EMPLOYMENT TRIBUNALS

Claimant: Ms E Gazi

Respondent: Ministry of Defence

Heard at: Cambridge Employment Tribunal via CVP

On: 10,11,12,12 and 14 January 2022

Before: Judge Bartlett, Mr Hayes and Mr Holford

Representation
Claimant: Mr Chiguvare
Respondent: Mr Daliami

JUDGMENT

1. The claimant's claims for direct race discrimination under section 13 of the Equality Act 2010 fail.

2. The claimant's claims for pregnancy and/or pregnancy related illness under section 18 of the Equality Act 2010 fail.

3. The claimant's claim that she suffered from victimisation contrary to section 27 of the Equality Act 2010 fail.

REASONS

Background

4. The claimant commenced employment with the respondent on 4 September 2014. She remains an employee of the respondent. At the time of the events which gave rise to this claim the claimant was working in the Main Commercial Buildings Team.

5. In very brief summary, the claim arises from issues raised by the respondent around July 2017 about the claimant's use of the flexible working hours scheme

and home to detached duty time deductions. The respondent instigated a disciplinary investigation process which lasted from around 20 July 2017 until January 2018. During the investigation phase it was found that there was no case to answer in relation to the flexible working hours scheme. At the conclusion of the disciplinary investigation, it was found that, in relation to the home to detached duty time deductions, which was the only issue considered, that "*the allegations have not been proven and that misconduct has not occurred*."

6. The claimant's ET1 was received by the Tribunal on 30 April 2018 following a period of conciliation with ACAS which commenced on 7 February 2018 and ended on 7 March 2018.

7. The claim was initially allocated to the Manchester Employment Tribunal but it was transferred to the South East region.

8. Preliminary hearings took place on:

   8.1. 9 July 2018;

   8.2. 8 April 2020;

   8.3. 8 January 2021

The Hearing

9. The hearing was scheduled to take place over five days between 10 and 14 January 2022. Prior to the hearing the respondent made an application for the case to be converted to a CVP hearing or at least a hybrid hearing so that counsel and one witness could participate remotely. The parties had been informed that a decision would be made about the format of the hearing and they would be informed around 11 AM on 10 January 2022. As it transpired the Judge originally assigned to hear this case was unable to hear it and Judge Bartlett was allocated the case during the morning of 10 January 2022. Judge Bartlett is based at Watford and in the circumstances the case was converted to a fully CVP hearing. 10 January 2022 was used as a reading day and the witness evidence commenced on 11 January 2022. Witness evidence was heard over the course of 11 and 12 January 2022, oral submissions were heard on the morning of 13 January 2022, the tribunal took time to deliberate before giving oral judgement on the afternoon of 14 January 2022.

10. There were no difficulties with communication or connection during the hearing. The claimant was represented by her partner, Mr Chiguvare, and they were both together during the course of the hearing. The claimant was unable to use the camera on the device she was using and therefore when she was not giving evidence she was largely out of view. Judge Bartlett did discuss this with Mr Chiguvare and he confirmed that the claimant was comfortable with this arrangement. Sometimes the claimant sat next to Mr Chiguvare and was partially in view.

11. Several housekeeping issues were raised at the start of the hearing. One

concerned whether or not the claimant's case included a victimisation claim. Following a Case Management hearing on 8 January 2021 Judge Tynam set out the full and final list of issues to be heard in this case. This list did not include a victimisation claim though both parties agreed that Judge Tynam had made comments along the lines that it was possible that the claimant's amended Grounds of Claim included a victimisation claim. The claimant did not contact the tribunal to seek amendments to the list of issues so that it included a victimisation claim. In correspondence, several months before the hearing, the claimant's repeated to the respondent that she was pursuing a victimisation claim. The respondent stated that if she wished to do so she needed to write to the tribunal but the claimant did not do so.

12. At the start of the hearing Mr Chiguvare confirmed that the claimant wanted to bring a victimisation claim. The tribunal heard submissions as to whether or not this was included in the claimant's amended Grounds of claim and, if it was not, the claimant's application for the claim to be amended to include such a claim and the respondent's objections to it.

13. The tribunal took time to consider its position and made the following decision.

    13.1. The ET1 and amended Grounds of claim did not contain a victimisation claim. There was no identification of anything that could be construed as a protected act. There was no identification of the act of victimisation. The facts to which Mr Chiguvare referred were clearly identified as pregnancy related discrimination only. Further, there have been a number of preliminary hearings in this case and correspondence with the Tribunal. The claimant could have used those means to ensure that the victimisation claim was put. Whilst we recognise that Judge Tynam made some reference to victimisation it did not appear on the list of issues. The respondent informed the claimant of this and the claimant's need to contact the tribunal. However, the claimant did not do anything further.

    13.2. The tribunal allows the claimant's application to amend her claim to include an act of victimisation as set out below:

        13.2.1. The claimant's argument was that she genuinely believed that the victimisation claim was part of the claim. The respondent objected on two main grounds. One is that the respondent had informed the claimant in correspondence that if she wanted to bring a victimisation claim, she needed to contact the tribunal and she did not do anything. The second is because it is out of time. The facts relied on occurred in August 2018 by which time the claimant had already brought her claim. The respondent accepted that the issue could be dealt with in cross examination or re-examination and that the respondent will be on the back foot but it was is not entirely unable to deal with the allegation.

        13.2.2. We considered that the respondent's witness statements largely addressed the issue and that further evidence can if necessary be elicited in examination in chief and cross examination. Therefore the tribunal decided there is very little prejudice to the respondent but there is obvious prejudice to the claimant from the inability to bring the claim;

13.2.3. We find that the time issue carries little weight because an amendment was allowed for the claimant to raise the issue concerning August 2018 in relation to a pregnancy related discrimination claim. It is the same facts which it is alleged give rise to the victimisation claim.

14. The victimisation claim is as follows:

14.1. Are the facts such that the tribunal could conclude that, by Andrew Chivers refusing on or around 3 August 2018 to sign the claimant's flexible working hours timesheet for June 2017, the respondent subjected the claimant to a detriment.

14.2. The protected acts relied on are this Employment Tribunal claim which was received by the Tribunal on 30 April 2018 and the grievances lodged by the claimant on 5 September 2017 and 27 November 2017.

The issues

15. There had been correspondence from the claimant which stated that she had withdrawn a number of her claims. These were the claims that Judge Tynam had made subject to a deposit order and were listed at sections 10(a), (b) and 11 of the list of issues prepared by Judge Tynam. At the start of the hearing Mr Chiguvare confirmed that these issues were withdrawn.

16. A claim relating to monitoring the claimant's work hours was struck out by Judge Tynan.

17. The list of issues prepared by Judge Tynam at the preliminary hearing which took place on 8 January 2021 with the removal of the 3 withdrawn claims and the addition of the victimisation claim are the only issues that will be considered in this determination because they are the only issues in this case. The parties were reminded of this at the start of the hearing and at a number of points during the hearing. The claimant made reference to a number of other allegations including the failure to carry out a pregnancy risk assessment, complaints about the investigation and disciplinary process and complaints about the monitoring of her working time. However as can be seen from the list of issues these do not form part of the issues in this case.

18. The issues to be decided in this case are as follows:

Time Limits

1. Are any of the Claimant's complaints related to matters that occurred before 3 January 2018, (i.e. more than three months before the presentation of the claim on 30 April 2018, allowing for the effects of Acas Early Conciliation, which took place between 7 February 2018 and 7 March 2018)?

2. If so, can the Claimant show that the conduct which she complains of extended over a period which ended on or after 3 January 2018?

3. If not, can the Claimant show that it would be just and equitable for the Tribunal to allow a longer period for bringing proceedings?

Direct Race Discrimination – Section 13 Equality Act 2010

4. Are the facts such that the Tribunal could conclude that because of race the Respondent treated the Claimant less favourably than it treated her white British comparators (Andrew Chivers, Gayle Ludgate and Karen Sinclair) by:

   (a) suspending the Claimant on 20 July 2017;
   (b) beginning a disciplinary investigation on or around 20 July 2017; and
   (c) continuing the investigation until the decision to close it on 29 January 2018?

5. If so, can the Respondent nevertheless show that it did not contravene s.13?

Pregnancy Discrimination – Section 18 Equality Act 2010

Discrimination because of pregnancy related illness: s.18(2)(b) Equality Act 2010

6. Are the facts such that the Tribunal could conclude that the Respondent, by acting as follows, treated the Claimant unfavourably because of illness suffered by her as a result of her pregnancy:

   (a) once informed that the Claimant was pregnant on 10 August 2017, failing to review whether the investigation remained appropriate and continuing the investigation until 29 January 2018?

7. If so, can the Respondent nevertheless show that it did not contravene s.18?

Discrimination because of pregnancy or pregnancy related illness: s.18(2)(a) and 18(2)(b) Equality Act 2010

8. Are the facts such that the Tribunal could conclude that, by Andrew Chivers refusing on or around 3 August 2018 to sign the Claimant's flexible working hours timesheet for June 2017, the Respondent treated the Claimant unfavourably because of her pregnancy or because of illness suffered by her as a result of her pregnancy?

9. If so, can the Respondent nevertheless show that it did not contravene s.18?

Victimisation s27 of the Equality Act 2021

11.1. Are the facts such that the tribunal could conclude that, by Andrew Chivers refusing on or around 3 August 2018 to sign the claimant's flexible working hours timesheet for June 2017, the respondent subjected the claimant to a detriment.

11.2. The protected acts relied on are this employment tribunal claim which was received by the tribunal on 30 April 2018 and the grievances lodged by the claimant on 5 September 2017 and 27 November 2017.

Remedy

12. If any of the above complaints succeed:

    (a) What is the appropriate award, if any, for injury to feelings?
    (b) Are aggravated damages available to the Claimant? If so, what is the appropriate sum for aggravated damages (as a sub-heading of injury to feelings)?
    (c) Has the unlawful conduct caused injury to the Claimant's health? If so, what is the appropriate sum for damages for personal injury?

The Evidence

19. The tribunal heard witness evidence from:

    19.1. the claimant who, after swearing an oath and adopting her witness statement, was asked a number of questions in examination in chief and cross examination;

    19.2. Mr A Chivers who, after affirming and adopting his witness statement, was asked a number of questions in examination and in chief in cross examination;

    19.3. Mr D Stacey who, after affirming and adopting his witness statement, was asked a number of questions in examination in chief and in cross examination; and

    19.4. Mr D McLaughlan who, after swearing an oath and adopting his witness statement, was asked a number of questions in examination in chief and in cross examination.

Submissions

20. Mr Dilaimi gave his oral submissions first. This was agreed with Mr Chiguvare in advance.

21. Mr Dilaimi relied on a written note on the law running to 9 pages and he gave oral submissions speaking largely to this note and the list of issues. These submissions are recorded in the record of proceedings.

22. Mr Chiguvare made oral submissions which are recorded in the record of proceedings.

The law

Discrimination

23. S13 of the Equality 2010 sets out the test for 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.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim…

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

24. S18 of the Equality Act 2010 sets out the test for pregnancy and maternity discrimination at work:

"(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 (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…"

25. S27 of the Equality Act 2010 sets out the test for victimization:

"(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—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this 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…

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

26. In MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13, the CA said that a detriment exists "*if a reasonable worker would take the view that the treatment was to his detriment*". However any alleged detriment must be capable of being objectively regarded as such as emphasised by HL in St Helens Metropolitan

Borough Council v Derbyshire [2007] UKHL 16, [2007] IRLR 540, [2007] ICR 841, applying Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337, where it was held (para 35) that "*an unjustified sense of grievance cannot amount to 'detriment*'".

27. S.23 of the Equality Act 2010 sets out the law relating to comparators:

"(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."

28. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that "*the comparator required for the purpose of the statutory definition of the discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.*"

Burden of Proof for discrimination

29. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination issues:

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

31. *(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.*

32. *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

33. In Igen Ltd v Wong the Court of Appeal approved the guidance given in Barton v Investec Securities Ltd [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail….

(9) Where the claimant has proved facts from which conclusions could be

drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

34. In Madarassy v Nomura International plc 2007 ICR 867, CA Lord Justice Mummery stated:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Findings

35. A number of facts were not disputed. We have provided a summary of these facts:

35.1. the claimant was suspended on 20 July 2017;

35.2. a meeting was held between Mr Stacey and the claimant as part of the disciplinary investigation on 10 August 2018. At this meeting the claimant informed Mr Stacey that she was pregnant. The claimant's line manager at this time, Elaine Betley, also attended the meeting as a notekeeper;

35.3. on 5 September 2017 the claimant made a grievance;

35.4. on 22 September 2017 the claimant formally notified the respondent she was pregnant;

35.5. on 5 October 2017 the claimant was sent a decision letter setting out the outcome of the investigation process. This was that there was no case to answer on allegation one which was abuse of the flexible working hours scheme but there was a case to answer in respect of allegation two concerning the failure to deduct home to detached duty time on 13 April 2017 and 8 May 2017;

35.6. on 15/27 November 2017 the claimant raised grievances against Gayle Woodgate, Karen Sinclair and Andrew Chivers;

35.7. on 16 January 2018 a misconduct meeting was held between Mr McLaughlan and the claimant;

35.8. on 29 January 2018 the claimant was issued with a decision letter

setting out that the outcome of the disciplinary process was that there was no misconduct;

35.9. in February 2018 the claimant commenced maternity leave.

36. We have set out our findings and conclusions in relation to each issues below.

Issue one: time limits

Time Limits

1. Are any of the Claimant's complaints related to matters that occurred before 3 January 2018, (i.e. more than three months before the presentation of the claim on 30 April 2018, allowing for the effects of Acas Early Conciliation, which took place between 7 February 2018 and 7 March 2018)?

2. If so, can the Claimant show that the conduct which she complains of extended over a period which ended on or after 3 January 2018?

3. If not, can the Claimant show that it would be just and equitable for the Tribunal to allow a longer period for bringing proceedings?

37. We find that some of the claimant's complaints relate to matters which occurred before 3 January 2018. However, we consider that the issues relating to the investigation are continuing acts. Mr Diliami made an argument that the disciplinary process could be separated into stages. We do not accept this argument. Whilst there are different stages in a disciplinary process they are not so different that they cause a break in the whole process which we consider to be a continuing act. We also conclude that the remaining issues which relate to signing the time sheet in August 2018 are also part of a continuing act because the dispute about them was part of the disciplinary process.

38. Even if we were wrong in relation to the August 2018 issue being part of a continuing act, we find that it would be just and equitable to allow a longer period for bringing the proceedings. This is because the claimant was permitted to bring an amended grounds of claim and the allegations relating to August 2018 were part of the List of Issues. There is a benefit to both parties that this allegation was added to this claim rather than a new Employment Tribunal claim being commenced for just that issue. The claimant's amendments were within 3 months of the events occurring. In relation to the victimisation claim, this arises from facts that were pleaded in the amended claim and we consider that it is artificial to separate the victimization claim and the pregnancy/pregnancy related illness claim. We note that the claimant is a litigant in person and in all the circumstances we consider that it is just and equitable to extend time.

Issue two: Direct Race Discrimination:

Dire[redacted]Race Discrimination – Section 13 Equality Act 2010

4. Are the facts such that the Tribunal could conclude that because of race the Respondent treated the Claimant less favourably than it treated her white British comparators (Andrew Chivers, Gayle Ludgate and Karen Sinclair) by:

   (a) suspending the Claimant on 20 July 2017;
   (b) beginning a disciplinary investigation on or around 20 July 2017; and
   (c) continuing the investigation until the decision to close it on 29 January 2018?

5. If so, can the Respondent nevertheless show that it did not contravene s.13?

Comparators

39. The Tribunal finds that the comparators identified by the claimant are not comparators. We find that they are material different as follows:

    39.1. The claimant was investigated for allegations of fraud. The applicable policy was the flexible working hours scheme;

    39.2. The allegations against the comparators were made by the claimant who at that time was subject to an on going disciplinary process;

    39.3. The allegations by the claimant against Gayle and Karen arose from the witnesses statements they provided in the disciplinary investigation against the claimant and related to what the claimant called covert monitoring but which was recording some start and finish times on a piece of paper from observations;

    39.4. The allegations made by the claimant against Andrew Chivers were more wide ranging and included the allegations about monitoring but also about his instigating of the disciplinary process;

    39.5. The allegations against the comparators were different in nature, they involved a different policy, were about different conduct and a different situation.

40. Our findings on comparators dispose of the claimant's direct discrimination claim however for completeness we have made further findings as set out below.

20 July 2017 suspension

41. It Is not disputed that the claimant was suspended.

42. Andrew Chivers' witness statement sets out in considerable detail the steps that he took before suspending the claimant which included seeking advice from HR and from FIRRU. We accept this evidence and it was not challenged by the claimant.

43. The claimant's appeared to argue that, instead of starting the disciplinary process and suspending her, it all could have been resolved if Andrew Chivers

had had an informal chat with her about the issues. It is possible that Andrew Chivers could have done this though it is far from certain that this would have resolved the issues. Without more the fact that the claimant would have preferred her manager to have adopted a different process or have a different managerial style is not discrimination. Different managers and organisations have different styles of management and a different approach to issues. As we have set out below we find that there is nothing more. There is nothing from which we can infer that an employee who is not black but in the claimant's (or a comparator's) situation would have been treated differently to her.

44. On 7 July 2017 Andrew Chivers received an email from Jenny van Alderwegen of HR which stated that:

> *"if they advise you to manage the case you would need to consider suspending the employee which is strongly advised as alleged Fraud falls as a gross misconduct case."*

45. The email also sets out what Andrew Chivers told HR about the allegations against the claimant which is discrepancies in time record during June 2017 and his concerns about her use of the Flexible Working Hours Scheme.

46. We find that Andrew Chivers also went on to seek advice from FIRRU.

47. A letter dated 17 July 2017 from the Matthew Lansbury, Confidential Hotline Team at the Headquarters MDP Wethersfield to the claimant's then line manager, Emily Turner, set out:

> The Confidential Hotline Team has received information regarding alleged Flexi Working Hours (FWH) Abuse concerning Emrna Gazi. It is alleged Mrs Gazi has manipulated times recorded on her time recording sheet to ensure she benefits via the accrueing of Flexi time. Concems have been raised regarding the time recording sheet ending 2nd June 2017, It is alleged at the start of this period Mrs Gazi was in a debit of 12 hrs 43 mins and by the end of this period she was in credit by 7 hrs 30 mins, this has rasied concems over the credibility of the times recorded on all Flexi sheets. It is also alleged Mrs Gazi is failing to record the correct times when on detached duty. It is alleged the concerned individual is recording her travelling time without deducting the time normally taken to travel between home and her permanent duty station.
>
> We have assessed the information and request that you, as line management, undertake a full and thorough investigation, in consultation with the Defence Business Services (DBS) Civilian HR and in accordance with the Policy Statement: Misconduct. You should also consult the following relevant departmental regulations:-

48. We find that Andrew Chivers did not exaggerate or misrepresent his concerns to HR or FIRRU. The written documents set out what his concerns were which were as they have been described to the tribunal and the claimant at that time. We find that he followed the advice from HR and then advice from FIRRU concerning suspension and commencing an investigation.

49. The claimant alleged that Andrew Chivers concocted the allegations and that this was because of her race. However, in the claimant's first grievance and other documents she stated that she believed that Andrew Chivers was acting in vengeance against her because she had told another employee, Jennifer

Curry, that Andrew Chivers was monitoring her work hours. It has not been asserted that Jennifer Curry was Black. The fact, as identified by the claimant, that Andrew Chivers was concerned about another employee's work hours indicates that there was no link between the claimant's race and his concerns about the claimant's work hours.

50. Further, we find that on the face of the time sheets and the evidence at that time there were reasonable grounds for concerns. The claimant does not dispute that Andrew Chivers tried to monitor her work hours indeed a complaint that he did so and that this was discrimination was struck out by Judge Tynam and a complaint that he and others did so formed part of the claimant's grievance. Therefore, the claimant's argument would have to be that he deliberate mis-recorded the claimant's starting and finishing times so that they disagreed with her time sheets and provided this false information to HR to obtain advice to suspend the claimant and commence disciplinary procedures. The Claimant accepted that only a few months before June 2017 Andrew Chivers had been happy for her to move to his team and was keen to arrange that. When all of these facts are considered, we cannot accept the claimant's argument that Andrew Chivers carried out such actions.

51. We find that the reasons set out in the email from Jenny van Alderwegen on 7 July 2017 was the reason for the action taken by Andrew Chivers and there was no connection to the claimant's race. It is not tenable to suggest that HR, who had no real knowledge of the claimant or her race (which is not obvious from her name) and were not based at the claimant's location, provided their advice to suspend the claimant for any reason connected with her race. It is also not tenable to suggest that FIRRU, who again had no connection with the claimant, were not based at the claimant's location and had no indication of her race, provided their advice to investigate the matters fully for any reason in connection to her race. Andrew Chivers followed this advice. There was some argument that he should not have followed it. We accept that he did not necessarily have to follow the advice though that may have been unusual but the fact that he did does not give rise to an inference that he did so because of a connection to the claimant's race.

52. We find that there is no connection whatsoever with the claimant's race and her suspension on 20 July 2017. We find that the claimant has not discharged the burden of proof which lies on her because there is nothing more related to her race. We recognize that the claimant considered the respondent taking formal action was disproportionate but given the nature of the concerns it was open to the respondent to adopt this course of action. Whilst some employers may not have acted this way, many employers take allegations of breaches of expenses and time recording policies extremely seriously and it is clear from MOD policy that, if established, such actions can be considered gross misconduct. There is absolutely nothing to suggest another employee of a different race would have been treated differently.

Beginning a disciplinary investigation on or around July 2017

53. For the reasons set out above, we find that the commencement of the investigation on or around 20 July 2017 was on the advice of Matthew

Lansbury, Confidential Hotline Team at the Headquarters MDP Wethersfield and we find that there is no connection whatsoever with the claimant's race. The claimant has not discharged the initial burden of proof on her as there is nothing more.

Continuing the investigation until the decision to close it on 29 January 2018

54. We find that once the investigation started it continued until its conclusion. We find that both David Stacey and David McLaughlan carried out a thorough process, obtaining and considering relevant evidence, interviewing relevant witnesses, holding a meeting with the claimant.

55. We experienced David Stacey and David McLaughlan giving evidence. Their witness statements set out the steps that they took in the investigation and disciplinary process and their consultations with HR. They answered questions fully, they gave detailed oral evidence and the Tribunal finds that they were trying to carry out the tasks they had been assigned in the investigation and deciding the disciplinary thoroughly and impartially. Neither individual was in the claimant's line management chain and prior to the disciplinary investigation had had little contact with her.

56. The claimant's claim is not that the process had flaws and that these were due to discrimination. Rather it is that continuing the investigation was discrimination. Further, we find that whist it is almost always possible to look at an investigation and find some criticisms of it, it had no significant flaws.

57. There is no evidence or basis to make an inference that continuing the investigation was in anyway connected to the claimant's race. Once the allegations had been raised and an investigation commenced it was proper to continue and complete it. The allegations against the claimant were not on the face of it false, flawed or irrelevant. Investigating the allegations through due process in these circumstances was not discriminatory.

58. We find that there is no connection whatsoever to the continuing of the investigation with the claimant's race and the claimant has not discharged the initial burden of proof on her as there is nothing more.

Issue three: Discrimination because of pregnancy related illness

Pregnancy Discrimination – Section 18 Equality Act 2010

Discrimination because of pregnancy related illness: s.18(2)(b) Equality Act 2010

6. Are the facts such that the Tribunal could conclude that the Respondent, by acting as follows, treated the Claimant unfavourably because of illness suffered by her as a result of her pregnancy:

   (a) once informed that the Claimant was pregnant on 10 August 2017, failing to review whether the investigation remained appropriate and continuing the investigation until 29 January 2018?

7. If so, can the Respondent nevertheless show that it did not contravene s.18?

59. We find that there is no connection whatsoever between failing to review whether the investigation remained appropriate and continuing the investigation with the claimant's pregnancy related illness. This is an assertion by the claimant that something extra should have happened that did not because of her pregnancy related illness.

60. It seems that the claimant may have been trying to allege that the allegation against her concerning her June 2017 working time did not take into account the fact that she was suffering from morning sickness and therefore spending more time than would otherwise be the case away from her desk. It was open for the claimant to raise this as an explanation in the investigation proceedings and in fact, but for other reasons, the allegation relating to misuse of the Flexible Working Hours Scheme (which concerned the June 2017 working time) was deemed unfounded during the investigation.

61. The claimant may also have been trying to allege that because of the investigation she was suffering from stress and that this had a greater impact on her because of her pregnancy. We do not accept that the claimant has established that the stressful effects of the investigation had a greater impact on her because of her pregnancy. Evidence has not been provided to establish this. Investigation and disciplinary proceedings are stressful to almost all employees, it is inherent in the process,

62. Further, the Occupational Health report dated 20 September 2017 sets out:

> The outlook is unknown as Ms Gazi's recovery and return to work will depend on the successful resolution of the issues that she feels were the cause of her absence and the outcome of the investigation.

63. Which is advice that the issues need to be resolved and we find that completing the investigation was a suitable means of achieving this.

64. We also find that the respondent did not fail to review the suspension. It is not disputed that once David Stacey concluded that there was no case to answer about the Flexible Working Hours Scheme issue the claimant's suspension was ended. The fact that the claimant was not sent letters setting out that reviews had taken place does not establish that the suspension was not reviewed at times. We consider that it was reviewed at a change of circumstances and that this was appropriate and had no connection with race.

Issue Four: Discrimination because of pregnancy or pregnancy related illness and victimisation

Discrimination because of pregnancy or pregnancy related illness: s.18(2)(a) and 18(2)(b) Equality Act 2010

8. Are the facts such that the Tribunal could conclude that, by Andrew Chivers refusing on or around 3 August 2018 to sign the Claimant's flexible working hours timesheet for June 2017, the Respondent treated the Claimant unfavourably because of her pregnancy or because of illness suffered by her as a result of her pregnancy?

9. If so, can the Respondent nevertheless show that it did not contravene s.18?

<u>Victimisation</u> s27 of the Equality Act 2021

11.1. Are the facts such that the tribunal could conclude that, by Andrew Chivers refusing on or around 3 August 2018 to sign the claimant's flexible working hours timesheet for June 2017, the respondent subjected the claimant to a detriment.

11.2. The protected acts relied on are this employment tribunal claim which was received by the tribunal on 30 April 2018 and the grievances lodged by the claimant on 5 September 2017 and 27 November 2017.

65. It is not disputed that Andrew Chivers did not sign the June 2017 time sheet. We do not find that he was given a management instruction to sign it. The claimant made the assertion that he was but there was no evidence to support it.

66. The hours recorded on the June 2017 time sheet formed the basis of the concerns Andrew Chivers had about the claimant using the Flexible Working Hours Scheme. These were investigated and it was found, at the conclusion of the investigation, that "*the allegations have not been proven and that misconduct has not occurred*.".

67. The claimant's argument is that Andrew Chivers did not sign the sheet because of pregnancy/pregnancy related illness discrimination and/or because she made protected acts.

68. The Tribunal experienced Andrew Chivers' giving evidence at the hearing. The Tribunal found that he was credible, he said what he believed to be true, he used logic and consistency in his thinking patterns and he still maintained that the June 2017 timesheet was not an accurate record of the claimant's work time during that period. We find that he genuinely held these beliefs and that they had no connection whatsoever to the claimant's pregnancy, pregnancy related illness or her having made protected disclosures.

69. The claimant argued that some evidence was produced during the investigation which showed that some of her disputed time recordings were explicable. We accept this however some discrepancies remained. It was accepted that the individual discrepancies were of a short duration but cumulatively they added up. Mr Stacey's evidence was that during the investigation he was looking for systematic abuse which included a concerted effort to maximise time recorded. He found that there were many different practices in recording time, the claimant's explanations were plausible and the evidence did not indicate that she intentionally misused the Flexible Working Hours Scheme. This does not contradict Andrew Chivers' view which is that the time sheet was not accurate. The assessment of the claimant's behaviour under the misconduct rules is not the same as assessing it for accuracy for sign off.

70. Andrew Chivers has been consistent in his belief about the inaccuracy of the time sheet from June/July 2017 to the present day. He adopted his stance in the summer of 2017 before any of the protected acts and maintains it to this day. We do not find that the protected acts influenced his behaviour in any way in this matter. We find that this is the reason he did not sign the time sheet and

there was no connection whatsoever with the claimant's pregnancy, pregnancy related illness or the protected acts.

71. We find that the claimant's grievance of 3 September 2017 is not a protected act as there is no allegation of contravention of the Equality Act or anything which could be connected to the Equality Act 2010. The Respondent accepts that the Claimant's grievance of 15/27 November 2017 and the ET1 claim submitted on 30 April 2018 are protected acts.

72. We find that the claimant was not subject to a detriment. She alleges the detriment was Andrew Chivers not signing her June 2017 timesheet in August 2018. The time sheet was signed by Jacqui Rock in August 2018. Andrew Chivers not signing the time sheet had no effect on the claimant. A delay of a few weeks for Jacqui Rock to sign the sheet was inconsequential. The claimant argued that it not being signed by Andrew Chivers left some cloud over her. She may feel this way however the Tribunal does not accept this is anything more than the feelings of the claimant. Viewed objectively these facts do not amount to a detriment.

Inferences from non-disclosure

73. The claimant asked the Tribunal to draw adverse inferences from the respondent not disclosing documents which the claimant alleges it should have. The respondent's position was that these documents did not exist. The Tribunal does not find that the respondent has withheld documents. The documents the claimant referred to as indicating there was non-disclosure of documents are ambiguous and we do not conclude that the documents the claimant asserts exist do in fact exist.

Conclusion

74. The claimant's claims for direct race discrimination under section 13 of the Equality Act 2010 fail.

75. The claimant's claims for pregnancy or pregnancy related illness under section 18 of the Equality Act 2010 fail.

76. The claimant's claim that she suffered from victimisation contrary to section 27 of the Equality Act 2010 fail.

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Employment Judge Bartlett

Date__17 January 2022__

JUDGMENT SENT TO THE PARTIES ON

10/2/2022

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