms Tezcan was unsure about whether the Claimant would return to work (although it was far too early for the Claimant to make a decision on that matter) and it is likely that she discussed this with Ms Ita and also expressed some concerns about the effect this would have on her business.

19. It is agreed that Ms Tezcan asked Ms Ita if she knew of anyone who would be interested in a part-time role to cover the Claimant's maternity leave. She recommended a friend, M.

20. On Tuesday 5 November 2019 the Claimant sent an email to a client which she entitled 'Portland Delivery Office' instead of 'Portland Delivery Fees'. Ms Tezcan was not happy about this error. She contacted the Claimant by telephone that evening to express her views. Ms Sydney Amakye is a friend of the Claimant and observed this conversation. She said that the Claimant became upset during this conversation. After that Ms Tezcan messaged the Claimant about her error (page 156) telling her she should 'write her emails properly'. We find that it is more likely than not that Ms Tezcan reacted spontaneously to the incorrectly headed email and that she may well have spoken quite harshly to the Claimant about it. We find that it is not relevant to decide whether the conversation took place inside or outside the Claimant's contractual working hours.

21. The Claimant originally planned to start her maternity leave at the end of January 2020. She wrote to the Respondent to confirm this (page 154). At the request of the Respondent she agreed to bring her leave forward to 1 January 2020 as they had recruited maternity cover (see letter at page 159).

22. During the week of 25 November 2019 the Claimant felt unwell. She had back pain, headaches, nausea and a cold, but she continued to attend work. The Claimant says and we accept that on Monday 25 November Ms Tezcan asked the Claimant to contact Ms Ita to see if she could cover for her that week. Ms

Ita replied that she was not. We therefore find that Ms Tezcan knew as of 25 November that the Claimant was unwell.

23. The Claimant worked her normal days at the start of that week – Monday and Tuesday. Ms Ita's normal working days were Wednesday, Thursday and Friday and the Claimant was due to work on Saturday.

24. The Claimant contacted Ms Tezcan late in the evening of Friday 29 November 2019 to inform her that she was still unwell and would not be in work on the Saturday. It is not in dispute that Ms Tezcan was annoyed and upset. Ms Tezcan had a full clinic the next day and was concerned that this would have to be cancelled. She had immediately contacted Ms Ita to see if she could cover for the Saturday but Ms Ita had travelled to Manchester for the weekend and could not.

25. We have heard a recording of part of one of the conversations that took place between the Claimant and Ms Tezcan that evening. Ms Tezcan tells the Claimant that she had employed the two women so that they could cover each other, and that if Ms Ita could not come in she would have to give both of them their notice. She also said that if Ms Ita could not cover, the Claimant would have to come to work. We refer to the transcript of the conversation which is at pages 161-162 and is accepted by Ms Tezcan as accurate. She says 'it's not that you're having a traffic accident' and 'unless you are dying it is not acceptable not to come'.

26. During the course of the evening the Claimant attended the emergency department of her local hospital. She has produced an Urgent Care report. This shows that all was well with her pregnancy. The Claimant says and we accept that she was asked to see a midwife as she had not felt the baby move for a while. We find that she was genuinely unwell with common pregnancy-related symptoms.

27. Ms Tezcan states that she later phoned the Claimant back to apologise and resolve matters. However at 2.03am that night the Claimant emailed the Respondent at Ms Tezcan's request to confirm that she was too unwell to come

into work. Following Ms Tezcan's comments to her on the telephone, she asked if she was being made redundant.

28. Ms Tezcan's email reply timed at 2.44am states that she expected the two women to cover each other. She suggested to the Claimant that if she found these arrangements too difficult she could resign or start her maternity leave early and that she presumed she would not be returning to work.

29. In that email Ms Tezcan also states that when the move to the new clinic took place the Respondent would employ only full-time receptionists and this would apply to 'old and new' staff. She asks the Claimant to let them know her 'decision'.

30. She ends the letter 'we will miss you however we wish you the best with your future endeavours'.

31. Texts in the bundle between Ms Ita and Ms Tezcan show that she was not able to provide cover as she was in Manchester. There is a text at page 180 of the bundle in which Ms Tezcan gives Ms Ita one week's notice of the termination of her employment, timed at 6.44am on Saturday 30 November. In an email on page 181 Ms Ita reports that in a Whatsapp message on 1 December Ms Tezcan had asked her to come into work on 2 December which she did not understand as she understood that she had been sacked. Ms Ita did not go back to work for the Respondent.

32. On Monday 2 December 2019 the Claimant provided a copy of the Urgent Care report to Mr Tezcan and asked whether she should return to work on Tuesday 3 December. She notes that she had been removed from the work Whatsapp group chat and the website and had been asked to return her office keys. Mr Tezcan replied that they had arranged for emergency cover for the next few weeks and that the Claimant would not be required to return to work until her maternity leave began.

33. We have also seen an email from Ms Tezcan to Ms Ita dated 2 December in which Ms Tezcan states that she had decided to put CCTV in the new clinic

because the Claimant had told her that at St George's Hospital where her husband worked, the staff were stealing gloves and other supplies, trading them and selling them.

34. The Claimant lodged a formal grievance on 9 December 2019. She asserted that since informing Ms Tezcan of her pregnancy at 16 weeks she had been 'bullied, insulted and discriminated against'. She complained about:

    a. The way in which Ms Tezcan had dealt with the incorrectly headed email
    b. Derogatory comments about her pregnancy and the fact that she was aged 25, made to Ms Ita and to the Claimant in front of patients
    c. False accusations of theft made against her husband
    d. Comments that she may not come back to work after her maternity leave and that she wanted to be a housewife
    e. A statement that she would 'sterilise' her or 'put a coil in me that would last 10 years'
    f. Lack of work breaks
    g. The events over the night of 29/30 November 2019
    h. Removal from the Whatsapp chat and website and request to return keys
    i. Lack of communication from that point.

35. The Claimant asked for a meeting to discuss all these matters at which she would be accompanied by a trade union representative. Mr Tezcan acknowledges the grievance stating that they will look at it in January after the Christmas break and the move to a new clinic.

36. In the same email dated 25 December 2019 (Christmas Day) Mr Tezcan informs the Claimant that her December salary would show a reduction of 6 days pay, representing '4 days of holidays used that are not yet entitled in your contract year and 2 days of unpaid sick leave'. The Claimant replied that she had been offered the holiday as Ms Tezcan would be attending a conference in Paris so there would be no clinics (page 186). She stated that it had been

agreed between her, Ms Tezcan and Ms Ita that this would be a paid holiday. Ms Tezcan replied that she had advised the Claimant to cancel the holiday and it should be unpaid. She states 'this attitude and emails makes it impossible for me to work with you again …' therefore the Claimant had been told to stay at home. (page 184).

37. On 2 January 2020 the Claimant emailed Ms Tezcan to ask if she had been dismissed. Ms Tezcan replied to say that she was not dismissed, she was on maternity leave.

38. In January the Claimant contacted ACAS. The grievance was never dealt with. The Respondent's position is that they understood that the need to deal with the grievance had been overtaken by the conciliation process that commenced with ACAS.

39. The Claimant never returned to work although she did not formally resign and nor did the Respondent issue notice of termination.

**Decision**

**Unlawful Deduction from Wages/Holiday Pay**

40. The Claimant started work on 1 October 2018 and had completed twelve months' service by the start of November 2019.

41. Her first contract stated that she was entitled to fifteen days' paid holiday. There is no mention of bank holidays. The Respondent asserts, and the Claimant agrees, that in practice Christmas Day, Boxing Day, New Year's Day and the two Easter bank holidays were given as paid leave. The clinic remained open for the two May bank holidays and the August bank holidays which were treated as normal working days.

42. A full-time member of staff is entitled to 28 days paid annual leave each year under the Working Time Regulations 1998 which can include bank holidays. If we add five bank holidays to the fifteen day's leave given by the first contract,

that adds up to 20 days suggesting that the first contract is incorrect as it does not comply with the legal minimum entitlement to paid leave.

43. The matter is complicated by the fact that the Claimant reduced her hours in May 2019. At that point she was issued with a new contract stating that she was entitled to 9 days paid leave plus the Christmas and New Year bank holidays (3 days). The Respondent also purported to change the Claimant's holiday year to 1 May to 30 April each year.

44. The contract therefore states that the Claimant was entitled to 12 day's paid holiday each year although in practice we find that she was also awarded an additional two day's bank holiday at Easter taking her to 14 days.

45. The government's holiday pay calculator suggests that the Claimant would have been entitled to 16.8 days paid leave for the holiday year from 1 May 2019 – 11.8 days in addition to bank holidays.

46. Of this, we find that as at the end of November the Claimant had taken nine day's leave – three days in June, three in July, and three in November.

47. Mr Tezcan agreed that a deduction representing four day's pay had been made from the Claimant's salary in December representing the holiday taken in November.

48. The Respondent appears to have been acting on the basis that all paid annual leave had to have accrued on a month-by-month basis, before it could be taken.

49. Under regulation 15A of the Working Time Regulations, the Respondent would be entitled to take this approach for the first year of the Claimant's employment. However she had passed her first anniversary on 30 September 2019. After that the Claimant was entitled to take any part of her annual leave allowance at any time during the year, subject to the Respondent's approval.

50. It is possible that the Respondent took the view that the change of contract in May 2019, and the re-starting of the holiday year at that point, had the effect of

're-setting the clock' in terms of the accrual of leave. However given the clear wording of regulation 15A we find that approach is not in accordance with the Working Time Regulations.

51. There is no evidence to suggest that the Respondent refused permission for the Claimant to take leave in November 2019. We find that the Claimant was taking leave as Ms Tezcan was to be away. The Respondent's assertion that the Claimant had been told that any leave taken would have to be unpaid is not made out, for the reasons set out above.

52. We find that as the Claimant had been employed for over a year as at the start of November 2019 she was entitled to take three days of her holiday entitlement in the week of 18 November. This was within her legal entitlement to paid holiday of at least 11.8 days per year, of which she had already taken six days.

53. We therefore find that the Respondent made an unlawful deduction from the wages of the Claimant in December 2019.

**Discrimination because of Pregnancy/Maternity**

54. Section 18(2) of the Equality Act 2010 states that a person discriminates against a woman if they treat her unfavourably because of pregnancy or because of illness suffered by her as a result of it during the protected period.

55. All the events complained about took place during the protected period as they occurred after the Claimant had advised the Respondent that she was pregnant and before her maternity leave commenced.

**56.** As to the test we should apply, we refer to the case of *Indigo Design Build and Management Limited and Bank v Martinez* [UKEAT/0020/14) in particular paragraphs 29 and 30. In each case we must ask ourselves whether, if unfavourable treatment is established it is 'because of' pregnancy and maternity. We must ask ourselves 'the reason why' rather than apply a 'but for' test. We have this guidance in mind as we consider each allegation.

57. We refer to the individual allegations of discrimination set out in the Case Management Order on page 43 of the bundle and we deal with each of these in turn.

**58. A) Ms Tezcan telling the Claimant on 5 November 2019 that an email the Claimant had sent was 'stupid and made no sense'**

59. The Claimant asserts that Ms Tezcan's attitude towards her changed after she announced her pregnancy around 1 October. However we have seen cordial exchanges between the two of them by text and we note that Ms Tezcan completed two ultrasound scans for the Claimant without charge. Taking all the evidence into account, we find that as at the beginning of November relations between the Claimant and Ms Tezcan had not been significantly affected by news of the Claimant's pregnancy.

60. We find that Ms Tezcan called the Claimant in the early evening on 5 November and expressed her unhappiness about the email in strong terms. She had high standards of her staff and was mindful of the need to give clear information to her clients. We accept that the Claimant was upset by this conversation. It was followed by a Whatsapp message which effectively tells the Claimant not to make the same mistake again.

61. We find that Ms Tezcan dealt with this error harshly and it was upsetting for the Claimant. The error was not major but Ms Tezcan viewed it in a poor light. We consider that her reaction was somewhat disproportionate to the error made. We reach the view that this was characteristic of Ms Tezcan – she herself agreed that she would tend to react quickly and in strong terms when something went wrong but that she would usually calm down upon reflection.

62. However when we consider Ms Tezcan's motivations for calling and messaging the Claimant we are not able to conclude that she raised this matter because the Claimant was pregnant. Ms Tezcan was entitled to raise a concern if she considered that the Claimant had made a mistake. She did so quite harshly, but

this was not unusual and we do not consider that she reacted more adversely because of the Claimant's pregnancy.

**63. B) Allegations about comments made to Ms Ita around November 2019:**

**64. It is alleged that Ms Tezcan said to Ms Ita that 'the claimant might not return from her maternity leave because she would have two children and might not be financially stable'.**

65. When this comment was put to Ms Ita during her evidence, she did not agree that Ms Tezcan had said it. Ms Ita stated instead that Ms Tezcan had commented that the Claimant was only 25 and would have two children. We accept Ms Ita's evidence and note that in this regard she does not support the Claimant's allegation about what was said to her. The allegation is therefore not made out and we find that the Claimant has not established facts from which an inference of unfavourable treatment should be drawn.

**66.** '**The Claimant alleges that Ms Tezcan said to Ms Ita that the claimant's focus was now on being a housewife'**

67. Ms Ita confirms the comment was made. We accept her evidence and find that such a comment is likely to have been made. It may have been unwise for Ms Tezcan to have such a conversation with Ms Ita. However we do not find that such a comment amounts to unfavourable treatment in the particular circumstances of this case. We find that it was not made maliciously in an attempt to denigrate the Claimant but was made in light of Ms Tezcan thinking ahead about what might happen, whether the Claimant might return and the effect this would have on the cover provided within the business for reception.

**68. The third comment allegedly made to Ms Ita by Ms Tezcan is that she said the 'Claimant's husband was taking PPE from St George's hospital and selling it'.**

69. This allegation is not made out. We have considered the email dated 2 December 2019 which simply asserts that the Claimant had said that staff at

her husband's workplace had been stealing equipment and selling it. The email does not contain an allegation that the Claimant's husband had been stealing. The Claimant has not established primary facts from which we would be able to conclude that unfavourable treatment had taken place.

**70. C) Ms Tezcan telling the Claimant on 29 November that she should come to work the following day unless she was dying or had been in a traffic accident.**

71. We have found that the Claimant's reason for absence on 30 November was pregnancy-related. She told Ms Tezcan that she was suffering from classic pregnancy symptoms – headache, backache and nausea – combined with a cold. When she attended the emergency department later that night she was referred to a midwife to check the health of her baby as she had not felt movements for a while.

72. Prior to attending hospital, the Claimant informed Ms Tezcan that she would not be able to attend work on Saturday 30 November as she was not well. Ms Tezcan reacted to this news with anger – she appears to have been completely outraged by the suggestion that the Claimant could not come to work.

73. We find that the words alleged were certainly said. We heard them on the recording and they are set out in the transcript.

74. Ms Tezcan's case in relation to the events of 29 November is that the Claimant and Ms Ita had formed a plan to 'provoke' her into overreacting in order to have grounds to bring a claim against the Respondent and obtain a financial settlement. She argues that the two women were aware of her tendency to react spontaneously to an issue before calming down. She suggests that the Claimant decided to wait until late Friday night before informing the Respondent of her likely absence the next day, knowing that Ms Ita would not be able to cover for, thus provoking the angry reaction which then ensued.

75. We considered Ms Tezcan's argument but did not find it at all credible. It ignores the fact that:

a. The Claimant had been unwell since Monday 25 November and Ms Tezcan was aware she was not well and the reasons for this;
b. Despite being unwell the Claimant had come into work on Tuesday 26 November;
c. Ms Tezcan was aware that Ms Ita had not been able to provide cover for the Claimant at the start of the week;
d. Ms Ita was not obliged under her contract to provide cover at short notice during periods of her colleague's sickness absence – but only for planned absences such as holidays;
e. Relations between the Claimant and Ms Tezcan had remained friendly up to this point following her announcement of her second pregnancy;
f. It is clear from the recording of the telephone conversation from the night of 29 November that the Claimant reacted to what Ms Tezcan said with genuine shock and distress, especially when it was suggested that she might lose her job.

76. In summary we find no evidence that the Claimant had colluded with Ms Ita and that she had a 'hidden agenda'. We find that despite being unwell she had struggled into work during the week but realised on the Friday evening that she would not be well enough to come into work the next day. She was then told that she had not been in a traffic accident and should come into work unless she was 'dying'.

77. We have no hesitation in finding that this statement amounted to unfavourable treatment. It was entirely unreasonable for Ms Tezcan to insist that the Claimant should come into work when she was unwell if Ms Ita could not cover for her. We further find that the statement was made because of the Claimant's pregnancy-related illness, and the fact that she was going to be absent as a result.

**78. D) Ms Tezcan telling the Claimant that from 1 January 2020 her part time role would cease to exist and that she would be expected to return full time.**

79. This statement is clearly set out in Ms Tezcan's email to the Claimant timed at 2.44am in the morning of Saturday 30 November. It is made clear that the full-time requirement will apply to 'old and new receptionists'.

80. Ms Tezcan asserts that she had previously said told the Claimant and Ms Ita that she would be looking for full time staff at the new clinic. We do not accept that. We prefer the evidence of Ms Ita and the Claimant who told us that previously there had been no suggestion that their job share arrangement could not continue, and any discussion about additional recruitment was focussed upon part time workers. We find that the first time this is mentioned is on the morning of 30 November and again this was part of an angry reaction to the Claimant's statement that she could not come into work that day.

81. Ms Tezcan also said in evidence that the reason the job share arrangement could not continue was that Ms Ita said she would not return to work. In fact it was Ms Tezcan's decision to dismiss Ms Ita on 30 November. The next day (1 December) she asked Ms Ita if she would be returning – understandably, Ms Ita declined. The exchange of communications set out above makes it clear that the Claimant was told that her role would have to be full time from January *before* Ms Ita said that she would not return. The Claimant was not able to work full time due to her childcare arrangements. Indeed she had previously resigned to find another job with more flexibility but had been persuaded to stay on. The statement that if she returned to work she would have to come back full time amounted to unfavourable treatment. It had not been discussed previously and we find that it was made solely in response to the Claimant's proposed pregnancy-related sickness absence.

**82. E) Mr Gorkhan Tezcan telling the Claimant on 2 December 2019 that she need not return to work even though she was fit to do so because cover had been obtained for her.**

83. The Claimant's illness lasted just a couple of days and she indicated that she was well enough to return on 3 December. She was then told not to return to work as cover had been arranged and that she could stay off until her maternity leave began. We have noted that this statement was accompanied by: the

removal of the Claimant from the work Whatsapp group chat; removing her name from the website; asking her to return her keys; a stated assumption that she would not be coming back; and informing her that Ms Tezcan could not work with her any more. We are not surprised that the Claimant formed the impression that her employment was being brought to an end.

84. We find that in these circumstances preventing the Claimant from returning to work on 3 December amounted to unfavourable treatment. She was forced to stop work a month before her planned maternity leave start date in circumstances that led her to assume that she was being sacked. Such treatment was wholly motivated by the fact that on 29 November the Claimant had informed the Respondent that she could not attend work because of pregnancy-related illness.

**85. F) Failing to deal with her grievance**

86. When the grievance was received, it was acknowledged and Mr Tezcan said it would be dealt with after Christmas. During January the Respondent was contacted by ACAS and they state and we accept that they considered that the matter was now going down a different road and that they were not obliged to deal with it.

87. This may have been unfavourable treatment but the Respondent acted in this way because they did not understand the importance of dealing with the grievance. Mr Tezcan said that prior to this he had not heard of ACAS. They assumed that the conciliation process overtook the grievance process. They did not ignore the grievance because the Claimant was pregnant.

**88. G) making unlawful deductions from the Claimant's December pay.**

89. The Claimant was only entitled under her contract to Statutory Sick Pay. Under SSP rules she was not entitled to be paid for the first two days of her sickness absence so the Respondent's actions were lawful.

90. We have already found that the deduction in relation to holiday pay amounted to an unlawful deduction from wages. This was due to a misunderstanding of the law by the Respondents.

91. We have carefully considered whether nevertheless the Respondent was motivated by a desire to retaliate against the Claimant for taking pregnancy-related sickness absence. We have noted that in December 2019 the Respondent appears to be assuming that the Claimant's employment was coming to an end and that she would not be returning after her maternity leave. We accept that it is possible that if the Claimant had not taken sickness absence the holiday pay deduction would not have been made. However that is not the test. In relation to these two allegations we find that the Respondents were acting on the basis of their understanding of the legal position. Both actions were unfavourable but were not carried out simply because of the pregnancy-related sickness absence.

**92. Did the discrimination occur during the protected period?**

**93.** Yes. The discrimination took place after the Claimant had announced that she was pregnant In October and before her maternity leave commenced on 1 January.

**REMEDY**

**94.** We award the Claimant the following sums:

**Unlawful Deductions**

95. The Claimant is entitled to £288.45 being the sum she calculates as three days net pay representing the three day's holiday pay deducted from December salary.

**Compensation for Discrimination**

**Loss of Earnings**

96. The Claimant did not look for work from the date her maternity leave ended in January 2021 until the date of hearing. She limits her claim for loss of earnings to three month's net pay and does not claim future loss.

97. The Claimant told us that in light of what happened at the end of 2019 she was not able to return to work with the Respondent. She says she suffered a significant loss of confidence and did not feel able to look for another job. She has been doing some online courses.

98. The Claimant says she is now feeling a little stronger but has decided to stay at home until her child is 18 months or two years old and can go into full time nursery.

99. We accept that the Claimant was unable to return to her job with the Respondent. She was threatened with dismissal for taking sickness absence, told not to return to work and informed that Ms Tezcan could no longer work with her. We have considered whether she failed to mitigate her losses by not seeking employment from January 2021 onwards, but we accept that she was not in a state to be able to look for work at the end of her leave due to the experience that she had. We find that her loss of confidence is directly attributable to the actions of the Respondent before her maternity leave commenced.

100. However we find that the Claimant could now seek work as she has started to recover from what happened, but she has chosen not to do so. She has made a personal choice to stay at home with her child for the time being.

101. In all the circumstances we think an award of three months loss of earnings is appropriate.

**Injury to Feelings**

102. The Claimant seeks an award in the middle band of **Vento** of £12,000. In their application for reconsideration the Respondent argues that any award should be in the lower band as the discrimination arose out of a 'one off' event.

103. The tribunal considered carefully whether an award should be made either towards the top end of the lower band or in the middle band. After discussion we agreed that an award in the middle band is appropriate. We agree that the discrimination *arose* out of a one-off event, namely the Claimant informing the Respondent that she could not come into work as she was not well. We have also noted that the events complained about took place within a very short space of time. However the repercussions for the Claimant were both numerous and severe: she was threatened with dismissal; she had to leave the job she enjoyed at very short notice and in advance of her planned maternity leave start date; she was removed from the work whatsapp group and website; she was asked to return her keys; she was told that if she came back she would have to work full-time; and she was unable to go back to work with the Respondent, in effect losing her job as a result of the unfavourable treatment she experienced. She says she suffered a stressful pregnancy after that. She lost confidence and felt unable to apply for other jobs for several months. She was tearful. She did not seek medical assistance but she attended three counselling sessions through her church. She moved back in with family after the birth as she felt overwhelmed.

104. We think an award towards the lower end of the middle band is appropriate and we agree the Claimant's figure of £12000.

105. We do not award aggravated damages in this case. The humiliation which the Claimant says she experienced, and upon which she bases her claim for such an award, is allowed for in the award for injury to feelings.

106. We award interest at 8% per annum on the figure for injury to feelings from 30 November 2019 until 30 June 2021, a total of 577 days at £2.63 per day. This comes to £1517.

107. In terms of the award for loss of earnings we award interest at the same daily rate of £2.63 from the midpoint between 30 November 2019 and 30 June 2021. This amounts to 288.5 days at £2.63 which comes to £758.75.

108. The Claimant seeks an uplift in light of the Respondent's failure to address the grievance. We agree this should have been done but note that the Respondent is a small organisation without an HR department. They operated under a mistaken belief that they did not need to deal with the grievance once ACAS was involved. We award an uplift of 10%. This comes to £1773.

109. The total sum awarded to the Claimant is £19,797.76

**Employment Judge Siddall**
**Date: 29 July 2021**