EMPLOYMENT TRIBUNALS

Claimant: **Miss J Channer**

Respondent: **Time 4 Recruitment Solutions Limited**

Heard at: **East London Employment Tribunal**

On: **26, 27 and 28 May 2021**
In Chambers on 3 June 2021

Before: **Employment Judge Russell**
Members: **Mrs G Forrest**
Mr M Rowe

Representation
Claimant: **In Person**
Respondent: **Mr O Holloway (Counsel)**

JUDGMENT

1. **The claim of discrimination because of pregnancy and/or maternity leave fails and is dismissed.**

2. **The claim of unauthorised deduction from wages fails and is dismissed.**

REASONS

1. By a claim form presented to the Tribunal on 24 May 2019 the Claimant brings complaints of discrimination on grounds of pregnancy or maternity and for unpaid wages. The Respondent resisted all claims.

2. At a hearing before Employment Judge Gardiner on 2 September 2019 the issues to be decided in respect of liability were identified as follows:

Time limits / limitation issues

2.1` 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") and Sections 23(2) to (4) of the Employment Rights Act 1966 ("ERA")? 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 of failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred.

2.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 February 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

EQA, Section 18: Pregnancy & Maternity Discrimination

2.3 The Claimant says that she suffered the following unfavourable treatment because of her pregnancy, having informed the Respondent that she was pregnant on 4 January 2018.

2.3.1 On 10 January 2018, the Respondent advertised for a management position to carry out the same role that the Claimant was already performing. The Respondent says that it was recruiting for an entirely different role.

2.3.2 On around 2 February 2018, the Respondent interviewed for the new managerial position to replace the Claimant's role.

2.3.3 On 2 February 2018, Mal Martin and Cath Thomas demoted the Claimant from Manager to Senior Recruitment Consultant and reduced her salary. The Respondent says that a change of role was mutually agreed.

2.3.4 On or around 31 March 2018, the Respondent underpaid the Claimant for the month of March 2018, as a result of her absence on sick leave with pregnancy related sickness.

2.3.5 Failing to include the Claimant in the group email sent by Grant Lillywhite on 7 December 2018 at 14:36 informing colleagues that there would be a change to the date on which pay would be made every month.

2.3.6 On 14 January 2019, the Claimant was told by Cath Thomas she was almost certain to be made redundant and the consultation period would last only 1 – 2 weeks. In a subsequent phone call on the same day she was asked whether the consultation could take place over the telephone, and a written notification of risk of redundancy was subsequently sent to her on that same day. Later, the Claimant discovered that the Respondent was advertising for two potential suitable roles for which the Claimant was never considered. The Claimant infers from these matters that the Respondent did not intend to engage in any meaningful consultation with her and did not consider her for suitable alternative employment to enable her employment to continue. The Claimant also complains about the

procedure that was followed in relation to her alleged redundancy.

2.3.7 At some point after 14 January 2019, the Respondent shared information about the Claimant's previous personal relationship with other employees (Mal Martin, Sue Martin, James Latham) that the Claimant had told to the Respondent in confidence.

2.3.8 During the period from July 2018 onwards, the Claimant was treated less favourably than Jamie Halsey, who was not put at risk of redundancy and was permitted to cover the London area whilst working from home.

2.3.9 Cancellation of the meeting scheduled for 23 January 2019.

2.3.10 The alleged hostility shown towards the Claimant in an email sent on 23 January 2019 at 16:30.

2.3.11 The decision made to terminate the Claimant's employment communicated to her orally on 30 January 2019 and confirmed in writing on 31 January 2019, taking effect from 12 February 2019.

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

2.5 Was any unfavourable treatment because of the pregnancy?

Unauthorised Deductions

2.6 Was there an unauthorised deduction from the Claimant's wages in March 2018 in reducing the Claimant's wages by £427.25? The Claimant says that this payment ought to have been made by exercising the same discretion that had previously been exercised when she had been off sick. The Respondent says that there was no contractual entitlement to this sum and therefore there is no basis for an unlawful deduction of wages claim.

3. The Tribunal heard evidence from the Claimant on her own behalf. From the Respondent we heard evidence from Mr R Draisey (Operations Director), Mrs S Martin (Communications Manager), Miss C Thomas (HR Manager) and Mr K Martin (Chairman). The Respondent produced a statement from Mr J Halsey. He did not attend to give evidence and the Tribunal attached little if any weight to his statement. The Claimant declined to cross-examine Mr Martin due to his significantly impaired health following infection with the Covid virus. With the agreement of the parties, the Tribunal undertook the questions on the Claimant's behalf. We were provided with an agreed bundle of documents and we read the pages to which we were taken in the course of evidence.

Findings of Fact

4. The Respondent is a recruitment consultancy business with offices based in Bristol, Cardiff and formerly London. The London office had two divisions: construction and services. The services division supported existing clients; these were stable, professional relationships. The construction division by contrast was largely sales-based, with the aim

of bringing in new business providing blue-collar labour to the construction industry. The London office was small. Although there was physical space for a maximum of 11 employees, in fact there were fewer than 8 employees working there at all material times.

5. The Claimant was employed from 1 August 2017 until 12 February 2019 as the London Divisional Manager for construction. The Claimant has worked in recruitment since 2007 and has considerable experience in the construction and property sector. There was another Divisional Manager responsible for services in the London office at the time and a Branch Manager, although he left just as the Claimant joined the Respondent.

6. The Claimant inherited a dysfunctional team who were not performing well, either in meeting targets or in their working relationships. The Respondent's intention in recruiting the Claimant was to try to improve the performance of the construction team in London.

7. The offer letter dated 29 June 2017 confirms a starting salary of £38,000 per annum, a car allowance of £3,000 per annum, commission based upon consultant sales and a personal bonus. These terms are reflected in the contract of employment which also provided for the payment of statutory sick pay. There was no contractual entitlement to company sick pay beyond statutory sick pay.

8. Mr Martin met the Claimant on 6 September 2017 and discussed some of the management issues with her team. An email sent by Mr Martin to the Claimant the following day, copied to Mr Draisey, set out nine action items which dealt with issues such as dismissing one consultant for failure satisfactorily to complete his probationary period, telling another consultant that he is not permitted to work from home for any reason or at any time and may be subject to a potential disciplinary action for failing to follow instructions and complete administrative paperwork correctly. Other action items were that the Claimant must manage the lunch rota appropriately, improve her weekly planning, ensure that the Monday morning meeting takes place dead on 10am and to update the sales boards at 10am and 4pm daily. Mr Martin said that this must be "set in stone". Mr Martin concluded that the Claimant must:

> "**start managing rather than befriending the team utilising the structures and systems, you need to rise above all the office politics – the team will either work with you, or not and will need to leave. Either way, you have my full support. We appointed you to this position because we believed you are capable of managing and developing the team and if you need any advice or have any questions, speak to myself or Rob D at any time**".

9. The only other contemporaneous record addressing the Claimant's performance is an email sent from Mr Draisey on 5 December 2017. It was prompted by the Claimant's request for a discussion as to how she was getting on and what she needed to do in order to pass her probationary period. Mr Draisey replied that she needed to continue to work on the points made by himself and Mr Martin at the last meeting; these included team structure, active clients/sites, planning and time keeping. Mr Draisey agreed to pay the Claimant in full for absence on 27 and 28 November 2017 which was classed as sickness.

10. The Tribunal accepts Mr Martin and Mr Draisey's evidence that there had been informal discussions with the Claimant about her performance and that of her team throughout her probation period, but primarily by telephone. Mr Draisey attended London on four occasions between 25 September 2017 and 5 December 2017 and spoke to the Claimant daily about what was required, although there were no formal meetings. In

evidence, the Claimant accepted that problems with members of the team affected her ability to manage. The Claimant's evidence made clear that she disagreed with Mr Martin's emphasis on strict times for team meetings and use of the boards, regarding it as unduly rigid micro-management.

11. The existence of ongoing concerns about the team and the need for improvement is consistent with the two emails set out above and the oral evidence given by Mr Draisey, Mr Martin and, to some extent, the Claimant. The Respondent did not instigate a formal capability or probationary review process with the Claimant but dealt with matters informally. Despite the Claimant's experience in sales, she had not managed to achieve the anticipated improvement in the team's performance which continued to be a cause for concern.

12. As a result, and in an attempt to reinvigorate the London office, Mr Martin and Mr Draisey decided to advertise for a Branch Manager. Mr Draisey's evidence, which the Tribunal accepts, was that the decision to recruit a Branch Manager was taken in around December 2017 but as there were difficulties recruiting staff in construction over the Christmas period the advertisement was not placed until 10 January 2018. The job advertisement makes clear that it is a more senior role than that held by the Claimant: the salary was £45,000 - £55,000, the role was to manage both Divisional Managers and their teams and it reported directly to the Operations Director. The decision to recruit a more senior Branch Manager is also consistent with the Respondent's work on changes to internal structures and systems, notified to employees including the Claimant on 8 January 2018. On balance, the Tribunal finds that the recruitment of a Branch Manager was purely to address the ongoing concerns about performance of the London office and was not a device to terminate the Claimant's employment.

13. On 4 January 2018, the Claimant informed Mr Draisey in writing that she was pregnant. Mrs Martin and her team congratulated her and the Tribunal accepts that Mr Martin did so too. At the time she announced her pregnancy, the Claimant was aware that the probationary review was due to take place in January as her probationary period was due to end on 31 January 2018.

14. Shortly afterwards, on 10 January 2018, the Claimant was criticised by the Finance Director for allowing two members of her team to use a company Oyster card over the Christmas period for personal rather than business use. His email is phrased in blunt terms, suggesting that she may have committed an act of misconduct and he did not accept the Claimant's explanation that she had permitted its use to defuse tension in the team about pay disparity. On 15 January 2018, the Managing Director expressed frustration in mild terms about the loss of a booking the previous week as the Claimant had not let him know that she had been unable to speak to the client. The Claimant apologised for the mix up. Whilst the timing of both criticisms was very shortly after the announcement of pregnancy, the Tribunal finds that this was a coincidence. The Oyster card was used over Christmas and could not have been known before her pregnancy was announced and the client loss occurred afterwards. The Tribunal does not draw any inference that the Respondent's attitude towards the Claimant changed after the announcement of her pregnancy.

15. Mr Martin met the Claimant in London on 15 January 2018. The following day, he sent an email which was critical of the Claimant, identifying a number of areas of concern which included failure to update the sales boards, lack of planning, meetings not

happening when they should be "set in stone" and inadequate planning and management. The Claimant did not accept that the concerns were justified and suggested that it was due to her pregnancy. In her email in reply, the Claimant said that she was not aware that there was a set metric for 10am starts for the team meetings. However, the Tribunal notes that this was a matter which had been raised with her as early as September 2017 and confirmed in writing. Nevertheless, the Claimant did accept that there were issues within the team's interactions, timekeeping, urgency and effort.

16. The Claimant attended a probation review meeting with Mr Martin on 1 February 2018. In preparation, she completed an assessment of her own performance which was broadly positive but which highlighted the challenges she had faced in managing a difficult team and reflected a concern that management may have a tainted view of the office. Mr Draisey completed a management assessment of the Claimant's performance which starkly differed from her own assessment. Mr Draisey stated that the Claimant had constantly struggled with numerous aspects of her role, principally management and planning.

17. Notes of the discussion were included in the bundle. The Tribunal finds that they are a broadly accurate summary of the discussion. During the review meeting, Mr Martin discussed in depth the issues in the team, sought to reassure the Claimant that they were not trying to get rid of her but suggested that she did not accept constructive criticism. He suggested that the probation period be extended for three months with closer management and development; alternatively he suggested that the Claimant could take a senior sales role on a reduced salary of £32,000 per annum and the same car allowance, without the management responsibility and with a view to returning to a divisional manager role in the future. The Claimant broadly accepted that there were problems in her team and agreed to move to a sales role in order to reduce the pressure she was feeling. She said that if she were not pregnant, she would have stayed as Divisional Manager but that she was tired and not sleeping well. The Claimant signed a revised contract for the demoted role on 13 February 2018. She raised no further issue about it until her grievance on 25 March 2019.

18. On balance, the Tribunal finds that Mr Martin did not place undue pressure upon the Claimant to move to a sales role and offered her time to consider her options. The Claimant chose to accept the change rather than an extended probation period. This was not an entirely voluntary choice in all of the circumstances given her position in her early stage of pregnancy and her anxiety about money but was a realistic assessment of her options and she did not object. This was not a demotion, it was a mutually agreed change.

19. In or about January 2018, the Respondent appointed a new London Branch Manager. The new appointee had considerable managerial experience but no experience in sales recruitment. The Tribunal finds this consistent with the Respondent's case that London required an experienced manager to address the dysfunctional team rather than somebody to bring in sales, which the Claimant was doing well. This is consistent with Mr Martin's concerns expressed in his email and in the probation review meeting, including his suggestion that the new Branch Manager may help the Claimant to develop as a manager.

20. It was not in dispute that the Claimant had a number of periods of pregnancy-related illness for which she was paid. She was not, however, paid for an absence in

March 2018. The reason for absence given at the time was stress. On balance the Tribunal accepts the evidence of Ms Thomas that the Claimant and had not referred to pre-natal depression and therefore she had not realised that the absence was pregnancy related. If she had, the Claimant would again have been paid. This is plausible given that the Claimant was paid for other absences which were clearly stated to be pregnancy-related.

21. The Claimant started her maternity leave on 25 June 2018, with an intended return to work on 24 June 2019.

22. On 7 December 2018, Mr Lillywhite sent an email to all staff to inform them that with effect from January 2019 salary would be paid on the last working day of the month rather than the last Friday in the month. As a result, all employees would receive their January pay six days later than usual. The Claimant did not receive the email because she was on maternity leave and was therefore unaware that she would be paid late. Upon becoming aware, the Claimant complained about the lack of communication and the financial hardship caused to her by late payment. On 25 January 2019, Ms Thomas wrote to the Claimant to apologise for the delay in informing her and stated that it was entirely her fault. The Tribunal accepts Ms Thomas' evidence that this was an administrative oversight on her part. The Respondent paid the Claimant shortly thereafter and before the revised pay date for January 2019.

23. With effect from 4 July 2018, Mr Halsey commenced employment with the Respondent. The offer letter confirms that his job title was Sales Support, his annual salary was £16,310 and he was recruited to join the Cardiff office. Although nominally based in the Cardiff office, Mr Halsey lived in the Milton Keynes post code area and would work from home on two days a week, conducting London site visits and booking sales in the London office. We find that Mr Halsey effectively covered the Claimant's sales role in London during her maternity leave as well as undertaking his own role for the Cardiff office, which involved sales for other parts of England where there was no office (such as Birmingham or Nottingham). He was able to do this as the volume of sales in London had substantially decreased. The Divisional Manager for services was physically based in the Cardiff office, the Respondent reduced its physical office space in London and by late 2018 only three employees remained based in the London office as employees who had left were not replaced. Due to the reduction in sales work in London, the administrator was made redundant on 31 December 2018.

24. By late 2018, the Respondent began to discuss the possible closure of the London office. There were no minutes of any meetings to discuss the possible closure of the London office but the Tribunal accepts that the senior management team were all located in Cardiff and would conduct informal discussions about the business which were not minuted. The Tribunal considered Ms Thomas to be a particularly impressive witness and accept her evidence that she found out about the potential closure of the London office in December 2018 and the final decision to close London was taken in January 2019. This was consistent with the evidence of both Mr Martin and Mr Draisey. The closure of the London office had nothing to do with the Claimant's maternity leave and was entirely due to its financial viability.

25. Although the Claimant was not due to return from maternity leave until June 2019, the Respondent decided that she should be told about the closure of the London office and that her job was at risk of redundancy. Ms Thomas telephoned the Claimant for this

purpose on 14 January 2019. The Claimant was not aware that this was the purpose of the call and, before being warned of the risk, had told Ms Thomas in confidence about some difficulties in her domestic and financial circumstances. Ms Thomas did not tell the Claimant the details of the business case which had led to the closure decision. The Claimant suggested a number of ways by which her job may be saved, including working from home, part-time working, working as an administrator or an earlier return to work from maternity leave. She also enquired about the payments she may receive if made redundant.

26. The Claimant's evidence was that at the end of the conversation, Ms Thomas advised that there would be a consultation period of between one and two weeks, asked if it could take place by telephone and told the Claimant that there was a 99% chance that she would be made redundant as she was the last employee left in the London office. Ms Thomas' evidence was that she told the Claimant that the consultation period would last for 14 days and that it was the Claimant who proposed that it be conducted by telephone due to her personal commitments. She denied telling the Claimant that there was a 99% chance of redundancy.

27. To resolve this dispute of evidence, the Tribunal had regard to the contemporaneous documents. Immediately after the telephone conversation, Ms Thomas sent the Claimant a letter to confirm their discussion in which she states that the Claimant said that she did not want the face to face meetings offered and preferred consultation by telephone. Ms Thomas wrote that she was happy to conduct consultation in that way but that if the Claimant changed her mind at any point, she would be happy to arrange a face to face meeting. The Claimant's mobile telephone records show a further four calls from Ms Thomas in a two hour period following the initial discussion.

28. On 15 January 2019, the Claimant emailed Ms Thomas and stated that she would like a face to face consultation meeting to start the consultation period, suggesting the week of 18 February 2019. Ms Thomas replied within 15 minutes to say that it was not a problem to arrange a face to face meeting, suggesting that they travel to meet the Claimant and asking her to provide suitable dates for the following week. The issue which the Claimant subsequently raised was whether the telephone conversation on 14 January 2019 began the consultation period: she believed that it did not, Ms Thomas believed that it did.

29. On balance, the Tribunal finds that Ms Thomas did tell the Claimant that there was a 99% chance of redundancy, that the Claimant proposed telephone consultation and that the focus of the conversation was then on the amount and timing of redundancy payments. This is consistent with the limited options available to the Respondent which intended to close the London office entirely and to the Claimant who was a single parent of a young child. Ms Thomas had made multiple follow up calls as a result of advice from ACAS that she must obtain written confirmation from the Claimant of her agreement to telephone consultation. The offer of face to face consultation in the follow up letter and the subsequent emails is consistent with telephone consultation being the Claimant's suggestion. The Tribunal found no reluctance on the part of the Respondent to arrange a face to face consultation when the Claimant subsequently requested the same. The Tribunal infers that the Claimant's subsequent attempt to delay the start of the consultation period to mid-February 2019 was borne of a desire to extend the consultation period and thus delay her redundancy for as long as possible. Whilst this is understandable given her personal circumstances, the Tribunal finds it more likely than

not that her position changed on reflection and that she had agreed on 14 January 2019 that the consultation period had started.

30. There then followed a series of emails attempting to arrange a suitable time and place for the meeting. By 21 January 2019, it was agreed that the meeting would take place at the Claimant's house on 23 January 2019. Later that day, the Claimant emailed Ms Thomas to inform her that she had had to leave her home on police advice and would send through any questions the following day. Ms Thomas was concerned about holding the meeting in the Claimant's house in light of the police advice as it would place those who would be attending in a potentially volatile and unsafe situation. She asked that the Claimant propose an alternative location. The Claimant sought to reassure Ms Thomas that the reason for the police advice would not apply from the following morning due to a change in circumstances.

31. Ms Thomas had copied Mr Martin and Mrs Martin into her email expressing concern about the safety of attending the Claimant's house. The Tribunal accepts that this was because it was anticipated that Mr Martin may attend the meeting and because Mrs Martin was the person ultimately responsible for HR matters. The information provided by the Claimant was not shared with any other employee of the Respondent. In evidence, the Claimant accepted that she did not think it had anything to do with her maternity leave although she maintained that Mrs Martin did not need to know.

32. On 22 January 2019, the Claimant emailed Ms Thomas asking for clarification of when the decision was taken, the closure date, how London placements would be covered and how the Respondent's business model would work without the London office. Ms Thomas informed her that the office was closing because it was no longer financially viable and the lease was due to terminate at the end of January 2019. In fact, the lease terminated on 7 February 2019. Ms Thomas refused the Claimant's request to record the meeting but agreed to provide notes of the discussion. The Tribunal considers that as the email chain grew, the tone changed from being initially friendly to being more guarded and business like on both sides.

33. The meeting on 23 January 2019 did not take place due to the unresolved dispute about the venue. At 16:30 on 23 January 2019, Ms Thomas sent the Claimant an email stating that she was disappointed with the Claimant's position on a meeting and her refusal to hold a conference call instead given the circumstances. Ms Thomas then answered the Claimant's earlier questions about payment timings, declined the Claimant's suggestion of working from home or part-time as no suitable vacancy was available and provided further information about the timing and reasons for closing the London office in the following terms:

> **"…the decision to close the London office was a difficult and regrettable one. Unfortunately, due to the lack of business in the London region closing the office was the only viable financial business option, and as such notice was given on the lease which will terminate at the end of January.**
>
> **Your question regarding the company's business model is not relevant, does not impact on this situation and I am unable to provide you with sensitive business information."**

34. Overall, the Tribunal finds that the tone of the email suggests a frustration with the dispute about the venue of a face to face meeting and a perception that the Claimant was being unreasonable. However, we do not agree that the email is hostile; it is business-like

and factual rather than empathetic and friendly as the earlier emails had been. Whilst the Claimant's questions were not unreasonable, it was not hostile simply for the Respondent to say that the future business model was not relevant and was commercially sensitive.

35. The consultation meeting was held at the Claimant's house on 30 January 2019, attended by Ms Thomas and Mrs Martin on behalf of the Respondent. Both had driven to London from Cardiff to attend. The Claimant covertly recorded the meeting, despite the Respondent's refusal of her earlier request. The Tribunal finds this indicative of her suspicion and lack of trust in the Respondent. Mrs Martin explained that the Respondent had not wanted to close the London office, provided details about the basis for the decision that it was no longer financially viable and that London was no longer a target market. During the discussion about Cardiff and Bristol offices, the Claimant at no point suggested that she would be prepared to relocate as an alternative to redundancy. Nor did the Claimant suggest relocation when Mrs Martin said that they would be prepared to re-employ her if things changed in the future, with specific reference to the possibility that the Claimant might relocate to an area closer to the Respondent's offices. They discussed her proposals for home working and part-time working. The Tribunal accepts as credible and reliable the evidence of Mrs Martin that, in a pre-pandemic context, the Respondent had decided that sales work could not be done from home and that the business operated a very office-based sales environment with rigid timings to be observed.

36. In early January 2019, the Respondent's Bristol office advertised vacancies for a Sale Consultant and an Administrator, both were at very reduced salaries to that being paid to the Claimant. The Respondent's case was not clear: on the one hand suggesting that the advertisements were simply to test the market, on the other hand that the Bristol manager had advertised the vacancies without authority. In either event, the Tribunal accepts that neither vacancy was filled. Moreover, as set out above, during the consultation meeting the Claimant did not indicate that she was prepared to consider relocation. The vacancies were subsequently deleted. The Tribunal can see that with hindsight, the Claimant now considers that a move to Cardiff or Bristol would have been attractive and provide a new start, but she did not suggest that she would consider it at the time. In the circumstances, the Tribunal declines to draw the inference that either was possible suitable alternative employment which the Respondent failed to offer because the consultation was not meaningful. Neither was this in any way due to the fact that the Claimant was on maternity leave, we find that the vacancies would not have been mentioned even if the Claimant had been at work.

37. By letter dated 31 January 2019, the Respondent confirmed that the Claimant's employment would be terminated by reason of redundancy on 12 February 2019.

38. After the closure of the physical London office at the end of January 2019, the Respondent kept a London telephone number but the calls were routed to Cardiff. On 25 February 2019, a contact of the Claimant telephoned Mr Halsey and posed as a client interested in recruiting construction staff for projects in London. In the call, Mr Halsey stated that the Respondent supplied labour nationwide, with offices in London, Cardiff and Bristol. When asked if there was any chance of meeting in London, Mr Halsey stated that they were moving the London office to Milton Keynes. In a follow up email sent the same day, Mr Halsey again said that he covered all of London and his email still showed the address of the previous London office, although the lease had by this date been terminated. The Tribunal finds on balance that this was merely sales puff on the part of

Mr Halsey who was keen to secure the work. The Respondent did not want to lose sales anywhere in the country and, to this limited extent, there were still sales in London. These, however, were not sufficient to require a sales consultant based in London and were covered by employees in Cardiff. Following the closure of the London office, Mr Halsey was required to be permanently based in Cardiff. He resigned and was not replaced.

39. The Tribunal attached no weight to a social media message exchange between the Claimant and Mr Halsey in October 2019 in which she asked whether he was person who had replaced her to do London trades from home in Milton Keynes during her maternity leave. This was eight months after his employment had terminated, the questions put by the Claimant were leading and Mr Halsey response was a brief affirmation only and there is no dispute that Mr Halsey was covering London sales during her maternity leave.

Law

Discrimination

40. Section 18 Equality Act 2010 ("EA") defines pregnancy and maternity leave as a protected characteristic. It provides that a person discriminates against a woman if they treat her unfavourably either because of pregnancy (during the protected period) or because she is exercising, seeking to exercise or has exercised her right to ordinary or additional maternity leave. No comparator is required.

41. The critical question for the Tribunal is whether, objectively considered in all of the circumstances, the treatment complained of was on the ground of pregnancy or maternity leave. The protected characteristic does not need to be the only factor, simply a significant influence and it does not need to be conscious as subconscious motivation is sufficient if proved, **Onu v Akwiwu and anor** [2014] ICR 571, CA.

42. In **Williams v. Trustees of Swansea University Pension and Assurance Scheme** [2019] IRLR 306, the Supreme Court considered the definition of 'unfavourable treatment' and held that: (i) in most cases little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions; (ii) the determination of what is unfavourable is to be judged taking a broad view and by broad experience of life; and (iii) treatment which is advantageous cannot be said to be "unfavourable" merely because it could have been more advantageous.

43. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

44. Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any unfavourable treatment.

Unauthorised Deduction from Wages

45. The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

46. A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA.

47. The Tribunal must first consider whether there has in fact been any deduction, in other words what amount was due to the claimant under the terms of her contract as set out above. In the event that a lesser sum was paid, the Tribunal must consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

Conclusions

Discrimination

48. The first two issues concern the advertisement and recruitment of a Branch Manager for the London office. The Claimant's case is that this was the same job that she was performing and that the new Branch Manger was recruited to replace her. The Tribunal considered that the lack of formal probation reviews identifying deficits in the Claimant's performance and the timing of the advertisement less than a week after she announced her pregnancy are facts from which we could conclude that there was discrimination, such that the burden of proof passes to the Respondent. The Tribunal has found as a fact that the decision to recruit the new Branch Manager was taken in December 2017, before the Respondent knew or had reason to suspect that the Claimant was pregnant. The advertisement was not placed until 10 January 2018 by reason of the Christmas holiday period. The sole reason for the decision was the continued problems with the construction team in the London office. It was a more senior role and was intended, at least in part, to support the Claimant in the development of her own management skills (as discussed in her subsequent probation review meeting). It was not a device to terminate the Claimant's employment or to replace her by reason of her impending maternity leave. It would have been better practice for the Respondent to conduct regular reviews of performance during the probationary period, as it does for more junior employees, as it would have helped the Claimant to understand, and perhaps even accept, that there were genuine concerns with regard to her management of her team which pre-dated and were entirely unrelated to her pregnancy or intention to take maternity leave.

49. As for the issue of demotion on 2 February 2018, issue 2.3.3, the Tribunal accepts that whilst the Claimant was aware that there were problems with the management of her team, the suggestion that she step down to a non-managerial role came completely out of the blue during the probationary meeting. Again, due to the lack of formal feedback about the Claimant's performance or any suggestion that she may not have passed her probationary period, coupled with the timing of the meeting so soon after she notified the Respondent of her pregnancy, the Tribunal considers that the burden of proof has passed. The Respondent is required to provide an explanation which is in no sense whatsoever to do with pregnancy or maternity leave.

50. The Tribunal concludes that this was a question of poor communication. The concerns about the Claimant's performance were genuine and pre-dated the announcement of her pregnancy. The Claimant was recruited to manage and improve the performance of a dysfunctional team. The anticipated change had not been realised. Concerns were discussed informally throughout the period leading up to the probationary review. The Claimant did not appreciate the magnitude of the Respondent's concerns but they were no less real. The Tribunal can understand why the Claimant links the suggestion that she step down to a sales role to the announcement of her pregnancy, given the close link in time between the two and upon hearing voiced in strongly critical terms concern about her ability as a manager which she had not previously realised existed.

51. The Claimant's decision to move to the sales consultant role was not entirely voluntary, in the sense that she was in a vulnerable position due to her pregnancy. However, she did not object and it was not enforced by the Respondent who offered her a genuine, if unattractive, alternative of an extended probationary period. The offer of a sales role is consistent with our findings of fact about the Respondent's general view of the Claimant's strengths and weaknesses: she was very good at achieving sales but had not managed her team as well as expected. That the change in role came so close to the announcement of her pregnancy was entirely due to the fact that her probationary period also ended in January, a time when her performance would inevitably be under review. For these reasons, the Tribunal accepts that pregnancy and maternity leave were entirely unconnected with the offer and acceptance of the sales consultant role.

52. As a matter of fact, we have found that the Claimant was not paid for sickness absence in March 2018 because Ms Thomas did not know that the cause of the absence was pregnancy related. It was not because of her pregnancy, quite the opposite, it was due to the lack of knowledge that it was related to pregnancy.

53. The failure to include the Claimant in the group email about the pay date change, sent on 7 December 2018, was an administrative oversight. It was a significant detriment to the Claimant as the delay in payment would have adversely affected her ability to pay bills and may have affected her entitlement to Universal Credit. The Respondent remedied the oversight swiftly albeit that the Claimant had a detriment of shock. The email was sent to all employees at their work address but the Claimant was not able to access it because she was on maternity leave. But for the maternity leave, the Claimant would have known about the pay date change. The causative link is not, however, a "but for" test and the Tribunal is required to consider whether the maternity leave was an effective and material cause for the failure to send the email to the Claimant. A hypothetical employee absent from work for another reason would equally have not

received the email. For these reasons, we conclude that the unfavourable treatment was not because of maternity leave even if it was an inadvertent consequence of the same.

54. At the heart of the Claimant's case lay the issues surrounding her redundancy, the role of Mr Halsey and the consultation process.

55. Based upon our findings of fact, Mr Halsey was not recruited to replace the Claimant. He was recruited to conduct sales from the Cardiff office but due to the downturn in London sales, was able to cover her maternity leave. The Claimant suggested in evidence and submission that she and Mr Halsey should have both been placed in a pool for selection. The Tribunal does not agree. Initially, the administrator in London was made redundant and the Claimant was not included in the pool as they were undertaking work of a different kind. Mr Halsey was not subsequently pooled with the Claimant because although he was covering sales in London as part of his role, he was not employed to work in London and was simply providing cover as is common during a period of maternity leave. He was not undertaking work of the same kind as he was a far more junior role and also covering sales for the Cardiff office. This was a paradigm redundancy due to the closure of the workplace. It would not be objectively reasonable to pool all employees undertaking sales from Cardiff and Bristol with the Claimant in London.

56. The Respondent tried to keep the London office for as long as possible in the hope that it may prove financially viable. It did not. The closure of the London office was the sole reason for the decision to dismiss the Claimant and her maternity leave was not in any sense whatsoever a material cause. Whereas Mr Halsey had been permitted to work from home for two days a week from July 2018, on both London and Cardiff sales, he was not permitted to do so after the closure of the London office. It was the requirement that he fulfil his contractual obligation to work in Cardiff that led to his resignation. The Tribunal does not accept that the Claimant's case that this requirement was imposed only as a means of justifying her redundancy. The Respondent's dislike of working from home pre-dated the Claimant's pregnancy, maternity leave and redundancy as shown by the email in September 2017 instructing the Claimant to tell another London sales consultant that he is not permitted to work from home for any reason or at any time.

57. As for the process adopted, the Tribunal has found that, on 14 January 2019, Ms Thomas did tell the Claimant that she was almost certain to be made redundant and that the consultation period would last for one to two weeks but that it was the Claimant's initial request that consultation take place by telephone. The Claimant made a number of suggestions to avoid redundancy: working from home, part-time work, demotion or an earlier return to work. The Respondent rejected all of them and gave reasons for its decision. The sad fact is that due to the downturn in business, the Respondent no longer required a London office or the staff previously employed in that office. This affected both the Claimant and the administrator. Whilst it would have been preferable for the Respondent to have explained more clearly on 14 January 2019, or in response to the Claimant's subsequent request, its reasons for deciding to close London, Mrs Martin did give that information at the face to face meeting with the Claimant as well as a genuine explanation for why the alternatives proposed were not suitable. The email sent on 23 January 2019 was not hostile and was entirely unrelated to pregnancy or maternity leave.

58. At the face to face consultation meeting, Mrs Martin made clear that they valued the Claimant and would like to re-employ her in the future if circumstances changed. Even if unwelcome news for the Claimant, the Tribunal finds that the decisions of the Respondent

to reject part-time working or working from home were in no sense whatsoever related to the Claimant's earlier pregnancy or continued maternity leave. They are consistent with a reluctance to consider home working for sales staff which was known to the Claimant as early as September 2017.

59. There was a significant dispute of evidence about the possible vacancies in Bristol at the time of the Claimant's redundancy. Both were advertised but neither was offered to the Claimant as alternatives to dismissal. The Claimant submits that the Tribunal should infer that the Respondent did not intend to engage in meaningful consultation with her and did not consider her for suitable alternative employment to enable her employment to continue because the termination of her employment was due to the fact that she had taken, and was still on, maternity leave. Whether or not the vacancies were real at the time that they were posted, both were subsequently deleted without being filled. The Claimant had not expressed any interest in relocation to Bristol, even when Mrs Martin discussed possible re-employment in Cardiff or Bristol if the Claimant's circumstances changed in the future.

60. The Tribunal reminds itself that this is not an unfair dismissal case and that the issue is whether the Claimant would have been offered, or at least considered for, either of these roles, had she not been on maternity leave. As set out above, the Tribunal considers that the Claimant's suggestion that she would have relocated is borne of hindsight and was not something which would have been considered suitable by her at the time. The Tribunal has declined to draw the inference that either was possible suitable alternative employment which the Respondent failed to offer because the consultation was not meaningful. Neither was this in any way due to the fact that the Claimant was on maternity leave. The vacancies would not have been mentioned even if the Claimant had been at work and not on maternity leave.

61. Having considered each of the specific issues raised surrounding the Claimant's redundancy, and stepping back and looking at the matter holistically, the Tribunal concludes that this was a genuine redundancy situation where no suitable alternative employment existed, it was entirely unconnected to pregnancy or maternity leave. The Claimant's dismissal was in no sense whatsoever because of her maternity leave but was entirely due to the closure of the London office at which she was employed and the Respondent's continued insistence that home working was not feasible. There were no suitable alternative vacancies and Mr Halsey was not retained in London doing the Claimant's job, even if he had covered London sales during her maternity leave.

62. As set out in our findings of fact, the decision of Ms Thomas to copy Mr Martin and Mrs Martin into her email expressing concern about the safety of attending the Claimant's house and the subsequent cancellation of the planned meeting had nothing whatsoever to do with the Claimant's maternity leave. The Claimant had told the Respondent that she had been advised by police to leave her home. This was genuine reason to be concerned about whether those intending to be present at the meeting would be safe and therefore to share the information. Whilst the Claimant believed that the meeting could go ahead safely due to a change in her circumstances, it was reasonable for the Respondent to cancel the planned meeting to ensure that this was indeed the case. None of this had anything to do with the Claimant's maternity leave and was entirely due to safety concerns following police advice.

Unauthorised deduction from wages

63. The deduction was effected in March 2018. The claim form was not presented until 24 May 2019. This was long outside of the three month time limit and it was reasonably practicable to have presented the claim in time. In any event, the Claimant had no contractual entitlement to full pay and the failure to exercise the discretion in her favour was not an act of discrimination for the reasons given above.

Outcome

64. For the reasons set out above, all of the claims fail and are dismissed. The Tribunal would like to commend all those involved in the hearing for the calm and measure way in which they conducted themselves. The issues raised surrounding the Claimant's pregnancy and maternity leave clearly brought back traumatic memories for the Claimant and her family who have steadfastly supported her. Similarly, the effect of the Covid 19 pandemic and its particularly serious effect upon Mr and Mrs Martin has clearly been traumatic. None of the Claimant, Mr or Mrs Martin allowed emotion to affect the way in which they presented their cases and they each behaved with great dignity and respect despite the difficult circumstances that each has faced.

Employment Judge Russell
Date: 18 November 2021