



EMPLOYMENT TRIBUNALS

Claimant: Ms A Brito Brito

Respondent: One Step Recruitment Ltd

Heard at: Exeter **On:** 7 and 8 February 2022

Before: Employment Judge Matthews

Members: Ms R A Clarke
Ms R Hewitt-Gray

Representation:

Claimant: In Person

Respondent: Mr N Mock – Managing Director of the Respondent Company

UNANIMOUS RESERVED JUDGMENT

1. Ms Brito Brito's claims that she was discriminated against because of the protected characteristics of her sex and/or pregnancy by reference to sections 13 (direct discrimination) and 18 (pregnancy and maternity discrimination: work cases) of the Equality Act 2010, are dismissed.
2. Ms Britto Brito was victimised by reference to sections 27 and 39 of the Equality Act 2010. Ms Britto Brito was subjected to detriments because she had done a protected act.
3. The Respondent is ordered to pay to Ms Britto Brito compensation for injury to feelings in respect of the discrimination of £9,996.16 including interest of £996.16.
4. Ms Britto Britto's complaint under section 23 of the Employment Rights Act 1996 is well founded.
5. The Respondent is ordered to pay Ms Britto Brito £6,908.32 in respect of the complaint referred to in paragraph 4 above. Any amount which the Respondent

lawfully deducts from this sum by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of this order. In the absence of evidence (such as a pay slip) to substantiate the lawfulness and amount of any such deduction, the gross amount shall be due under this Judgment to Ms Britto Brito.

6. The total sum awarded to Ms Brito Brito, before any lawful deductions as set out in paragraph 5 above, is £16,904.48.

REASONS

INTRODUCTION

1. Ms Adriana Brito Brito's claims and the issues involved were discussed at a preliminary hearing before Employment Judge M Salter on 22 June 2021. They were summarised in Case Management Orders sent to the parties on 24 June 2021 (the "CMO") (37-50).
2. In summary, Ms Brito Brito claims that she was discriminated against because of the protected characteristics of her sex and/or pregnancy and/or maternity by reference to sections 13 (direct discrimination) and 18 (pregnancy and maternity discrimination: work cases) of the Equality Act 2010 (the "EA"). In addition, Ms Brito Brito claims she was victimised by reference to section 27 (victimisation) of the EA.
3. Ms Brito Brito also claims that she is owed wages by reference to section 23 of the Employment Rights Act 1996 (the "ERA").
4. As far as the issues are concerned, these were identified in the CMO. They are:

In respect of the section 13 and 18 EA claims -

1. not paying the Claimant the agreed level of salary during her maternity leave from March 2020 onwards;
2. refusing the Claimant furlough;
3. refusing to let the Claimant work from home;
4. forcing the Claimant to take unpaid additional maternity leave;
5. changing the Claimant's job title from "Branch Manager and Senior Consultant" to "Managing Consultant" and changing her duties; and

6. verbal abuse upon return to work in October. Mr Mock, on the Claimant's return to work from sickness in October rang the Claimant in October shouting "*I am your fucking manager listen to me, be quiet*".

In respect of the section 27 EA claim –

1. made it hard for the Claimant to work part-time; and
2. changed the Claimant's job titles and duties.

In respect of the claim for wages the issue is about the amount of the wages Ms Brito Brito was entitled to receive, as will be explained below.

5. The Respondent Company denies any discrimination and says that there are no unpaid wages. The CMO reserved the possibility that one or more of the claims might not have been brought within the applicable time limits.
6. Ms Brito Brito gave evidence supported by a written statement. On the Company's side we heard from Mr Nicholas Mock, Managing Director, who also produced a written statement, some of which repeated itself.
7. There was a bundle of documentation running to 207 pages. References in this Judgment to page numbers are to the pages in the bundle unless otherwise specified.
8. The Hearing was listed for four days but, with the co-operation of the parties, it was completed in two days, albeit with Judgment being reserved.
9. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate the provisions of section 136 EA (Burden of Proof) have been taken into account as is explained below.

FACTS

10. As its name suggests, the Company's business is in recruitment, both for temporary and permanent placements. During the period dealt with in this Judgment, the Company had its head office in Taunton with an office in Chard, both in Somerset. For some of the time there was also an office in Yeovil, Somerset, but this was closed. In recent times, the Company has employed between 20 and 30 people,

although there has been a reduction in numbers as a result of the Company adjusting to the economic fallout from the Coronavirus pandemic.

11. Ms Brito Brito started work for the Company on 21 February 2013 as a part time Administrator. With effect from 15 January 2014 Ms Brito Brito was given a full time contract (the "Employment Contract") (53-64). Whilst the Employment Contract was not re-issued in a revised format until 18 November 2020 (and then, as explained below, left unsigned), it appears that it has been updated by e-mail on occasions to record promotions and increases in remuneration. By 2019 Ms Brito Brito had been promoted a number of times. At that stage, as far as Ms Brito Brito was concerned, her job title was Chard Branch Manager & Senior Consultant. As such, Ms Brito Brito, amongst other duties, had responsibility for the day to day running of the Chard office and its team of around 6.
12. At the date of this Hearing, Ms Brito Brito remained employed by the Company. It is clear, however, that the employment relationship has broken down. Ms Brito Brito is angry, bitter and emotional on the subject. Mr Mock has addressed the issue by trying, so far as possible, to maintain a distance in the workplace from Ms Brito Brito. Ms Brito Brito told the Tribunal that she intended to leave as soon as she gets the chance. This came as no surprise to Mr Mock.
13. It seems that, for some 6 years, Ms Brito Brito and Mr Mock enjoyed a good working relationship, on the whole. There were different points of view, but Ms Brito Brito saw Mr Mock as a father figure and felt she was a friend as well as an employee. Mr Mock gave Ms Brito Brito the opportunity to improve her English and develop her career. In essence, it appears that Ms Brito Brito was Mr Mock's protégé.
14. On Ms Brito Brito's account, by February 2019, she was about to be promoted to a Senior Manager and Branch Manager for both the Chard and Yeovil offices. The new challenge would be to turn around the unsuccessful Yeovil office.
15. On 11 February 2019 Ms Brito Brito told Mr Mock that she was pregnant. Ms Brito Brito says that Mr Mock looked "*deflated and confused*" by the news. Mr Mock only recalls congratulating Ms Brito Brito on her pregnancy. In any event, it seems the plans for Ms Brito Brito to take on the Yeovil office were shelved.
16. On 30 April 2019 Ms Brito Brito and Mr Mock met to discuss pay during Ms Brito Brito's forthcoming maternity leave. The Employment Contract did not include any provision for contractual maternity pay. Ms Brito Brito set out her case for maintaining her pay at its

contractual level, rather than it reducing to Statutory Maternity Pay (“SMP”). Mr Mock expressed a reservation that other employees might expect the same treatment and went away to think about it.

17. Ms Brito Brito had to chase Mr Mock on the subject on a few occasions and there was another meeting between the two in August 2019. Ms Brito Brito was pleased with the outcome, which Mr Mock summarised in an e-mail to her on 2 September 2019 (67). It read:

“As discussed regarding your exceptional maternity arrangements agreed

SMP lasts for 39 weeks

Is normally paid at 90% for 6 weeks and then £148.68p per week or 90% of salary whichever is lower

You will receive Your first 6 weeks at the statutory figure of 90% of your average weekly (in this case monthly) earnings

Instead of that figure reducing after 6 weeks you will receive 90% of your basic salary for the tenure of the next 33 weeks plus 90% of commissions due in that month to retain your level of income that reflects your contribution to the office and the value we place on that and you.

If you have any problems while in maternity regarding your wages contact Myself or Alice straight away.”

18. Ms Brito Brito started her maternity leave on 23 September 2019 fully expecting to return after 39 weeks of ordinary maternity leave. All was set fair and, in the usual course of events, it might have been expected that Ms Brito Brito would draw her agreed pay without incident until her ordinary maternity leave ended and she returned to work on 22 June 2020. The course of events, however, was to be far from ordinary.
19. On 16 October 2019 Ms Brito Brito gave birth to her daughter.
20. On 24 December 2019 Ms Brito Brito flew to La Palma in the Canary Islands on a surprise visit to show her side of the family the new baby.
21. In the early part of 2020, the Coronavirus pandemic was taking hold in Europe. By the middle of March, the Spanish authorities had imposed a lockdown, which continued until July. Ms Brito Brito’s partner had come over for a few days and they were due to fly back to the UK on 14 March 2020 but had to cancel the tickets. This left Ms

Brito Brito, her partner and their daughter effectively marooned at her family's house.

22. On 23 March 2020 Mr Mock sent an email to the Company's staff (82). Having taken stock of declining business levels, the Company was suspending the payment of all bonus and commissions. The Employment Contract (54, clauses 7 and 8), certainly permitted this in Ms Brito Brito's case. Presumably the step was also permitted by the contracts of employment between the Company and its other staff.
23. On 6 April 2020 Ms Brito Brito received an email from Mr Mock (83). Attached to it was a letter (84). It included this:

"At the start of your maternity leave it was my intention to keep you on 90% of past earnings during your maternity leave period. However, now with the business struggling to remain open during this crisis we can no longer continue to offer this. Therefore, as of the 1st April your pay will revert to what is outlined in your contract and government SMP guidelines."

24. In short, what Mr Mock meant by this was that, with effect from 1 April 2020 (that is, retrospectively by a few days) Ms Brito Brito would be paid SMP only. That is how Ms Brito Brito understood it. Ms Brito Brito telephoned Mr Mock immediately and suggested a compromise solution. Mr Mock maintained his position.
25. Ms Brito Brito sent Mr Mock an email the next day, 7 April 2020 (83). The email should be referred to for its full content. Ms Brito Brito expressed understanding but would have appreciated some notice. Although Ms Brito Brito's email does not expressly agree to the change, Mr Mock might have chosen to interpret it that way.
26. On the same day, 7 April, it seems that Ms Brito Brito telephoned the landlord of her house in Chard to tell her that Ms Brito Brito could not pay the rent or utilities (191). This appears to have been prompted not only by the Company's action in reducing Ms Brito Brito's maternity pay, but also by her partner's loss of pay as a result of the onset of the Coronavirus pandemic. This was the start of a long process that ended with Ms Brito Brito being rehoused by South Somerset District Council at the beginning of January 2021.
27. It seems that Ms Brito Brito also spoke to a CAB advisor and ACAS. As a result, on 8 April 2020, Ms Brito Brito sent another email to Mr Mock (85). This left no doubt that Ms Brito Brito was not accepting the modification to her maternity pay arrangements.

28. On 10 April 2020 Ms Brito Brito sent a further email to Mr Mock (87-91). In essence Ms Brito Brito asked that the Company consider placing her on furlough. This, Ms Brito Brito suggested, would mean the Company could recover 80% of her salary up to £2,500, thus enabling the Company to pass that sum on to her.
29. On 13 April 2020, having received no answer to her suggestion, Ms Brito Brito resent her email of 10 April to Mr Mock, copying in his fellow director, Ms Samantha O'Brien (92). It seems that, because of the close working relationship Mr Mock had with Ms Brito Brito, Ms O'Brien became involved as someone who had a more arms length relationship with Ms Brito Brito. Ms O'Brien replied the same day (93). The Company had decided not to furlough employees, although the background position on furlough was changing all the time. Mr Mock's evidence, which we accept, is that, in making this decision, the Company acted on advice.
30. There was further correspondence. On 18 April 2020 Ms O'Brien sent Ms Brito Brito an e-mail. This set out the Company's position unequivocally (96). Ms Brito Brito would not be furloughed because the Company was unable to take that step under the government guidance. The maternity pay arrangements that Mr Mock had agreed with Ms Brito Brito were "*discretionary*" and the enhanced maternity pay had ceased to be payable after 31 March 2020.
31. On 24 April 2020 Ms Brito Brito, on advice from ACAS, sent an email to Ms O'Brien requesting her wages per the enhanced maternity pay terms (97). The email included this:
- "According with my employment specialist at ACAS who has looked into my case, and due to the fact that we had a written payment agreement for my maternity leave and regardless of this one not being of a contractual nature that during my maternity leave I was going to be receiving 90% of my salary including bonuses and commissions."*
32. Exactly what that passage in Ms Brito Brito's email meant is unclear at first sight. Ms Brito Brito has an excellent conversational command of the English language. However, it is not her first language and she makes small errors in her written English. On a plain reading what it appears to say is that there was a written agreement to pay, but it was outside the Employment Contract document itself. That undoubtedly was the position.
33. On 27 April 2020 Ms O'Brien replied reaffirming the Company's position (98).

34. Ms Brito Brito's personal circumstances whilst in La Palma had been aggravated by illness. On 1 May 2020 they were further aggravated by an eviction notice in respect of her rented property in Chard (100-101).
35. As time went by and travel restrictions remained in place, Ms Brito Brito started to be concerned that she would not be able to travel back to the UK in time for her scheduled return to work on 22 June 2020. Ms Brito Brito discussed this with Mr Mock from time to time. It seems that, from April onwards the Company had started to make use of the furlough scheme and home working for some employees. However, the advice received by the Company, as far as Mr Mock was concerned, continued to be that Ms Brito Brito could not be furloughed in her particular circumstances.
36. The debate about furlough continued. In an e-mail to Mr Mock on 4 June 2020 Ms Brito Brito included this (102):
- "I cannot help but feeling discriminated and I still don't know what have I possibly have done to deserve it."*
37. That email also included a passing mention that the two had discussed Ms Brito Brito working from "home" in La Palma. The bundle does not reflect that Ms Brito Brito pressed the subject much at the time but, in any event, Mr Mock rejected the idea. In Mr Mock's view there would be communication difficulties (clients would have to make international calls), there was a regulatory problem with remote access to the Company's databases (GDPR), there were problems making the right hardware available and, even if those issues could have been overcome, working from home had to be discontinued in the UK because it did not work out.
38. In June 2020 Ms Brito Brito took legal advice from Battens, Solicitors. Ms Brito Brito has waived legal privilege in relation to this and also to the "without prejudice" letter sent by Battens to the Company on 8 June 2020 (115). In short, Ms Brito Brito asserted her right to enhanced maternity pay and required to be furloughed.
39. Ms O'Brien responded, "without prejudice" on 10 June (116). To the extent that response attracts any privilege, Mr Mock waived it. The Company was neither going to pay Ms Brito Brito more than SMP nor was it going to furlough her. Ms O'Brien asked Ms Brito Brito if she was going to return to work on 22 June 2020.
40. On 11 June 2020 Ms Brito Brito sent an email to Ms O'Brien (117). Ms Brito Brito was unable to get a flight back to the UK until early July. Working from La Palma was mentioned again. The email ended:

"I honestly feel that you are not treating me fairly because I am on maternity leave and that you are putting me in an unfair position given that the business knows I am stuck in Spain and have recently been very ill."

41. Ms O'Brien replied by email on 17 June (118). It included:

"We do thank you for your offer to work from Spain from the 22nd June onwards, however this is not a viable option. You do have the option for maternity leave for another 3 months, which we are happy for you to continue as this will give us some peace of mind knowing it provides you time to rest and continue your recovery. Also, this will allow you the time to become more comfortable with travelling back to the UK.

Please take the time you need and keep us updated as you confirm your date for returning so we can coordinate the staffing levels at the Chard office.

Wishing you a speedy recovery and we await to hear from you when you know more."

42. From Ms Brito Brito's perspective, this left her with a return to work date of 21 September 2020 and no income between 22 June and 21 September. Ms Brito Brito gave vent to her feelings in a lengthy email to Mr Mock on 4 August entitled "*Homeless due to One Step*" (119-121). As Ms Brito Brito saw it, the Company was responsible for destroying her life, her homelessness, discriminatory business decisions and making her ill.

43. After chasing by Ms Brito Brito, Mr Mock responded by email on 12 August 2020 (124). Mr Mock sought to reassure Ms Brito Brito that her job remained open for her, ending:

"Please understand, I feel so upset for you but you seem to be blaming Me for everything and I find that very unfair."

44. On 14 August 2020 Ms Brito Brito returned to the UK.

45. Ms Brito Brito responded to Mr Mock's email of 12 August on 19 August 2020 (125). That response can be referred to for its full content but included:

"If you think you were just getting rid of me that easily you were mistaken me for someone else. I am probably one of the smartest and kindest people you ever had the pleasure of meeting, and even more the blessing to have me worked for you, your own words. And being brutally honest as I

always am, I regret so much to have thought of you almost as if you were family, worrying about your personal problems and tried guiding you when you were blinded and careless about your business and health.”

46. The Tribunal's observation at the Hearing was that, notwithstanding the 18 months that have elapsed since those exchanges, neither party's view has changed.
47. Ms Brito Brito contacted ACAS for early conciliation on 27 August 2020 and ACAS issued an Early Conciliation Certificate on 27 September 2020. We do not know specifically, of course, what passed between the parties and ACAS. What we do know, because the parties told us so, is that the discussions concerned both the maternity pay issue and alleged discriminatory treatment. Mr Mock's evidence was that the mention of discriminatory treatment was something that "upset me".
48. On 17 September 2020 Ms Brito Brito sent an email to Mr Mock (130). It covered various subjects including a request that Mr Mock considered Ms Brito Brito starting back part time. Mr Mock's reply confirmed he was prepared to discuss this (131). Mr Mock also explained that Mr James Tuckett was now permanently based in Chard and was the senior manager there. Mr Tuckett had always been a more senior employee than Ms Brito Brito but based in Taunton. With Mr Tuckett's move to Chard, it would not have been lost on Ms Brito Brito that she would no longer be in charge of the Chard office. Ms Brito Brito handled this carefully in her follow up email to Mr Mock on 18 September (133).
49. Ms Brito Brito returned to work on 21 September 2020. Unsurprisingly, given all that had happened, Ms Brito Brito felt very uncomfortable. After half an hour or so Ms Brito Brito joined Mr Mock for a return to work and catch up meeting. Exactly what happened in this meeting is one of the few areas of significant factual dispute between Mr Mock and Ms Brito Brito. It is common ground that Mr Mock explained how the Coronavirus pandemic had affected the Company. 10 people had left, 6 had been made redundant and only 4 of the people Ms Brito Brito had known remained. After some other explanatory matters had been covered, Mr Mock asked if Ms Brito Brito had any other questions.
50. At this point Mr Mock's recollection of events parts company from Ms Brito Brito's. In essence Mr Mock says that he does not recall what was said but it would not have been "that". From the Tribunal's perspective, both Ms Brito Brito and Mr Mock were credible witnesses. As far as the bare facts were concerned, they were mostly

agreed. Where there were differences, although radical in some cases, they were often a matter of the interpretation put on events by Ms Brito Brito. However, in this instance, there is a difference in the bare facts and we prefer Ms Brito Brito's clear account.

51. Ms Brito Brito says that, in response to Mr Mock's invitation to ask questions, she asked what would seem to us to have been the obvious ones. First, with Mr Tuckett as the senior manager in Chard, what was Ms Brito Brito's role to be? Second, what was Mr Mock's response to her request for part time hours? Third, could they have a conversation to sort out the issues that had occurred during her maternity leave? Mr Mock and Ms Brito Brito had previously agreed to deal with the third question as a separate matter and Ms Brito Brito would have known that raising it on this occasion was potentially inflammatory.
52. Mr Mock replied that he would have to talk to Mr Tuckett about Ms Brito Brito's role. Mr Mock would see what he could do about part time hours but it would be difficult. Further, he wasn't going to have any discussion about the issues that had arisen during Ms Brito Brito's maternity leave. Ms Brito Brito reports the following exchange on this subject. The Tribunal does not accept this word for word but does accept that it conveys the gist.

Mr Mock "If you have any more crap, talk to your friend in Manchester."

Ms Brito Brito "It's not crap it's important for me and it has really affected me, what friend are you talking about?"

"Your friend from ACAS, I told him everything I need to say, and I have no time for more nonsense, I can't believe that the only time I cannot help you, you have to call ACAS. Why haven't you quit after all? What are you still doing here?"

"I need the money after all I've lost, of course I'm not happy to be back here, but I have a daughter to support and I am losing my house plus the pandemic."

"I just don't get it, this meeting is now over go home as your system is not ready, come back tomorrow at 9am."

53. Whatever the tone of the meeting on 21 September 2020 had been, Mr Mock sent Ms Brito Brito a measured email on 23 September (134). They would sit down to discuss alternative ways of working and holidays at the end of the week. Mr Mock would be flexible about hours in the following week to allow Ms Brito Brito to arrange childcare.

54. Ms Brito Brito's evidence is that Mr Mock finally agreed that she work a three day week on 15 October 2020. Apparently at Ms Brito Brito's suggestion, the arrangement was to be effective from November (see 190).
55. On 26 October 2020 Ms Brito Brito lodged her claims with the tribunals.
56. At the end of October and beginning of November 2020 there was an incident involving Ms Brito Brito and Mr Mock. Although it occurred after Ms Brito Brito had lodged her claims with the tribunals, we record it because it sums up the breakdown in the relationship between the two. It shows neither in a good light.
57. On 30 October 2020 Ms Brito Brito, her partner and daughter discovered they had a serious bout of something like flu, which they suspected might be Coronavirus. (They later tested negative.) Ms Brito Brito took sick leave and told Mr Mock what was going on. A few days later an employee of the Company, Ms Katrice Foggon sent Ms Brito Brito a message to the effect that it would have been appreciated if Ms Brito Brito had let her work colleagues know earlier that she had a suspected case of Coronavirus (147). The message was unfriendly but, objectively viewed, did not merit Ms Brito Brito's reaction. Miss Brito Brito made it clear in no uncertain terms to Mr Mock that she blamed him because he had not passed the news on to her work colleagues (148). Mr Mock attempted to placate Ms Brito Brito (148).
58. Miss Brito Brito was not prepared to let the matter rest. On her return to work on 10 November, Miss Brito Brito insisted on a meeting with Ms Foggon in Mr Tuckett's presence. There is more than a suggestion that this was the continuance of office politics between Ms Brito Brito and Ms Foggon. It appears that Ms Brito Brito upbraided Ms Foggon. Ms Brito Brito then sent Mr Mock the injudicious email we see at 149. Miss Brito Brito accused Mr Mock of lying and ended "*Please could you explain yourself?*"
59. Unsurprisingly, Mr Mock was not impressed. He responded in an e-mail to say that he would deal with the matter when he got back to his desk "*but i am furious as it is not factual and i would expect you to be working not spending your time with this. You accused me of lying so i would like you to explain how as i take this allegation extremely serious.*"
60. Mr Mock rang Ms Brito Brito later the same day. Mr Mock agrees that Ms Brito Brito's account of what happened is probably more or less right, although he does not recollect it at this distance in time. Miss

Brito Brito reports the conversation as follows. Again, we doubt the word for word accuracy of this but accept the gist. (We also note that Ms Brito Brito was no stranger to using the “f” word herself – see 74.)

Mr Mock *“What the actual fuck is going on with you, you are accusing me of lying and telling me what should I do? Who do you think you are?” “I am your fucking Manager shut up and listen to me, be quiet!” “I honestly don’t want you here any-more, you have become just problems, and I gave you the fucking part time hours and 4 hours of pay on top, when are you going to shut up?” “You know what? Fuck off!”*

Mr Mock hung up but rang back shortly afterwards. *“I had a fag and I’m calm now let’s talk”*

Ms Brito Brito *“before I talk to you, you need to apologise” “I will hang up this time if you keep disrespecting me.”*

61. This was followed by what appears to have been a semi-civilised discussion of the incident with Ms Foggon. Thereafter, Mr Mock appears to have avoided being in the office at the same time as Ms Brito Brito for some months.
62. On 18 November 2020 Mr Mock sent Ms Brito Brito a revised contract of employment *“reflecting your new hours and salary”* (151-162). Ms Brito Brito suspected a hidden agenda and was not happy with her job title of *“Managing Consultant”*. To date, Ms Brito Brito has not signed that contract.
63. Ms Brito Brito has produced a letter from her doctor dated 21 January 2022 and addressed *“To whom it may concern”* (183). The doctor writes that Ms Brito Brito was diagnosed with reactive depression in April 2020. If that is right, the diagnosis predates the incidents with which we are concerned. Ms Brito Brito was in La Palma in April 2020, so we assume the doctor meant April 2021. The doctor comments:

“The stress of being a new mum with her maternity pay stopped and eviction from her property caused Adriana to become clinically depressed.”

“The pressure of the eviction also led to the breakdown of her relationship with the father of her baby. He began gambling and all the financial responsibility and responsibility for caring for her daughter fell to Adriana. She used all her savings trying to support her daughter and put a roof over

her head and Adriana had to return to work before she was ready to.

Adriana now has a diagnosis of depression and post traumatic stress disorder as a result of the immense pressure she has been under financially and emotionally over the last year. This has been compounded by the Covid pandemic which has meant she has not been able to see her family in Spain for support.

I do feel that the loss of her maternity pay and having to return to the work place for financial reasons has contributed directly to her physical and psychological problems.”

64. Ms Brito Brito has chosen not to take medication but to address her diagnosis with therapy sessions, both through the NHS and a national organisation providing support for partners of gamblers (184).

APPLICABLE LAW

65. Section 23 of the ERA, so far as it is relevant provides:

“23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in contravention of section 13”

“(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,”

(3) Where a complaint is brought under this section in respect of-

(a) a series of deductions”

“The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series”

“(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).”

66. Section 24 of the ERA, so far as it is relevant, provides:

“Determination of complaints

“(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13”

“(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.”

67. Section 27 of the ERA, so far as it is relevant, provides:

“27 Meaning of “wages” etc

(1) In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including-

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,”

68. Section 4 of the EA, so far as it is relevant, provides:

“4 The protected characteristics

The following characteristics are protected characteristics-”

“pregnancy and maternity;”

“sex;”

69. Section 13 of the EA, so far as it is relevant, provides:

“13 Direct discrimination

(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.”

70. Section 18 of the EA, so far as it is relevant, provides:

“Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends –

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;”

“(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).”

71. The word “because” in section 18 of the EA is significant. Causation is important in this context. It is not enough that the unfavourable treatment would not have happened “but for” the pregnancy or pregnancy related illness. An employment tribunal must examine “the reason why” the unfavourable treatment occurred.

72. Section 27 of the EA, so far as it is relevant, provides as follows:

“27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-”

“(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation made, in bad faith.”

73. Section 39 of the EA, so far as it is relevant, provides as follows:

“39 Employees and applicants

“(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 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.”

“(4) An employer (A) must not victimise 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 access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

74. Section 123 of the EA, so far as it is relevant, provides:

“123 Time limits

(1) Subject to section 140B, 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,”

Section 140B of the EA is the provision that extends time limits to facilitate conciliation through ACAS. The scheme of it is twofold. First, the period of conciliation is discounted when calculating time limits. Second, if a time limit would have expired in a period of conciliation, the time limit is extended for a month beyond the end of conciliation.

75. Section 136 of the EA, so far as it is relevant, provides:

“136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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."

76. Regulations 18(2), 18A and 19 of the Maternity and Parental Leave etc Regulations 1999 (the "MPLR") , so far as they are relevant, provide as follows:

"18 Right to return after maternity or parental leave"

"(2) An employee who returns to work after-

(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave,"

"is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances."

"18A Incidents of the right to return

"(1) An employee's right to return under regulation 18(1) or (2) is a right to return-

(a) with her seniority, pension rights and similar rights as they would have been if she had not been absent, and

(b) on terms and conditions not less favourable than those which would have applied if she had not been absent."

"19 Protection from detriment

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2)."

77. The Tribunal was not referred to any case law.

CONCLUSIONS

78. The essence of this case is the breakdown of the employment relationship between Ms Brito Brito and Mr Mock. In our view, the facts show that there was fault on both sides in that respect. Our task is to determine the issues that arise from that breakdown.

79. **Time points**

80. Ms Brito Brito contacted ACAS for early conciliation on 27 August 2020 and the Early Conciliation Certificate was issued on 27 September 2020. The claim form was presented on 26 October 2020. Any complaint about something that happened before 28 May 2020 is, therefore, potentially out of time.
81. The claim for maternity pay is in time. The last of the series of “deductions” was made on 31 May 2020.
82. The discrimination and victimisation claims are also all in time. The discussions about furlough and working from home continued well after May 2020 and the issue of additional maternity leave arose in June 2020. The issues of job title, verbal abuse and part time working started in September 2020. All arose before Ms Brito Brito lodged her claim form on 27 September 2020.

83. **The claim for maternity pay**

84. It was the Company’s decision to stop topping up Ms Brito Brito’s maternity pay to 90% of Ms Brito Brito’s historical average earnings that is at the root of all that went wrong afterwards. It is, therefore, right to deal with our conclusions on this claim first. It should be noted that SMP is not the issue here. That was paid as required.
85. Mr Mock’s commitment to the arrangement in his e-mail of 2 September 2019 (see paragraph 17 above) was, in effect, an amendment to Ms Brito’s contract of employment. The Company was contractually bound to top up Ms Brito Brito’s maternity pay for 33 weeks to 90% of Ms Brito Brito’s average earnings, including commissions (bonuses were not mentioned but Mr Mock seemed to regard the two as intermingled for this purpose). There is no credible evidence that the agreement was expressed to be discretionary. Ms Brito Brito had a contractual right to enforce those terms. On the facts, Ms Brito Brito did not agree to the withdrawal of the contractual right. Nor does the financial pressure faced by the Company as the Coronavirus pandemic took hold amount to circumstances that frustrated the contractual right. However, the general withdrawal of commissions and bonuses that took effect, we understand, from 1 May 2020, did modify the amount payable to Ms Brito Brito. As there were no such commissions (and bonuses, if included) earned, the top up to 90% of commissions (and bonuses, if included) was nil for May and June 2020.
86. Ms Brito Brito is, therefore, entitled to the shortfall for the months of April, May and June 2020. In the Schedule of Loss (51-52) Ms Brito

Brito puts this at £6,308.04 net. Ms Brito Brito's gross monthly salary was £2,916.66. Leaving aside commission (and bonuses, if included), 3 months' salary was £8,749.98. Ms Brito Brito gives credit for £1,841.66 received (presumably SMP – this may be a net payment but it is the only figure the Tribunal has to work with), which would leave a balance due of £6,908.32. The parties did not know what would have been due by way of 90% of commission (and bonuses, if included) for April. In the circumstances we award Ms Brito Brito **£6,908.32** gross in respect of deductions from the wages properly payable to her.

87. Ms Brito Brito claims solicitors' fees of £734.40, which she says are attributable to the shortfall. We do not consider it appropriate to award a sum in that respect. They were not a financial loss sustained by Ms Brito Brito attributable to the shortfall. Rather, they were a voluntary expense incurred by Ms Brito Brito in an attempt to find alternative solutions.

88. The section 13 and 18 EA discrimination claims

89. Ms Brito Brito relies on the protected characteristics of sex and/or pregnancy and maternity. If Ms Brito Brito succeeds in the section 18 pregnancy and maternity discrimination claim in respect of an issue, she cannot also succeed in the section 13 direct discrimination claim in respect of the same issue because of the provisions of section 18(7) of the EA.

90. All the treatment complained of potentially falls within section 39 of the EA.

91. For the purposes of section 18 of the EA, the protected period for Ms Brito Brito started no later than 11 February 2019 and ended on her return to work on 21 September 2020.

92. Not paying the Claimant the agreed level of salary during her maternity leave from March 2020 onwards

93. On the facts, the Company stopped topping up Ms Brito Brito's salary with effect from 1 April 2020 because it was facing business and financial uncertainty as a result of the onset of the Coronavirus pandemic and lockdowns. The act was within the protected period but, for the purposes of section 18 of the EA, it was not because of Ms Brito Brito's pregnancy, because she was on compulsory maternity leave or because she was exercising the right to be on maternity leave. The section 18 claim must, therefore fail. This claim is clearly a section 18 claim. It fits less comfortably under section 13. For the purposes of section 13 it may be necessary to compare the

treatment of Ms Brito Brito with either the treatment of an actual or hypothetical comparator. No actual comparators are offered for any of the claims. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. A man would not, of course, be on maternity leave. The point is this: however the comparator is constructed, the Tribunal's conclusion is that he would have been treated in exactly the same way. If no comparator was necessary, the conclusion would be the same as for the section 18 claim. These claims are dismissed.

94. Refusing the Claimant furlough

95. The Company refused Ms Brito Brito's request to be furloughed on advice. The act complained of was within the protected period but, for the purposes of section 18 of the EA it was not because of Ms Brito Brito's pregnancy, because she was on compulsory maternity leave or because she was exercising the right to be on maternity leave. The section 18 claim fails. Again, this is clearly a section 18 claim. It fits less comfortably under section 13. For the purposes of section 13 it may be necessary to compare the treatment of Ms Brito Brito with a hypothetical comparator. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. A man would not, of course, be on maternity leave. Arguably a man in La Palma prevented from returning because of travel restrictions and asking to be furloughed might be a suitable comparator. Again, however the comparator is constructed, the Tribunal's conclusion is that he would have been treated in exactly the same way. If no comparator was necessary, the conclusion would be the same as for the section 18 claim. These claims are dismissed.

96. Refusing to let the Claimant work from home

97. The Company refused to allow Ms Brito Brito to work from home in La Palma for a variety of reasons (see paragraph 37 above). The act complained of was within the protected period but, for the purposes of section 18 of the EA it was not because of Ms Brito Brito's pregnancy, because she was on compulsory maternity leave or because she was exercising the right to be on maternity leave. The section 18 claim fails. Once again, this is clearly a section 18 claim. It fits less comfortably under section 13. For the purposes of section 13 it may be necessary to compare the treatment of Ms Brito Brito with a hypothetical comparator. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. A man would not, of course, be on maternity leave. However, a man prevented from returning from La Palma by travel restrictions might be a comparator. Again, however the comparator is constructed, the Tribunal's conclusion is that he would have been

treated in exactly the same way. If no comparator was necessary, the conclusion would be the same as for the section 18 claim. These claims are dismissed.

98. Forcing the Claimant to take unpaid additional maternity leave

99. We do not see that Ms Brito Brito was forced by the Company to take additional maternity leave. It was, in effect, the travel restrictions that left Ms Brito Brito with additional maternity leave as the only alternative to resigning. What Ms Brito Brito means by “forcing” is that she should have been furloughed or allowed to work from home in La Palma as alternatives. Those points are dealt with above. We do not, therefore, see any detriment for the purposes of the section 18 or 13 claims. If we were to be wrong about this, the position would be as follows. The act complained of was within the protected period but, for the purposes of section 18 of the EA the Company did not put forward the option of additional maternity leave because of Ms Brito Brito’s pregnancy, because she was on compulsory maternity leave or because she was exercising the right to be on maternity leave. Rather, the Company put it forward because, as the Company saw it, it was a means of continuing the employment relationship in circumstances where Ms Brito Brito was prevented by travel restrictions from returning to work after the end of her ordinary maternity leave. Again, this is clearly a section 18 claim. It fits less comfortably under section 13. For the purposes of section 13 it may be necessary to compare the treatment of Ms Brito Brito with a hypothetical comparator. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. A man would not, of course, be on maternity leave and would not be entitled to additional maternity leave. However, a man prevented from returning from La Palma by travel restrictions and offered an additional period of 26 weeks unpaid employment might be a comparator. Once again, however the comparator is constructed, the Tribunal’s conclusion is that he would have been treated in exactly the same way. If no comparator was necessary, the conclusion would be the same as for the section 18 claim. These claims are dismissed.

100. Changing the Claimant’s job title from “Branch Manager and Senior Consultant” to “Managing Consultant” and changing her duties

101. There is no claim before the Tribunal under section 47C of the ERA by reference to the MPLR. If there were, the argument would centre on whether or not it was reasonably practicable for the Company to permit Ms Brito Brito to return to her old job. Since Ms Brito Brito had gone on maternity leave, the Coronavirus pandemic had required exceptional measures including redundancies. The position then

changed again when Ms Brito Brito asked to work part time hours. Whilst we do not need to decide that point, it is illustrative to look at Ms Brito Brito's return to work in the context of her rights under the MPLR. Whatever job Ms Brito Brito returned to, it did not carry the title nor does it seem to have had the duties of Chard Branch Manager & Senior Consultant. It did, however, carry the same pay.

102. Against that background we have to consider the section 18 and 13 claims. The section 18 claim must fail because the unfavourable treatment relied on fell outside the protected period and there is no evidence that it was in implementation of a decision taken in the protected period. For the purposes of section 13 it may be necessary to compare the treatment of Ms Brito Brito with a hypothetical comparator. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. A man would not, of course, be returning from maternity leave with the right to his job back. Here it is, in our view, impossible to construct a suitable male comparator. In any event, however, the treatment of Ms Brito Brito in this instance was not because of her protected characteristics of sex and/or pregnancy and maternity. These claims are dismissed.

103. Verbal abuse upon return to work in October. Mr Mock, on the Claimant's return to work from sickness in October rang the Claimant in October shouting "I am your fucking manager listen to me, be quiet"

104. This is a reference to the incident on 10 November 2020. What happened is set out in paragraphs 56-61 above. The section 18 claim must fail because the incident was outside the protected period. For the purposes of section 13 it is necessary to compare the treatment of Ms Brito Brito with a hypothetical comparator. A hypothetical comparator would be a man otherwise not in materially different circumstances from those of Ms Brito Brito. In this case it would be a man who had accused Mr Mock of lying in the same circumstances. The Tribunal's conclusion is that he would have been treated in exactly the same way. The treatment of Ms Brito Brito in this instance was not because of her protected characteristics of sex and/or pregnancy and maternity. These claims are dismissed.

105. In summary, therefore, Ms Brito Brito's claims of direct discrimination and pregnancy and maternity discrimination by reference to sections 13 and 18 of the EA, respectively, are dismissed.

106. **The section 27 victimisation claim**

107. All the treatment complained of potentially falls within section 39 of the EA.

108. Was there a protected act?

109. On 4 June 2020 Ms Brito Brito had complained to Mr Mock that she was being discriminated against (see paragraph 36 above). On 11 June 2020 Ms Brito Brito complained to Ms O'Brien of unfair treatment because Ms Brito Brito was on maternity leave (see paragraph 40 above). On 27 August 2020 Ms Brito Brito contacted ACAS for early conciliation. We know that ACAS raised the issue of discrimination with Mr Mock. This was the parties' common evidence. In the Tribunal's view, each of these three acts by Ms Brito Brito was a protected act. If there was any doubt about the first on 4 June 2020, there can be no doubt about the other two. Ms Brito Brito was "*doing any other thing for the purposes of or in connection with*" the EA and/or "*making an allegation (whether or not express)*" that the Company, and/or Mr Mock and/or Ms O'Brien had contravened the EA.

110. The Company does not argue that the protected act was false or in bad faith.

111. Did the Company subject Ms Brito Brito to the detrimental treatment alleged because Ms Brito Brito had done the protected act or acts?

112. The CMO identified the specific detrimental treatment alleged as Mr Mock making it hard for Ms Brito Brito to work part-time and changing her job titles and duties. There was one other allegation of detrimental treatment identified as an issue that is relevant here. That is Mr Mock's behaviour towards Ms Brito Brito on 21 September 2020 (see paragraphs 49-52 above). That allegation was not, however, set down as a distinct issue in the context of the section 27 claim. Whilst including it as an issue would be no more than a "labelling" exercise, it is not necessary for us to take this step in reaching our conclusion. The incident is, however, context for our decision.

113. There are two preliminary factual questions to be answered.

114. First, did Mr Mock make it hard for Ms Brito Brito to work part time? Mr Mock's behaviour on 21 September 2020 leads us to conclude that, although Mr Mock did agree to permit Ms Brito Brito to work part time on 15 October 2020, he had initially considered the request at best grudgingly. This was a detriment.

115. The second factual question is, did Mr Mock change Ms Brito Brito's job titles and duties? Whilst it cannot be said that Mr Mock changed Ms Brito Brito's job title, the fact of the matter is that her

duties changed. Ms Brito Brito no longer performed the role of Chard Branch Manager. This was a detriment.

116. Having identified the two detriments, the question for the Tribunal to answer is, did the Company subject Ms Brito Brito to one or both of them because she had done the protected act or acts?

117. The test to be applied in answering this question does not require that the sole reason for the detrimental treatment be the doing of the protected act. It is sufficient that the doing of the protected act was a significant factor in the detrimental treatment.

118. We think there were two reasons for Mr Mock's begrudging consideration of Ms Brito Brito's request for part time working. First, was the practicality of it in the context of the Company's needs. This cannot have been of much significance as it was easily overcome. Second was Mr Mock's obvious irritation that Ms Brito Brito had continued to pursue the issue of her entitlement to enhanced maternity pay and had contacted ACAS to do so. Pursuing that issue included the question of discrimination and we know that "upset" Mr Mock (see paragraph 47 above). Mr Mock's comments on ACAS's involvement further demonstrate the point (see paragraph 52 above).

119. Our conclusion is that Ms Brito Brito was victimised because Ms Brito Brito doing the protected act or acts was a significant factor in Mr Mock's begrudging treatment of Ms Brito Brito's request to work part time.

120. As far as the change to Ms Brito Brito's job duties is concerned, the position is less clear. The Coronavirus pandemic had caused significant disruption. However, we have not been given any satisfactory explanation why Ms Brito Brito could not have picked up her role as Chard Branch Manager, with Mr Tuckett reverting to his former role. In the absence of that evidence, there are facts from which we could conclude that the protected act or acts were a significant factor in the Company's not allowing Ms Brito Brito to take up her former role as Chard Branch Manager. The Company has not shown us that this was not a significant factor and the victimisation claim also succeeds in this respect.

121. The Company does not rely on section 109 of the EA.

122. **Remedy in respect of the finding of victimisation**

123. *Declaration*

124. A declaration is made.

125. *Recommendation*

126. As Ms Brito Brito intends to leave her employment, there is no appropriate recommendation to be made. If that had not been the case, the Tribunal would have suggested that the parties move on from the findings of this Tribunal by agreeing a mutually satisfactory job description and contract of employment. To do so, both sides would have to put past events into perspective and show some realism in their future dealings.

127. *Injury to feelings*

128. An award made in this respect is to compensate for anger, distress and upset caused to the claimant by the unlawful discrimination they have been subjected to. It is not a punitive award. The focus is on the injury caused to the claimant. It is awarded in bands. The upper band for the most serious cases is £27,400 - £46,500, the middle band for cases that do not merit an award in the upper band is £9,100 - £27,400 and the lower band for less serious cases is £900 - £9,100.

129. In this instance there are clearly many factors that have contributed to Ms Brito Brito's anger, distress and upset. The victimisation found by the Tribunal is by no means the only factor involved. Ms Brito Brito has had to face becoming a mother for the first time partly during the Coronavirus pandemic, being stranded in Spain by travel restrictions, the breakdown of the relationship with her partner and moving house following eviction proceedings. Whilst Ms Brito Brito lays all these things at the door of the Company, that is a view that cannot be objectively justified. By no means is all of Ms Brito Brito's anger, distress and upset attributable to the acts of victimisation.

130. However, we do see that the acts of victimisation contributed to Ms Brito Brito's anger, distress and upset.

131. In our view, an award at the top end of the lower band is appropriate and we put this at **£9,000**. Interest is payable on this award calculated as follows:

Days between 21 September 2020 (that being taken as the day of the discriminatory act) and 8 February 2022 (the day of calculation): 505

Interest rate: 8%

$505 \text{ (days)} \times 0.08 \times 1/365 \times \text{£}9,000 = \text{£}996.16$

132. *Personal injury*

133. Ms Brito Brito's doctor's letter identifies several factors in Ms Brito Brito's diagnosis of reactive depression and subsequent post traumatic stress disorder (see paragraph 63). They are: becoming a new mother, illness, having her maternity pay top up stopped for 3 months from April 2020, eviction, the breakdown of Ms Brito Brito's relationship with her partner, financial responsibility and the Coronavirus pandemic with accompanying travel restrictions from and to La Palma. The acts constituting the victimisation found by the Tribunal are not mentioned. Even if that is too strict an approach to the issue of whether or not the victimisation caused Ms Brito Brito personal injury, it is clear that the discrimination found by the Tribunal was not the primary cause and probably not a significant cause of Ms Brito Brito's diagnosis. Accordingly, no award is made for personal injury.

Employment Judge Matthews
Date: 15 February 2022

Judgment sent to parties: 17 February 2022

FOR THE TRIBUNAL OFFICE