EMPLOYMENT TRIBUNALS

Claimant: Mrs C Boateng

Respondent: (1) London Borough of Croydon
(2) Ms B O'Neill
(3) Mr E O'Dwyer

HELD AT: London South ET by Cloud Video Platform **ON:** 4-8 July 2022

BEFORE: Employment Judge Barker
Mr A Fairbank
Mr W Dixon

REPRESENTATION:

Claimant: In person
Respondent: Mr Goodwin, counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's first four claims of pregnancy discrimination against the first, second and third respondents fail and are dismissed.

The claimant withdrew her fifth claim for of pregnancy discrimination against the first, second and third respondents during this hearing and that claim is dismissed on withdrawal by the claimant.

The claimant withdrew her claim for accrued but unpaid annual leave against the first respondent during this hearing and that claim is dismissed on withdrawal by the claimant.

REASONS

Preliminary Matters

1. The claimant was employed by the first respondent since 8 April 2014 as a debt recovery officer. She is no longer employed by the first respondent but was employed at the time to which these claims relate, and none of these claims relate to dismissal. Her claims are for pregnancy discrimination (s18 Equality Act 2010) and unpaid annual leave under the Working Time Regulations 1998.

2. By ACAS early conciliation which lasted for less than one day on 14 September 2020 and claim forms dated 14 September 2020, the claimant brought claims of pregnancy discrimination against the first respondent (hereafter "R1") and the second respondent (her former manager Ms O'Neill and hereafter "R2") and the third respondent (Mr O'Dwyer, who had also managed the claimant and hereafter "R3"). By a further claim form dated 10 May 2021 the claimant added claims of unpaid holiday pay and the Tribunal subsequently directed that both claims be heard together.

3. At a case management preliminary hearing on 26 May 2021 the parties agreed a list of issues for the Tribunal to decide at this hearing. They are:

> *(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA"). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.*
>
> *(ii) EQA, section 18: pregnancy discrimination: Did the respondent treat the claimant unfavourably as follows:*
>
> *a. Failing to refer the claimant to Occupational Health after her return to work in March 2020. The claimant states that she asked for such a referral approximately 3 times.*
> *b. Meetings for a Health and Safety risk assessment relating to the claimant's pregnancy and the claimant's stress were not carried out. This was an ongoing failure until the claimant went on annual leave (16 June 2020). The first meeting was meant to take place on 10 April 2020 and was cancelled approximately 5 times.*
> *c. The claimant was taken to hospital on 20 May 2020 with an ectopic heart beat. On her return to work afterwards the claimant was not referred to Occupational Health.*
> *d. The claimant provided the respondent with her Mat 1 form on 23 March 2020 and her MatB1 Form on 8 April 2020. The respondent did not respond to the claimant's emails on this and to confirm the dates for*

her maternity leave until after she copied the CEO into her email on 11 June 2020.
e. The respondent failed to pay the claimant's annual leave that was outstanding during this period.

(iii) Was any unfavourable treatment because of the pregnancy or of illness suffered as a result of it?

(iv) Unpaid annual leave – Working Time Regulations. When the claimant's employment came to an end, was she paid all of the compensation s/he was entitled to under regulation 14 of the Working Time Regulations 1998?

4. The claimant withdrew her claims for unpaid annual leave and the fifth count of pregnancy discrimination during this hearing, the first respondent having clarified her annual leave entitlement and having repaid a small amount of unpaid annual leave. Those claims are hereby dismissed.

5. The claimant has brought previous proceedings against the first respondent and other individuals who were employed by R1, which failed and were dismissed. We make reference to this in so far as we found that it had an impact on the claimant's return to work and ongoing relationships with the three respondents in 2020. It was the claimant's husband's evidence that this contributed to her feelings of being treated badly by R1 on her return to work. We find, however, that both R2 and R3 were professional, friendly, and polite with the claimant and attempted to encourage her to engage in a similarly friendly and professional manner. However, the claimant has clearly found it very difficult to move on from the previous dispute, and repeatedly referred to those issues during these proceedings, most notably when cross-examining R2.

6. Adjustments that were made during the hearing were that the claimant's husband was allowed to be in the room with the claimant when he gave evidence. We allowed the claimant to ask for clarification of any legal issues raised by the respondents in their submissions. The parties were given from 11.50 on day three of the hearing until close of business that day to exchange written submissions with the claimant having been given guidance as to what was, and was not, expected of her in doing so.

7. At the point of exchange with the respondent's solicitor (shortly before 5.30pm on day 3), the claimant told the Tribunal she had not finished her written submissions. Although there was some prejudice to the respondents' counsel in not having received the claimant's written submissions in advance, given that she was appearing in person we allowed oral submissions from her which took approximately 15 minutes, after the respondents' oral submissions on day 4. Approximately five minutes of further submissions were made by her after a discussion with the judge, the claimant having said that she was "*just giving up*

now" because her notes were not properly ordered. She asked to submit those notes at the end of her oral submissions (at approximately midday on day 4) but she was not permitted to do so, as the respondents' counsel would have had to have the opportunity to read these and respond and the Tribunal considered further submissions from the claimant to be not necessary or proportionate given the time available and the oral submissions already made by the claimant, and the fact that there were only four allegations for the Tribunal to consider and for the claimant to speak to.

8. The claimant's evidence to the Tribunal was somewhat haphazard and at times evasive. She did not always answer the questions which were asked by the respondents' counsel and the same question had to be put several times. Her evidence was more focussed on the fact that she did not like the way she had been treated in previous years by the respondents rather than on issues relating to her pregnancy. For example, the claimant's cross-examination of R2 began with asking her about their difficulties in their working relationship from 2019 to 2020. Of the first 3 cross-examination questions, two were about their relationship. She told R2 "*our relationship was rather strained*" but we find R2 was trying her best to be objective and professional. R2 replied "*you complained about me three times, there were no findings of wrongdoing, and no impact on our day to day, I always try to be objective*".

9. In her cross-examination of R3 she paused and raised the issue that he appeared to be taking direction from someone in the room with him. This was explored by the Tribunal and the claimant was able to be reassured that he was alone in the room and was looking at the screen in front of him and not another individual from respondent.

Findings of Fact

10. The claimant was assessed by occupational health in December 2019 due to her absence from work caused by stress and anxiety, which period of absence had started on 8 November 2019. That report was dated 10 January 2020 and was provided to the claimant while she was still off sick. She was due to return to work on 13 January 2020 but provided a fit note dated 10 January that extended her absence until 16 March 2020.

11. The claimant also informed the respondents by email on 12 January 2020 that she was 11 weeks pregnant. Ms Bevan, Head of HR at R1, and R2 both congratulated her by return. Her manager at the time, R3, did not reply until 31 January 2020 as he was out of the office due to a family emergency. In his email, he congratulated her and informed her that they would have to carry out a risk assessment and they subsequently made arrangements to speak on 26 February 2020. In answers to cross examination, R3 said that his intention was to do two risk assessments, one for pregnancy and one due to her return to

work following absence for stress. We accept that this was an appropriate course of action in the circumstances and that this was his intention at the time.

12. We note that even in relation to making arrangements for the completion of the stress risk assessment and pregnancy risk assessment, R3 had to reassure the claimant that if she attended the office, they would not meet on the floor where the rest of her team were. The evidence before the Tribunal was that this hesitancy to rejoin her team persisted until the claimant took leave on 16 June 2020, prior to starting her maternity leave, as it was noted in the minutes of her meeting with R2 on that date that she was still uncomfortable being seen on camera on video meetings with her team.

13. The claimant as noted was initially managed by R3, but as of 25 March 2020, R2 resumed management of the claimant. Reference was made in the meeting of 17 March notes to "*a fresh start following the ET case*" with R2.

14. The end of the claimant's phased return to work happened in April 2020. There was a dispute of evidence between the claimant and R2 about how stressful the claimant's workload would have been once she finished her phased return to work. We accept that the circumstances of working from home with a young child, as was necessary in the Covid lockdown, would have been inherently difficult. However, R1 had communicated with all staff that they could be flexible about working hours, breaks, and workload in the circumstances and staff were to contact their managers if they were having difficulties.

15. However, we note that the claimant never had any such conversations with R2, R3 or indeed anyone in R1 to notify them that she was having difficulties managing her workload. Furthermore, we accept R2 and R3 evidence that the claimant's debt recovery department was not operating "business as usual" in any event, because of "s114 proceedings" in operation at R1 at the time, in that R1 was effectively insolvent in early 2020. Additionally, special Covid measures were in place at the time to not press for payment for those in debt to R1 and so effectively we accept the respondents' evidence that the claimant's targets were suspended along with those of her colleagues as of April 2020 at least. Also, the claimant was still in her phased return to work until April 2020 in any event which initially only involved her clearing her backlog of emails.

16. While we accept that ordinarily the claimant's role would have been stressful, in the circumstances of the Covid lockdown and the council's special measures plus her phased return to work, the requirements of the job changed such that we do not accept that it would have been inherently stressful for the claimant at the time to which these proceedings relate.

17. Any stress that may have been caused by difficult relationship with the claimant's team were reduced, we find, by measures agreed with R2 and R3

such as turning off her camera in team meetings and because she was working from home she was not in the same place as them.

The claimant's specific complaints: (a) Failing to refer the claimant to Occupational Health after her return to work in March 2020. The claimant states that she asked for such a referral approximately 3 times.

18. The meeting on 26 February 2020 was cut short because R3 had not had sight of the occupational health report dated 10 January 2020 by then, despite both R3 and Ms Mangra Bapoo of HR chasing Medigold, the occupational health provider, to supply them with that report. R3 told the claimant on 26 February that he intended to complete both assessments with her but was unable to do so without sight of the occupational health report.

19. In a letter dated 5 March, R3 wrote to the claimant, supplying her with copies of the blank risk assessments and asked her to complete both forms. The claimant did not receive this by the time she emailed R3 on 9 March asking when the risk assessments would be completed. R3 replied on 10 March to say that "*a letter has been composed which is being sent to you and should be soon*".

20. R3 emailed the claimant on 12 March to say, "*the letter was posted on Friday 06.03.2020*" and he attached the letter and enclosures to the email. The claimant alleges in her witness statement that "*this could not be the case as the email he sent on the 10th March 2020 stated that the letter was about to be sent*." We find that this is indicative of the ongoing difficulties in the claimant's relationship with the respondents in that she questioned the accuracy and, by implication, the truthfulness of his statements on 10 and 12 March about the sending of the letter. It was not clear to us from the claimant's evidence why she continued to seek evidence of dishonesty on the part of the respondents, as opposed to engaging in a positive manner and one willing to provide some give and take, but it did not assist in open communication and a smooth working relationship.

21. A meeting was eventually held on 17 March 2020 by telephone as the claimant was at home. She had declined to return to the office because of the increasing threat of Covid-19. There had been a request by R3 that she attend the office in person, but we accept that this was because the Covid situation at the time was unclear and no lockdown has been announced. However, by 17 March it was clearer that there was a threat to pregnant women. We accept R3's evidence that his focus in that meeting was facilitating her return to the office after the difficulties of the litigation and re-introducing her back to the team.

22. R3's evidence was that he was "*incredibly busy*" at the time in March as he was involved in developing and managing the newly-introduced local authority Covid business grants scheme, which had been announced earlier in March 2020. His evidence, which we accept, was that he was working 18- to 24- hour days,

and also managing R2's team at the time as she was off sick. We note that no formal record of the meeting was made by R3 and contemporaneous notes only exist as made by the claimant. However, R3 did not take issue with their accuracy.

23. We find that the claimant talked about occupational health during this meeting, but did not directly ask for a reference to be made by R3. Her notes record her saying that she would provide medical information about her pregnancy to R3 so that he could forward it to occupational health and "*they* [that is, occupational health] *would review and arrange a new meeting*". R3's evidence was that the claimant reported that other than the stress of where to be in the office "*I have no other stress problems and I was fit for work*". R3 said that this was why he did not of his own volition refer her to occupational health again at the time.

24. What was discussed was Covid 19 pregnancy advice to work from home, the claimant's phased return to work and that her work would initially be limited to four hours per day in the first week, 5 hours the following week, with then training being given on the new system and building up to business as usual. However, a considerable part of the return to work discussion, as shown in the claimant's notes of 17 March, related to dealing with the consequences of the claimant's previous litigation and where she could work in the building, whether with her team on the fifth floor, or not. This was, we find, an entirely separate issue from her pregnancy but was clearly the cause of stress to the claimant.

Complaint (b): Meetings for a Health and Safety risk assessment relating to the claimant's pregnancy and the claimant's stress were not carried out. This was an ongoing failure until the claimant went on annual leave (16 June 2020). The first meeting was meant to take place on 10 April 2020 and was cancelled approximately 5 times.

25. R3's evidence was that on 17 March they did not have time during the meeting to go through both risk assessment forms together given how heavy his workload was at the time. We accept his evidence in that regard.

26. On 25 March, R3 emailed the claimant in response to a number of queries by her. The email was detailed and addressed a number of issues, but in essence the claimant was told that the R1 and R3 were very flexible as to when she took annual leave, and what her working hours and working pattern could be to accommodate childcare. This response was, we find, very reasonable in the light of the circumstances.

> *"With regards to your annual leave, and due to the ever changing landscape, I am happy to be flexible with your leave. If you would like to take your annual leave at this time please feel free, if this leave is not taken it can be carried forward into the new financial year….*
> *[…….]*

I am happy to be flexible in the working approach you take during this time, which is the same for all staff. If you find working from home with a child is tricky, then please feel free to work around your situation, some officers are working earlier, or later/ Some will make up time during the weekends if they are unable to fulfil their required time due to children being at home. All we ask is that you keep us updated as to what your situation is."

27. The claimant's submissions to the Tribunal was that this was an unreasonable approach to take and that she was disadvantaged by it as she found it tiring to work later or at weekends as her pregnancy progressed. However, we find that the letter and the approach were reasonable in that the claimant and other staff were being given flexibility to manage their own time and it was not prescriptive. It was, we find, open to the claimant to notify R2 or R3 or anyone from R1's HR function had this become a problem, and she did not.

28. Although the claimant did provide information to alert the respondents that her pregnancy was high risk, by way of an email dated 20 March 2020, she did not inform them of any additional adjustments that were needed, other than more breaks, which she took, and did not subsequently inform them that her workload or working pattern was causing her difficulties.

Complaint (c): The claimant was taken to hospital on 20 May 2020 with an ectopic heartbeat. On her return to work afterwards the claimant was not referred to Occupational Health.

29. On 20 May 2020 the claimant attended an antenatal appointment at which concerns were noted with the baby's heartbeat. The medical records disclosed to the respondents at the time, and before the Tribunal, show that this was not an urgent or serious concern for the sonographer at the scan. Nevertheless, the claimant was admitted to hospital for 24 hours' monitoring and discharged the following day. Her medical records show that the baby was well, and the claimant reported to R2 that she was feeling better.

30. R2 spoke to the claimant on morning of 20 May and asked after her health and the baby. The claimant told R2 that she had been sent to hospital for further checks and would not be working. R2 received an email dated 21 May from the claimant saying she was released from hospital and would have to take maternity leave in early July. R2's evidence was that no further details were given by the claimant, which we accept, and asked for clarification of whether the claimant was signed off work. The claimant appeared to assume that R2 was chasing her for a sick note, which we accept she was not, and the claimant was not very forthcoming with more information.

31. The claimant now says she asked for a referral to occupational health during a conversation she had with R2 on 26 May 2020, and that R2 refused as she said this would not be necessary. R2 disputes that this was requested by the claimant, and says if the claimant had asked for a referral, she would have done

it. We find on the balance of probabilities that the claimant thought it was sufficient to mention occupational health in the meeting for a referral to take place, but that it was not reasonable to expect R2 to have understood that this was the request being made, as it was done very indirectly and there was no evidence provided to R2 that would have led to her reaching the conclusion that a referral was necessary, in that the claimant forwarded to R2 medical information and "outpatients medication" on 21 May 2020. R2 quite reasonably said in evidence that she was not able to interpret this as she is not a clinician. The mere fact of a high risk pregnancy does not automatically mean that an individual is ill or in need of any particular extra attention. Therefore, we accept that without further reason, it did not automatically mean that a referral to occupational health should have been done for the claimant. The claimant was not sick at this stage, although we accept that she would have been worried about the need for monitoring. However, the evidence before us was that she assured R2 that the baby was moving and well and declined to give her any further information.

32. R2 said that claimant declined during the meeting to discuss any more details of her medical issues. The claimant's evidence was that this was because when she initially reported to R2 on 26 May what had happened (in terms of the overnight monitoring and so on) R2 appeared "*unconcerned*". However, we find that the claimant was very quick to read ill-intent into R2's reactions. We find that this appeared to be due to a lack of trust by the claimant in the R2 and that this was as a result of the litigation in 2018/2019 and not due to R2's approach to her pregnancy.

Complaint (d): The claimant provided the respondent with her Mat 1 form on 23 March 2020 and her MatB1 Form on 8 April 2020. The respondent did not respond to the claimant's emails on this and to confirm the dates for her maternity leave until after she copied the CEO into her email on 11 June 2020.

33. In terms of replying to confirm MA1 and MATB1 forms and the date for maternity leave, the respondents acknowledge they should have done it within 28 days and they did not. The obligation to do so was on R3 as he had taken this on himself to do even though the claimant was being managed as of 25 March by R2. On 15 April R3 was told by Ms Mangra Bapoo to follow up with the clamant and he did not.

34. He exchanged emails with the claimant on 3 June and said that his workload had calmed down by this point and he would be in touch with her by the end of the week, but he was not. She then raised a complaint to R1's chief executive, Ms Negrini, on 12 June 2020, that she had not been provided with a reply to her MATB1 form or MA1 for since 23 March 2020 to confirm her maternity leave start dates. The claimant also complained that a pregnancy risk assessment was not carried out for her. However we note that even in this letter, the claimant herself appears to suggest that she considers that the reason for any

unfavourable treatment was her prior Tribunal proceedings or possibly a change in the respondent's procedures. She does not appear, in this letter, to be alleging that this is due to pregnancy or maternity discrimination, given that she was raising what would appear to be allegations of victimisation with the chief executive. We find that had she held a belief that she was suffering pregnancy discrimination she would have raised it on that occasion also. Her focus at this stage is on past behaviour and not her current situation.

35. R3 admitted in cross examination that the only reason he did reply about her leave was because of the complaint to Ms Negrini. He said that his workload had been excessive, and he prioritised it only as a result of her complaint. We accept that R3 did not respond within a reasonable period and that he did not prioritise the claimant and that this this caused the claimant stress and upset, especially given how far advanced the pregnancy was and how close she was to starting her leave.

The Law

36. Pregnancy and maternity discrimination is unlawful as per s18 Equality Act 2010 ("EQA"), which at s18(2) states

> *"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"*

37. What is "*unfavourable treatment*" as per s18 EQA? The Equality and Human Rights Commission Code of Practice on Employment (2011) does not discuss the definition of "*unfavourable treatment*" in s18, but by analogy in relation to cases brought under s15 for discrimination arising out of disability, states that it means that the person "*must have been put at a disadvantage*" (paragraph 5.7). "Disadvantage" is described in paragraph 4.9 as

> *"it is enough that the worker can reasonably say that they would have preferred to be treated differently. This does not have to be quantifiable and the worker does not have to experience loss, economic or otherwise".*

38. This is accepted to be a relatively low threshold to engage s15 and therefore by analogy s18.

39. Examples in the Code in relation to unfavourable treatment due to pregnancy are at 8.22, and include failure to consult a woman about changes to work or possible redundancy and excluding a pregnant woman from business trips.

40. *Williams v Trustees of Swansea University Pension Scheme, 2019 ICR 230 SC* is a claim in relation to s15 EQA for discrimination arising out of disability. The Supreme Court noted that in that claimant's case, the central objection to it was that there was nothing intrinsically disadvantageous about what was complained of by the claimant (such that it could not amount to "unfavourable

treatment"). Furthermore, *Williams* is confirmation that unfavourable treatment is to be objectively assessed and is therefore not simply based on an individual worker's assessment of unfavourable treatment.

41. In *Private Medicine Intermediaries Ltd v Hodkinson & Ors, EAT 0134/15* another s15 claim, the respondent was not found to have subjected the claimant to unfavourable treatment by failing to formally review her medial situation or carry out a risk assessment on her return to work following a period of absence due to her disability. Any formal review or risk assessment would not in that situation have removed any disadvantage experienced by the claimant.

42. What does "because of" the pregnancy or "because of illness suffered by her as a result of it" mean? In *Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14*, it was held that a Tribunal needs to look at the "*grounds*" for the treatment, that is, the reasons for it, and what was operating in the mind of the respondent (*R v Governor of JFS and another [2010] 2 AC 728)*. It is not enough for pregnancy to simply be the background context, or for the cause to be something arising from the pregnancy. It must be the "reason why" or form an important factor or an effective cause of the treatment (as also stated in paragraph 8.20 Equality and Human Rights Commission Code of Practice 2011) for the treatment to be "because of" the pregnancy or a related illness.

43. An employer's failure to carry out a risk assessment under the Management of Health and Safety at Work Regulations 1999 SI 1999/3242 ('the 1999 Regulations') may, in the case of a pregnant worker, entitle her to bring a complaint of pregnancy and maternity discrimination under S.18 EQA although there is no automatic right to a specific risk assessment for pregnant workers (*O'Neill v Buckinghamshire County Council 2010 IRLR 384, EAT*). In that case, in the absence of evidence that the work of a pregnant teacher would involve a risk to her health and safety, there had been no obligation on the employer to carry out a risk assessment under Reg 16 of the 1999 Regulations. The obligation to carry out a risk assessment of a pregnant worker arises only where (a) the employee notified the employer in writing that she was pregnant, (b) the work was of a kind that could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby, and (c) the risk arose from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of the Pregnant Workers Directive.

44. *Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14*, stated that failure to carry out a risk assessment relating to pregnancy or maternity may be, but is not necessarily, 'because of' pregnancy or maternity leave. It may, for example, be a simple administrative error. Where, as in this case, the mental processes of the alleged discriminator are in issue, the tribunal should apply the same process of reasoning as is required in any other discrimination case as set out above.

45. Not only must it be shown that the unfavourable treatment was 'because of' pregnancy or maternity leave, but it must also be shown that, if the unfavourable

treatment relied on is the failure to carry out a pregnancy-specific risk assessment pursuant to Reg 16, that obligation had been triggered and the claimant was at particular risks given the nature of her job and the hazards she is likely to encounter (*Madarassy v Nomura International plc 2007 ICR 867, CA*). The ET must find that the work involved a risk to health and safety to find that respondent was in breach of R16 and evidence must be presented to the Tribunal in that regard. No such evidence was provided in *Madarassy*, which can be distinguished from *Hardman v Mallon t/a Orchard Lodge Nursing Home* where there had been '*direct medical evidence that the employee's work, as a care assistant in a nursing home for the elderly, could involve heavy lifting, which posed a risk to her or her baby's health and safety*'.

46. Burden of proof: Section 136(2) EQA states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. This means that once there are facts from which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof is then on the respondent to prove a non-discriminatory explanation for any less favourable treatment. Section 136(3) states that this does not apply if the person shows that he or she did not contravene the relevant provision.

47. A claim of pregnancy discrimination does not require the claimant to identify a comparator who has been treated less favourably, but it does require her to establish that she has experienced unfavourable treatment 'because of' her pregnancy or an illness related to it (S.18(2) EQA).

48. Discrimination complaints are subject to the time limits set out in EQA at s123(1), as follows:

"…proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

49. Section 123(3) Equality Act 2010 make special provision relating to the date of the act complained of as follows:

"For the purposes of this section…conduct extending over a period is to be treated as done at the end of the period"

50. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a "just and equitable" basis.

51. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the

evidence might be affected by the delay and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action. The Tribunal should also take into account the merits of the claim.

Application of the Law to the Facts Found

52. **Complaint (a)**: We find the respondents did not refer the claimant to occupational health after her return to work in March 2020, but this was not unfavourable treatment as there was no disadvantage to the claimant by this lack of a referral. This is because the claimant never expressly asked to be referred to occupational health, and did not provide the respondents with any clear evidence that a referral to occupational health was necessary. She cannot therefore reasonably say that she would have preferred to be treated differently. It is not reasonable to expect a referral if no referral is requested and no evidence is provided that one is necessary.

53. We find that the claimant indirectly asked them to refer her on 17 March 2020, in that she said she would send her information about her pregnancy to R3 to send to occupational health for them to review and arrange another meeting. This is not a direct request for an occupational health referral and puts the onus on occupational health to decide whether another meeting would be necessary. Further references by the claimant to occupational health in subsequent meetings were similarly indirect. The claimant appears to have presumed, unreasonably, that R2 and R3 plus R1's managers such as Ms Mangra Bapoo would read into this that the claimant wanted a direct referral to occupational health.

54. In the absence of any particular objective reason why this would have been necessary (other than the claimant considered this to be her entitlement) it was not reasonable for the claimant to expect the respondents to reach this conclusion without a direct request.

55. Furthermore, as per *Private Medicine Intermediaries*, any referral to occupational health would not have removed the disadvantage because her stress issues were not, we find, due to her work, but due to Covid and her high risk pregnancy. Finally, the claimant had already been given a very flexible work environment, notably in the email of 25 March from R3. She had not alerted the respondents to any difficulties in completing her work tasks at any stage or any damage or risk to her health as a result of work. We also find that the work she was doing at the time was not particularly stressful, although we accept she was stressed for other reasons. Therefore the lack of a referral was not unfavourable treatment.

56. **Complaint (b):** the claimant says that meetings for "a health and safety risk assessment" relating to pregnancy and stress were not carried out. It is correct that no meetings were carried out until 16 June 2020, when the claimant had a meeting with R2 to discuss risk assessments. However, we find that as a matter of fact, adjustments were made on an ongoing basis to the claimant's workload

and work environment, due to the flexibility that she was given by the respondents.

57. Was there a failure to have a meeting for health and safety assessments related to pregnancy and stress ongoing until leave on 16 June 2020? Was this cancelled 5 times? We find that a meeting was scheduled once for 26 February 2020, which was cut short because of lack of occupational health report, then the claimant was asked to complete forms first which she did not do. A meeting was then held on 17 March, but the forms were not reviewed as R3 said he did not have sufficient time to complete the forms. Further meetings were not scheduled as the respondents were waiting for the claimant to do as she had been asked and fill in the forms.

58. Help was given by Ms Mangra Bapoo to the claimant by email on 15 April 2020, when the claimant told her she had given enough information for the stress risk assessment but still did not fill in the pregnancy risk assessment form. She was sent the correct form and some guidance, but still did not complete the pregnancy risk assessment form. Eventually after her complaint to Jo Negrini, R1's chief executive, that these risk assessments were not done, there was a meeting with R2 at which they discussed the forms. Following this, R2 sent the claimant the forms that she filled in for the claimant, but the claimant strongly objected to her having done this and accused R2 of having "*fabricated*" the risk assessments.

59. We find that it is possible that the claimant has not taken the time to familiarise herself with the risk assessments, particularly the pregnancy risk assessment, as had she done so she would note that the vast majority of it is not applicable to her job role and therefore it was appropriate that R2 only discussed one or two relevant issues with her in order to complete it. Alternatively, the claimant may be fully familiar with the contents of it and was insisting that R2 discuss with her in depth and at length questions that on no reasonable reading of the form could ever possibly apply to her, such as to do with working on a farm or the handling of hazardous chemicals, simply so that the claimant could say that the form had been fully completed. Either approach by the claimant is entirely unreasonable in the circumstances, particularly as she was working from home due to Covid lockdowns and her work environment was outside the control of the respondents.

60. There was no evidence that the meeting was cancelled "5 times" as the claimant alleged, and the claimant's evidence as to why she made this assertion was not credible. It was clear that the reason for the lack of such further meetings was (1) because the claimant had been asked to complete the relevant forms and had not and (2) because of the extenuating business circumstances because of Covid.

61. We find that there was no disadvantage to the claimant in there having not been any dedicated meetings to complete the risk assessments until 16 June 2020. As her work did not trigger the need for a risk assessment under regulation 16, and particularly as she was working from home and on a phased return to work

and then with no targets, she was not under stress due to her job itself. She may have preferred to be treated differently, but she cannot reasonably or objectively say that she was disadvantaged or subjected to unfavourable treatment.

62. Furthermore, in relation to the stress risk assessment, we find that this would not have changed anything and note the claimant accepted the respondents' remote process for carrying out the stress risk assessment in the email of 15 April and indicated she was happy with it. Also, a risk assessment for pregnancy would have not made any difference, because her work was already reduced in volume, was more flexible in terms of hours and breaks in that she was allowed to work whenever she could and take breaks whenever she wanted, and her targets had been removed. There is therefore no unfavourable treatment.

63. R2 noted in her follow up email after the meeting on 16 June, regarding reasonable adjustments

"I have been advised that Eoghan first sent you the pregnancy risk assessment on 12 March for you to complete and reminded you of this on the 17 March. On 15 April HR also sent you the pregnancy risk assessment to be completed and requested that you email the completed form to Eoghan.

During our meeting of 16 June, we discussed your pregnancy risk assessment following the Pregnancy risk assessment form being sent to you by EON we discussed action/outcome that should/could be undertaken to support you. You said you had a diabetes induced by pregnancy which meant you had to take additional breaks because of injections. You confirmed that although this was not officially discussed with management and agreed, you were able to take those breaks as needed without any problems."

64. **Complaint (c):** this is that there was no referral to occupational health after the claimant's discharge from hospital on 20 May 2020. As noted above, the claimant never directly asked for an occupational health referral on this occasion and declined to give R2 any detailed information about the issue but told her that the baby was "moving and well" and she was feeling better. It was therefore not reasonable for the claimant to expect a referral to occupational health with such patchy and conflicting information being given to the respondents. And would have made no difference anyway, ongoing adjustments set out above being made by the respondents. She may have preferred to have been treated differently, but this was not unfavourable treatment, and it was not reasonable for the claimant to expect to be treated differently in the circumstances.

65. **Complaint (d):** As set out above, we find that this is clearly unfavourable treatment and caused the claimant a great deal of stress as she could not plan when to go off on maternity leave and she felt she was being ignored, especially in early June by R3.

66. R3's email 3 June 2020 contained an apology and a promise to reply by the end of the week. The claimant chased both R3 and Ms Mangra Bapoo on 8 June, and received no reply. She received no reply for ten days in total until she complained to Ms Negrini on 12 June. R3 admitted he only did respond after her complaint to Ms Negrini. It was acknowledged by Sue Moorman that this was unacceptable and the claimant had an apology from her.

67. However, we find no evidence that this was anything other than mismanagement by the respondents and it was not "because of" her pregnancy or any pregnancy related illness. R3 promised to give it the highest priority and he did not, but there is no evidence whatsoever to suggest that he failed to do this because of the claimant's pregnancy. In other communication with the claimant, he was flexible and accommodating of her pregnancy.

68. Although R3 promised a reply on 3 June, the query addressed to him in the claimant's email of 3 June was for annual leave in her letter. The query about maternity leave was to Ms Mangra Bapoo. No response was received from HR either, even when the claimant chased on 8 June.

69. The claimant has not discharged the initial burden of proof that the lack of a reply was because pregnancy was an important factor or an effective cause operating on the minds of R3, or Ms Mangra Bapoo, for the failure to reply. There was nothing before us in evidence from which we could conclude that the failure to reply was motivated in any way by R3 or R1's mental processes about the claimant's pregnancy, either consciously or subconsciously. All the evidence before us leads us to find that it was because this was mis-managed by the respondents, for which Sue Moorman of R1 apologised by email on 19 June 2020.

70. In conclusion therefore, in relation to the claimant's four complaints of pregnancy discrimination contrary to s18 EQA, all fail and are dismissed. The first three fail because we find there was no unfavourable treatment, and although in the fourth we did find unfavourable treatment, the failure to respond to her emails and confirm her maternity leave dates was not because she was pregnant.

71. The claimant alleges also that the obligation on R1 to carry out a risk assessment contrary to R16 of the 1999 Regulations was not met. Any stand-alone claim on this basis cannot be made to this Tribunal. Where it forms part of her claim for s18 pregnancy and maternity discrimination we have considered it, but we have no jurisdiction to consider it separately from s18.

72. As a final issue, we were asked by the respondents to consider whether the claimant's claims were out of time as they allege. The claimant asked the Tribunal to find that there was an ongoing course of conduct, or that in the alternative it would be just and equitable to extend time to allow the claims to be presented late. We find that there was no ongoing course of discriminatory conduct but that in any event it was just and equitable to extend time to allow the claims to be heard. The claimant told us that after taking maternity leave as

her pregnancy progressed, she became quite unwell and was seriously ill after her baby's birth with post-natal complications. We therefore accept that it is just and equitable to extend time to allow for the late presentation of her claims.

73. This judgment and reasons were delivered *extempore* at the conclusion of the hearing on 8 July. The claimant requested written reasons be provided at the conclusion of the judgment.

_____
Employment Judge Barker

Date_____8 July 2022_____