EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Arti Lal	**v**	KNP Logistics Group Limited

Heard at: Cambridge

On: 11, 12 and 13 April 2022
In Chambers Discussion: 4 May 2022

Before: Employment Judge Tynan

Members: Ms KJ Johnson and Mr S Holford

Appearances
For the Claimants: Mr M Anastasiades, Solicitor
For the Respondent: Mr Ruaraidh Fitzpatrick, Counsel

RESERVED JUDGMENT

The Claimant's complaints pursuant to Section 18 of the Equality Act 2010, that she was discriminated against in the protected period in relation to a pregnancy of hers, by being treated unfavourably because of the pregnancy or because of illness suffered by her as a result of it, are not well founded and are dismissed.

REASONS

1. By a claim form presented to the Employment Tribunals on 7 May 2020, following ACAS Early Conciliation between 3 March 2020 and 17 April 2020, the Claimant brings complaints against the Respondent that she was discriminated against contrary to Section 18 of the Equality Act 2010 ("EqA").

2. There was an agreed Hearing Bundle running to 215 pages. Any page references in this Judgment are to the numbered pages in the Bundle.

3. We heard evidence from the Claimant who had made a detailed 20 page statement in support of her complaints. On behalf of the Respondent, we had statements by and heard evidence from the following individuals:

    - Ian Johns, who was engaged by the Respondent as Interim Finance Director, from August 2017 until June 2020. Mr Johns has remained with the Respondent in a non-executive capacity since ceasing to be Interim Finance Director.

    - Kate Bainbridge, who has been employed by the Respondent since 22 November 2016 and is currently employed as a Human Resources Manager. Ms Bainbridge gave evidence regarding the Claimant's absences and alleged timekeeping issues, as well as the first stage of her Grievance when Ms Bainbridge both acted as a note taker and provided HR support to Mr Farr as the Grievance Officer.

    - Theresa Smith-Wauters, who was engaged by the Respondent between March 2018 and October 2019 as Interim Group Financial Controller. Ms Smith-Wauters was the Claimant's Line Manager until September 2019 when her permanent replacement, Mr Ward joined the Respondent.

    - Nick Bithell, the Respondent's Human Resources Director. Mr Bithell acted as the note taker and provided HR support at the Claimant's Grievance Appeal Hearing.

    - Paul Abbott, Group Director of the Respondent. Mr Abbott heard the Claimant's Grievance Appeal.

4. The issues to be determined in this case were identified by Employment Judge Kurrein at a Case Management Preliminary Hearing on 2 July 2021 and are set out at paragraph 3 of the Reasons section of the record of that Hearing (pages 52 and 53). Although six issues were identified, the sixth numbered issue adds nothing further to the fourth numbered issue and we proceed on the basis therefore that there are five substantive issues to be determined. Whilst they concern events between September 2019 and February 2020, we make findings about earlier events which, as we shall return to, provide important context, particularly in coming to a judgement as to the reasons why the Claimant was treated as she was.

Findings of Fact

5. The Claimant joined the Respondent on 13 August 2018 as a Management Accountant. Clause 9.3 of her contract of employment provides as follows:

> "9.3 If you are absent from work due to sickness or injury and you comply with the requirements set out above, you will be paid

> Statutory Sick Pay (SSP) subject to qualification. For the purposes of SSP your qualifying days should be your normal working days. SSP is not paid for the first 3 days of absence and so in this period you will receive no pay. At the sole discretion of the Operator you may receive additional sick pay of such amount as the Operator, in its absolute discretion, considers reasonable. Such payment is not contractual and can be withdrawn, withheld, or varied by the Operator at any time. Any such sick pay will be deemed inclusive of SSP."

This is also confirmed in the Summary of Employment Terms signed by the Claimant on 13 August 2018 (page 66).

6. There were three significant events in the Claimant's life during her first year of employment with the Respondent:

   6.1 she was badly injured in a car accident in December 2018, a little over three months after she commenced employment with the Respondent;

   6.2 her brother passed away suddenly and unexpectedly on 31 March 2019; and

   6.3 in August 2019, she became pregnant.

7. Although this claim arises out of the Claimant's alleged treatment during her pregnancy, we deal first with how she was treated by the Respondent at the time of the car accident and following her subsequent bereavement and also consider the issue of her time keeping.

8. Following a car accident in December 2018, the Claimant was off work from 4 December 2018 to 19 January 2019, a period of six and a half weeks, albeit straddling the Christmas holiday period. The Claimant's undisputed evidence was that she was absent for 31 working days, confirmed by the absence details at page 59B of the Hearing Bundle. It is not in issue that the Respondent exercised discretion and paid the Claimant her full salary, rather than SSP, during this absence. In her evidence at Tribunal Ms Smith-Wauters explained that she had been reluctant to lose the Claimant, having only recently recruited her to the Finance Team, and that she was also understanding of the unfortunate situation in which the Claimant found herself. This is corroborated by emails at page 77 of the Hearing Bundle which evidence that discretion was exercised to maintain the Claimant on full pay as she was considered to have settled in very well and to be,

> *"…doing an excellent job so far. The timing of her accident (and the fact she was in no way at fault) was really unfortunate."*

9. We accept the Respondent's evidence that this was unusual and represented a significant departure from its normal policy and practice in relation to sick pay, particularly in relation to a recent joiner.

10. Although the Claimant's sick leave ended on 20 January 2019, she worked from home for a further period of five weeks, finally returning to the office on 25 February 2019.

11. The Claimant observes that there was no Return to Work interview or specific risk assessment on her return to work, either in January 2019 or when she returned to the office in February 2019. Whilst she was not challenged regarding her evidence, ultimately nothing turns on the matter.

12. Following the Claimant's brother's death, the Claimant says she was hurt and upset to be asked to take four days from her annual leave in addition to two days' compassionate leave granted under the Respondent's standard policy on family bereavement and compassionate leave. She was aware that a colleague had been paid in full for five days' compassionate leave following the death of her sister, and felt that they were not being treated consistently. Superficially, their circumstances may have seemed to the Claimant to be the same. However, whilst we were not told how long the Claimant's colleague had worked for the Respondent, Ms Smith-Wauters' unchallenged evidence was that she had a good attendance record. Furthermore, the Claimant acknowledged in the course of her evidence at Tribunal that whereas her brother's funeral had taken place locally in Leicester, her colleague had travelled to Scotland, effectively necessitating two full days of travel.

13. An email at page 86 of the Hearing Bundle evidences that Ms Smith-Wauters had endeavoured to be consistent in her approach, even if the two cases were handled differently in the particular circumstances. What is relevant, we think, is that Ms Smith-Wauters' starting point was that there should be broad consistency of treatment. In this regard, we note that she agreed with the Claimant that she should work from home for three days as a further supportive measure. The Claimant's absence records, at pages 59B and 60 of the Hearing Bundle do not evidence that she took four days' leave from her annual entitlement, even if this was originally proposed at the time.

14. In any event, to the extent that there was any difference in how the Claimant and her colleague were treated, this evidently had nothing to do with pregnancy or illness suffered as a result of pregnancy, since the Claimant was not then pregnant. The explanation instead is to be found at page 88 of the Hearing Bundle. Ms Smith-Wauters met with the Claimant on 30 April 2019 to discuss the Claimant's concerns. In an update email the following day to Ms Bainbridge and Mr Bithell, Ms Smith-Wauters confirmed that the decision in relation to the Claimant's bereavement leave was driven by the fact the Claimant had been maintained on full pay following her car accident in December 2018. The email further records that Ms Smith-Wauters and the Claimant had discussed the fact that the

Claimant was continuing to work from home on those days that she had physiotherapy appointments as part of her ongoing rehabilitation following her accident. The Claimant was asked to change the appointments to the end of the day so that she could come into the office earlier in the day rather than work from home all day. This request evidently irked the Claimant who perceived it as evidencing a lack of trust on the Respondent's part. On the contrary, we find it evidences the Respondent's ongoing flexibility, even if the revised arrangements meant that the Claimant was no longer able to make physiotherapy appointments at any time of her choosing during the working day.

15. The Claimant had an Appraisal meeting with Ms Smith-Wauters on 31 May 2019. The record of the Appraisal (page 90) evidences that Ms Smith-Wauters agreed with the Claimant's self-assessment that she was performing strongly in the role, was effective and, in certain respects, was exceeding the role requirements.

16. Emails at page 91 of the Hearing Bundle evidence that Ms Smith-Wauters had begun to have concerns regarding the Claimant's time keeping by July 2019. She sought Ms Bainbridge's advice. In an email dated 3 July 2019 she wrote,

> *"Arti often gets to work late. She is meant to start at 9am and some mornings she gets in on time (I'd say 50% of the time). The lateness tends to vary between 9.01 and 9.15am. This morning, it was 9.08am.*
>
> *I have had a word with her on countless occasions about this and explained that as she is probably the most senior member of staff under me, it does not set a good example…*
>
> *It is likely I am leaving soon so I am half tempted to leave it and let my replacement deal with it, but it irks me that she is taking no notice and still getting in late. I have mentioned it to Ian and he said he'd have a word with her if he noticed her coming in late but he doesn't appear to have done anything.*
>
> *Can you think of another way I can approach this to make her understand?"*

17. The Claimant may likewise have viewed this as a trust issue, and perhaps a little petty given that she was indisputably working above and beyond what was expected of her, but ultimately the matter of her start time was not at her discretion. As her Manager, Ms Smith-Wauters was entitled to raise the matter and to request that the Claimant fulfil her contractual start time, particularly given, as we accept, she was concerned that there could be a knock on effect in terms of timekeeping, morale and cohesion within the wider team. As Ms Smith-Wauters' email confirms, time keeping issues had arisen previously with another member of staff, with a knock on effect.

18. The Claimant describes Ms Smith-Wauters' email of 3 July 2019 as hostile. We did not agree. What it evidences to us is Ms Smith-Wauters' frustration, specifically her frustration that her various requests to the Claimant to address her time keeping seemed to have gone unheeded by the Claimant. We got some sense of the Claimant's single minded outlook in the course of her evidence. In response to questions from Mr Fitzpatrick there were certain issues on which she was somewhat rigid and entrenched in her views and showed limited insight as to the opposing view. For example, she simply could not recognise why persistent lateness, even by a few minutes, might present an issue within a workplace. She could only see the matter from her own perspective that she frequently worked late. We preferred Ms Smith-Wauters' evidence on the issue; she readily acknowledged that the Claimant's poor time keeping irked her, but that she had never shown hostility to the Claimant in the matter. As she said,

"I just tried to get her to come in on time, that's it basically".

We accept Ms Smith-Wauters' evidence that she is not someone who micro manages her team and agree with her when she said it was not too much to ask for the Claimant to come in on time.

19. The Claimant disputes Ms Smith-Wauters' assessment in her 3 July 2019 email, that the Claimant arrived at work on time perhaps 50% of the time. Whether or not she was fully accurate in that assessment seems to us to miss the point. What is relevant is that by early July 2019, Ms Smith-Wauters was genuinely of the view that the Claimant was a poor time keeper. It is in that context that their subsequent interactions during the Claimant's pregnancy are to be seen.

20. In August 2019, the Claimant discovered that she was pregnant. She shared the news with Ms Smith-Wauters very early on in the pregnancy. She claims that she was nervous about telling Ms Smith-Wauters due to her allegedly hostile attitude towards the Claimant. However, the only hostility to which she refers in her witness statement is what she refers to as Ms Smith-Wauters' *"petty rant"* in her email of 3 July 2019. However, that email was not addressed to the Claimant and only came to her attention when it was disclosed to the Claimant in the course of the subsequent Grievance proceedings in early 2020. As such, the email cannot explain why the Claimant might have been nervous in August/September 2019 when she disclosed to Ms Smith-Wauters that she was pregnant. The fact that she informed Ms Smith-Wauters of her pregnancy when she was just three or four weeks pregnant evidences to the Tribunal that she was happy to take Ms Smith-Wauters into her confidence and that she trusted her with the news. At Tribunal, Ms Smith-Wauters gave a spontaneous and happily animated account of their interactions at the time. She described the Claimant as excited and that she was very happy for her. We accept that those sentiments were genuinely expressed at Tribunal and genuinely felt and expressed at the

time. We do not uphold the allegation at paragraph 16 of the Claimant's witness statement that Ms Smith-Wauters was annoyed when the Claimant informed her that she was pregnant.

21. We think it relevant to note in this regard the Claimant's reaction in March 2020 when she learned that a copy of her Grievance letter had been sent to Ms Smith-Wauters. She wrote to Mr Bithell,

> *"she has nothing to do with the Grievance and as such the allegations* [were] *purely against Michael Ward and not Theresa".* (page 141)

As at 6 March 2020 therefore, the Claimant seemed not to be of the view that Ms Smith-Wauters had discriminated against her. Her witness statement does not address when and why her views changed. However, it seems unlikely that Ms Smith-Wauters' email of 3 July 2019 was the cause of this, since the Claimant had sight of it by February 2020, yet the following month she was still saying to Mr Bithell that the Grievance did not concern Ms Smith-Wauters.

22. This brings us to the first issue in the proceedings. In September 2019, the Claimant suffered with shingles. She was then within her protected period. The Claimant was off work between 5 and 13 September 2019. If she self-certified, this information is not in the Hearing Bundle. There is evidence that Ms Smith-Wauters had to chase the Claimant for copies of her Fit Notes. One was provided on 17 September 2019, certifying the Claimant for the period 12 to 22 September 2019. A retrospective Fit Note was provided for the period 5 to 12 September 2019. They cited shingles and ophthalmic shingles respectively. There is nothing in either Fit Note to indicate a link to the Claimant's pregnancy and no other available GP or hospital records that might indicate the cause. Indeed, there are no hospital records at all in relation to the matter, which is surprising. At paragraph 18 of her witness statement, the Claimant states that she was told by Leicester Royal Infirmary that during pregnancy a woman's immune system is lowered and that this would be a contributory factor in developing shingles. She does not identify who allegedly told her this or provide a more detailed account of any discussion and whether the individual(s) in question was talking in general or specific terms. There is no evidence in the Hearing Bundle regarding any potential link between shingles and pregnancy. The Claimant has the burden of proof in the matter, but in our judgment has failed to establish, on the balance of probabilities, that her shingles was related to her pregnancy.

23. The Claimant alleges that she returned to work early following the shingles because she was under pressure to carry on working. She did not raise this as an alleged concern in her Grievance submitted on 28 January 2020 (pages 100 – 101).

24. The decision regarding what the Claimant would be paid during her shingles related absence, i.e. whether discretion would be exercised in her favour, was Mr Johns', albeit he consulted Ms Smith-Wauters on the matter. His evidence is that he knew the Claimant was pregnant, albeit he was never informed that her shingles might be related to her pregnancy. It is implicit from the Claimant's case that each of Mr Johns' and Ms Smith-Wauters were influenced, whether consciously or otherwise, in their views and decision by the fact the Claimant was suffering with a pregnancy related illness. However, the contemporaneous evidence does not support this. On 16 September 2019, Ms Smith-Wauters emailed Mr Johns with her thoughts. She was a little uncertain on the matter and asked to be reminded of company policy. She wrote,

> *"When Arti was off for two months previously, following her car crash, she was paid in full for the whole period. Due to that, I would recommend we pay her SSP as per the Company Policy as Knights has already been very generous with her. I am not sure if Ian concurs with this. I have to take into consideration that we haven't received 'proof' of her illness (sorry this sounds harsh but I am trying to be realistic and practical) which is why I would suggest paying SSP as per the Company Policy.*
>
> *I am not sure how Arti's current 'situation' would dictate what we pay her? Please can you confirm if this affects how we pay her for this sick period."*

25. Had the Claimant told Ms Smith-Wauters that her shingles was pregnancy related, we think Ms Smith-Wauters would have referred to this in her email. Her comments regarding the 'situation' evidence to us that Ms Smith-Wauters was uncertain whether the Claimant's pregnancy meant that she should be maintained on full pay, in other words, Ms Smith-Wauters was concerned to ensure that the Claimant did not experience any unfavourable treatment because she was pregnant. Subject to receiving further HR advice on this, her view otherwise was that discretion should not be exercised in the Claimant's favour as she had previously been treated generously during her convalescence from her car accident. Her views in this regard were entirely consistent with the position she had taken in April 2019 in relation to the Claimant's bereavement leave, as she had explained in her meeting with the Claimant on 30 April 2019. The Claimant may disagree with her, and evidently remained unhappy about the matter following the meeting on 30 April 2019, as Ms Smith-Wauters' email of 1 May 2019 confirms, but the fact remains that Ms Smith-Wauters was consistent in her approach both before and after the Claimant became pregnant.

26. Mr Johns responded to Ms Smith-Wauters email of 16 September 2019 to confirm that the Claimant would be paid SSP only. He did not specifically endorse Ms Smith-Wauters' thinking / rationale, though that may be inferred from the fact that he agreed with her recommended approach. He suggested they might have a further catch up, though at Tribunal neither of

them could recall whether they had in fact had any further discussion on the matter.

27. Around this time, Mr Ward joined the Respondent company and Ms Smith-Wauters stood back from managing the Claimant and others in the team. She briefed Mr Ward, including regarding the Claimant's shingles (the Claimant may then have been working from home whilst she fully recovered) and her time keeping concerns. We accept Ms Smith-Wauters' evidence that Mr Ward in fact noticed the time keeping issue himself, as he commented upon it to her.

28. This brings us to the second issue in the proceedings, namely Ms Smith-Wauters and Mr Ward's treatment of the Claimant when she experienced morning sickness. It is not in dispute that the Claimant suffered with morning sickness during her pregnancy. Her evidence was that there was no particular pattern to the sickness and that she had experienced morning sickness before she left for work, on the way to work and at work. We accept that Ms Smith-Wauters and Mr Ward were aware that she was experiencing morning sickness, even if they were not told each and every time she experienced symptoms. The Claimant alleges that they questioned her as to why she was late when she got to work and said she needed to improve her timekeeping. Paragraphs 20 and 29 of the Claimant's witness statement suggest that those questions and criticisms were regularly levelled at her. She states that she experienced the questions as hostile and that she was frustrated and hurt when they kept asking her these questions, not only during September 2019 but throughout her pregnancy. We find her evidence in this regard to be unreliable.

29. In her Grievance letter of 28 January 2020 (pages 100 – 101), the Claimant said Ms Smith-Wauters had consistently told her she was late and that she needed to improve her timekeeping. We conclude that she has conflated this with the pre-pregnancy period when, as Ms Smith-Wauters said in her email of 3 July 2019 already referred to, she had raised the issue with the Claimant *"countless times"*.

30. During her second Grievance meeting with Mr Farr on 28 February 2020, the Claimant initially said that Mr Ward had said nothing to her on the subject of her timekeeping during her pregnancy (page 130). Later in the same meeting this changed and she said she had been pulled up on her timekeeping a couple of times since she had become pregnant (page 134). A few moments later, she told Mr Farr it had happened three times since becoming pregnant, though she went on to identify one of the three dates in question as July 2019 when she would not in fact have been pregnant; we conclude that is likely to be when Mr Johns spoke to her a week or two after Ms Smith-Wauters had raised the issue with him. Otherwise, the Claimant told Mr Farr on 28 February 2020, that she had been pulled up by Mr Ward in November and December 2019. She did not say that criticisms had been levelled against her throughout September and into October, though she did go on to suggest at Tribunal

that she could no longer remember the precise dates. She specifically identified on 28 February 2020 that she had been pulled up by Mr Ward rather than Ms Smith-Wauters, which would further explain why she said on 6 March 2020 that her Grievance was with Mr Ward alone.

31. We consider the Claimant's evidence on this issue to have been imprecise, muddled and ultimately unreliable.

32. We did not hear evidence from Mr Ward who left the Respondent's employment approximately two years ago. However, in comments provided at the time of the Grievance, he said that he had challenged the Claimant regarding her time keeping during her appraisal, albeit she had refused to sign the appraisal form. We find that she refused to sign an appraisal form that included feedback in relation to her time keeping and that her refusal in that regard is consistent with her earlier unwillingness to engage with Ms Smith-Wauters on the issue of her time keeping which had caused Ms Smith-Wauters such frustration.

33. On 29 November 2019, Mr Ward issued a general and gentle reminder to the Finance Team regarding sickness and medical appointments. He had discussed the matter first with Mr Bithell as he was concerned about absence levels in the Finance Team. Mr Bithell did not keep a note of their discussion. We do not attach significance to this and accept that much of Mr Bithell's working day involves 'business as usual / operational HR issues' that are capable of being addressed through informal advice and guidance rather than formalised in writing or where a written record needs to be retained. Mr Bithell's advice was to draw a line and to effect a 'reset' by communicating the Company's Policy to ensure consistency in the future.

34. The Claimant was absent from work on 11 and 12 December 2019. Her evidence is that she was suffering with really bad morning sickness and that she attended Leicester Royal Infirmary with dehydration and low blood pressure. When she returned to work she was informed by Mr Ward that she would need to take the days as part of her annual leave entitlement if she wished to be paid her full salary for them, otherwise she would be paid SSP in accordance with the Respondent's Policy, on the basis discretion would not be exercised in her favour to increase her sick pay to her normal full salary. This is the third issue we must determine.

35. Insofar as the Claimant seeks to contrast her treatment with the alleged treatment of Paula Showell and Janice Wakely when they were on sick leave in October and November 2019, this overlooks that Mr Ward's email of 29 November 2019 had effected a reset.

36. The Claimant's medical records at pages 99D and 99E of the Hearing Bundle evidence that the Claimant reported as experiencing abdominal pain on 11 December 2019, and that she had been vomiting over a 24 hour period. There is no record in the detailed history of morning sickness or hyperemesis gravidarum. Given that the Claimant said she had been

experiencing morning sickness by then for at least 3 months, she might have recounted those issues to the medical staff at Leicester Royal Infirmary if she believed that they were relevant to the symptoms she was then experiencing. The documented diagnosis in the medical records was *"likely GE"*, which we find is a reference to gastroenteritis. The medical professional concerned, Dr Naz noted that the Claimant was 20 weeks pregnant, yet did not document the issue as being pregnancy related. In her evidence at Tribunal, the Claimant asserted that gastroenteritis is a common condition during pregnancy, though produced no further evidence in this regard. We conclude that it was unrelated to the Claimant's pregnancy. We add, for completeness, that this was also Mr Ward's understanding at the time. In comments provided to Mr Farr in connection with the Claimant's Grievance in February 2020, he said that at her Return to Work meeting with him, the Claimant had reported the issue as a stomach bug and non-pregnancy related. Although he had not seen her medical records at that time, his reference to it being a stomach bug is consistent with what is recorded in the Claimant's own medical records and lends further weight therefore, to Mr Ward's recollection some weeks following the absence.

37. For completeness, we set out in our conclusions below why we consider that the Claimant was not treated unfavourably in any event in the matter and why it was not pregnancy related.

38. The fourth issue that the Tribunal must determine is whether during her Appraisal on 16 January 2020, Mr Ward said to the Claimant,

> *"Well you will be going on maternity leave soon anyway so what's the point of paying you".*

39. In cross examination, Mr Fitzpatrick accused the Claimant of lying in her evidence to the Tribunal. In his closing submissions he identified three separate lies, namely: her evidence in two respects as to why she had omitted what otherwise would seem to have provided a compelling basis for her belief that she had been discriminated against, from her detailed Grievance letter submitted to the Respondent just 12 days later; and her explanation as to why she seemingly failed to raise the matter during the Grievance process.

40. We do not consider that the Claimant lied to the Tribunal or that she has set out to mislead it. Nevertheless, this is a case where the Claimant's evidence, and her now firmly held belief that inappropriate comments were made by Mr Ward, are not based in fact. In the course of her own evidence, the Claimant provided a slightly, but ultimately materially, different account of Mr Ward's alleged comments. She said he had said to her,

> *"You're going on maternity leave soon Arti, come on what's the point.*"

41. We have noted already the reasons why other aspects of the Claimant's evidence are not reliable. Mr Fitzpatrick was right to highlight the fact that Mr Ward's alleged comment was not included in the Claimant's Grievance. We agree with him that it makes little sense, as the Claimant sought to suggest, that the explanation is that she had raised the matter separately with Mr Johns and, having done so, considered the matter closed. Mr Fitzpatrick pointed out that this was not put to Mr Johns in cross examination. He also rightly pointed out that there is no reference in the Grievance Meeting minutes to the Claimant having raised the alleged comments with Mr Farr in either of their two meetings in February 2020. It is regrettable that when Mr Ward's comments were sought in April 2020, after the alleged comment was, we find, first reported during the Claimant's Grievance Appeal Hearing, Mr Abbott's immediate response was, *"we thought as much"* when Mr Ward denied having made such a comment, or that he would do so. Be that as it may, it does not alter the fact, as we find, that the comment was not made. In the circumstances the complaint fails on the basis that the Claimant has failed to discharge the primary burden upon her to establish the primary facts upon which the complaint is based.

42. The Claimant's final allegation is that during the Grievance Meeting on 28 February 2020, Mr Farr spoke to her aggressively and subjected her to a verbal attack when she attempted to discuss her concerns, and that she was refused a break during the meeting. In his closing submissions Mr Anastasiades began to suggest, in the alternative, that the Claimant may have been discriminated against by not being offered a break during the Grievance Appeal Meeting. However, he then clarified that the Claimant was not seeking to amend her claim to pursue that complaint in the alternative. As such we have limited ourselves to the identified issue of whether she was refused a break. The meeting minutes are detailed and do not evidence either that the Claimant sought a break or that one was offered by Mr Farr. We prefer Mr Farr and Ms Bainbridge's evidence on the matter, particularly as the Claimant's criticisms in the course of her evidence were focused on Mr Farr's alleged failure to offer her a break. On the issue we have to determine, we find that the Claimant did not request a break and, accordingly, was not refused one.

43. On the broader issue of Mr Farr's conduct of the second meeting on 28 February 2020, we rely in particular upon the evidence of Ms Bainbridge, an experienced HR professional of some years, who attended as a note taker and to provide HR advice. She referred to a meeting (not involving Mr Farr) when it had been necessary for her to intervene given the conduct of one of the attendees, but that this and the earlier meeting were not such an occasion. We accept her evidence. The meeting minutes do not support that Mr Farr spoke aggressively to the Claimant. We have read them in their entirety. The minutes from the 18 February 2020 meeting certainly evidence that Mr Farr showed limited empathy towards the Claimant. He did not acknowledge the Claimant's difficulties during her pregnancy, including when she described having shingles in September 2019, or when she said she had been in hospital in December

2019. On the other hand, he concluded the meeting on 18 February by expressing his desire to resolve the matter and *"get closure on this".*

44. Likewise, the notes of the second meeting on 28 February 2020, also evidence that Mr Farr was looking to find a resolution and that he wanted there to be clarity and transparency for the Claimant. He acknowledged that she had raised some valid points (page 138) and that he would make some *"suggestions"* (we think he meant to say 'recommendations') and put in place a proper structure for the future. We do not consider these to be the comments of someone acting aggressively, or who allegedly subjected the Claimant to a verbal attack when she attempted to discuss her concerns. Furthermore, the fact the meeting lasted about one and a half hours (something upon which all were agreed) does not support that Mr Farr was trying to shut the Claimant down, or would not allow her to raise her concerns. On the contrary, having read the notes in full, they evidence that the Claimant was able to put across her Grievance at length and in detail.

45. Ms Bainbridge's letter of 9 March 2020 (pages 145 and 146) likewise evidences that the Claimant's points were well understood and addressed in detail. The Claimant's perception is and was (as her letter of Appeal dated 15 March 2020 confirms) that Mr Farr had been aggressive, but as with Mr Ward's alleged comments on 16 January 2020, we conclude that they have no basis in fact, rather that the Claimant perceived the meeting as hostile because the outcome was unfavourable, in the sense that her Grievance was not upheld, and because Mr Farr had endeavoured to keep the meeting focused on issues of relevance rather than extraneous matters. We are reinforced in our findings in this regard by Ms Bainbridge's evidence that she accompanied the Claimant from the meeting, as she would do as a matter of course in these situations to ensure the welfare of the employee. In this case she had no recollection of the Claimant showing any distress in circumstances where her actions in accompanying the Claimant from the meeting were precisely in order to ensure that she was alright.

The Law and Conclusions

46. It follows from our findings above that the complaints identified as Issues 4 and 5 cannot succeed as the Claimant has failed to establish the primary facts upon which the complaints are founded.

47. Section 18 of the Equality Act 2010, provides as follows:

> 18. Pregnancy and maternity discrimination
>
> (1) …

> (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.

48. In the course of the Hearing we alerted the parties to the issue of whether, under s.18(2)(b) EqA 2010 liability can only be established if the employer has knowledge both of the illness and that the illness is suffered by the employee as a result of a pregnancy of hers, or whether knowledge of the illness alone suffices. We are grateful to Mr Fitzpatrick for bringing to the Tribunal's attention the first instance decisions of the Birmingham and Glasgow Employment Tribunals which suggest that in order for liability to be established, it is necessary that the employer knows that the illness is pregnancy related. There is seemingly no appellate authority on the issue. Whilst it seems to us that an employer cannot ignore information reasonably available to it or avoid liability under s.18(2)(b) EqA 2010 by failing to make reasonable enquiries to establish whether there is in fact a link between a known pregnancy and reported illness, it is not necessary for us to finally determine the issue since we have come to the conclusion that the Claimant has failed to establish, on the balance of probabilities, that her shingles and the gastroenteritis were illnesses suffered by her as a result of any pregnancy of hers. To the extent therefore that the complaints identified as Issues 1 and 3 are pursued by reference to s.18(2)(b) they cannot therefore succeed.

49. In so far as Issues 1 and 3 are pursued by reference to s.18(2)(a) of EqA 2010, we are satisfied that the reason for the unfavourable treatment complained of, namely the Respondent's decision not to disapply its policy to pay SSP only for sickness absence, was in both cases a continuation of the April 2019 decision not to exercise discretion in the Claimant's favour in circumstances where she had already received a high level of paid sickness absence; and in the case of the December 2019 absence, was additionally intended to reflect the very recent 'reset' that had been effected by Mr Ward on 29 November 2019. The difficulty with Mr Anastasiades' submissions on this issue, is that he is effectively advocating a 'but for' test of liability, namely, but for the fact the Claimant was allegedly experiencing pregnancy related ill health she would not have been absent from work and would not therefore have suffered a reduction in her pay. That is insufficient to found liability as it fails to address the central question of what was operating in the minds of Ms Smith-Wauters, Mr Johns and Mr Ward, the relevant decision makers; in this case, it was not the pregnancy or illness, it was that: there had already been a generous exercise of discretion in the Claimant's failure within the previous 12 months; in the case of the September absence, the Claimant had failed to submit Fit Notes at the point of which the exercise of discretion was being considered; and in the case of the December absence, the Respondent had effected a reset of its policy which served to emphasis

the established policy that SSP was ordinarily payable in respect of sickness absence.

50. That leaves Issue 2, namely Ms Smith-Wauters' and Mr Ward's interactions with the Claimant regarding her time keeping during her pregnancy. We have found the Claimant's evidence to have been imprecise, muddled and ultimately unreliable. As identified in the List of Issues, the complaint relates to a single event in September 2019, even if the matter was expanded upon in the Claimant's witness statement and evidence at Tribunal. In the February 2020 Grievance meetings, which provide a more contemporaneous account of the Claimant's concerns, she identified that Mr Ward's actions were in November and December 2019 and Ms Smith-Wauters in July 2019. She was emphatic on 6 March 2020 that her Grievance had nothing to do with Ms Smith-Wauters. It is impossible for us to make specific findings in relation to any particular date in September 2019 given the Claimant has failed to place the necessary evidence before the Tribunal.

51. In any event, the overwhelming weight of evidence is that Ms Smith-Wauters had a good working relationship with the Claimant and treated her with dignity and respect even if she was frustrated with her time keeping and failure to take on board her concerns and feedback. If, by 6 March 2020 and then aware of the contents of the 3 July 2019 email, the Claimant remained of the view that the Grievance did not concern Ms Smith-Wauters, we are unclear what caused the Claimant to change her mind. She has not identified any further evidence that came to light that caused her to view Ms Smith-Wauters' actions differently or to attribute a discriminatory motive or mindset to them. We cannot identify any facts or circumstances from which we might infer that Ms Smith-Wauters' actions towards and treatment of the Claimant were because she was pregnant or suffering illness as a result of pregnancy. On the contrary, the available evidence is that the Claimant took Ms Smith-Wauters into her confidence early in the pregnancy, and that Ms Smith-Wauters was very happy for her and concerned to ensure she treated the Claimant appropriately and supported her during the very short period before she handed over her responsibilities to Mr Ward.

52. Likewise, although Mr Ward did not give evidence, there is nothing before us from which we might infer that he too discriminated against the Claimant, whether in September 2019 as she alleges, or subsequently. The time keeping concerns he sought to highlight in her subsequent appraisal were consistent with the timekeeping concerns expressed by Ms Smith-Wauters. We think it relevant that he sought to document them through the appraisal process, namely an open and transparent process which would have provided an opportunity for the Claimant to document why she disagreed with his perception and, critically, to document if she believed any timekeeping issues, or Mr Ward's perception of them, was influenced by her pregnancy or pregnancy related illness. Instead, she refused to sign the appraisal, consistent with her long standing failure to engage with Ms Smith-Wauters on time keeping issues that pre-dated her

pregnancy. We conclude that the issue was not the Claimant's pregnancy or any illnesses related to it, rather that the Claimant was unwilling to conform to the Respondent's reasonable time keeping expectations because she felt she went above and beyond what was required of her at other times of the day.

53. For all these reasons, the complaints are not well founded and are dismissed.

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Employment Judge Tynan
25 May 2022

Sent to the parties on: .....

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For the Tribunal Office.