EMPLOYMENT TRIBUNALS

Claimant: Mrs L Duffy

Respondent: Barnet, Enfield & Haringey Mental Health NHS Trust

Heard at: Watford (by CVP) **On:** 5,6 & 7 January 2022

Before: Employment Judge Maxwell
Mr Kapur
Mr Wright

Appearances
For the Claimant: in person
For the Respondent: Mr Sudra, Counsel

JUDGMENT

1. The Claimant's claim of pregnancy discrimination is well-founded and succeeds.

2. The Claimant's claims of sex discrimination, harassment and for unlawful deductions are not well-founded and are all dismissed.

REASONS

Issues

1. The Claimant's claims were clarified at a case management hearing before EJ Daniels on 18 February 2021, as:

   1.1 Direct sex discrimination;

   1.2 Pregnancy & maternity discrimination;

   1.3 Harassment;

   1.4 Unlawful deductions.

2. The discrimination claims were all based on the same list of detriments, unfavourable treatment and conduct, namely:

2.1 (a) On or about 6 August 2019 Ms Jo Cleasby allegedly stating; “have you told Jackie that you won’t be coming back after maternity?” :

2.2 (b) Ms Cleasby allegedly telling the claimant that she was "in charge of the forms” for her new role, (which the claimant took as a warning to her that the band 5 change was in her hands)?

2.3 (c) Asking the claimant how Mrs Saunders “was funding the change” to band 5;

2.4 (d) Ms Cleasby allegedly making accusations that other people would have their jobs cut for her and that staff weren’t happy;

2.5 (e) In the second week of August 2019 Ms Cleasby allegedly stating to the claimant: “you are naive to think you are getting a band 5”;

2.6 (f) “you planned your pregnancy well”;

2.7 (g) “don’t be so sure of yourself’;

2.8 (h) “you have nothing in writing”;

2.9 (i) “don’t count your blessings”;

2.10 (J), (k) & (i) Ms Cleasby allegedly informing staff members about the claimant’s pregnancy and that “she shouldn’t have a band 5 because she’s going on maternity”, “she’s not going to come back” and “what is she going to do if other people get what they want and she doesn’t”;

2.11 (m) Mr Beaton in a meeting with the claimant allegedly saying he wanted to discuss her “future plans” and at the same time nodding (or gesturing) at her stomach with regard to her pregnancy;

2.12 (n) On 12 September 2019, after a day’s sick leave, being allegedly told by Sharon Quidley that she would have to take that sick day as annual leave and that she “better not think that she’s taking sick for yesterday because there’s nothing wrong with her”;

2.13 (o) Ms Cleasby allegedly approaching senior management to tell them to keep her on band 4;

2.14 (p) Deciding on or about 8 November 2019 to place her at the bottom of band 5 pay scale and not to grant her “scale points” (as had allegedly previously been discussed);

2.15 (q) On asking Sharon Quidley whether she would submit the forms to HR to process her rebanding/pay rise, Sharon Quidley allegedly stating “who know’s, things change like the wind in this place” and

2.16 (r) The process by which her request for rebanding was dealt with including not submitting the forms to HR (who allege they had never received such a request) and allegedly giving inconsistent explanations for not processing her rebanding.

3. In each case, separately from finding whether the thing complained of was said or done, it would be necessary for the Tribunal to consider the other relevant elements of the statutory provision relied upon.

4. The issue for determination on the unlawful deductions claim was said to be:

    4.1 Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying the sum properly payable at pay point 20 from December 2019 and, if so, how much was deducted?

5. The Tribunal will also need to consider whether the claims were presented in time.

Evidence & Submissions

6. The Tribunal heard evidence from:

    6.1 Mrs Laura Jo Duffy, a PA and the Claimant;

    6.2 Ms Joanne Cleasby, a PA;

    6.3 Ms Sharon Quidley, Senior Admin Manager;

    6.4 Mrs Leigh Saunders, Senior Service Lead;

    6.5 Mr Alan Beaton, Senior Service Lead.

7. The Tribunal received an agreed bundle of documents running to 300 pages.

8. The Respondent provided a chronology and cast list. Mr Sudra also supported his closing submissions with a written skeleton argument, in which he set out, fairly, the relevant statutory framework and case law.

Facts

9. The Claimant has been employed by the Respondent since 8 September 2008. In 2019 she was working as a PA for Mrs Saunders. The Claimant was a band 4 employee on spine point 17. She did, however, have recent experience of acting up at band 5.

10. Ms Cleasby was one of the Claimant's colleagues and a fellow PA. Ms Cleasby was a band 5 employee and had recently acted up to band 6. The Claimant and Ms Cleasby had been on good terms, the relationship deteriorated, however, following events early in 2019, the details of which are not relevant to the claim. Following this, the two were no longer close.

11. In June 2019, the Claimant told Ms Saunders that she was pregnant. She also asked for this to be kept in confidence. The Claimant's health meant that her pregnancy was high risk and she was awaiting the 3-month scan, at which point she would know more about what was likely to happen.

12. At about this time, some of the Claimant's other colleagues also found out about her pregnancy, including Ms Cleasby. We do not find this was because Ms Saunders breached the Claimant's confidentiality. The Claimant must have told someone else, who passed on the news and it became commonly known at this point.

13. In about July 2019, a restructure was announced affecting the area in which the Claimant and Ms Cleasby worked. Insofar as this concerned the PA function, going forward there would be two band 5s and one band 6, instead of two band 5s and one band 4.

14. Ms Cleasby's acting up role was due to come to an end. For various reasons she decided not to pursue the new band 6 role.

15. Jackie Liveras was then the Respondent's Managing Director. She appointed Mr Beaton to lead on the restructure of the PA team.

16. At the beginning of August 2019, Ms Liveras and Ms Saunders, separately, told the Claimant about the restructure and that it was planned to job match her current position to one of the new band 5 roles, by way of a developmental interview. This was an informal way of proceeding. Although Ms Saunders (responding in February 2020 to a detailed written complaint submitted by the Claimant in November 2019) said this conversation involved her "advising [the Claimant that she] would be given the opportunity to come forward for the new band 5 post but that we would have to ensure that the correct processes were followed" we find that description is not accurate and involves a degree of hindsight. Rather the conversation was as the Claimant set out, which is to say she was told her transition to band 5 would be by way of job matching and an informal interview. We prefer her evidence on this because:

    16.1 the Claimant, who was delighted, immediately told her colleagues about this;

    16.2 Ms Cleasby, was not at all pleased to hear about this, she believed it was unfair the Claimant should be job matched when she herself had been led to believe she would have to apply for the band 6;

    16.3 Ms Liveras referred to this plan in her email to Peter Couchman of HR and Mr Beaton of 3 September 2019:

    > **Can you proceed as planned please and carry out a development interview with LauraJo for the band 5 as planned**

    16.4 Ms Liveras instructed Mr Couchman to carry out the developmental interview;

    16.5 Ms Liveras persisted with this plan on 4 September despite pushback from Mr Couchman to the effect that the Respondent's formal change process should be followed:

    > **No it's agreed to proceed ASAP to sort out our admin in Enfield**

16.6 in a meeting with Mr Couchman on 10 September 2019, the Claimant said she had been "promised a band 5";

16.7 the Claimant was extremely unhappy, following a meeting with Mr Beaton on 10 September 2019 (to which we will return below) because she had attended this believing it was the informal interview Ms Liveras and Ms Saunders had led her to expect, only to be told by Mr Beaton that a formal change process would be followed instead and if she failed the interview she might be redeployed;

16.8 Ms Liveras appears only to have relented and decided not to continue with the informal route, following sustained pressure from HR, including Jackie Stephen, the Executive Director of Workforce;

16.9 the Claimant set out her version on the discussions she had with Ms Liveras and Mrs Saunders about this, in her complaint email sent to Ms Saunders in November 2019, when recollections would still be relatively fresh;

16.10 Ms Saunders did not reply to or contest the Claimant's account until February 2020.

17. We pause to note that Mr Beaton, in his evidence at this hearing, did not agree there had ever been a "plan" to proceed by way of job matching and an informal interview for the Claimant. Rather, he said this had merely been a "proposal". We found this to be an unrealistic position, given the clarity of Ms Liveras' language, in correspondence copied to Mr Beaton at the time. It is apparent that the subsequent decision to proceed by way of a formal change process, including a ring-fenced interview for the Claimant, was a departure from what had originally been planned by Ms Liveras, as communicated by her to both Mr Couchman and Mr Beaton. This variation in the approach was brought about by sustained opposition from HR, which is captured and reflected in the correspondence. In particular, we noted that on 10 September 2019, Ms Stephen wrote to Mr Couchman in the following terms:

> **I decided to email Natalie, basically saying that this is not good practice and if it goes ahead will be held up (probably for years) as an example of preferential treatment.**
>
> **Need to crack this one otherwise HR will, once again, be accused of supporting unfair practice and we'll never get to the point where staff trust the selection process.**

18. Ms Cleasby, thinking it was very unfair for the Claimant to be appointed band 5 without having to go through any formal process, did not keep this opinion to herself, rather she told her colleagues. Ms Cleasby worked for Mr Beaton and went to him to complain, being upset about this. Given the difficult situation and tension created, it is unsurprising that Mr Beaton came to, or was reinforced in the view that the Respondent's formal change process should be applied to the Claimant.

19. We accepted the Claimant's evidence as to the comments made directly to her by Ms Cleasby. There was considerable cross-examination on the date, the

Claimant previously having asserted that various comments were made on 6 August 2019 and it now being clear Ms Cleasby was not at work during the first week of that month, the Claimant has changed her position to these things must have been said to her at some point during the first two weeks of that month. We find the conversations did take place in the second week of August. The Claimant has been specific and consistent in her evidence about what was said. She has been careful to distinguish what was said directly to her and what others told her had been said to them by Ms Cleasby. No reason for her to have fabricated all of these remarks has been advanced. No suggestion was made that other things were said by Ms Cleasby and the Claimant misunderstood. Whilst Ms Cleasby denied saying anything at all even vaguely consistent with what the Claimant alleges, Mrs Saunders did recall the Claimant on more than one occasion reporting unwanted remarks from Ms Cleasby (whilst she denied hearing anything about "pregnancy", she specifically recalled the Claimant complaining of being told she was "naïve"). This is not a case that involves a constructive dismissal and the Claimant's response to all of this was modest. She said Ms Cleasby's comments were "unnecessary" and made at a time when she was anxious about her high-risk pregnancy.

20. The reason why Ms Cleasby said these things is that she was annoyed and upset about what she perceived was the Claimant's unfair preferential treatment. We find that in the second week of August 2019, Ms Cleasby said: "have you told Jackie that you won't be coming back after maternity?"; she was "in charge of the forms" for her new role (whilst Ms Cleasby was not a relevant decision-maker, her role as PA to Mr Beaton would give her access to a person who was and relevant documentation); how "was [Mrs Saunders] funding the change"; other people would have their "jobs cut" and "staff weren't happy"; "you are naive to think you are getting a band 5"; "you planned your pregnancy well"; "don't be so sure of yourself'; you have nothing in writing"; "don't count your blessings".

21. Separately from comments that were made directly to the Claimant, remarks by Ms Cleasby were also reported back to her by colleagues. Whilst we accept the Claimant's evidence about what she was told, we have not heard from those colleagues and cannot evaluate the reliability of their information. We cannot be satisfied on the balance of probabilities as to what, if anything, Ms Cleasby said to these others.

22. The Claimant and Mr Beaton met on 10 September 2019 to discuss how her position would be dealt with. She was expecting an informal interview. Events took a different turn. Mr Beaton's witness statement makes no mention of this occasion. Rather he asserted that "I first met with Ms Duffy to discuss the new restructure on 30 September 2019" before going on to give an account of discussing with her the various matters set out in a letter of the same date. Indeed, the Claimant was cross-examined (presumably on the basis of this evidence) to the effect there had been no meeting between her and Mr Beaton about the restructure, prior to the 30th.

23. We are satisfied there was a meeting between the Claimant and Mr Beaton on 10 September 2019 because:

    23.1 the Claimant gives a clear and credible account of her meeting with Mr Beaton on this occasion, which we accept

23.2 the Claimant had been told that she would be appointed a band 5 informally and once a decision had been made to proceed instead by way of a formal change process, it would be necessary for someone to break that news to her and we think this would have been memorable for both the bearer of bad tidings and recipient;

23.3 immediately following her meeting with Mr Beaton, at 12.36pm on 10 September 2019 she sent a message to Ms Quidley (the two were then very close, although this is no longer the case) with no content and simply a one word subject line "FUMING";

23.4 the Claimant and Ms Quidley spoke shortly thereafter and both agree the Claimant was very upset;

23.5 the Claimant advances an entirely credible reason for being so upset, namely the content of the meeting with Mr Beaton;

23.6 Ms Quidley, in her evidence to the Tribunal, could offer no explanation for why the Claimant was so upset and although she repeated that the Claimant was worried about the restructure, could give no reason for matters coming to such a head on that particular day;

23.7 it was common ground that Ms Cleasby had been off sick for two weeks and it could not, therefore, have been her passing a comment that day which set the Claimant off;

23.8 in a message exchange on 11 September 2019 (the following day, when the Claimant had not come to work) Ms Quidley wrote:

> **I know you were feeling a crap yesterday after speaking to them both what you heard yesterday was upsetting and I know it is stressful but try not to worry to much, your baby is your priority as you said.**

23.9 Ms Quidley said she could not now remember whom "them both" referred to or what it was the Claimant had "heard yesterday" that was so upsetting, which evidence we found unconvincing;

23.10 the Claimant's evidence is that she met Mr Couchman and Mr Beaton on 10 September and quite plainly, Ms Quidley's "them both" refers to those two – Mr Couchman refers to speaking with the Claimant in an email he wrote that day and Mr Beaton is the other;

23.11 the Claimant gave her account of this meeting with Mr Beaton on 10 September, in the complaint she sent to Mrs Saunders in November 2019;

23.12 the Claimant's account of this was not disputed in Mrs Saunders' response in February 2020.

24. Having been referred to various documents suggesting that he did meet with the Claimant on 10 September, Mr Beaton was asked whether he recalled this. He responded it was likely he did have an "ad hoc conversation" with the Claimant before the 30th but he did not recall. The Claimant asked him several questions about what was said during this earlier conversation. Mr Beaton chose to answer

by giving his account of meetings with her on 30th September and 7th October, which prompted the Tribunal to intervene and remind him that she was not asking about that. We did not conclude that Mr Beaton was confused by the Claimant's questions, rather he was choosing not to answer directly. When pressed he reiterated not having a recollection of this earlier conversation. Later in his evidence he sought, somewhat inconsistently, to say what would and would not have been part of this earlier conversation (process yes but not her new role) he could not recall. We did not find Mr Beaton's evidence on this to be satisfactory or persuasive. Mr Beaton was meeting with the Claimant to reverse what she had been told (by his senior) would happen to her role. He had seen how upset his own PA had been about this matter and the potential for the Claimant to become upset would have been obvious to him. The Claimant was upset and this meeting would have been memorable for Mr Beaton too.

25. We accept the Claimant's account of the meeting, including Mr Beaton making a comment about her "future" and nodding toward her stomach. We reject his denial of ever having said or done this. He knew of her pregnancy (it was then a matter of common knowledge amongst colleagues) and this is what he was referring to. We do not find he had any malign intent. We do, however, conclude this inappropriate reference and clumsy gesture was made. We found the Claimant's evidence about this to be credible. She offered a modest and persuasive account. In cross-examination she said it had not been particularly upsetting at the time but she thought Mr Beaton should not make comments of that sort and she was not upset to the extent of crying but thought Mr Beaton should not have made an issue of her pregnancy. It is apparent the Claimant was more worried and concerned at being told that her band 5 position was now at risk, she would have to go through an interview process and if unsuccessful would face redeployment.

26. As above, the Claimant also met with Mr Couchman on 10 September 2019. No complaint is made about his comments and so we do not need to make findings about that conversation.

27. Following her meeting with Mr Beaton, the Claimant spoke with Ms Quidley. The two were close at the time and we are satisfied the Claimant gave her a full account of the conversation with Mr Beaton, including the "future" comment and nodding. Mrs Saunders arrived after the conversation between the Claimant and Ms Quidley was already underway and she only heard part of this.

28. The Claimant did not attend for work the next day, 11 September 2019. She had a message exchange with Ms Quidley:

> **Hi Sharon, sorry to be a pain but I won't be in today, I've not had hardly any sleep last night after yesterday and I feel quite stressed so today and tomorrow I'm going to rest and try and forget about it. Last thing I need is anything going wrong with my pregnancy. Apologies to Leigh. I will call u lunchtime as I want to get some sleep right now,feel like crap x**

29. On 12 September 2019, when the Claimant came back to work, she was told by Ms Quidley that Mrs Saunders had said "she better not think she's taking sick for yesterday because there's nothing wrong with her". This may not be word for word what Mrs Saunders had said to Ms Quidley but we find she must have said

something to the effect the Claimant could not take the day as sick leave because she had not been unwell. Mrs Saunders adopted this position because whilst she understood the Claimant had been upset by events on 10 September 2019, it did not appear that she was unable to attend for work because of an illness. This is a legitimate position to adopt, as employees are not entitled to take time off work merely because they feel upset or aggrieved by workplace events.

30. We do not find that Ms Cleasby approached senior management to "tell them to keep the [Claimant] on band 4". The Claimant did not say she witnessed this herself and none of the managers we heard from accepted it had been said to them. Whilst Ms Cleasby no doubt had her own views about the matter, it would be surprising if she thought she was in a position to "tell" managers what do and our conclusion is she did not.

31. The Claimant received a letter of 30 September 2019, which set out the new structure and advised she was at risk of redundancy. The letter also said she would be entitled to a ring-fenced interview for the band 5 position and invited her to a consultation meeting on 7 October 2019. She attended the consultation meeting with Mr Beaton, accompanied by Ms Quidley.

32. Subsequently, the Claimant attended an interview for the band 5 post and she was successful, although there was a delay in her being advised of this. Toward the end of October, during a discussion about pay in the new role, Ms Quidley told the Claimant that Mrs Saunders was trying to make this worth her while, which the Claimant understood to mean that her pay would be scale point 20 or 21. In the event, the Claimant's pay was set at point 18. The Claimant was dissatisfied with this and sought to contest the position. Her trade union representative suggested this was a matter within the discretion of Mrs Saunders and she could achieve the desired result simply by signing a salary variation form.

33. During a message exchange with Ms Quidley on 14 November 2019, the Claimant referred to what her union had told her and asked whether Ms Quidley thought Mrs Saunders would still do this for her. Ms Quidley replied:

Who knows with this place things change like the wind, x

34. The approach to the Claimant's promotion to band 5 had varied, from the informal steps envisaged by Ms Liveras to the formal change process applied. Ms Quidley's comment reflected the possibility that things might, yet again, take an unexpected turn.

35. In light of the Claimant's approach to Ms Quidley, further enquiries were made in connection with her pay. The advice from HR was, however, clear. Because the Claimant had only circa 6 months' experience of acting-up at band 5, she could not be put at point 20 or 21 (which required 4-6 years such experience). Furthermore, the Claimant's characterisation of being placed on the lowest point in the band is not correct. Band 5 ranges from point 16 to point 23. The Claimant being at the top of band 4, was already on point 17. Being put up the scale one point to 18, meant that she was some way into band 5 (not at the bottom, which would have been point 16). This approach was adopted because of the HR

guidance. Whilst Mrs Saunders accepted she could make a case for a salary variation if there were exceptional circumstances, none applied to the Claimant. She gave an example concerning a cohort of nurses whose shift patterns were being changed and their pay was liable to be reduced as a result. As the Respondent was most anxious to retain this staff group, an exception was made.

36. The process followed with the Claimant's re-banding was consistent with the Respondent's policies.

37. On 21 November 2019, the Respondent wrote to the Claimant to advise that she had been successful at interview and would be appointed to band 5 at point 18.

38. By an email on 29 November 2019, the Claimant wrote to Mrs Saunders setting her complaints at length. She subsequently attached this to her form ET1 to serve as her particulars of claim.

39. Mrs Saunders responded on 26 February 2020. At that point, relatively little issue was taken with the Claimant's factual narrative.

Law

Discrimination

40. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment.**

41. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

Direct Discrimination

42. EqA section 13(1) 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.**

43. The Tribunal must consider whether:

43.1 the claimant received less favourable treatment;

43.2 if so, whether that was because of a protected characteristic.

44. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

45. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

46. As to whether any less favourable treatment was because of the claimant's protected characteristic:

46.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

46.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

47. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

48. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that A does not possess; this is sometimes known as 'discrimination by association'.

49. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(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) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

50. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider

the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT**.

51. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

52. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

Pregnancy and Maternity Discrimination

53. Treating a woman less favourably because she is pregnant may amount to direct sex discrimination; see **Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus (C-177/88) ICR [1992] 325 ECJ**. EqA does, however, include specific protections in this regard. In so far as material, EqA section 18 provides:

> **[…]**
>
> **(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.**
>
> **[…]**
>
> **(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).

54. The main difference between discrimination under EqA section 18 and a claim of direct discrimination under section 13, is the absence of any requirement for a comparator. Accordingly, we must consider:

54.1 whether the claimant received unfavourable treatment;

54.2 if so, whether that was because of a her pregnancy, or illness suffered as a result of that.

55. Although there is no statutory definition of 'unfavourable' in section 18, with respect to the same word in EqA section 15, the **Equality and Human Rights Commission** ("EHRC") **Code of Practice on Employment (2011)** provides that the claimant "must have been put at a disadvantage." This in turn would appear to be similar to the test for detriment, per **Shamoon**.

Harassment

56. Insofar as material, EqA section 26 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> > **(a)the perception of B;**
> >
> > **(b)the other circumstances of the case;**
> >
> > **(c)whether it is reasonable for the conduct to have that effect.**

57. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of", in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected characteristic does require a "connection or association" with that; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

> **69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.**

58. In relation to the proscribed effect, although C's perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.

59. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

> **10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:**
>
> > **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:**
>
> > **"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially**

> **offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**
>
> **12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.**

Time

60. In the ordinary course, a claim under EqA must be presented within three months. That time period is extended by the operation of the ACAS EC scheme:

    60.1 the period between the claimant contacting ACAS and the EC certificate being issued is not counted;

    60.2 if the time limit would otherwise expire in the period of one month following issue of the EC certificate, it is extended the end of that period.

61. Where a claim is presented outwith the primary limitation period, the Tribunal has a discretion to extend time, where it is just and equitable to do so.

62. Separately, where a series of discriminatory acts are found by the Tribunal to constitute a single continuing act of discrimination, the claim will be in time where the last part of the act was within the 3-month period.

63. So far as material EqA section 123 provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **[…]**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**

> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

64. An Employment Tribunal applying section 123 has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

    64.1 the length of and reasons for the delay;

    64.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

    64.3 the extent to which the party sued had cooperated with any requests for information;

    64.4 the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

65. The balance of prejudice between the parties will always be an important factor.

66. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. […]**

67. Most recently, the Court of Appeal considered the exercise of this discretion in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
>
> **19. That said, 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).**

68. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

Conclusion

Harassment

69. We consider firstly, whether there was any unwanted conduct related to sex. For these purposes we have also considered whether words or actions related to the Claimant's pregnancy; consistently with the approach for direct discrimination, per **Dekker**.

70. In the second week of August 2019, Ms Cleasby made various unwanted comments, as set out above. Only two of these, however, were related to the Claimant's pregnancy, namely:

    70.1.1 "have you told Jackie that you won't be coming back after maternity?";

    70.1.2 "you planned your pregnancy well".

71. These two comments expressly referred to and were predicated on the Claimant being pregnant.

72. Ms Cleasby's other comments concerned the restructure and how the Claimant's position would or might be dealt with. These were wholly unrelated to her pregnancy.

73. On 10 September 2019, Mr Beaton made an unwanted comment and gesture related to the Claimant's pregnancy, namely:

    73.1 Saying he wanted to discuss her "future plans" and at the same time nodding toward her stomach with regard to her pregnancy.

74. Mr Beaton knew of the Claimant's pregnancy and was referring to it.

75. Although we have found Ms Quidley told the Claimant that Mrs Saunders had said she "better not think that she's taking sick for yesterday because there's nothing wrong with her" that was not related to her pregnancy. Mrs Saunders had made comments to that effect because it had appeared to her that the

Claimant was off work as a result of being upset and annoyed rather than ill. Mrs Saunders' reasons had nothing to do with the Claimant's pregnancy. Similarly, Ms Quidley was reporting or passing on Mrs Saunders comments. Ms Quidley did not say this for any reason connected with pregnancy. The words themselves having nothing to do with pregnancy. That the Claimant, subsequently, came to be believe this day's absence was for a pregnancy-related illness does not change the position.

76. As set out above, the Claimant was put on point 18 in band 5 because that was the clear advice from HR that the Respondent's policies required this and there were no exceptional grounds to justify a departure. The decision about the Claimant's pay had nothing at all to do with pregnancy.

77. Ms Quidley's comment "who know's, things change like the wind in this place" was said because of the change in the way the Claimant's band 5 appointment had been dealt with. The comment was not made because of the Claimant's pregnancy and nor did it refer to that.

78. The processes by which the Claimant's appointment to band 5 and pay were dealt with were in accordance with the Respondent's policies. The reason for doing so was in order to act compliantly with the same. The Claimant's complaint appeared to include the proposition that Mrs Saunders had originally said she would submit a salary variation form to support a pay increase and then decided not to pursue the same. We did not find this was the sequence of events.

79. Accordingly, the unwanted conduct we have found, in so far as that related to sex (including pregnancy) are the two comments made by Ms Cleasby in the second week of August 2019, followed by Mr Beaton's "future plans" reference and nodding toward her stomach on 10 September 2019.

80. We then go on to whether the conduct had the proscribed purpose or effect.

81. Ms Cleasby's remarks were not made for the proscribed purpose. Ms Cleasby said what she did because she was annoyed and upset about what she thought was unfairness in their respective treatment. She was letting off steam. We do not think she was intending to bring about any particular state in the Claimant's feelings.

82. Nor do we think Mr Beaton had the proscribed purpose. We are not sure why he said what he did. As he denied the remarks he could not explain them. He may have wanted to know what the Claimant's current intentions were for the Respondent's planning. He may have believed, mistakenly, that his was a polite and supportive enquiry. We see no evidence of him seeking to discomfort the Claimant.

83. Not being satisfied that either actor had the proscribed purpose, we go on to consider whether nonetheless this conduct, in isolation or cumulatively, had the effect within EqA section 26(1)(b).

84. We have considered the statutory wording - violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment - and reminded ourselves of the guidance in this regard. The language in the section is

strong and we should not find it satisfied too easily. The Claimant was unhappy with the words of Ms Cleasby, which she believed were "unnecessary" and also what Mr Beaton said and did, which she thought was "inappropriate". Her reaction to this unwelcome behaviour was relatively modest. The Claimant was far more upset about her employment being put at risk, when she had been led by Ms Liveras to believe things would be dealt with otherwise. In these circumstances, we do not find that the unwanted conduct relating to sex (pregnancy) had the effect within EqA section 26(1)(b). As such, the harassment claim cannot succeed.

Pregnancy and Maternity

85. With respect to the discrimination claims, since EqA section 13 cannot apply to treatment which falls within EqA section 18, we first consider whether the latter provision applied.

86. The Claimant suffered the unfavourable treatment already referred to. We have gone on to consider whether any of that treatment was because of her pregnancy. Although we were careful to apply the specific statutory test in this regard ("because" of rather than "related to") we came to like conclusions and for the same reasons as set out above under the heading harassment. Much of the treatment was not because of the Claimant's pregnancy, rather it had nothing whatsoever to do with that. The treatment we have found was because of the Claimant's pregnancy are the two comments made by Ms Cleasby in the second week of August 2019, followed by Mr Beaton's "future plans" reference and nodding toward her stomach on 10 September 2019.

87. With respect to Ms Cleasby, whilst the main reason for her saying what she did was because she was annoyed and upset by the unfairness as she perceived it of the Claimant's position being deal with as Ms Liveras had decided to, the two comments which expressly referred to pregnancy were predicated on the same and said, because of that factor. Pregnancy was not the main reason for the remarks but it was a significant reason. Put another way, if because of upset or annoyance a person makes unpleasant remarks and when so doing, reaches for a protected characteristic, then what is said may be discriminatory. The question posed to the Claimant as to whether she had told Ms Liveras she would not be coming back after maternity leave was not based on anything the Claimant had said to Ms Cleasby about her intentions, rather it involved a stereotypical assumption about new mothers not returning to work. The comment about the Claimant having planned her pregnancy well, involves the proposition that in becoming pregnant, she was motivated by the desire to obtain a workplace advantage, which was a most unpleasant comment to aim at the Claimant in these circumstances with a high risk pregnancy. Mr Beaton made a clumsy enquiry and the Claimant was right to think this inappropriate. The obligation on the Claimant to inform her employers about her intentions was a long way off and he ought not to have referred to this at all. These three acts were (individually and cumulatively) unfavourable treatment because the Claimant was pregnant. They were done during the protected period within EqA section 18(6).

Sex Discrimination

88. Having found the three acts previously identified were pregnancy discrimination, pursuant to EqA section 18(7) they cannot also be direct sex discrimination within EqA section 13.

89. As far as the other treatment is concerned, this was not done because of sex within EqA section 13. Once again, although we were mindful to apply the correct test, for like reasons as set out above, the various things were said or done for reasons which had nothing to do with the Claimant being a woman.

Time

90. The latest act we have found could amount to contravention of EqA section 18, is Mr Beaton's comment and gesture on 10 September.

91. The Claimant commenced ACAS conciliation on 15 January 2020 and received a certificate on 15 February 2020. Her claim was presented on 5 March 2020. Accordingly, the latest date for an in-time complaint (absent the Tribunal exercising its discretion) would have been 16 October 2020. Mr Beaton's conduct on 10 September was just over a month before this point. Strictly, as three months had already elapsed by 9 December 2019 and the Claimant had not then contacted ACAS thereby securing an extension of time, it could be said the claim was nearly 3 months late.

92. The claim having been presented beyond the period within EqA section 123(1)(a) and there being no scope for a continuing act argument, we must consider whether the claim was presented within such other period as the Tribunal considers just and equitable.

93. The reason for the lateness of the claim was twofold: firstly, the Claimant wished to avoid bringing a claim at all and delayed because she was fearful that doing so would damage (or further damage) working relations with Ms Cleasby and her managers; secondly, she did not wish to 'rock the boat' before a final decision was made about her band 5 appointment. Whilst these are not absolute impediments and certainly would not satisfy the 'reasonable practicability' test were that applicable, they are legitimate and understandable concerns.

94. There has been little or no adverse effect on the cogency of the evidence by reason of the Claimant's delay. Whilst two important witnesses (Ms Quidley and Mr Beaton) professed a lack of recollection, we were doubtful about reliability of what they told us to this effect and in any event, their witness statements were dated December 2021 and there was no requirement on the Respondent to wait so long before causing its witnesses to record their accounts in writing.

95. The Claimant presented her claim at the beginning of March 2020 and the Claimant's complaints were set out then. The Respondent could have taken instructions and recorded the evidence from Mr Beaton and Ms Quidley at that point. Furthermore, the Claimant wrote at great length to Ms Saunders in November 2019, setting out her complaints. The Respondent could have sought a response from Mr Beaton and Ms Quidley at that time. The good sense in doing so should also have been underlined when the Claimant commenced

ACAS conciliation. When she did present her claim, the particulars were her letter to Mrs Saunders.

96. As to the balance of prejudice, if time is extended the Respondent faces judgment with respect to claims it would otherwise have a procedural defence to. Whilst its witnesses say they do not recall certain events, as we have found the extent of their poor recollection is doubtful and the Claimant's delay did not prevent the Respondent from recording the evidence of Mr Beaton and Ms Quidley when matters would have been relatively recent. If time is not extended and in the absence of an in time complaint upon which to base a continuing act argument, then the Claimant's claim will be defeated irrespective of their merits.

97. In our judgment it is just and equitable to extend time. The delay in this case was modest. The Respondent had notice of the substance of the Claimant's complaints at an early point, within 3 months of the events in question. At the point when she did commence proceedings and if it had not done so previously, the Respondent could have obtained and recorded the accounts of relevant witnesses. The Respondent will suffer no, or no significant disadvantage in being required to answer the claims at the point they were presented as compared with the point when they would have been in-time. Absent an in-time complaint and if the Tribunal does not exercise its discretion, the Claimant faces a complete procedural defence to her claims irrespective of their merit. The balance or prejudice and interests of justice favour the Claimant. Accordingly, the Tribunal has jurisdiction.

Unlawful Deductions

98. The Claimant's claim of unlawful deductions is predicated on her being entitled to pay in band 5 at point 20, rather than 18. This claim could only have succeeded if we found that she had been discriminated against in the setting of her pay point and then it would have been recoverable as a head of loss in that regard. As matters stand, there is no evidence before us to the effect the Claimant was paid anything other than was due under her contract, based upon pay at point 18.

Remedy

99. The Tribunal has heard no argument on remedy but offers the following provisional view, in case it is helpful to the parties:

    99.1 No discrimination has been found with respect to the Claimant's pay and so she will not have a good claim for loss of earnings;

    99.2 The Claimant's remedy is likely to comprise an award for injury to feeling;

    99.3 Given the Claimant's evidence of a modest reaction to the matters we have found amounted to pregnancy discrimination and taking into account that we will not be able to compensate her for upset caused by the change to the way in which her position was dealt with, it is likely that injury to feelings will fall within the lower band, which is now £900 to £9,100.

100. The parties are invited to liaise to see if the question of remedy can be resolved by way of agreement. The content of any such discussions will be confidential to them (without prejudice) and this must not be copied or disclosed to the Tribunal. In the event of there being no agreement, the Tribunal will not be bound by the provisional view on remedy set out above and it will be open to both parties to argue for a different approach.

101. The parties are ordered, by **14 February 2022**, to write to the Tribunal:

101.1 to confirm that an agreement has been reached and the Claimants' claim for a remedy can be dismissed; or

101.2 to confirm:

101.2.1 no agreement has been reached;

101.2.2 directions for a remedy hearing are required;

101.2.3 whether they would be available for a 1-day remedy hearing on 15 July 2022.

EJ Maxwell

Date: 11 January 2022

Sent to the parties on:

21/1/2022

For the Tribunal Office:

N Gotecha