EMPLOYMENT TRIBUNALS

Claimant: Ms A Nabuuma

Respondent: Bupa Care Homes (AKW) Ltd

Heard at: Croydon by cloud video platform and then in person
On: 25 and 26 November 2021

Before: Employment Judge Nash
Mr R Singh
Ms L Brookes

Representation
Claimant: In person
Respondent: Mr J Wallace of counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS early conciliation from 20 March 2020 to 20 April 2020, the claimant presented her claim on 21 April 2020.

2. There was a first preliminary hearing on 30 March 2021 before Employment Judge Martin and a second preliminary hearing on 16 June 2012 in front of Employment Judge McLaren.

3. At this final merits hearing the Tribunal heard evidence from the claimant on her own behalf. The claimant's witness statement did not go to all the issues. Accordingly, it was agreed that the Tribunal would treat the claimant's claim form and her email to Ms McGee (of the respondent's solicitors) on 19 July 2021 (page 47) as her witness statement and the claimant swore to these documents in addition to her statement.

4. The Tribunal heard behalf of the respondent from Ms Charlie Kenny, at the time the regional support manager for the Home.

5. The Tribunal had sight of an agreed bundle to 169 pages. All references are to this bundle unless otherwise stated.

The claims

6. It was agreed that the claims before the Tribunal were as follows: –

    a. maternity and pregnancy discrimination under section 18 Equality Act 2010
    b. direct sex discrimination under section 13 Equality Act 2010
    c. unauthorised deductions from wages under section 13 Employment Rights Act 1996
    d. breach of contract - notice pay.

The Issues

7. The issues were recorded in the order made by Employment Judge McLaren at the second preliminary hearing and confirmed at this hearing.

8. There were two disputes between the parties arising out of the list of issues. Firstly, the parties disputed what was contained in the list of issues. The claimant contended in effect that the McLaren order could be interpreted as including a constructive dismissed (based on the meeting on 13 January 2020) as an act of pregnancy discrimination. This was in addition to the events of 13 January being relied on as freestanding acts of discrimination. The respondent objected to this interpretation. In the alternative the claimant applied to amend her claim to include constructive dismissal as a freestanding act of discrimination.

9. The Tribunal accepted that the list of issues contained in the McLaren order should be interpreted as including constructive dismissal as a freestanding act of discrimination because all of the elements of a constructive dismissal claim were present on the face of the McLaren order.

10. For the avoidance of doubt if the Tribunal was incorrect about this, the Tribunal would have granted the claimant's application to amend her claim at this hearing to include constructive dismissal for the following reasons.

11. The Tribunal would have applied the case law in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661 and found that the amendment would be in the middle of the so-called sliding scale, a relabelling amendment adding labels to facts already pleaded. The Tribunal would not have found that this was an entirely new cause of action because it did not relate entirely to new factual allegations or to a new cause of action because the claimant sought to add a new act of discrimination to her existing discrimination claims.

12. Allowing the claimant to amend to include constructive dismissal as a freestanding act of discrimination would not be likely to involve substantially different areas of enquiry because the Tribunal would still be concerned with the alleged fundamental breach or breaches which were already freestanding acts of discrimination. The Tribunal would have to consider whether these

amounted to a fundamental breach contract, whether they caused the resignation, and whether the claimant had affirmed the contract.

13. The Tribunal took into account that the application was made very late in the day, that is at the beginning of the final merits hearing. Whilst the Tribunal would have had regard to the Presidential guidance on case management that a party would need to show why the application was not made earlier, the Tribunal would have taken into account that the claimant was unrepresented.

14. In the view of the Tribunal the most important question would have been the balance of hardship or prejudice between the parties. The Tribunal would have considered the overriding objective, specifically the requirement to avoid formality and to put the parties, as best as possible, on a level playing field. The Tribunal considered the balance of prejudice to the parties and found that the respondent would not be put to material prejudice. All of the elements of a constructive dismissal -being the alleged fundamental breach- were set out in terms in the original list of issues. The respondent had been on notice of these facts and had not been at any disadvantage in providing evidence going to the facts. The same witnesses would be relevant. To refuse an application to amend on this basis would not be proportionate to the advantages to the claimant of permitting the amendment.

15. The second dispute was a contested application from the claimant to amend her claim to include a further act of discrimination - being a refusal to transfer the claimant on 13 January 2020. The Tribunal accordingly took into account the same factors as set out above when determining the application to amend.

16. This potential amendment had been discussed at the second preliminary hearing where the claimant stated that she wished to include the transfer refusal as an act of discrimination. According to the McLaren order, the claimant accepted that the transfer was not referred to in the claim form. The McLaren order recorded in terms that the process to apply for an amendment had been explained to the claimant, and that the Tribunal informed her that she must decide whether she wished to make an application to amend to include the transfer, no later than 7 July. The respondent would have 21 days to object and any application would be determined at the final merits hearing.

17. Following the second preliminary hearing, the claimant made no application to amend. The Tribunal did not accept the claimant's contention that she had in effect applied to amend by way of her schedule of loss because there was no reference to the transfer in the schedule of loss. Following service of the schedule of loss, the claimant provided written clarification to Ms Magee on 20 July 2021 stating that she was requesting to amend the list of issues. She stated, "in addition a further case of discrimination was listed in the recently shared schedule of loss. The additional act will be pregnancy discrimination section 18".

18. The Tribunal taking these matters into account refused the claimant's application to amend. A judge had identified the point at a preliminary hearing attended by the claimant. The judge set out a route by which the claimant might apply to amend. The claimant did not take advantage

of this opportunity. Applying the overriding objective, the Presidential Guidance and the factors in *Selkent*, it would not be proportionate to accept the amendment at this late stage. It would be prejudicial to the respondent who reasonably had not expected to meet this point. The claimant would lose the opportunity of arguing this point, but the majority of her claim would still proceed. The balance of prejudice was in effect on the side of the respondent.

19. Accordingly, the final list of issues was as follows: –

Unlawful deduction from wages (s.23 ERA) backpay for September 2016

1) Was the Claimant's claim for weeks worked during her notice period in September 2016 presented in time?
2) If not, was it reasonably practicable for the Claimant to submit their claim in time?
3) If not, was the claim submitted within a reasonable period of time thereafter?
4) Has the respondent made a deduction from the claimant's wages in that she worked her notice for four weeks in September 2016 and this was not paid?
5) If so, was the deduction permitted by reason of:
a) reimbursement of an overpayment;
b) a statutory provision;
c) a relevant provision of the Claimant's contract; or
d) the Claimant's written consent?
6) If such deduction was not permitted, how much is owed to the Claimant?

Pregnancy discrimination (s.18 EqA)

7) Did the Respondent treat the Claimant unfavourably within the protected period?
8)The claimant relies on 3 acts.
i) She says that she was denied sick pay. She underwent a three-day operation from the 10th to 12 January 2020 and in a conversation on the phone with Ms Patel on 10 January 2020 asked for sick leave, having been advised by her doctor that she would need two weeks off work. Despite this, she is scheduled to work on the following day and when she did not attend was called by Ms Patel to query why. The claimant repeated her request for sick leave was told to attend a meeting on Monday the 13th. She attended that meeting, asked again for sick pay and this request was refused by Ms Patel.
ii) On 13 January 2020 in the conversation with Ms Patel she was told by Ms Patel that she either needed to attend work or to resign. The claimant resigned as she had no choice but to do so given, she was unable to work because of ill health connected to her pregnancy.
iii) The 2 previous acts amounted to a fundamental breach of the claimant's contract of employment which she accepted by resigning and without affirming. The claimant was accordingly constructively dismissed.
12) If so, was the less favourable treatment because of pregnancy? The respondent states that it had no knowledge of the claimant's pregnancy.

Direct discrimination-sex-S13

13)This claim is brought in the alternative should the any discrimination have occurred outside of the claimant's protected period. The claimant relied on the same two acts as under section 18.
14)Was that less favourable treatment? Who is the correct comparator?
15)If so, was it because of pregnancy/ sex?

Wrongful dismissal (breach of contract) 2020

16) Did the claimant resign without notice on 28 February 2020 as the respondent says or 28th March 2020 as the claimant says?
17) If so, was this a constructive dismissal?
18) If so, what notice compensation ought to be awarded to the claimant? The Claimant states she was entitled to 4 weeks' pay.

The Facts

20. The respondent's business is running and managing nursing and care homes. It is a large organisation.

The claimant's first employment with the respondent

21. The claimant's first period of the employment with the respondent finished in 2016 when she resigned. It was the claimant's case that she worked during her notice period in September 2016. It was also the claimant's case that she had always believed that she was entitled to 4 weeks extra pay because she was resigning. According to her email of 12 March 2022 to Ms Kenny, "I believe you have failed to understand the lawful policy regarding Pilon payments. Both of my contracts offer Pilon payments upon resignation".

22. The claimant's evidence was that she did not apply to the Employment Tribunal at the time because she trusted the respondent and did not want to damage the relationship. She was aware of the Citizens Advice Bureau.

23. The claimant's evidence was that she made a number of attempts to persuade the respondent to pay her the money she believed she was owed. Her evidence was that she made 7 attempts. The claimant said she telephoned and went to the Home. The claimant said that in 2019 the respondent had told her that she had been taken off the system.

The claimant's second employment with the respondent

24. The claimant reapplied to work for the respondent on 20 August 2019 (page 91). The Tribunal accepted her account, which was plausible and consistent, that she originally applied online and then completed a paper application.

25. The respondent offered the claimant a job as a care assistant at its Heathland Court care home ("the Home") on 3 October 2019. The claimant would report to Ms Nita Patel who was the Home Manager. After some delays the parties agreed a start date of 16 December 2019.

26. The claimant started pre-employment training. The claimant stated that she underwent a termination procedure which lasted in effect three days from 10th to 12th January 2020. She told her trainer that she was unable to attend on the 10th because of surgery. She did not mention pregnancy or termination. She rang Ms Patel on 10 January 2020 asking to take sick leave. The claimant was scheduled to attend again on 11 January but did not attend. Ms Patel telephoned her the next day to ask why not she had not attended. The claimant's evidence was that she again asked for sick leave and Ms Patel told her to come to a meeting on 13 January.

Meeting on 13 January 2020

27. There was a meeting between Ms Patel and the claimant at 6:30 am on 13 January 2020. The claimant's evidence was that she asked for sick leave and Ms Patel refused. According to the claimant, Ms Patel told her that she would be paid for the day she had had surgery, but not the other days.

28. The Tribunal considered the contemporaneous written evidence. There was no direct evidence going to the question of whether the claimant was paid for 10 to 12 January 2020. The Tribunal had sight of a text from the claimant to Ms Patel dated 20 January 2020. The last paragraph stated as follows, "Last but least entitled to sick pay on my contract so I must be paid for the shifts I missed when under surgery until the day of the meeting 16/01/2020. (sic)"

29. The Tribunal also had sight of a lengthy email from the claimant to Ms Kenny dated 5 March 2020. This email went into detail about the money the claimant stated that she was owed. There was reference to payment in lieu of notice, annual holiday accrual and statutory annual leave. There were detailed calculations of holiday pay said to be due. There was no reference to sick pay.

30. On balance of probabilities the Tribunal determined that the claimant had not been paid, as she contended, one day's sick pay. There was no evidence to substantiate this. The limited reference to sick pay in the contemporaneous text was more consistent with the claimant not having been paid any sick pay rather than one day sick pay.

31. The claimant contended that she had provided Ms Patel with documents relating to her pregnancy at the meeting. However, the claimant's evidence was unclear and inconsistent concerning the documents. The claimant stated that she had given to Ms Patel her discharge letter from the hospital (dated 12 January 2020/page 120) which referred in terms to pregnancy. However, very shortly after stating this in oral evidence, she stated, "I believe that the bundle does not have the discharge letter". Her evidence was also inconsistent as to how she obtained the discharge letter. Her original evidence was that it was posted to her home address although it was addressed to her GP surgery. When it was pointed out to her that she could not have

received the letter through the post in time to bring it to the meeting, she said that the letter was handed to her at the hospital.

32. The claimant's evidence was that Ms Patel said that the claimant needed to come to work or to resign. The claimant felt she had no choice and accordingly resigned. The Tribunal had sight of a handwritten letter of resignation dated 14 January 2020 (page 121) as follows, "I am writing to confirm my resignation as of 14/1/2020. As per our conversation I will await on an internal transfer at Lynton Hall preferably for a part-time role or 36 hours". There was a handwritten annotation on the letter as follows, "processed as a leaver 14/1/2020 on 25/2/2020 CE Kenny".

The Meeting with Ms Kenny on 16 January

33. The claimant emailed Ms Kenny on 14 January 2020 (page 24) including the following, "I am writing to inform you that am incurring situational pressure that is out of my control and would require managerial intervention in order to perform my role confidently with assurance." The claimant went on to detail the difficulties with the onboarding process which took approximately 6 months.

34. The claimant continued, "I called in on Friday and I told reception that I was undergoing surgery and the doctor said I can't work, a message was also left on the BUPA direct line 06:17 hours. BUPA policy indicated I must call the home to update them of my condition and when I do the manager says, "I don't know". I'm very disappointed in the experience I have received with the managers at Heathland Court because it seems like I am being pressured without them understanding my circumstances and who said what?" The claimant finished by stating that she was still owed money for 2016. She asked a meeting with management.

35. The claimant's evidence was that she went to the Home to speak to Ms Patel who did not mention anything about pregnancy, illness or sick pay.

36. The claimant met with Ms Kenny on 16 January. The Tribunal had sight of very brief meeting notes. The meeting was described as an exit interview. According to the notes, the claimant said that she had resigned on 14 January, and she was coerced into her resignation by Ms Patel. (Ms Kenny stated that "coerced" was her word not the claimant's.) The claimant originally told the Tribunal that she had told Ms Kenny at this meeting about the pregnancy. However, she then resiled from this and stated that because Ms Kenny should already have known about the pregnancy because it did not need saying. Ms Kenny's evidence was that the claimant did not mention pregnancy at this meeting, and she was unaware of the claimant's pregnancy.

37. It was agreed that the claimant suggested that she transferred to a different home, Lynton Hall. Ms Kenny agreed to see if the transfer might be possible. the claimant also suggested moving to bank staff, that is a zero hours contract.

Events and Correspondence after the Meetings

38. The Tribunal had sight of an email from Ms Kenny to the claimant on 20th January stating that she had spoken with the Home Manager at Lynton Hall who he did not have a vacancy. Ms Kenny went on, "following on from our conversation last week on 16 January, I can confirm that processing you as a leaver has been halted and changed to process you from contracted staff to bank staff at your request."

39. The claimant's evidence was that in fact the vacancies were available at Lynton Hall, but the Tribunal saw no evidence of this.

40. After meeting with Ms Kenny, the claimant texted Ms Patel on 20 January. The claimant's meaning in this email was not entirely clear but the first and longer paragraph related to Ms Patel allegedly processing the claimant as a leaver before the question of a transfer had been resolved. The second paragraph stated, as set out above, that the claimant was entitled to sick pay for the shifts she missed when under surgery until 16 January 2020.

41. Ms Kenny duly instructed the respondent not to process the claimant as a leaver to change her to a zero hours contract. The claimant continued in employment as bank staff from 15 January 2020. The Tribunal accepted her evidence that she carried out two shifts at a home in Clapham called Collingwood, as referred to in an email from the claimant to Ms Kenny on 3 March 2020 (page 153).

42. The claimant emailed the respondent on 28 February stating she was resigning that day. She wrote, "I would like to finalise my resignation as of today 28/02/2020." This was a lengthy email setting out the claimant's concerns about payments or lack thereof in 2016. The claimant said she was still owed £1260. There was no reference to pregnancy or sick pay. The claimant told the Tribunal that by the time she sent this email she was "fed up".

43. It was put to the claimant that it was her concerns about money not being paid which caused her to resign. The claimant replied that the reason for resignation was the difficulties about being paid money she believed she was owed and Ms Patel's conduct. The claimant said that she did not wish to lose her privacy about sensitive medical matters.

44. It took some time for Ms Kenny to resolve the claimant's pay queries after her resignation. Ms Kenny emailed the claimant on second March concerning monies owed. She said (incorrectly) that the claimant had not completed a bank shift since 14 January and set out her annual leave entitlement. The email concluded, "if there's any further information or questions you have in the meantime please do contact me."

45. The claimant emailed Ms Kenny (it was unclear whether this was before or after Ms Kenny's email of 2 March) that she had forgotten to say what annual holiday and payment in lieu she believed was owed for 2016. She also referred to a payment for resignation in October 2019 and annual leave for 2019.

46. The Tribunal had sight of a further email from the claimant to Ms Kenny on 5 March querying her holiday pay. It referred to the respondent having made errors as to holiday pay entitlement

which was, "a very serious offence". The claimant stated, "I suggest you also do some research on payment in lieu and holiday accrual because these are legal payments BUPA has to make unless you're telling me that you don't follow the law".

47. The Tribunal also had sight of a further lengthy email from the claimant to Ms Kenny on 5th March 2020 concerning payments in lieu, annual holiday accrual and statutory annual leave. There was a further email from the claimant to Ms Kenny on 5 March contesting the monies the respondent said were owed. The claimant made reference to Ms Kenny not understanding the law concerning payments in lieu and annual holiday accrual.

48. There was further correspondence between Ms Kenny and the claimant in this regard including an email on 12 March 2020 from the claimant to Ms Kenny referring to her resignation. The tribunal was not taken to and nor could it find any reference to sick pay in this correspondence.

49. Ms Kenny sent a final letter to the claimant on 10 March 2020 in which she stated she was clarifying matters. She dealt expressly with payment in lieu of notice, annual holiday accrual and statutory annual leave. She set out her findings. There was no reference to sick pay or to pregnancy.

50. The claimant replied by way of an email of 12 March 2020. She again in effect contended that the respondent should pay a notice payment when the claimant had resigned. The claimant made reference to a "hostile environment", to the respondent ignoring her calls, and the respondent "making up your own rules". The claimant continued that she would bring the matter to the Employment Tribunal and asked that there be accountability of whilst documents including a passport and bank statement. There was no reference to sick pay or pregnancy.

The Law

51. The law in respect of direct sex discrimination is found at section 13 and 23 Equality Act 2010 as follows: –

> **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.
>
> **23 Comparison by reference to circumstances**
>
> (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.

52. The law in respect of unauthorised deduction from wages is found at section 13 and 23 Employment Rights Act 1996 as follows: –

> **13Right not to suffer unauthorised deductions.**
>
> (1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

…

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

…

(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, or

…

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

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

53. The law in respect of maternity and pregnancy discrimination is found at section 18 equality act 2010 as follows: –

18Pregnancy 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 (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.

…

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

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

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

(b)if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7)Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a)it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b)it is for a reason mentioned in subsection (3) or (4).

54. The law in respect of constructive dismissal is not found in statute. According to the Court of Appeal in *Western Excavating (EEC) Ltd v Sharpe* 1978 ICR 221, a repudiating breach of contract by the employer is required. "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed"

Submissions

55. Both parties made brief oral submissions. The respondent also provided an 11 page opening note which the Tribunal treated as the respondent's submissions.

Applying the Law to the Facts

Unauthorised deduction from wages

56. The Tribunal firstly considered whether the claim was brought in time. It did not prove possible to ascertain exactly when the alleged deduction was said to have been made. The claimant's case was that the deduction occurred in September 2016. The Tribunal took the view that if the claimant believed that she was owed money for September 2016 this should have been paid by the end of October 2016. The claimant should, therefore, have taken the first step in Tribunal proceedings, that is contacting ACAS to start early conciliation, no later than early February 2017. The claimant did not present her claim until 21 April 2020. Accordingly, she presented her claim over 3 years after the expiry of the statutory time limit.

57. Because the claim had been presented to the tribunal more two years after the date of the alleged deduction, the tribunal did not have jurisdiction to consider it under section 23(4A).

58. For the avoidance of doubt, the tribunal also determined whether it was or was not reasonably practicable for the claimant to have presented her claim within the statutory time limit of 3 months less one day, taking into account the operation of the ACAS early conciliation scheme.

59. According to the Court of Appeal in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372*, 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. According to Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07*: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'. The burden is upon the claimant to establish reasonable that it was not reasonably practicable.

60. The claimant did not suggest that she was unaware of her right to apply to an employment Tribunal in the event of unauthorised deduction from wages or that she was unaware of a statutory time limit. The claimant's reasons for failing to apply to the Tribunal within time were that she chose rather to try to resolve the matter internally with the respondent and not to damage what might be an ongoing relationship. In the view of the Tribunal this was an understandable and not irrational choice. Once the claimant had concluded that she was not going to resolve the matter internally, she did not apply to the Employment Tribunal. There was no misrepresentation by the respondent as to the facts giving rise to the alleged unauthorised deduction. The claimant was aware of the Citizens Advice Bureau as a source of assistance.

61. Accordingly, the Tribunal found that it was not reasonably practicable for the claimant to have presented her claim within the statutory time limit and therefore the Tribunal did not have jurisdiction to consider her complaint under section 23 (2) and (4), in addition to section (4A) Employment Rights Act 1996.

Pregnancy and Maternity Discrimination section 18 Equality Act 2010

62. The Tribunal firstly considered whether the claimant had protection under section 18 Equality Act, that is whether the alleged acts of discrimination took place within the protected period. According to the discharge letter of 12 January 2020, the termination procedure took place on 12 January 2020.

63. The date that the protected period came to an end was determined by whether the claimant was entitled to ordinary and additional maternity leave pursuant to section 18 (6) (a). In view of the Tribunal, the claimant did have the right to ordinary and additional maternity leave as she was an employee. Accordingly, the protected period ended when the claimant returned to work after the pregnancy. The difficulty for the Tribunal was that the claimant and respondent did not know when the claimant returned to work. She attended work on 13 January to meet with Ms Patel but did no work. The Tribunal had accepted the claimant did carry out some work at the Collingwood Home, after this date and before her resignation on 28 February. Accordingly, the Tribunal found on the balance of probabilities that the protected period ended on a date between 13 January and 28 February 2020. If the Tribunal has fallen into error the claimant because was not entitled ordinary and additional maternity leave then, pursuant to section 18 (6) (B), her protected period would have ended two weeks after the end of the pregnancy, being two weeks after 12 January 2020.

64. Whichever approach is taken, whether under either subsections (a) or (b) of section 18 (6), the effect on the issues appears the same. The meeting on 13 January occurred within the protected period and was therefore captured by section 18. Any constructive dismissal occurred on the date of the claimant's resignation, being 28 February, and was therefore outside the protected period.

65. The Tribunal did consider whether the constructive dismissal happened when the claimant wrote her first letter of resignation on 14 January. However, it was not in dispute between the parties that the claimant remained in employment (as a bank employee) after this date and until her resignation letter of 28 February. She did some work for the respondent during this time. Accordingly, any constructive dismissal can only have occurred or crystallised on 28 February.

66. The respondent relied on the decision of the Employment Appeal Tribunal in *Lyons v DWP Jobcentre Plus 2014 ICR 668, EAT* that if a pregnancy -related illness arises within the protected period but continues after the end of the protected period, then an employer may take into account the pregnancy-illness after the end of the protected period in determining whether to dismiss without being in breach of section 18. In effect, any discrimination in such circumstances arises under section 13 rather than section 18. The Tribunal agreed with this analysis. Accordingly, if the claimant was suffering a pregnancy-related illness after the end of her protected period (and the Tribunal was taken to no evidence indicating this), the claimant would still not be able to rely upon section 18 but would fall back upon section 13.

67. The Tribunal accordingly considered whether the first two acts of discrimination - the respondent's treatment of the claimant's request for sick leave and sick pay from 10 to 13 January, and the comment that the claimant needed to attend work or resign, amounted to discrimination under section 18.

68. It was the respondent's case that the claimant had not requested sick pay or sick leave to Ms Patel (or for that matter Ms Kenny), whereas the claimant contended that she had requested sick pay and sick leave.

69. In finding the facts and making its determination, the Tribunal heard oral evidence from the claimant, but not from the alleged decision-maker/discriminator Ms Patel. This is not an uncommon situation for Tribunals, particularly as a result of Covid and lockdown.

70. The Tribunal reminded itself of the authority of *Hovis v Louton* EAT 2020 000973 LA that if a Tribunal treats itself as precluded from making a finding of fact against a witness who gives evidence before a Tribunal, when there is no witness to counter that evidence, it makes an error of law. A Tribunal must weigh the evidence before it, assess its reliability and the weight to attach to it. It is not prevented from considering hearsay or documentary evidence and if such evidence is relevant sufficiently relevant to what the Tribunal has to decide, then the Tribunal should consider and evaluate it. A Tribunal must subject the credibility and reliability of oral evidence given before it to some evaluation. In a given case oral evidence may be outweighed by determinative documentary or hearsay evidence which in all the circumstances the judge finds more reliable or compelling.

71. The Tribunal considered the documentary evidence. The only reference to sick pay or sick leave to which the Tribunal was taken was the claimant's email to Ms Patel on 20 January. The main thrust of this email was a concern that the claimant was being processed as a leaver when the question of a potential transfer had not yet been resolved. In the view of the Tribunal, the final paragraph relating to sick pay was of less importance in the claimant's mind. The Tribunal noted that the claimant said that she was entitled to sick pay so must be paid for the shifts she missed. There was no reference in this paragraph to any previous discussion about sick pay with Ms Patel (or Ms Kenny). The Tribunal found that the email of 20 January was more consistent with the claimant retrospectively considering that her contract entitled her to sick pay and raising this for the first time.

72. The Tribunal was bolstered in this finding by there being no reference to sick leave or sick pay in the considerable correspondence between the claimant and the respondent after 13 January. The claimant sent a lengthy resignation email to Ms Kenny on 28 February 2020. She started, "I'm currently writing regards to monies owed for a 3/4 year period… You have been appointed to investigate my ongoing complaint". The claimant set out in terms the money she was claiming from 2015 including several paragraphs of calculations. In respect of her resignation on 28 February she asked for a payment in lieu.

73. In the view of the Tribunal, the claimant set out in this email what important to her and her reasons for resignation; she sent out what was on her mind. The claimant told the Tribunal that she was "fed up" when writing this email**.** She reviewed the history of her employment with the respondent, including her earlier employment in 2016. However, there was no reference to sick leave or sick pay. The claimant wrote a further email to Ms Kenny on 5 March in which she set out the monies owed in considerable detail. She made no reference to sick pay.

74. The claimant in her correspondence with the respondent after 16 January expressed her serious concerns that the respondent was failing to comply with employment law. She stated in terms that the respondent was breaking the law and that it needed to obtain better employment advice. The claimant was robust in setting out her sense of grievance. In the view Tribunal it was therefore significant that at no time did she refer to the respondent failing to provide sick leave or sick pay following her request. In the view of the Tribunal, if the claimant had requested sick leave/or sick pay from Ms Patel, and how been refused, it was extremely likely that she would have repeated or at least referred to this in correspondence with setting out her other grievances. The Tribunal accepted that Ms Kenny never investigated sick pay because she was never asked to do so.

75. The Tribunal also took into account the unsatisfactory evidence from the claimant as to what if any documents she handed to Ms Patel at the meeting on 13 January concerning her sickness and pregnancy. The claimant's evidence in cross examination was inconsistent. She contradicted herself. For instance, she originally stated that the discharge letter at page 120 was posted to her. When it was pointed out that this would make it impossible for her to show it to the respondent at 6:30 am the day after it was posted, she then said that the letter was handed to her. Whilst the claimant gave a number of accounts to the Tribunal as to what documents were

handed to Ms Patel, her final answer was that she gave the discharge letter page 120 and nothing else.

76. Ms Kenny wrote what was expressly described as the respondent's final view on what was owed to the claimant. She made no reference to sick pay or sick leave. The claimant did not challenge this. The Tribunal was taken to no other document where the claimant raised the issue of sick pay until her claim form presented on 21 April 2020.

77. The Tribunal reminded itself that it had heard oral evidence on oath, subject to cross examination, from the claimant as to what she told Ms Patel between 10 and 12 January. The Tribunal heard no evidence to counter this from Ms Patel. The respondent's case was based on there having no evidence - documentary or otherwise - that the claimant had raised the question of sick pay or sick leave with Ms Patel. In particular, Ms Kenny was unaware of the sick pay issue, indicating that Ms Patel herself was unaware of the issue.

78. The Tribunal, looking at the evidence in the round and taking into account the lack of reference in the documentary evidence to sick leave or sick pay when it would be expected to be included, together with the inconsistencies in the claimant's evidence, found on the balance of probabilities that the claimant had not requested sick leave or sick pay from Ms Patel or the respondent during her employment.

79. Accordingly, the first act of discrimination, being the respondent's conduct in respect of a request for sick leave and sick pay, was not made out on the facts.

80. The Tribunal went on to consider the second act of discrimination, that Ms Patel told the claimant that she must attend work or resign. Again, the claimant gave oral evidence that Ms Patel had told her this and the Tribunal heard no counter evidence from Ms Patel. No one else was present at the meeting.

81. Both the claimant and Ms Kenny, corroborated by documentary evidence, stated that on 16 January (a few days after the conversation with Ms Patel) the claimant alleged that she had felt pressured into resignation by Ms Patel. The Tribunal considered the context in which the claimant and Ms Patel had their meeting. The Tribunal accepted the thrust of the claimant's evidence that Ms Patel badly very much wanted to know the claimant's position. There was no real dispute from the respondent that Ms Patel had a shift in the Home which she needed to cover immediately. The claimant had been expected to work that shift, and was now saying she was unable to do so. The Tribunal further took into account the claimant was something of an unknown quantity for Ms Patel; the claimant was not an employee with a track record with Ms Patel. Accordingly, it was plausible that Ms Patel viewed the claimant as letting the respondent down before she had even started work, and that Ms Patel was frustrated by this.

82. In those circumstances the Tribunal accepted that on the balance of probabilities Ms Patel expressed frustration with the claimant and pressed her to decide if she wanted to start work or not. The Tribunal on the balance of probabilities determined Ms Patel did not use the words, you must attend work or resign or work. Nevertheless, on the balance of probabilities Ms Patel

made it clear to the claimant that she needed to start work. It was a credible thing for a manager to say in the circumstances.

83. The Tribunal went on to consider whether this comment from Ms Patel amounted to unfavourable treatment. There is no definition of unfavourable treatment in the Act. The Tribunal had regard to the Equalities and Human Rights Commission Statutory Code. Whilst this does not provide any definition in respect of section 18, it does refer to unfavourable treatment in the context of section 15, discrimination arising from disability. Following the standard approach that the same word appearing in different places in a statute is to be interpreted in the same way, the Tribunal had regard to the Code provisions under section 15. At paragraph 5.7 the code states that a claimant, 'must have been put at a disadvantage'.

84. The Tribunal had found that Ms Patel had more likely than not put some pressure on the claimant to attend work forthwith. The claimant, who had recently undergone a serious medical procedure and was under understandable physical and mental pressure, felt that she had been put at a disadvantage.

85. The Tribunal accordingly went on to consider whether this was because of her pregnancy.

86. The respondent's case was that, if it could show that it had no knowledge of pregnancy, this constituted a complete defence the purposes of section 18. The Tribunal accepted the respondent's submission that, pursuant to *Hair Division Ltd v Macmillan* (EAT, 12th October 2012) [59], a discriminator cannot discriminate against an employee because of pregnancy unless they have some knowledge of that pregnancy. The Tribunal also took into account *Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14* that, when determining causation it is necessary to consider the mental process of the employer. This approach is consistent with the case law in pregnancy and maternity unfair dismissal cases. The Code addresses this matter in terms at paragraph 8.18 as follows, "Unfavourable treatment will only be unlawful if the employer is aware that the woman is pregnant. The employer must know, believe or suspect that she is pregnant - whether this is by formal notification or through the grapevine."

87. The Tribunal in determining whether Ms Patel was aware of the pregnancy reminded itself of the case law set out above in circumstances where it only had the advantage of one party's oral evidence.

88. The Tribunal had found that the claimant did not provide any documentary evidence to Ms Patel about her pregnancy. The Tribunal considered whether the claimant had told Ms Patel about the pregnancy. There was no reference to pregnancy in any contemporaneous documents. There were references to surgery, but not to pregnancy. The claimant's her final position, although her evidence was inconsistent, was that she had not told Ms Kenny about the pregnancy on 16 January. Accordingly, Ms Kenny could only have known about the pregnancy from Ms Patel. The Tribunal had the advantage of hearing from Ms Kenny in person. The Tribunal found on the balance of probabilities that if Ms Patel had known about the pregnancy, she would not have concealed and conceal this from Ms Kenny. There was no reason for Ms

Patel to do this. If the claimant had told Ms Patel about the pregnancy, it would be likely that she would tell other people in the respondent about pregnancy because the matter would come out in any event.

89. The Tribunal accepted Ms Kenny's evidence that she had not been told by Ms Patel about the pregnancy the following reasons. There was no reference to the pregnancy in any documents. The Tribunal accepted Ms Kelley's evidence that the respondent had a protocol in respect of pregnant workers. This is a common employment practice in light of the complex law regarding pregnancy and maternity. In the view of the Tribunal, Ms Kenny would be motivated to ensure that, if the respondent knew of a pregnancy (whether it was continuing or not), this was recorded so that the respondent would do everything required of it. The claimant's case appeared to be as understood by the Tribunal that Ms Kenny was denying knowledge of the pregnancy because Ms Kenny sought to get the claimant out of the business. However, this was not consistent with Ms Kenny putting the claimant on bank rather than processing her as a leaver.

90. The Tribunal further noted that, although the matter was set out in terms in the claim form, there was no reference in either the witness statement or the McLaren order to the claimant's stating that she had told the respondent that she had a pregnancy related illness or that she had been pregnant.

91. Further, there was no reference to pregnancy or maternity in the numerous emails between Ms Kenny and the claimant.

92. On the balance of probabilities, the Tribunal found that it was more likely than not that the claimant had not told either Ms Patel or Ms Kenny of the pregnancy. The claimant told the Tribunal that she wished to protect her privacy and the Tribunal accepted was a private and sensitive matter.

93. Although the claimant did not run this case, for the avoidance of doubt the Tribunal considered whether the respondent should in effect have worked out or suspected that the claimant had been pregnant. In view of the Tribunal, there was no reason for the respondent to suspect this. The claimant had been sick and had been unable to attend work. She had had surgery. There was no reason that the respondent would have assumed that this was linked to a pregnancy.

94. As the respondent was not aware that the claimant was pregnant, the claimant cannot succeed under section 18.

95. For the avoidance of doubt, if the Tribunal had fallen into error and the alleged constructive dismissal occurred within the protected period and therefore any remedy lay under section 18 section 13, the respondent's lack of knowledge would similarly provide a complete defence.

<u>Direct discrimination because of sex - section 13 Equality Act</u>

96. The third act of discrimination was the alleged constructive dismissal. This occurred outside of the protected period and the claimant was thus required to rely on section 13 - discrimination because of sex.

97. The claimant did not contend that she was discriminated against because of her sex for any other reason than pregnancy. She did not, for instance, contends that a man in the same circumstances would have been treated more favourably.

98. The Tribunal considered the nature of the comparison if any it was required to make in a pregnancy related case under section 13. The Employment Appeal Tribunal in *Lyons* considered this point in the context of a claimant whose pregnancy related illness extended outside of the protected period and therefore fell to be considered under section 13 rather than section 18. The Employment Appeal Tribunal at paragraph 30, quoted from the judgement of the European Court of Justice in *Brown v Rentokil* at paragraph 30 as follows: –

> 26. However, where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, Hertz, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex.

99. Accordingly, the question of whether any treatment constitutes discrimination because of sex under section 13 depends on whether a female worker was or would have been treated in the same way as a male worker in the same circumstances (on the facts of *Brown* and *Lyons* - the same duration of absence). If a male worker and a female worker were treated the same, there is no discrimination sex.

100. As the claimant did not contend that she would have been treated differently in respect of an alleged constructive dismissal had she been a man, she could not succeed under section 13. The claimant's case under section 13 was expressly stated to be in the alternative to her case under section 18; it was based run on the same factual basis.

<u>Breach of contract – notice pay</u>

101. The Tribunal found that the claimant resigned without notice on 28 February 2020. The email of 28 February stated in clear and unambiguous terms that the claimant was resigning. She did no work for the respondent after this date. There was no indication in any document after 28 February that the claimant viewed herself as still being in employment. The post-28 February emails referred to the claimant having resigned.

102. The Tribunal accordingly had to determine whether the claimant was constructively dismissed on 28 February 2020. The Tribunal considered whether the treatment of the claimant in the meeting of the 13 January 2020 and subsequent behaviour amounted to a fundamental

breach of the claimant's contract of employment. As the Tribunal had not found that the respondent had discriminated against the claimant, the Tribunal considered whether the respondent's conduct breached the fundamental duty of mutual trust and confidence implied into the claimant's contract of employment. The House of Lords in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL* concluded that there was an implied contractual term that an employer 'will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.

103. The Tribunal reminded itself, applying *Western Excavating*, that this does not extend to a contractual duty on employers to behave reasonably. A Tribunal must, judging reasonably and sensibly, determine whether any breach is sufficiently serious to enable an employee to treat themselves as discharged from further performance, i.e., that, "the employee cannot be expected to put up with it".

104. The Tribunal had found that Ms Patel was not aware that the claimant was pregnant, and the claimant had not asked for sick pay or sick leave. Nevertheless, Ms Patel had put some pressure on the claimant to attend work. In the circumstances the Tribunal found that this did not amount to a fundamental breach contract. It did not go to the root of the relationship between the claimant and the respondent. Even if it was unreasonable, and the tribunal was not convinced that it was, it was not sufficiently serious and something serious. The Tribunal could identify no conduct after the meeting that could form part of any fundamental breach or constitute a last straw. The respondent quickly arranged for the claimant to meet with Ms Kenny. Ms Kenny agreed to the claimant's request to become a bank worker and try to find her alternative position. The claimant then resigned.

105. For the avoidance of doubt and if the Tribunal fail into error in finding that the claimant was not subjected to a fundamental breach of contract, the Tribunal would have found that Ms Patel's conduct in the meeting on 13 January was not the reason for the claimant's resignation. According to the Court of Appeal in *Meikle v Nottinghamshire County Council 2005 ICR 1, CA*, an employee need only resign in response in part at least to the fundamental breach. There must be sufficiently clear findings of fact to conclude that a fundamental breach was one of the reasons why the claimant left.

106. The Tribunal determined that Ms Patel's conduct at the meeting on 13 January was not one of the reasons that the claimant left her employment. It was not mentioned by the claimant after her meeting with Ms Kenny a few days later. It was not referred to a letter of resignation and there were no references to it in any of the correspondence post resignation. The claimant was focused on being paid the money she believed she was owed. The claimant made a number of references to resignation in correspondence after 16 January but made no reference to the conduct on 13 January being the reason for the resignation.

107. Accordingly, as any repudiatory breach arriving at the meeting of 13 January was not one of the factors that the claimant resigned, she was not constructively dismissed.

108. Therefore, the claimant content employment terminated by resignation and she was not entitled to notice pay. Her claim for breach of contract must therefore fail.

Employment Judge Nash
Date: 5 May 2022

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