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EMPLOYMENT TRIBUNALS

Claimant:	**Miss L Musguin**
Respondent:	**Breyer Group plc**
Heard at:	**East London Hearing Centre**
On:	**12 November 2021**
Before:	**Employment Judge Russell (by Cloud Video Platform)**
Members:	**Mr P Lowe** **Mr P Lush**
Representation	
Claimant:	**In Person**
Respondent:	**Mr J McHugh (Counsel)**

JUDGMENT

1. **The Claimant was subjected to unfavourable treatment contrary to section 18 of the Equality Act 2010 in respect of the refusal of a pay rise on or around 24 August 2020.**

2. **All other claims of unlawful discrimination are dismissed.**

3. **The claim for unauthorised deduction of wages and/or breach of contract in respect of company sick pay fails and is dismissed.**

4. **The claim of unfair dismissal is dismissed for want of jurisdiction.**

5. **The Respondent shall pay to the Claimant the sum of £9,000 for injury to feelings, with interest calculated from 24 August 2020.**

REASONS

1. By a claim a form presented to the Employment Tribunal on 26 November 2020, the Claimant brought complaints of pregnancy/maternity discrimination, unfair dismissal and for other payments. The unfair dismissal claim was dismissed as the Tribunal lacked

jurisdiction due to the fact the employment was ongoing at the date that the claim was presented. The Respondent has resisted all remaining claims.

2. We heard evidence from the Claimant on her own behalf. For the Respondent we heard evidence from Mr H Rayat (Head of HR), Mr N Fisher (Finance Director) and Mr J Breyer (Managing Director). We were provided with an agreed bundle of documents and read those pages to which we were taken during the course of the evidence.

Findings of Fact

3. The Respondent is a construction company. The Claimant was employed by the Respondent from 3 July 2017 as an HR Adviser. She had an earlier period of employment but as it was not continuous service, it is not relevant to this claim.

4. In January 2018, the Claimant's pay was increased to £30,000 per annum in respect of a 40-hour working week. The Claimant was on maternity leave with her first child from 17 June 2019 until 18 August 2020. On or around July 2020, Ms Dyer the previous HR Director left the Respondent's employment creating a vacancy for a new Head of Human Resources. On 27 July 2020, Mr Rayat contacted the Claimant and asked whether or not she would be interested in applying for the role. The Claimant replied by email that she was not interested but was open to talking about the further responsibilities. Mr Rayat was the only candidate to apply and was subsequently appointed as Head of HR.

5. The initial HR structure at the Respondent comprised the HR Director, a Recruitment Manager (previously Mr Rayat), an HR Assistant reporting directly to the Director (the Claimant's position) and an HR Administrator (latter changed to HR Co-ordinator, at a salary of £27,000 per annum). During the Claimant's maternity leave, in or around June 2020, the then HR Co-ordinator also went on her own maternity leave. The Respondent decided to recruit a fixed term employee to provide cover for the Co-ordinator role. Contemporaneous emails show that the Respondent's intention was to pay £27,000 per annum. The successful candidate, Fiona, wanted an increased salary of £28,000 and the Respondent agreed in order to fill the vacancy. The Tribunal accepts the Respondent's evidence, which was consistent with the contemporaneous documents, that Fiona's salary was set by reference to market rates. When Fiona was subsequently appointed to the job on a permanent basis, her salary decreased to £27,000 per annum.

6. There was a dispute of evidence between the parties as to how the Claimant found out about the salary being paid to Fiona. The Tribunal did not consider it necessary to resolve that dispute of fact. It was not material to the issues whether the Claimant had been told by Mr Rayat or whether she had seen the documents in the ordinary course of her duties, in either event the Claimant found out about Fiona's pay entirely legitimately.

7. The Claimant was very unhappy that there was only a £3,000 differential between her salary as an HR Assistant compared to Fiona's salary in the more junior HR Co-ordinator role. She believed it to be deeply unfair and to undervalue her work and her experience. The Claimant discussed this with Mr Rayat. The Claimant and Mr Rayat had to this point enjoyed a good working relationship and he was receptive to the Claimant's argument that she should be paid a higher salary to reflect her more senior role. He valued her support and expertise within the department and agreed to make a business

case for a pay rise for the Claimant.

8. In preparing the business case, Mr Rayat reviewed the structure of the HR department as a whole and he discussed his ideas for the future of the HR department with the Claimant, including whether the Claimant's role could be developed with additional responsibilities, particularly with regard to recruitment. This was however a very generalised discussion, there was no formal agreement reached and it was very much we find a work in progress prompted by the Claimant's request for a pay rise.

9. On 24 August 2020, Mr Rayat attended the regular weekly HR meeting with Mr Fisher and Mr Breyer. By this time, the Claimant had told Mr Rayat that she was pregnant again and she gave him permission to tell Mr Fisher and Mr Breyer in the meeting. No notes of the meeting on 24 August 2020 were produced.

10. The Claimant's evidence is that Mr Rayat went into the meeting and that when he met her afterwards he told her that he had made the request for a pay rise but that this had been refused by Mr Fisher because she was due to commence a period of maternity leave at Christmas. Mr Rayat told her that Mr Fisher had said that as the Claimant would only be in the business for four months, a pay rise was not feasible. In her witness statement, the Claimant made clear that Mr Rayat had said that because they were friends and he respected her he did not want to lie to her, that is why he had given her the real reason for the refusal.

11. Mr Rayat's evidence is that he made the request to Mr Fisher and Mr Breyer for a pay rise for the Claimant and for another employee but had not had the full business proposal with him at the time. Both pay rise requests were refused on the grounds that the business could not support them at that time. After the meeting, he told the Claimant that the initial request had been rejected but it was she who said that it was because she would only be there for four months before her next period of maternity leave.

12. In order to resolve this dispute as to whether Mr Rayat told the Claimant that her impending maternity leave was the reason for refusal or whether the Claimant merely inferred this without any evidential basis from Mr Rayat, the Tribunal had particular regard to contemporaneous documents given the frailty of human memory in providing evidence particularly in the context of Tribunal proceedings, having regard to the guidance of Leggitt J in **Gestmin.**

13. The Claimant sent a WhatsApp message on 24 August 2020 to Ms Dyer, her former manager. The content of the message is not independent corroborating evidence as the author is the Claimant, however, the Tribunal attaches significant weight as the message was both contemporaneous and made without litigation in prospect. In the WhatsApp message, the Claimant told Ms Dyer that Mr Breyer and Mr Fisher had rejected her pay increase as she would only be back for four months, adding "**obs that is between Hardeep and me and not their official stance**". The Claimant expressed her unhappiness that a low pay rise of £2,000 had been refused and that Mr Rayat had said that he would draft an email the following day. The Claimant concluded that she may raise a grievance for direct discrimination due to pregnancy and states: "**I am so upset and angry, it is not even about the pay increase, it is the fact that I am worth so little that they think six pence is enough difference**".

14. A further WhatsApp message sent late the same day from the Claimant to Ms

Dyer read:

> "**They said they wouldn't increase it seeing I am only back for 4 months, Hardeep told them I planned to go off at Christmas. He told them I was pregnant and going off at Christmas before he asked for my pay increase. He wants me to learn recruitment and he is getting me involved in all the policy meetings Neil for fleet, he also wants me to be is full cover for holiday (which I get) I think he plans to pass that on to me.**
>
> **…**
>
> **"I am not sure I can go in tomorrow. I am so angry and upset, and even if Hardeep gets Tim to change his mind, I really know that he does not think I am worth it. […] I am not worth £2k because I am pregnant and leaving again. What is the point of even trying"**

15. On 25 August 2020 the Claimant sent a further WhatsApp message to Ms Dyer stating that she had spoken to Mr Rayat and read his draft email in support of her pay increase. The Claimant said that it made her realise how much she did not want to be there, referring to being stressed out and that her doctor had indicated that he would sign her off with work related stress potentially until Christmas if needed. She told Ms Dyer that she had sent an email to Mr Rayat outlining her issue "**without throwing him under the bus**". It is clear from the message that the Claimant felt disillusioned with her employer.

16. The Tribunal finds that the phrase in the message on 24 August 2020, "**obs that's between Hardeep and me and not their official stance"** is consistent with the Claimant's evidence that Mr Rayat shared the true reason for the refusal with her because he was a friend and he respected her. Similarly, her message sent on 25 August 2020 is consistent with her evidence that she was expressly told that the decision to refuse the pay rise was because she would only be there for four months before going on maternity leave again. On balance, we prefer the evidence of the Claimant and find that Mr Rayat did tell her that the reason for refusal was given by Mr Fisher, namely that as the Claimant would only be in the business for four months, a pay rise was not feasible. This is inherently plausible in the context of a meeting in which Mr Rayat both asked for a pay rise for the Claimant and stated that she was again pregnant and intending to take maternity leave at Christmas.

17. On 24 August 2020, after the initial meeting, Mr Rayat produced a revised business proposal. A copy was not given to the Claimant. The revised business proposal states that the pay rise of £2,000 is in return for the Claimant assuming additional responsibilities. The Tribunal finds that the revised proposal was produced by Mr Rayat because of his genuine wish to support the Claimant and therefore used additional responsibilities as a way of justifying the pay rise. There was no formal agreement with the Claimant as to what those responsibilities would be and they are not reflected in the subsequent letter sent to the Claimant confirming the pay rise with effect from 1 September 2020. The proposed additional responsibilities were the vehicle to secure the pay rise that the Claimant desired and to create a greater financial differential between her salary as an HR Assistant and the salary of the HR Co-ordinator. The Tribunal does not consider that there is anything improper in this approach nor that it was in any way related to her pregnancy or intention to take a period of maternity leave.

18. On 25 August 2020 the Claimant sent Mr Rayat an email setting out her

dissatisfaction with the pay differential between her job and that of the HR Co-Ordinator and her view that her experience and skills were not sufficiently valued.

19. The Claimant was informed on 26 August 2020 that the pay rise of £2,000 had now been agreed.

20. On 23 September 2020, the Claimant raised a grievance setting out her unhappiness at what she regarded as an unfair pay differential between her job and that of the HR Co-ordinator, it is clear that she remained of the view that she was undervalued even with the £2,000 increase. Mr Rayat, Mr Fisher and Mr Breyer produced statements in response. The Tribunal attached less weight to the contents of each as they were produced some time after the meeting and when there was clearly a dispute in which discrimination was being alleged. In the grievance (and in her earlier email of 25 August 2020 to Mr Rayat), the Claimant did not mention the fact that Mr Rayat had told her that the reason for refusal was because she would only be in the business for four months before a period of maternity leave. The Tribunal find that this was because she did not want to compromise Mr Rayat's position for sharing the real reason with her, consistent with her WhatsApp message that she did not want to "**throw him under the bus**".

21. The Claimant was off sick from 26 August 2020 and she did not return to work before she went on maternity leave. Her GP certificate's gave the reason as "work related stress in pregnancy. The Tribunal finds that her illness was not pregnancy related; it was work related albeit it occurred during pregnancy which limited the medication which the Claimant could take.

22. During her sickness absence, the Claimant was paid Statutory Sick Pay and, as a result, received only maternity allowance rather than statutory maternity pay. Prior to March 2020, she would have received full pay as the Respondent operated a discretionary company sick pay scheme which would have entitled her to full pay for sickness absence during pregnancy. In March 2020, due to the effects of the Covid-19 pandemic, the Respondent varied its policy so that all sickness absence would be paid only as SSP. The previous discretionary company sick pay scheme was reinstated in April 2021. The Claimant was not aware of the change as she was on her first period of maternity leave when it was introduced and she did not receive the email sent to all members of staff. In evidence, the Claimant accepted that there was nothing to suggest that any employee was treated differently during the period March 2020 until April 2021 when the revised, less generous sick pay policy applied.

Law

23. Section 18 Equality Act 2010 refers to pregnancy and maternity as a protected characteristic. It provides that a person discriminates against a woman if it treats her unfavourably either because of pregnancy (during the protected period) or because she is exercising, seeking to exercise or has exercised her right to ordinary or additional maternity leave.

24. As the Supreme Court held in **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65, in most cases little is to be gained by seeking to draw narrow distinctions between the word "unfavourably" and analogous concepts such as "disadvantage" or "detriment". The Tribunal must identify as a fact what

was the relevant treatment and in what way it was unfavourable to the Claimant. Treatment which is advantageous cannot be said to be unfavourable simply because it could have been more advantageous.

25. The proper test for causation is not what would have happened "but for" pregnancy or maternity leave. It is an objective assessment of whether pregnancy or maternity leave were a material, effective and operative cause for the unfavourable treatment.

26. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

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

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

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

Conclusions

30. The Tribunal has accepted the Claimant's evidence and found as a fact that the request for a pay rise on 24 August 2020 was refused because the Claimant was seeking to go on maternity leave four months later. The refusal of a pay rise is unfavourable treatment. Even if the Claimant was not entitled to a pay rise, the refusal to exercise discretion in favour of giving a pay rise because of impending maternity leave is clearly unfavourable. This was an act of overt discrimination contrary to section 18.

31. The second and third alleged detriments significantly overlap. The first is that the Claimant should have been given a pay rise at the time of the recruitment of Fiona, the cover HR Co-ordinator. The second is that the subsequent pay rise should have been backdated to 22 July 2020 when Fiona started her cover position. The Tribunal has found as a fact that Fiona received a higher than intended salary because she successfully negotiated it in order to fill the vacancy and was therefore set by reference to market

rates. Fiona was not recruited as cover for the Claimant's post but for the HR Co-Ordinator post.

32. The Claimant subsequently received a pay rise because she expressed her discontent that her additional skills and experience were not sufficiently valued in the pay differential. No doubt if the Claimant had been present in the business in July 2020 and become aware of the pay differential at that point, she would have expressed her concern then rather than on her return from maternity leave on 18 August 2020. However, the test is not that "but for" her maternity leave she would have complained or obtained the pay rise sooner. The Claimant's maternity leave had nothing whatsoever to do with the reason for narrowed pay differential caused by Fiona's increased salary. As the Claimant's maternity leave was not a material or effective cause, there was no reason automatically to review or increase her pay or to backdate it when the pay rise was agreed. There was no unfavourable treatment because of pregnancy or maternity leave.

33. The Claimant was not contractually entitled to full pay for sickness absence during pregnancy by reason of the policy change in March 2020. There is nothing unfavourable in receiving the pay to which you are contractually entitled. The fact that the Respondent would have treated her more advantageously before March 2020 or after 2021 is not sufficient to show unfavourable treatment. It is not inherently discriminatory not to pay an employee full pay for a sickness absence when pregnant and, in this case, the sickness absence was not caused by the pregnancy (or pregnancy related) it was work related stress. There was no unlawful discrimination or unauthorised deduction from wages.

34. Having given our Judgment orally on liability, the Tribunal invited additional submissions from the parties as to remedy.

35. The Tribunal reminds itself that that compensation in discrimination cases should be such sum as would put the Claimant in the position she would have been in had the discrimination not occurred. The Claimant seeks to recover the financial losses caused by her period of sickness absence (receipt of SSP only leading to maternity allowance rather than SMP). The Claimant bears the burden of providing that the sickness absence was caused by the discriminatory conduct. The Claimant has provided GP fit notes for the entire period but these refer only to stress at work in pregnancy, without further information. The content of the Claimant's grievance and subsequent appeal did not assist us in addressing the cause of her sickness absence. Indeed, the reference to Occupational Health is about the effect upon stress in a pregnant employee rather than the cause of that stress.

36. The Tribunal accepts the Claimant's evidence that on 24 August 2020 the Claimant developed a migraine and had a sleepless night, was distressed, angry and upset because of the conversation she had with Mr Rayat about the refusal of the pay rise and the reason given for it. Her evidence was that, as she told Mr Rayat, the damage was done: she was not worthy of a pay rise simply because she was growing a human. However, the Tribunal also took into account the content of the Claimant's contemporaneous WhatsApp messages. In particular, her message on 25 August 2020 from which we find that the Claimant was dissatisfied with the £2,000 proposed pay rise as she did not feel sufficiently valued by the pay differential between her salary and that of the HR Co-Ordinator. This is consistent with her subsequent grievance which also alleged that stress had been caused by the early recruitment of her maternity cover and the failure

to pay full sick pay.

37. The Claimant's reference in contemporaneous WhatsApp messages to the fact that her doctor had indicated that he was prepared to sign her off until the start of her maternity leave, right at the very start of her period of sickness, is quite startling. We find on balance that the Claimant had formed the view that she was under valued generally, she was disillusioned with the limited value attached to her and her work and the £2,000 was an insufficient figure to remedy that. In conclusion, the Claimant has not shown on the balance of probabilities that the single discriminatory comment, serious though it was, was a material and effective cause of her stress-related sickness absence. As a result, we make no award for loss of earnings.

38. The Claimant is entitled to an award for injury to feelings and we applied a two-stage approach: first, applying **Vento**, to consider the appropriate band by reference to the conduct of the employer; second, to consider the actual effect of the conduct upon the feelings of the Claimant.

39. Having regard to the employer's conduct we are satisfied that this is a single act, it was swiftly remedied and it had very limited financial consequences to the Claimant particularly as we have found that there is no entitlement to back dating. An overtly discriminatory act of refusing a pay rise because of a proposed period of maternity leave is, however, inevitably a very serious matter. The period of pregnancy and maternity is a time at which a female employee is particularly vulnerable and it is for that reason that the statutory protections exist. On balance, the Tribunal is satisfied that this is a lower bracket **Vento** case but falling at the upper end of the range. The lower band of **Vento** at the time that this claim was presented was from £900 - £9,000.

40. Whilst the Claimant has not shown on balance that the discriminatory refusal of her pay rise was an effective cause of her sickness absence, we have accepted that she was upset and distressed by the reason given by Mr Fisher. The actual upset caused was exacerbated by the fact that she felt undervalued because of her pregnancy. Instead of seeing her pregnancy and impending maternity leave as a happy time to be enjoyed, it was tainted with mixed feelings as it was the stated cause of the reason she was initially refused the pay rise. The WhatsApp messages make clear the effect upon her sleep and the way in which she felt that she was valued. For all of those reasons, the Tribunal is satisfied that the appropriate award for injury to feelings is £9,000. The Claimant is entitled to interest at the statutory rate from the date of injury, namely 24 August 2020.

Employment Judge Russell

6 May 2022