EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss T Waite	v	Thompson Cains Limited t/a Stericare

Heard at: Reading (by CVP) **On**: 20, 21 and 22 January 2021

Before: Employment Judge Hawksworth
Ms G Lock
Mrs F Tankard

Appearances
For the Claimant: In person
For the Respondent: Mr M Howson (senior litigation consultant)

JUDGMENT

1. The claimant's complaint of maternity discrimination succeeds in respect of issue (iii)(c) of the list of issues, that is the claimant being told by Mr Holt in an email on 16 August 2018 that she could take accrued annual leave or 52 weeks maternity leave.

2. The claim was submitted outside the primary 3 month time limit but it is just and equitable to extend time to hear that complaint.

3. The claimant's other complaints of maternity discrimination and sex discrimination do not succeed.

4. The claimant is not entitled to pay in lieu of any untaken annual leave which accrued during her maternity leave as she remains employed by the respondent, but the tribunal records that the respondent has accepted that the claimant will be entitled to pay for any outstanding leave on the termination of her employment.

5. The claimant's complaint of unauthorised deduction from wages in respect of sick pay for eight weeks during the period 16 November 2018 to 18 January 2019 succeeds.

6. The claimant is awarded compensation for maternity discrimination in the sum of £8,063. This is made up of:

    6.1. £2,084 in respect of financial losses arising from the discrimination, of which £185 is interest; and
    6.2. £5,979 in respect of injury to feelings, of which £979 is interest.

7. The claimant is awarded £715 in respect of unauthorised deduction from wages (sick pay for eight weeks during the period 16 November 2018 to 18 January 2019).

8. The total award to the claimant is £8,778 (£8,063 + £715).

REASONS

Introduction

1. The claimant worked for the respondent from 4 April 2016. She brought her employment tribunal complaint on 15 May 2019, after Acas early conciliation from 18 March 2019 to 18 April 2019. The respondent defended the claim.

2. The hearing took place before us by video (CVP). There was a joint bundle of 174 pages. Page references in this judgment are to the bundle.

3. At the start of the hearing, the respondent made an application in respect of its witness evidence. A statement for Mr Harry Thompson was served on the claimant on 18 January 2021. However, Mr Harry Thompson was unable to attend the hearing because of urgent business. The respondent sought to rely instead on a statement by Mrs Nicola Thompson which was in substance the same as Mr Harry Thompson's statement (both their statements recorded what had happened according to the documents, because neither Mr Harry Thompson nor Mrs Thompson were involved in the respondent's business at the time of the matters the claimant complains of). We allowed the application.

4. The tribunal took some time for reading. After some initial connectivity problems were resolved, we heard evidence from the claimant and Mrs Thompson on 20 January 2021. We heard closing comments from the respondent's representative and the claimant on 21 January 2021. We gave our judgment on liability on the morning of 22 January 2021, and explained our findings of fact and conclusions. We then heard evidence on remedy from the claimant and closing comments on remedy from both parties. We gave our judgment on remedy on 22 January 2021. The claimant requested written reasons in respect of both liability and remedy judgments.

Issues for decision by us

5. The issues for us to decide were identified at a preliminary hearing on 5 March 2020 and were set out in the case management summary (pages 30-32) as follows:

Time limits/limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis.

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before [19 December 2018] is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 18: pregnancy & maternity discrimination

(iii) Did the respondent treat the claimant unfavourably as follows:

a. In the way that the respondent handled the claimant's return to work discussions and return to work? (c. July 2018 — August 2018)
b. Reneging on an agreement that the claimant was to be permitted to take her annual leave accumulated during the maternity at the conclusion of her maternity leave? (26 July 2018 - 14 August 2018)
c. At a meeting with John Holt on the 16 August 2018 insisting that the claimant was either to take 14 days annual leave at the end of the maternity leave and [then return] to work or she was to be required to take additional maternity leave of 1 year?
d. On the 22 November 2018 threatening to discipline the claimant for her non-attendance at work following a period when the claimant was signed off sick?
e. By promoting Hannah Gidden/Trevelyan and failing to consider the claimant for promotion?
f. By the matters mentioned above creating an atmosphere/relationship with the claimant resulting in the claimant becoming ill and which made it impossible for the claimant to return to work at the end of her maternity leave period?

(iv) Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?

(v) Was any unfavourable treatment: because the claimant was on compulsory maternity leave or because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

EQA, section 13: direct sex discrimination

(vi) (In the alternative and if section 18 EQA does not apply) has the respondent subjected the claimant to the following treatment referred to in (iii) (a)-(e) above?

(vii) Was that treatment “less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators”) in not materially different circumstances?

(viii) If so, was this because of the claimant’s sex?

Holiday pay

(ix) Is the claimant entitled to £4,539.88 holiday pay?

(x) Has the respondent failed to pay the claimant holiday?

Unauthorised deductions/Sick pay

(xi) Did the respondent make unauthorised deductions from the claimant’s wages in accordance with section 13 of the Employment Rights Act 1996 by failing to pay to the claimant sick pay in the sum of £754?

Remedy

(xii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (“section 207A”)?
c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Findings of fact

6. The respondent's business is dental equipment servicing. On 4 April 2016 the claimant began employment with the respondent as a service co-ordinator. Her role involved arranging jobs, ordering parts and dealing with accounts. The legal name of the claimant's employer is Thompson Cains Ltd t/a Stericare (this is on the claimant's contract and payslips at pages 46 and 158).

7. On 20 November 2017 the claimant began a period of maternity leave. We find that before she went on maternity leave the claimant spoke to one of the respondent's directors, Mr John Thompson, to say that she planned to take most of her annual leave at the end of her maternity leave. She said that she would tell the respondent her return to work date closer the time, but that she was likely to return towards the end of September/start of October 2018 (page 125).

8. The birth of the claimant's baby was traumatic, and the claimant had post-natal depression. She lived in a very isolated way after the baby was born and throughout her maternity leave.

9. On 15 February 2018 the claimant had a return to work meeting with Mr Matthew Griffin at the respondent's office (page 113). The claimant told Mr Griffin that she wanted to return to work but not full time. She confirmed the days that she would be able to work. At this stage the claimant made a verbal request only. Mr Griffin said he would pass this information on to Mr John Thompson, but there is no evidence that the respondent took any steps to deal with the claimant's request at this time.

10. At the meeting on 15 February 2018 the claimant was introduced to Hannah Giddens. The claimant had not met Ms Giddens before. We find (based on email signatures on documents in the bundle) that Ms Giddens had been employed by Thompson Medical as a customer care manager. Thompson Medical was an associated company of the respondent; it dealt with servicing medical equipment for hospitals. There was some overlap between the two companies in that the roles of some staff including Mr Griffin included work for both companies. Although she worked for a different company, Ms Giddens had been covering the claimant's work while the claimant was on maternity leave. Ms Giddens had taken 5 weeks annual leave at the time of her wedding. We accept the claimant's evidence on this point as it was included in her claim form and was not challenged by the respondent.

11. The claimant went to the respondent's office again on 26 July 2018 (pages 129 and 126). On the same day, she made a request on the respondent's annual leave system to take annual leave at the end of her maternity leave, from 20 August 2018 to 12 September 2018.

12. Mr John Holt, another of the respondent's directors, replied to the claimant's annual leave request by email (page 125). He said, 'That amount of leave in

one tranche would require prior approval subject to business needs.' The claimant emailed Mr Holt to confirm that she was in fact asking to take annual leave until 22 September w2018 because she had booked a holiday and would not be able to return to work until that date. She was requesting 25 days annual leave (one of which was a bank holiday). She was assuming that if she had insufficient days annual leave to cover the whole period between 20 August and 22 September 2018, she could take unpaid leave.

13. On 3 August 2018, Mr Griffin emailed the claimant to ask her to put her flexible working request in writing to Mr John Thompson (page 129). On 4 August 2018, in response to Mr Griffin's email, the claimant sent an email request for flexible working to Mr John Thompson (page 131). She said that she wanted to return to work on 24 September 2018 and work 2 days a week. She also mentioned her request in an email to Mr Holt on 7 August 2018 (page 124).

14. On 14 August 2018 Mr Holt emailed the claimant about her annual leave request. He said, 'The maximum we would be prepared to go with is 15 days in one tranche' (page 124). The claimant replied by email asking what that meant for her, whether she would have to take 14 days holiday from 20 August 2018 and then come back to work, or whether she would have to come back to work on 20 August 2018 and then take 14 days holiday from 7 September 2018.

15. In an email on 16 August 2018 Mr Holt spelled out the claimant's options (page 123). He said:

    "1. Your holiday entitlement is 15 days accrued to the end of August plus 6 days for the Bank Holidays which have occurred to date making a total of 21 days available.
    2. You have the option to take 52 weeks Maternity leave which I believe is the 19th November but the end of SMP is the 18th August as discussed previously
    3. We need a return to work date from you and as part of that, to consider your request for flexible working, we need you to complete a formal request so that we can consider the implications.
    4. I will forward on a letter by post to allow you to make the flexible working request please let me have a current address."

16. Mr Holt did not tell the claimant that it was open to her to take part of her remaining unpaid maternity leave. His email left the claimant with the understanding that her only options were to return to work earlier than she had intended, or to take her full 52 weeks maternity leave (a further 13 weeks of unpaid leave).

17. The claimant did not return to work on 20 August 2018. On 24 August 2018 she emailed the respondent to say that she intended to take her full 52 weeks maternity leave. The respondent had already started paying the claimant holiday pay for the 10 working days in August after the expiry of her statutory maternity pay. The claimant returned the holiday pay for

August as she understood that it could affect her entitlement to remain on maternity leave.

18. After her pay in August 2018 which comprised her final statutory maternity pay for the period to 19 August 2018, the claimant was not paid by the respondent, either in respect of salary or holiday pay. The claimant's contract of employment does not provide for payment in lieu of annual leave other than on termination of employment (page 46).

19. On 28 August 2018 Mr Holt emailed the claimant to confirm that the end date of her 52 weeks maternity leave would be 19 November 2018. He said that the respondent needed the claimant to complete an application form for her flexible working request (page 122).

20. On 29 August 2018 the claimant emailed Mr Holt to say that she would be in touch regarding her flexible working request in the near future (page 122). We find that the claimant did not in fact complete this form.

21. On 20 September 2018 Mr Holt emailed the claimant again about her holiday entitlement and request for flexible working (page 133).

22. On 16 November the claimant had corrective surgery related to the birth of her child. The hospital issued a fit note which said she was post-operative and unfit for work from 16 November for 4 weeks (to 14 December 2018) (page 134).

23. The claimant's 52 week maternity leave ended on 19 November 2018. The claimant did not return to work and she did not notify the respondent that she was unfit due to sickness absence. The respondent's handbook set out arrangements for employees to notify sickness absence. It required notification on the first day of incapacity (page 59).

24. On 22 November 2018 Ms Giddens wrote to the claimant to say that she had been absent from work since 19 November 2018 without explaining the reasons for her absence, and that if she did not contact the respondent by 6 December 2018 they would have no option but to commence disciplinary action against her (page 135).

25. On 14 December 2018 the claimant sent an email to the respondent's directors. It said, "*Directors Please see attached*" (page 132). In the respondent's amended grounds of resistance, the respondent said that the attachment to this email was a fit note (page 43). We find the attachment was the fit note issued by the hospital on 16 November 2018. (It cannot have been the claimant's second fit note, because the email predated the second fit note, which was issued on 21 December 2018.) Mr John Thompson replied to the claimant on 14 December 2018, asking the claimant to confirm her home address (page 132).

26. On 2 January 2019 the claimant sent another email with the same wording ("*Directors Please see attached*") and confirming her home address (page 132). We find that this email enclosed the second fit note (page 136). This

second fit note certified the claimant as unfit for work from 21 December 2018 to 18 January 2019.

27. The claimant did not return to work on 19 January 2019 after the expiry of the second fit note. She was still recovering from the effects of the birth and her operation for a period of around 6 months after the operation, that is until mid-May 2019. She did not however obtain any more fit notes.

28. On 28 February 2019 the respondent wrote to the claimant to ask her to attend a welfare meeting on 28 March 2019 (page 138). The claimant replied on 8 March 2019 and said she could not confirm the suggested date because she was awaiting a medical review which was due around that time (page 140).

29. On 20 March 2019 the respondent sent a letter to the claimant by email asking her to contact them (pages 140 and 142). The claimant did not get in touch and did not attend the welfare meeting that was set for 28 March 2019.

30. On 15 May 2019, after Acas early conciliation from 18 March 2019 to 18 April 2019, the claimant submitted her employment tribunal claim form.

31. The respondent wrote to the claimant again on 30 May 2019 (to her home address) asking her to contact them (page 144). After that date the claimant remained employed by the respondent and was contacted by the respondent from time to time but she did not contact the respondent about her employment or send any further fit notes. She was not paid after August 2018.

32. In March/April 2019 Mr Holt retired and he was not in contact with the respondent again after that.

33. Sadly, in October 2019, Mr John Thompson died.

The relevant law

Discrimination

34. Section 13 of the Equality Act 2010 prohibits direct discrimination. It provides:

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

35. Protected characteristics are set out in section 4 of the Equality Act 2010 and include i) pregnancy and maternity and ii) sex.

36. Establishing 'less favourable treatment' for the purposes of section 13 requires a comparison with someone who is more favourably treated than the claimant, where there is no material difference between their

circumstances and the claimant's circumstances (section 23). The person who is more favourably treated is known as the comparator. They can be a real person or a hypothetical person.

37. Pregnancy and maternity discrimination at work is expressly prohibited by section 18 of the Equality Act:

> *"(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
>
> *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*
>
> *(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
>
> *(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*
>
> *(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*
> *(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.*
>
> *(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—*
>
> *(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or*
> *(b) it is for a reason mentioned in subsection (3) or (4)."*

38. Therefore, section 18 prohibits any unfavourable treatment which is because of pregnancy or because of illness suffered as a result of pregnancy or because of exercising or having exercised the right to ordinary or additional maternity leave. Unlike complaints under section 13, section 18 does not require any comparison with a comparator.

39. Section 18 establishes what is known as the protected period. Where the woman has the right to additional maternity leave, the protected period ends at the end of the additional maternity leave period or when she returns to work before the end of that period (section 18(6)).

40. Section 18(7) deals with the overlap between section 13 complaints of direct sex discrimination and section 18 complaints of pregnancy and maternity discrimination. A complaint of direct discrimination because of pregnancy or maternity which relates to treatment during the protected period cannot be brought as a complaint of direct sex discrimination contrary to section 13.

41. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

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

42. In a case of direct discrimination, this means that if there are facts from which the tribunal could properly and fairly conclude that less favourable treatment (or, in maternity discrimination, unfavourable treatment) was because of the protected characteristic, the burden of proof shifts to the respondent.

43. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic. The respondent would normally be required to produce “cogent evidence” of this. If there is a prima facie case and the respondent’s explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

Discrimination time limit

44. The time limit for bringing a complaint of direct discrimination is set out in section 123. A complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (sometimes called the ‘primary’ time limit), or after such other period as the tribunal thinks just and equitable (sometimes referred to as whether it would be just and equitable to extend time). Conduct extending over a period is treated as done at the end of the period.

45. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal emphasised that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were

fresh). In Adedeji v University Hospitals Birmingham [2021] EWCA Civ 23 the Court of Appeal considered the case of British Coal Corporation v Keeble [1997] UKEAT 496/98 which referred to the factors in section 33 of the Limitation Act 1933. The Court of Appeal in Adedeji explained that the best approach for a tribunal considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, rather than adopting a rigid adherence to a checklist, as this can lead to a mechanistic approach.

46. Section 123 of the Equality Act is subject to provisions relating to Acas early conciliation. These are contained in section 140B of the Equality Act. Sub-section (3) says that:

> *"In working out when a time limit … expires the period beginning with the day after Day A and ending with Day B is not to be counted".*

47. Day A is the day on which Acas is notified for early conciliation, and Day B is the day on which the claimant receives the early conciliation certificate.

Deduction from wages

48. Section 13(1) of the Employment Rights Act 1996 provides:

> "*An employer shall not make a deduction from wages of a worker employed by him unless –*
>
> *a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
> *b) The worker has previously signified in writing his agreement or consent to the making of the deduction."*

49. Wages are defined in section 27 of the Employment Rights Act. Sub-section (1)(b) provides that wages include:

> *"statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992."*

Annual leave

50. Regulation 14 of the Working Time Regulations 1998 provides that payment in lieu of untaken annual leave may be made when the worker's employment terminates:

> *"(1) This regulation applies where—*
> *(a) a worker's employment is terminated during the course of his leave year, and*
> *(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which*

he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)..."

51. There is no statutory entitlement to pay in lieu of untaken annual leave other than on termination of employment.

Conclusions on liability

52. We applied those legal principles to our findings of fact in respect of the issues we had to decide, and we reached the following conclusions.

Discrimination

53. At the preliminary hearing there were six points identified as allegations of pregnancy or maternity discrimination or, in the alternative, sex discrimination. They are described as issues (iii) (a) to (f).

54. Maternity discrimination is unfavourable treatment which is because the claimant was exercising, seeking to exercise or had exercised or sought to exercise the right to ordinary or additional maternity leave. The law recognises that discrimination is not always overt, and there is a shifting burden of proof in place to address that. The shifting burden of proof requires us to consider as a first step whether there is evidence from which we could conclude that there was discrimination. If we find that there is, we go on to the second stage and look to the respondent to satisfy us that any unfavourable treatment we have found is in no sense whatsoever because of the claimant's pregnancy or maternity leave.

55. Sex discrimination has a different test. We assess at the first stage whether there is evidence from which we could conclude that the claimant has been less favourably treated than a man in similar or not materially different circumstances. We agree with Mr Howson's submission that there was no evidence before us that a man was or would have been treated any more favourably in relation to any of the six allegations of discrimination.

56. Our focus therefore has been on whether there is any evidence before us from which we could conclude that any of the issues (a) to (f) (as we found them to have occurred) were unfavourable treatment because of the claimant's pregnancy or because of her exercising or having exercised her right to ordinary or additional maternity leave. We have looked at those issues one at a time.

57. Issue (a) is a complaint about the way in which the claimant's return to work discussions and return to work were handled by the respondent. There is a potential for overlap with issues (b) and (c); we have not considered as part of issue (a) any issues which are expressly included in points (b) and (c).

This means that point (a) is focused on the way in which the claimant's flexible working request was handled by the respondent.

58. We remind ourselves of our findings of fact which are relevant to point (a). In February 2018 the claimant had a discussion with Mr Griffin about the days she would be able to work when she returned to work after her maternity leave. At that time nobody at the respondent seems to have dealt with the claimant's request as a request to reduce her hours. The claimant did not chase it up or repeat her request at that stage. She raised it again on 26 July 2018 with Mr Griffin when she attended the office. He emailed her and asked her to put it in writing which she did on 4 August 2018 in an email to Mr John Thompson; she also mentioned it on 7 August 2018 in an email to Mr Holt. On 16 August 2018 Mr Holt said the claimant would need to fill in a form to make her flexible working request; the claimant replied to say that she would do the form in the near future. However, the form was never completed.

59. We concluded that there was no evidence from which we could make a finding that any of this treatment amounted to pregnancy or maternity discrimination, for the following reasons.

60. We first considered the period between February 2018 and 26 July 2018. The respondent did not follow up the claimant's request to reduce her working hours after the meeting in February 2018. However there was no evidence from which we could conclude that this was related to the claimant being pregnant, or being on or having taken maternity leave. The claimant would have understood that for a formal agreement for her to change her working pattern, a request would have to be put in writing. That is certainly a requirement for a statutory flexible working request under the Employment Rights Act. The discussion in February was an informal verbal discussion only. It was followed up by the claimant in due course in July 2018, and the respondent then told the claimant that she would have to put her request in writing.

61. There is also no evidence from which we could conclude that the treatment of the claimant in respect of her flexible working request after 26 July 2018 was because of her pregnancy or maternity. She did not put her request in writing until 4 August 2018. There was then a short delay of 12 days replying to the claimant's 4 August email, following which the respondent told the claimant that she needed to fill in a form. By then it seems that the urgency had passed, because the claimant had decided she would be away on maternity leave until 19 November 2018. She accepted in her email of 22 November 2018 that she would have to complete the form at some stage and we have found that she did not in fact do that.

62. We have concluded that there were stages in the process where the respondent could have acted more quickly. They could also have considered the claimant's request informally rather than asking for a written application, although that could have been to the claimant's detriment because there would then have been no duty for the respondent to consider the request in line with the formal statutory process.

63. However, the fact that the respondent could have acted differently, or the fact that any of the treatment might be unfair or even unreasonable is not by itself evidence from which we could conclude that there was discrimination so that the burden shifts to the respondent to persuade us that there was no unlawful discrimination. There was no evidence from which we could conclude that the claimant was subject to maternity discrimination in respect of issue (a), and for that reason, we find that the burden does not shift to the respondent, and the claim in relation to issue (a) does not succeed.

64. Issue (b) is 'reneging on an agreement that the claimant was to be permitted to take her annual leave accumulated during her maternity at the conclusion of her maternity leave'. We have accepted that the claimant spoke to Mr John Thompson before she went on maternity leave to say that she planned to take most of her annual leave at the end of her maternity leave and that she would give a date of her return to work closer to the time. We have not found that that amounted to an agreement. It was an indication of her intention from which it was clear that there would be further discussions about it in future. Because of our findings of fact, we conclude that the respondent did not renege on an agreement with the claimant, and therefore issue (b) did not happen as the claimant alleged. We have found that the claimant was not permitted to take all of her annual leave in one tranche at the time she had applied to take it, but that aspect forms part of issue (c) which we are coming on to next. So, the complaint set out at issue (b) in relation to pregnancy and maternity discrimination does not succeed because of our findings of fact.

65. Issue (c) relates to the options as they were put to the claimant on 16 August 2018. We have found that the options were set out in an email and not a meeting as it says in the list of issues. Our findings of fact are based on the wording of that email. We have found that the claimant was told that she was entitled to 15 days holiday and that she had the option to take 52 weeks of maternity leave. The email was part of an exchange of emails between the claimant and Mr Holt.

66. We have looked carefully at the exchange of emails between the claimant and Mr Holt as invited by Mr Howson. It is helpful to do so because they are the contemporaneous record of what the claimant was told. One reading of the email of 16 August 2018 is that Mr Holt was simply providing the claimant with information about her holiday entitlement and how much unpaid maternity leave she was able to use. However, looked at in the context of the claimant's earlier email to Mr Holt in which she asked what the respondent's decision about restrictions on taking annual leave meant for her, we accept that the email of 16 August 2018 appears to present a closed choice for the claimant to either come back to work early or take the remainder of her maternity leave. The claimant was not told and did not understand that there were other alternatives. For example, she could have taken a short period of unpaid maternity leave and then 15 days of annual leave, which would have allowed her to keep to her intended return to work date of 24 September 2018. The treatment amounted to unfavourable treatment because it resulted in the claimant having to delay her return to

work and take a period of unpaid maternity leave which she had not intended to take.

67. We have gone on to consider whether there is evidence from which we could conclude that this unfavourable treatment was because the claimant had exercised her right to take additional maternity leave. We have decided that there is, for two reasons.

68. The first is the timing of this and the fact that it happened when the claimant was on maternity leave. Her request of 26 July 2018 was for more time off immediately following her absence on maternity leave. We could infer from this that the respondent was inclined to take a more negative response to the request because the claimant had already had nine months off on maternity leave.

69. Secondly, Ms Giddens, an employee of an associated company who was covering the claimant's role, had been permitted to take five weeks annual leave at one time, when she was not on maternity leave.

70. We have concluded that this is evidence from which we could conclude that the unfavourable treatment was because of the claimant exercising her right to maternity leave. The burden of proof shifts to the respondent to satisfy us that maternity leave did not play any part whatsoever in the respondent's treatment of the claimant in this regard. We have to consider whether the respondent has provided us with cogent evidence from which we are satisfied that the claimant's maternity leave did not play a part in the respondent's treatment of the claimant.

71. The email by Mr Holt of 16 August 2018 does not give any explanation as to why the claimant could not be permitted to take the period she was requesting as annual leave but she could take an additional three months unpaid maternity leave as an alternative. The reason given by Mr Holt in his earlier email that all leave needed to be approved 'subject to business needs' does not logically fit as an explanation. The claimant was requesting 25 days paid annual leave, but was told that she could only take 15 days, in circumstances where she was entitled to take 13 weeks unpaid maternity leave. The refusal to allow the claimant to take 25 days leave (permitting only 15) resulted in her being absent from the business for a further three months. We do not see how 'business needs' can justify a decision to refuse an additional 2 weeks annual leave in circumstances where the respondent accepted that the claimant had the right to be absent for a further 13 weeks on unpaid maternity leave in any event.

72. The respondent's witness, Mrs Thompson, suggested that respondent's reason might have been that it was not keen to set a precedent, but she fairly accepted that she could only speculate about this. In any event, a desire not to set a precedent does not fit with Ms Giddens having been permitted five weeks annual leave at the time of her wedding.

73. Importantly, we heard no evidence or explanation as to why the email of 16 August 2018 did not suggest that the claimant could take a combination of

the two forms of leave, especially as it was sent in response to the claimant's email asking about her options. It came across as an either/or position. It is unclear to us why the claimant was not offered the option of taking a shorter period of unpaid maternity leave or a mixture of unpaid maternity leave and accrued annual leave, and why she could not return to work as she had requested on 24 September 2018.

74. We are not therefore satisfied that the respondent's treatment of the claimant in relation to the refusal of her request to take 25 days annual leave after her paid maternity leave period ended was not related to the fact of her having exercised her right to statutory maternity leave. This requires us to make a finding of discrimination on issue (iii)(c) subject to the time limit which we come back to below.

75. Issue (d) is the letter of 22 November 2018 which is said to be threatening to discipline the claimant for non-attendance at work. We have found that on 22 November 2018 the claimant was absent from work and had not been in touch since August 2018. Although the claimant had been signed off sick by the hospital, the respondent was not aware of this on 22 November 2018, because the claimant's first fit note was not sent to the respondent until 14 December 2018. We have also found that the letter of 22 November 2018 said the respondent would have to commence disciplinary proceedings <u>if</u> the claimant did not contact the respondent to explain the reasons for her absence.

76. We have not found any facts from which we could conclude that the sending of the letter of 22 November 2018 was anything other than a response to a situation where the claimant was not at work when expected and had not contacted the respondent to explain why. There was no evidence from which we could conclude that the claimant's previous absence on maternity leave played any part on the sending of this letter. Of course, there were other ways that the claimant's absence could have been dealt with, and the letter could have been phrased more sensitively, but that is not evidence from which we could make a finding of discrimination such that the burden of proof shifts to the respondent. We conclude that the burden does not shift, and that issue (d) fails.

77. Issue (e) is an allegation that the respondent promoted Ms Giddens and failed to consider the claimant for promotion. We have not found that Ms Giddens was promoted or that she was in any other role than the role of Customer Care Manager in an associated company. She was recruited to work in that company but helped cover the claimant's work during the claimant's absence on maternity leave. Ms Giddens had a different job title to the claimant but she also had a different role. We have not found any evidence from which we could conclude that the recruitment of Ms Giddens to Thompson Medical, the role that she did or the job title that she had amounted to discriminatory treatment of the claimant. The burden of proof on this allegation does not shift to the respondent and the complaint set out at issue (e) fails.

78. Issue (f) is about the atmosphere created by the matters at (a) to (e), which resulted in the claimant becoming ill and made it impossible for her to return to work at the end of her maternity leave period.

79. The claimant's maternity leave period ended on 20 November 2018. The claimant's evidence and the evidence of the fit notes was that from 16 November 2018 until 18 January 2019 she was unfit for work because of her operation. The claimant told us that because of the operation she was unfit for work for about a further four months after that, in other words to about mid-May 2019. There was no evidence before us that the treatment of the claimant by the respondent had made her unwell and prevented her from returning to work. This issue cannot succeed because we have not found the facts on which this allegation is based to have been proven.

80. To the extent that this issue refers to the claimant being unable to return to work on 24 September 2018 at the end of her paid maternity period and any annual leave, we have dealt with this within issue (c).

81. We have found that issue (c) of the claimant's complaints of pregnancy and maternity discrimination succeeds (subject to the time point). The other allegations fail in respect of both pregnancy/maternity discrimination, and sex discrimination.

Discrimination time limit

82. We go on to consider the time limit in respect of the complaint at issue (c). It happened on 16 August 2018; the primary three-month time limit would have expired on 15 November 2018. The tribunal is allowed to extend time if it considers that it is just and equitable to do so. That requires us to assess relevant factors and to balance the points in favour of extending the deadline and against, and the hardship that will be suffered by each party depending on what decision we take. Key factors that we have to take into account are the length of the delay, the reasons for the delay and whether the respondent has been prejudiced or disadvantaged by the delay.

83. We have first considered the length of the delay. In this case, where the deadline was 15 November 2018 and the claimant presented her claim on 15 May 2019, it was submitted around six months late. This is a significant period in a context where the primary time limit is three months. Because the claimant's contact with Acas took place after the three-month period had already expired, there is no extension of time arising from that contact with Acas, although we take it into account in our general assessment of what is just and equitable.

84. We next consider the reasons for the delay. We have heard evidence about the difficulties the claimant experienced at the time of the birth of her baby and afterwards. She lived in an isolated way after the birth of her baby and during her maternity leave. She was still on maternity leave until 19 November 2018. She had an operation on 16 November 2018 and was (other than a short period between two certificates) certified unfit for work until 18 January 2019. We have accepted the claimant's evidence that she

was not well enough to work for a further four months after that, although she did not obtain fit notes for that period. The medical history was, in our view, a good reason for the delay by the claimant.

85. Against that factor we have to balance any prejudice or disadvantage to the respondent. In this case, there is a disadvantage arising from the fact that two of the directors that would have been expected to be the respondent's key witnesses are not here and have not given evidence. One, Mr Holt, has retired and sadly the other, Mr John Thompson, has died. The retirement of Mr Holt was in March/April 2019. Had the claimant's claim been presented in time, it would have been presented when he was still in the business but as it was, by the time the claim was presented he had retired.

86. Mr John Thompson was still involved in the business at the time the claim was submitted and when the response was presented but, by the time of the preliminary hearing at which the claimant's complaints were clarified, Mr Thompson had died and so he was not able to provide his account in respect of the key points of the claimant's complaint as clarified by her at that hearing. The amended grounds of resistance must have been prepared without Mr John Thompson's input.

87. In the context of a complaint of discrimination where the burden shifts to the respondent to provide us with an explanation and where we have to scrutinise that explanation carefully, the absence of Mr John Thompson and in the light of our findings, Mr Holt in particular, has obviously disadvantaged the respondent.

88. The assessment of the relevant factors as to whether time should be extended is very finely balanced indeed in this case, and we have found this the most difficult of the issues that we have had to consider. We have decided that the balance falls just in the claimant's favour for the following reasons.

89. Although it was of course not possible under any circumstances for Mr John Thompson to give evidence, this was not the case with Mr Holt. It was Mr Holt's email of 16 August 2018 which was the crucial factor in respect of issue (c), the issue we have found to amount to maternity discrimination. We were provided with very limited detail as to why Mr Holt, although retired, could not give evidence on behalf of the respondent. We were told that Mr Holt had not been in touch with the respondent but we were not told what steps had been taken to contact him to ask him to attend as a witness even though he has retired. A witness order could have been sought for him if he was reluctant to attend.

90. We also bear in mind that the respondent had exchanged a statement for its new director, Mr Harry Thompson, but on the first day of the hearing made an application for Mrs Thompson to be permitted to give evidence in place of Mr Harry Thompson who was unable to attend because of urgent business. We were not given any further explanation for Mr Harry Thompson's absence. We allowed the application but noted that we were

surprised by Mr Harry Thompson's absence and the lack of detail we had been given about this.

91. The position in respect of Mr Holt is similar. In the absence of a clear and detailed explanation for the inability for him to attend as a witness, we infer that the respondent must have made a decision that it did not wish to rely on his evidence. For that reason and bearing in mind in particular that the claimant has a good reason for the delay in presenting her claim, we have decided that the claimant's maternity discrimination complaint was presented within a period which we think just and equitable, and that time should therefore be extended. That means that the claimant's complaint of maternity discrimination at issue (c) succeeds.

Annual leave

92. We turn next to the claimant's complaint about pay for annual leave (holiday).

93. The respondent accepts that the claimant accrued paid holiday leave during her maternity leave which she has not taken and that any of that leave which is outstanding will be payable on the termination of her employment. At that stage the claimant will become entitled to pay, under regulation 14 of the Working Time Regulations 1998 and under her contract of employment which provided that pay in lieu of holidays accrued but not taken will be paid on termination of employment.

94. We cannot make any order in respect of pay for untaken holiday pay for someone who, like the claimant, remains employed by their employer because the entitlement to pay in lieu of untaken annual leave only arises on the termination of employment. However, we have noted in our judgment that the respondent's position is that any outstanding annual leave accrued by the claimant during her maternity leave will be payable to the claimant on the termination of her employment.

Deduction from wages (sick pay)

95. Finally, we have considered the claimant's claim for unauthorised deduction from wages in respect of sick pay.

96. The claimant was certified unfit from work from 16 November 2018 when she was on the last few days of her unpaid maternity leave. The fit note recorded that this would remain the case until 14 December 2018. We have found that the fit note was sent to the respondent on 14 December 2018.

97. The Statutory Sick Pay Regulations 1982 require employees to notify sickness absence in accordance with the employer's terms and conditions. In this case the respondent's handbook required notification on the first day of incapacity. The claimant's first notification that she was unfit to work was made around four weeks late (less than a calendar month).

98. Regulation 7 of the Statutory Sick Pay Regulations 1982 permits an employer to pay statutory sick pay if the delay in notifying the first day of absence is less than a month and if the employer accepts that there was a good reason for the delay. We conclude that the claimant's health issues would have been a good reason for late notice to have been accepted by the respondent.

99. The same applies in respect of the period of sickness covered by the second certificate which was dated from 21 December 2018 to 18 January 2019. This was notified to the respondent on 2 January 2019, around 10 days late. Again, we conclude that the claimant's health issues would have been a good reason for this late notice of sickness absence.

100. If the respondent had accepted late notice of sickness the claimant would have been entitled to statutory sick pay for the period of eight weeks covered by the two fit notes.

Additional findings and conclusions on remedy

Discrimination remedy

101. We have first considered the remedy for maternity discrimination under the Equality Act 2010.

102. Under section 124(2)(b) of the Equality Act, where a tribunal finds that there has been a contravention of a relevant provision it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

103. The aim of compensation is that 'as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct' (Ministry of Defence v Cannock and ors 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position she would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.

104. Loss may include financial losses and injury to feelings. (The claimant did not make any claim for personal injury.)

105. We need to consider what would have happened if the claimant had not been subject to discrimination on 16 August 2018. We have concluded that, if the discriminatory act of 16 August 2018 had not taken place, the most likely outcome would have been that the claimant would have taken a short period of unpaid maternity leave until 3 September 2018, followed by 15 days annual leave. This would have allowed her to return to work on her preferred date as identified in her email of 4 August 2018, that is 24 September 2018.

106. The losses the claimant has suffered as a result of the discrimination therefore include 15 days paid annual leave. The claimant's daily rate of pay was £60.31, so 15 days paid annual leave would be £60.31 x 15 = £904.65.

107. (Because the remedy for the discrimination claim reflects the loss of 15 days paid annual leave, the claimant will not be entitled to pay in respect of those 15 days as pay for untaken holiday on termination of employment. However, the respondent has accepted that when her employment with the respondent ends, the claimant will be entitled to pay for the remaining days annual leave which she accrued during her paid maternity leave. From the respondent's email of 16 August 2018, we understand this to be an additional 6 days as at August 2018. As explained in our findings on liability, we cannot make any award in respect of those additional days because the claimant remains employed by the respondent.)

108. We find that the most likely position from 24 September 2018 is that the claimant would have returned to work with the respondent two days per week as she intended. We do not consider that it is likely that the claimant would have returned full time. Although there was an indication in an email from Mr Griffin that the claimant's flexible working request would not have been granted (page 150), we find that this was not a conclusive final decision by the respondent in respect of the claimant's working arrangements. The respondent had not had the opportunity to fully consider the claimant's flexible working request, and Mr Griffin would not have been the decision maker in respect of a formal flexible working request. We take into account also that Mrs Thompson told us that from her experience she would not attach much weight to what Mr Griffin said.

109. We find that the claimant would have gone on sick leave because of her operation on 16 November 2018, irrespective of whether the discrimination had occurred.

110. The losses the claimant has suffered as a result of the discrimination therefore include loss of pay for 2 days a week for a period of 8 weeks (24 September 2018 to 15 November 2018). That is a loss of 8 x 2 x £60.31 = £965.00. The claimant would also have been entitled to employer pension contributions at a rate of 3% on this pay; 3% of £965 is £29.00.

111. We have made an award in respect of statutory sick pay in the compensation for unauthorised deductions. This covers the weeks during the period from 16 November 2018 to 18 January 2019 when the claimant was signed off sick.

112. We do not make any award in respect of financial losses for the period after 18 January 2019, because there was no evidence before us that the claimant would have been entitled to pay (or statutory sick pay) after that date or that the claimant's inability to return to work after that date was as a result of the discrimination we have found. We did not find that the discrimination made it impossible for the claimant to return to work at the end of her additional maternity leave period.

113. In summary, the claimant's financial losses arising from the discrimination are as follows:

Financial losses arising from discrimination		
Dates	**Loss arising from:**	**Total (to nearest £)**
20 August 2018 to 2 September 2018	Unpaid maternity leave	nil
3 September 2018 to 21 September 2018	15 days paid annual leave at £60.31 per day	£905
24 September 2018 to 15 November 2018	8 weeks working 2 days per week at £60.31 per day	£965
24 September 2018 to 15 November 2018	Employer pension contributions at 3%	£29
Total		£1,899

114. We award interest on these losses. For an award of financial loss, interest is payable at a rate of 8% from the midpoint of the period which runs from the date of the discrimination to the date of calculation. The act of discrimination occurred on 16 August 2018. The period from this date to the date of calculation (22 January 2021) is 890 days. The period from the midpoint to the date of calculation is 890/2 = 445 days. The daily rate of interest on the financial award is 0.08 x £1,899/365. The interest is calculated as 445 days x the daily rate of interest (445 x (0.08 x £1,899/365)) = £185.

115. The award for financial loss arising from the discrimination is therefore £1,899 plus £185 interest, in total £2,084.

116. We have considered the Vento bands for awards of injury to feelings. As the unlawful treatment was a one-off occurrence, an award in the lower band is appropriate. The Presidential Guidance provides that in respect of claims presented on or after 6 April 2019, the Vento lower band is £900 to £8,800. The midpoint of the band is £4,850.

117. The problems that arose as a result of the claimant not being able to return to work on her preferred date and having to take an additional period of unpaid maternity leave had a significant impact on her. We have decided that an award of £5,000, a little above the midpoint, is appropriate.

118. We award interest on the injury to feelings award. For an award of injury to feelings, interest is payable at a rate of 8% for the whole period from the start of the discrimination to the date of calculation. The act of discrimination occurred on 16 August 2018. The period from the start of the discrimination to the date of calculation (22 January 2021) is 890 days. The daily rate of interest on the injury to feelings award is 0.08 x £5,000/365. The interest is calculated as 890 days x the daily rate of interest (890 x (0.08 x £5,000/365)) = £979.

119. The award for injury to feelings arising from the discrimination is therefore £5,000 plus £979 interest, in total £5,979.

120. The award to the claimant in respect of discrimination is therefore £2,084 plus £5,979, in total £8,063.

Unauthorised deduction from wages remedy

121. We have found that statutory sick pay was deducted from the claimant's pay for the 8 week period in respect of which she had fit notes (all of which fell within the period from 16 November 2018 to 18 January 2019).

122. The weekly rate of SSP for 2017/2018 was £89.35 (not £94.25 as suggested in the claimant's schedule of loss, this is the rate for 2019/20). The weekly rate applies to full time and part time employees, there is no reduction in sick pay for someone who works part time. Therefore the deduction from the claimant's wages over the 8 week period was 8 x £89.35 = £714.80, or £715 to the nearest pound.

123. No interest is payable on awards in respect of unauthorised deductions from wages.

124. Finally, the claimant did not follow the Acas Code of Practice in respect of grievances, in that she did not make a formal grievance complaint. However, we do not consider the failure to follow the code to be unreasonable, because of the claimant's health issues. For this reason, we make no reduction of any part of the award to the claimant.

125. A summary of the total award to the claimant is as follows:

Discrimination award:			
Financial loss	£1,899		
Interest on financial loss	£185		
Total financial loss		£2,084	
Injury to feelings	£5,000		
Interest on injury to feelings	£979		
Total injury to feelings		£5,979	
Total discrimination award			£8,063
Unauthorised deduction from wages:			
Loss of SSP for 8 weeks			£715
Total award			**£8,778**

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Employment Judge Hawksworth
Date: 15 February 2021

Sent to the parties on: 4 October 2021

For the Tribunal Office