# THE EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Ms H Moxon** | **v** | **(1) London Borough of Islington**<br>**(2) Mr Y Zavery** |

**Heard at**: London Central **On**: 3-7 October 2022

**Before:** **Employment Judge Glennie**
**Ms H Craik**
**Mr T Harrington-Roberts**

**Representation:**
**Claimant:** In person
**Respondent:** Mr F McCombie (Counsel)

# JUDGMENT

**The judgment of the Tribunal is as follows:**

1. **(By a majority) The complaint of discrimination because of pregnancy contrary to section 17(2) of the Equality Act 2010 is well-founded against both Respondents in respect of the acts complained of done by the Second Respondent on 14 July 2020 (issue 6.5 below).**

2. **(Unanimously) All of the other complaints are dismissed.**

3. **Remedies for the successful hearing will be determined, if necessary, at a further hearing on a date to be fixed**

# REASONS

1. By her claim to the Tribunal the Claimant brought complaints of disability discrimination by association under section 13 of the Equality Act 2010; pregnancy and maternity discrimination under section 18 of the Equality Act; in the alternative to the latter, sex discrimination under section 13; and

victimisation under section 27 of the Equality Act. The Respondents by their response dispute those complaints.

2. The Tribunal is unanimous in the reasons that follow, save on one point, which will be explained below.

3. The issues were defined by Employment Judge Elliott at a preliminary hearing on 18 February 2022 in the following terms.

4. Disability discrimination by association. The Respondents admit that the Claimant's daughter is disabled. (There is no need for this Tribunal to identify the conditions concerned or the nature of the disability).

5. In May 2020, did R1 and R2 treat the Claimant less favourably than her comparators were treated, because of her association with her disabled daughter, by refusing her homeworking requests? Her comparators are (a) Mr Gallagher and (b) Mr Robson.

6. Pregnancy and maternity discrimination. The Claimant became pregnant during her period of maternity leave ending in May 2020. Her baby was born on 23 December 2020. The respondents accept that at all material times she was within the protected period under section 18(6) of the Equality Act. Did R1 and R2 treat the Claimant unfavourably because of pregnancy and/or pregnancy related illness and/or having exercised the right to maternity leave, by the Second Respondent doing the following:

   6.1 In May 2020 refusing her home working requests.

   6.2 On 27 May 2020 denying her Approved Mental Health Professional training.

   6.3 On 28 May 2020 failing to complete a return to work process.

   6.4 On 3 July 2020 failing to complete a covid risk assessment.

   6.5 On 14 July 2020 ridiculing her about taking further maternity leave.

   6.6 On 15 July 2020 asking her to complete tasks while on pregnancy related sick leave.

   6.7 On 4 August 2020 denying her supervision by her manager (R2).

   6.8 On 14 August 2020 failing to provide her with equipment recommended by OH.

   6.9 On 23 November 2020 copying an admin manager Ms Ferreira into an e-mail about her pregnancy related health condition.

   6.10 On 17 December 2020 ridiculing her by making reference to her car accident in the context of her having previously been overpaid.

6.11 On 18 December 2020 ignoring her raising the issue of a maternity risk assessment.

6.12 On 18 December 2020 requesting medical documentation following her requests for support by way of provision of equipment and IT.

6.13 On 21 December 2020 making critical remarks about her inability to work due to sickness.

6.14 On 22 December 2020 not following the grievance policy by failing to prevent all contact between the Claimant and R2.

6.15 The Claimant also complains that from May 2019 to May 2020 she was on maternity leave and R2 failed to share with her any changes to the team, promotion, or training opportunities. The Claimant is aware of a team manager's position for the Islington Practice based mental health team becoming available during that period that she was not told about.

7. Direct sex discrimination. In the alternative the Claimant relies on the above matters as acts of direct sex discrimination. They cannot be both (see section 18(7) of the Equality Act). Did the Respondents treat the Claimant less favourably then either of her comparators because of sex, if the above matters are proven. The comparators are (a) Mr Gallagher and (b) Mr Robson.

8. Victimisation. The Respondents accept that the Claimant's grievance submitted on 21 December 2022 was a protected act.

9. Was the Claimant subjected to the following detriments because she had done a protected act:

9.1 On 22 December 2020 Durand Darourgar, Service Manager, failed to stop R2 from contacting the Claimant.

9.2 On 23 December 2020, R2 induced Ms Begum in HR to ask the Claimant for a copy of the birth certificate for the purposes of the commencement of maternity leave.

9.3 In December 2020 a managerial post became available which R2 failed to share with her. This was a Band 7 post within the service in which the Claimant worked.

9.4 In December 2020 R2 failed to share a Best Interests Assessor training opportunity with the Claimant.

10. Jurisdiction: time limits. Early conciliation was commenced on 22 February 2021 and the certificate was issued on 5 April 2021. The claim was presented on 21 April 2021.

10.1 Are any acts in the above list occurring before 23 November 2020 to be treated as being in time? Was there conduct extending over a period which should be treated as done at the end of that period?

10.2 If any acts are out of time, is it just and equitable to extend time?

**Evidence and findings of fact**

11. The Tribunal heard evidence from the following witnesses:

11.1 The Claimant, Ms Moxon.

11.2 The Second Respondent, Mr Yusuf Zavery, who was the Claimant's line manager throughout her employment with the First Respondent.

11.3 Mr Durand Darougar, Head of Core Community Services.

12. There was an agreed bundle of documents containing 444 pages. Page numbers in these reasons refer to this bundle.

13. Ms Moxon began work as a mental health social worker with the First Respondent's ("Islington") Primary Care Team in April 2018. She has a disabled daughter, and there was no dispute that Islington and Mr Zavery in particular were aware of this at the relevant time.

14. Ms Moxon was on maternity leave from May 2019 to May 2020. Issue 6.15 above relates to this period. Her complaint is that Mr Zavery failed to share with her information about matters such as changes to the team, available promotions or training opportunities. Mr Zavery did not dispute failing to contact the Claimant until the time for her to return to work was approaching (around February or March 2020). His explanation for this in paragraph 11 of his witness statement was that Ms Moxon had said that she did not wish to be contacted while on maternity leave. (His evidence in paragraph 13(xv) of his statement seems to have confused this issue with the Claimant's subsequent maternity leave in 2020-2021).

15. In cross-examination Mr Zavery said that he did not make keeping in touch calls because Ms Moxon had asked him not to contact her. He said that this occurred shortly before the maternity leave started, and was not documented. He stated that Ms Moxon said that she did not want to be approached by anyone from work. Ms Moxon's evidence when cross-examined on this aspect was that she neither stated nor gave the impression that she did not want to be contacted.

16. The only contemporaneous document that the Tribunal was referred to in this connection was the Resilience and Business Continuity Plan published in March 2020. The Key Team Contact List at page 398 did not include Ms Moxon. When asked about this, Mr Darougar said that Ms Moxon was still part of the team, but was not on the list as she was not on active duty,

being on maternity leave. The Tribunal found this document of no real help on the issue as to whether Ms Moxon had said that she did not wish to be contacted.

17. The Tribunal found this issue difficult to resolve, given the lapse of time since May 2019 and the fact that it turns on recollections of what was or was not said. On the one hand, if Ms Moxon had asked not to be contacted, one might expect there to be some record of that. On the other hand, the Tribunal did not find it unusual for someone on maternity leave not to be contacted for about 8 months, until close to the time she was expected to return to work. It was possible that, rather than the stark alternatives of Ms Moxon having clearly stated that she did not want to be contacted, or having not said it, that there had been some form of miscommunication or misunderstanding.

18. In the event, the Tribunal found itself unable to make a positive finding on this point. The significance and consequences of this will be explained later in these reasons.

19. Ms Moxon was overpaid during this period of maternity leave. How or why this happened is not within the scope of the issues before the Tribunal, but the relevance of this is that it caused her to want to return to work earlier than might otherwise have been the case.

20. Issues 5 and 6.1 concerned working from home. By May 2020 the first national lockdown was in progress. Mr Zavery stated, and the Tribunal accepted, that before the pandemic some members of staff had worked from home as and when they needed to, and that during the pandemic employees could work flexibly or from home but would have to have the necessary IT equipment to enable them to do so. He said that Mr Gallagher had expressed a wish to limit his time in the office, and had the necessary equipment for this. He did not line manage Mr Robson, but said that he too would have had the choice of working from home. Mr Zavery himself continued to come in to the office.

21. Mr Zavery and Ms Moxon had a telephone conversation about her return on 18 May 2020. Ms Moxon's account of this in paragraph 19 of her witness statement did not include specific mention of working from home or returning to the office. She stated that Mr Zavery said that she could return to work at her usual contractual hours, and that there was some conversation about school places for key workers. Ms Moxon agreed in cross-examination that the conversation was about contractual hours, rather than home working. In paragraph 7 of his witness statement Mr Zavery said that at his time there was some confusion about how the work would be carried out (which the Tribunal accepted) but that nobody was forced to come in to the office. He then said "The complainant in fact contacted me requesting she return to work earlier than planned which I agreed to."

22. The Tribunal found as a matter of probability that there was no express reference to working from home in this conversation; that when there was discussion of returning to "work" Ms Moxon took this to mean returning to the office; and that Mr Zavery did not say anything to the contrary. This would have been consistent with the prevailing uncertainty in the early stages of the pandemic and the impact of this on a key community service.

23. Ms Moxon returned to work on 26 May 2020, attending the office on that day and subsequently, until she commenced a period of sick leave on 8 June 2020. It was common ground that a short meeting between her and Mr Zavery, lasting about 10 minutes, took place on 27 May 2020. Mr Zavery did not create any documentary record of the meeting. This is the subject of issue 6.3, in which Ms Moxon complained of a failure to complete a return to work process.

24. Unlike the position for an employee returning from long-term sick leave, where Islington had a requirement for a return to work meeting and a record of this, there was no similar policy requirement in the case of an employee returning from maternity leave. The Tribunal considered that it nonetheless would have been preferable for a record of the meeting to have been made. Mr Zavery's explanation for the brevity of the meeting and the lack of a record was that he was managing a busy service where one team manager post was vacant and which was under additional pressure because of the pandemic. The Tribunal accepted Mr Zavery's evidence on this point. We concluded that in the particular circumstances, anyone returning from a period of absence, other than long-term sick leave, would have been treated in the same way, because of the pressures on the service and on Mr Zavery.

25. In paragraph 21 of her witness statement Mrs Moxon said that she told Mr Zavery that she had a shielding letter for her daughter and that she wanted to limit her time in the office, preferably working from home, and that he referred to available carer's leave and left her with no alternative to attending the office. When it was put to Ms Moxon that she had said that she preferred to attend the office, she denied this, saying that Mr Zavery "refused for me to work from home when I presented him with the shielding letter".

26. In paragraph 6 of his witness statement Mr Zavery said that at no point did he tell Ms Moxon that she could not work from home. When cross-examined he repeated this, adding that he was "pretty certain" that he would have suggested prioritising IT equipment. Later in his oral evidence Mr Zavery said "I don't believe I said you could work from home regardless of the equipment but neither did I say that you had to return to the office".

27. Ms Moxon sent an email at page 102 to Ms Ferreira and the ICT service desk, copied to Mr Zavery and Mr Darougar, on 29 May 2020. This read:

"Dear ICT,

I would like you to be aware my daughter has received a shielding letter and it is quite important I limit my time at the office.
Please could this request be fast tracked."

28. There was a later exchange of emails which referred to this aspect on 15 July 2020 at pages 436-437. Ms Moxon (who as noted above had been absent sick since 8 June 2020) said that she was the only member of staff at the office and that she was expected to attend every day or use carer's leave or annual leave. Mr Zavery replied:

"As far as I am aware you have not been asked to come into work, rather this was your preference. To clarify, we do not expect you to come into the office.
Numerous emails have been raised with ICT……if you can continue to call them….."

29. Ms Moxon responded attaching a copy of her email of 29 May 2020 and stating that it had not been her preference to come in to the office, but that she had not been provided with a choice. She continued:

"I was at the office for nearly three weeks with no login details and no access to system but not provided any alternative, I would come in to do nothing this did not adhere to government policy around the pandemic."

30. The Tribunal concluded that, as a matter of probability, Mr Zavery did not expressly say that Ms Moxon had to come in to the office. She did not assert this in her emails, saying that she was "expected" to attend and that it was important to limit her time in the office. Equally, Mr Zavery did not say that Ms Moxon should stay at home regardless of the position regarding IT enabling her to work. The Tribunal concluded that this caused Ms Moxon to come to the view that she should come to the office, and that Mr Zavery did not try to dissuade her from doing this.

31. The Tribunal considered why it was that Mr Zavery took the approach that he did. We noted that this applied in practical terms to the relatively short period between 26 May and 8 June 2020, after which Ms Moxon was not in the office. The Tribunal concluded that Mr Zavery took this approach because he was trying to maintain the service as best he could in the difficult and confusing circumstances generated by the pandemic, and because (as shown by the references to ICT in the emails) Ms Moxon did not have the IT equipment available to enable her to work from home.

32. The Tribunal found that Mr Zavery was not in any way influenced by Ms Moxon's association with her disabled daughter. A complaint of direct discrimination (which this is) involves asserting that Mr Zavery took an unfavourable view of Ms Moxon's request to work from home <u>because</u> her daughter was disabled. That would have been a callous attitude in the circumstances of the pandemic and what Ms Moxon was saying about her daughter's need to shield, and the Tribunal did not believe that Mr Zavery took such an attitude. Indeed, there was nothing in Ms Moxon's emails at

the time to suggest that this was what she meant: her point was rather that Mr Zavery did not seem to be taking sufficient account of her daughter's need to shield.

33. We also found that Mr Zavery was not in any way influenced by Ms Moxon's sex. The Tribunal found it inherently improbable that he would have been so influenced. Although Ms Moxon pointed to Mr Gallagher and Mr Robson as comparators, there was no evidence that women generally were expected to attend the office; indeed, she said in her email of 15 July 2020 that she was the only member of staff at the office.

34. In paragraph 25 of her witness statement Ms Moxon complained of another matter that arose on 27 May 2020 (issue 6.2). It was not clear whether she was saying that this was part of the 10-minute meeting or occurred subsequently. In any event, Ms Moxon said that Mr Zavery told her that she was not eligible for AMHP training because she had not worked for Islington for 2 years. She continued that she referred to a colleague who had done this training after less than 2 years employment, to which Mr Zavery replied that she could contact the person responsible for organising the training, but that as she had been on maternity leave and had not worked for Islington for 2 years, he did not think that she would be eligible. Ms Moxon stated that she then contacted the organiser, who told her that the deadline for applying had passed as it was in April (and so within the period of Ms Moxon's maternity leave, as set out above).

35. Mr Zavery's evidence on this point in paragraph 13(ii) of his witness statement was that he did not deny Ms Moxon this training; that he was not on the selection panel for it; and that she was aware that she could contact the AMHP service directly about it. The Tribunal found that none of this was inconsistent with Ms Moxon's evidence, as she did not ultimately say that Mr Zavery had denied her the training. On her account, he had expressed the opinion that she was not eligible for it, but did not make any decision about it. That was done by the person responsible for organising the training. It was not apparent from the evidence whether that person was an employee of Islington or of another organisation, but there was no suggestion that Ms Moxon was alleging discrimination on her part. There would be no reason to conclude that from being told that the deadline for applying had passed.

36. The Tribunal therefore found that, as a matter of fact, Mr Zavery did not deny Ms Moxon this training.

37. On 3 July 2020, while still on sick leave, Ms Moxon learned that she was 12 weeks pregnant. On the same day she sent an email to Mr Zavery at page 94 informing him of this, and saying that this had come as a shock to her. She gave her address for delivery of a laptop and concluded: "I think I will need a referral to occupation health, if I can self refer let me know." Contrary to paragraph 30 of her witness statement, Ms Moxon did not in this email make reference to a high-risk pregnancy or to a covid risk assessment (the subject of issue 6.4).

38. In the event, Mr Zavery completed a pregnant worker assessment form on 4 August 2020. This was 7 days after Ms Moxon had returned to work from sick leave. In paragraph 13(iv) of his witness statement Mr Zavery said that it had been difficult to arrange a date and time for this given his other commitments and Ms Moxon's absence.

39. The Tribunal would not have expected this assessment to be carried out while Ms Moxon was on sick leave. We accepted that, beyond this period, Mr Zavery's other commitments accounted for the 7 days that elapsed before he completed the assessment.

40. There was a dispute about events on 14 July 2020 (issue 6.5). In paragraph 36 of her witness statement Ms Moxon said that, in a telephone conversation, Mr Zavery said that he did not think that she would be entitled to maternity leave again, as she had become pregnant while on maternity leave. In cross-examination Mr Zavery said that he would not have said this and that he would have remembered if he had done so.

41. On the same date Mr Zavery sent an email at page 438 to HR which read in part as follows:

    "Further to our telephone conversation please be advised that Helen Moxon's circumstances have changed.

    "She was on maternity leave – returning to work on the 21/05/20 she has been on sick leave as of 08/06/20 due to pregnancy related illness. I have been informed she is approximately 13 weeks pregnant.
    "We are unsure as to when she will return to work, I have also been asked to clarify her entitlements to maternity etc as she would have become pregnant whilst on previous maternity leave….."

42. Ms Moxon sent an email at page 437 to Mr Zavery on 15 June 2020 which included the following:

    "In regards to maternity entitlement I have not asked for this to be clarified nor have I voiced this as a concern, is this your concern? I don't understand why I am privy to this process as its worrying and stressful with no evidence to this claim – Islington maternity process does not suggest this.

    "My concern is outlined in an email to yourself and service management, stating I do not feel safe to return to an office environment especially now I am pregnant but that does not rule out working from home. I am the only member of staff at the office, on my own for significant periods of time as all members of staff have the flexibility to work from home.

    My daughter has a shielding letter……..I have to shield with my daughter or at a minimal limit my time at the office however I have been unable to do so. My daughter is being place at risk when most members of staff are

working from home but I am expected to attend the office every day or use carers / annual leave. To my knowledge other members of staff are not being asked to use leave entitlement and they are all working from home in some capacity whether they have health implications or not."

43. Mr Zavery responded on 15 July 2020 with an email also at page 437 in which he wrote:

"I was advised by HR to include the issue about your maternity entitlement in my email to them.

"As far as I am aware you have not been asked to come into work, rather this was your preference. To clarify, we do not expect you to come into the office.

"Numerous emails have been raised with ICT, I have also been in touch with Emily about this, if you can continue to call them……"

44. The Tribunal concluded that there was a telephone conversation about the possibility (as seen by Mr Zavery) that Ms Moxon would not be entitled to maternity leave in the circumstances. He raised the same point in an email to HR on the same day and copied Ms Moxon in to this. The Tribunal also found, as a matter of probability, that this idea had not been raised by HR. It was improbable that HR would have raised this possibility, without resolving it, and then would have asked Mr Zavery to include it in an email to them, as he suggested.

45. The Tribunal also considered that, whatever was the origin of the idea that Ms Moxon might not be entitled to another period of maternity leave, it would have been better if Mr Zavery had raised the question with HR without mentioning it to her. The idea that she might not be entitled to maternity leave would be worrying, there was nothing she could do about it, and the question could have been resolved without the need to trouble her with it.

46. The Tribunal then considered the reason why Mr Zavery raised this matter with HR, copying in Ms Moxon (the complaint in the list of issues being that this amounted to Mr Zavery "ridiculing" her about taking further maternity leave). The Tribunal differed in its findings on this aspect.

47. The majority (Ms Craik and Mr Harrington-Roberts) considered that, whatrever was the source of the idea, Mr Zavery's raising the question in the first instance showed that he took a negative view of Ms Moxon becoming pregnant while on maternity leave. While he might not have thought much about copying Ms Moxon in to his email to HR on the point, it was foreseeable that she would be worried by the question being raised and pursued, and that could have been avoided by not copying her in to the email. The majority therefore concluded that this was unfavourable treatment because of pregnancy.

48. The minority (Employment Judge Glennie) considered that this was a genuine question that Mr Zavery asked because he wanted to know the answer for organisational reasons. While considering that it would have been better if Mr Zavery had dealt with the matter differently, as explained above, EJ Glennie accepted that Mr Zavery did not know the answer and, the question having come to his mind by whatever route, it was reasonable that he would seek an answer to it. In EJ Glennie's view, this did not amount to unfavourable treatment.

49. Mr Zavery's email of 15 July 2020 indicated that Ms Moxon should continue to call ICT, this being a reference to chasing up the provision of equipment to facilitate her working from home. Ms Moxon replied on the same day on page 436 referring again to the issue about attending the office and stating:

    "I am off sick and have called them on several occasions, escalated with ICT manager which I have also copied you in. I do not feel this is no longer within my remit but a service issue that requires managers of higher input".

50. Issue 6.6 referred to Mr Zavery asking Ms Moxon to complete tasks while on pregnancy-related sick leave. The date given was 15 July 2020. The tasks Ms Moxon was asked to do on that date amounted to being asked to follow up the request previously made to ICT. In paragraph 44 of her witness statement Ms Moxon also complained of Mr Zavery asking her on 24 July 2020 to call into the office on the following Monday, when she was due to return from sick leave on the following Tuesday. Although this was not strictly within the scope of the issue as identified, the Tribunal has nonetheless considered this. Mr Zavery's explanation was that he must have thought that Ms Moxon was due to return on the Monday. We found it plausible that he might have thought so, and found as a matter of probability that this explained why he asked her to call in on Monday.

51. In paragraph 46 of her witness statement Ms Moxon said that she sent an email (which was not in the bundle) to Mr Zavery on 31 July 2020 stating that she was available for supervision (meaning a supervision meeting or discussion) during the period 10-14 August, and that he did not reply. Mr Zavery accepted this, saying that Ms Moxon was one of several people that he did not reply to at this time, and that supervision lapsed for most people. He said that the reason for this was that he was so busy. The Tribunal accepted this as a matter of probability: the pandemic put public services such as the one Mr Zavery was responsible for under a great deal of pressure. (Issue 6.7 gave the date for this as 4 August 2020, but the Tribunal accepted that the communication on 31 July 2020 was the relevant one).

52. On 12 August 2020 Ms Moxon attended a telephone consultation with Islington's occupational health advisor Ms Thompson. The latter sent a report at pages 110-113 to Ms Moxon and Mr Zavery on 14 August 2020. On page 112 Ms Thompson wrote the following about equipment:

"I would advise that she accesses the HSE checklist for the display screen equipment assessment to ensure that she is able to achieve a good posture and ergonomic position whilst sat at the desk. She currently uses a laptop and I would highly recommend the use of a laptop riser, separate keyboard and mouse in order the ensure that she is able to maintain a good posture."

53. With reference to issue 6.8, Ms Moxon maintained that this meant that all of the named items should have been provided without more, and that there was a failure to do this. Mr Zavery's evidence was that he was expecting Ms Moxon to go through the checklist and then inform him of what she required.

54. The Tribunal found that a reasonable reading of what Ms Thompson had written was that Ms Moxon should access the checklist and decide what she considered would be of assistance. It did not mean that all of the items mentioned should be provided without the need of any input from Ms Moxon: she might not want all of them. There was not, therefore, a failure to provide recommended equipment. Furthermore, the Tribunal accepted Mr Zavery's evidence that he was waiting to learn what Ms Moxon required.

55. On 23 November 2020 Mr Zavery copied the administration manager Ms Ferreira into an email chain that included reference to Ms Moxon's pregnancy-related health condition. In his witness statement Mr Zavery said that he did this in order to inform Ms Ferreira of the situation and that he did not think that thereby letting her know of Ms Moxon's condition would be an issue. He added that when Ms Moxon objected to this, he did not do it again.

56. The Tribunal found that it was reasonable for Ms Moxon not to want details of her medical condition forwarded to someone who did not need to know about it. As to the question why this happened, Ms Moxon's case, as set out in issue 6.9, was that this was an act of direct discrimination. The Tribunal had to decide whether Mr Zavery did this for the reason that he gave, or, in effect, because he was displeased about Ms Moxon's pregnancy.

57. The Tribunal concluded that this was a careless act, rather than a deliberate one. Although it was surprising that a manager of an organisation dealing with mental health issues would fail to take care with sensitive personal data, the Tribunal accepted that Mr Zavery was under significant pressure from the effects of the pandemic, and found that his attention to detail suffered at this time.

58. On 16 December 2020 Ms Moxon was involved in a road traffic accident. Her complaint in issue 6.10 was that Mr Zavery ridiculed her by making reference to this in the context of having previously been overpaid (i.e. while she was on maternity leave).

59. There were text messages passing between Mr Zavery and Ms Moxon on 17 December 2020 at pages 124-126 and 134-139. The Tribunal was

unable to establish with certainty the correct sequence of these. In answer to Ms Craik, Ms Moxon said that she noticed that she had some missed calls from Mr Zavery and then texted to say that she had been involved in an accident. Mr Zavery clearly texted at one point (page 138) "I'll be in touch with HR to clarify, obviously we don't want you to be overpaid again". It was difficult for the Tribunal to understand what the Claimant's complaint was about this. The previous overpayment had occurred while Ms Moxon was on maternity leave, but there was no ground for finding that Mr Zavery wrote what he did for any other reason than that he did not want the situation to arise again.

60. On 18 December 2020 Ms Moxon sent an email to Mr Zavery at page 127 in which she included the following:

Please could you also make the relevant adjustments directed by occupational health which I requested several weeks ago in ordering equipment so I can work at home safely and I believe a maternity risk assessment has not been completed."

61. Mr Zavery addressed some of the matters raised in that email in his of 21 December 2020 at page 129, although he did not deal with the adjustments or risk assessment. Issue 6.11 asserted that he had ignored Ms Moxon's request for a risk assessment. When cross-examined about this, Mr Zavery said that he was not ignoring Ms Moxon, and that it was possible that the issue slipped his mind. The Tribunal could see no reason why Mr Zavery would decide not to carry out a risk assessment, and found as a matter of probability that he had overlooked the matter, and that he did not intentionally fail to address it. We accepted Mr McCombie's submission that people do sometimes overlook things, and that this was such an occasion.

62. Issues 6.12 and 6.13 concerned emails on 18 and 21 December 2020. Ms Moxon complained that on 18 December Mr Zavery requested medical documentation following her requests for support by way of provision of equipment and IT and on 21 December made critical remarks about her inability to work due to sickness.

63. It was apparent from Mr Zavery's email of 18 December 2020 at page 132 that he was concerned to learn that Ms Moxon had been involved in a road traffic accident at a time when she was supposed to be working from home. He wrote:

"I am also a little puzzled, you previously informed me that you would be unable to travel to the trust site to collect a laptop, I was later in the week informed that you were in a traffic accident whilst my understanding was that you would be working from home on the same day.
I have made numerous attempts to contact you by phone on the days you were down as working from home however the phone either rang out or went to voicemail.

I would like to request letters of medical appointment dates and times as these have only been self-reported, if these could be backdated please."

64. Ms Moxon replied that she was dropping her children at school, and asked which were the medical appointments that Mr Zavery wanted evidenced. He responded saying that he wanted evidence of all appointments and Ms Moxon replied at page 129:

    "Please see proof of yesterday's appointment, please could you make it clear why you are asking for previous appointments as it was not requested at the time?"

65. Then on 21 December 2020 at page 129 Mr Zavery wrote:

    "As I have made clear I will be speaking with HR. You informed me that you will be working from home, yet when I have attempted to make contact with you via phone or communicated with you via e-mail there has been no response, on some occasions you informed me you were unwell and as such could not respond.
    This has placed us in difficulty as you are "working from home", yet not fulfilling functions required of you due to continued sickness or alleged ICT issues.
    I am now collating your sickness dates etc and as such these may not have been requested at the time. It is your responsibility to furnish these, if you are unable to please discuss directly with HR."

66. When cross-examined about this aspect, Ms Moxon said that Mr Zavery had no legitimate reason to be concerned, and that even if he had, he should have raised the issue with her without copying in HR (as he had done). The Tribunal concluded that Mr Zavery was genuinely concerned about Ms Moxon's whereabouts when she was due to be working from home, and that given the road traffic accident and her prevarication about providing evidence of her medical appointments, that concern was legitimate. The reason why he raised these matters was that concern. As to copying in HR, this was not complained of in the list of issues and, in any event, the Tribunal saw nothing wrong in Mr Zavery doing this: it was a matter about which he would reasonably wish to inform HR.

67. On 21 December 2020 Ms Moxon raised a grievance against Mr Zavery at pages 140-144. This raised many of the matters complained of in the present claim, and made allegations of pregnancy and maternity discrimination, confidentiality breach, not following maternity procedure, health and safety breach, bullying and harassment.

68. Meanwhile, Mr Darougar had, at Ms Moxon's request, arranged a meeting with her to discuss her working relationship with Mr Zavery. This took place on 22 December 2020. In issue 6.14 under pregnancy and maternity discrimination and issue 9.1 under victimisation Ms Moxon complained that Mr Darougar did not follow the grievance policy in that he did not prevent all contact between her and Mr Zavery.

69. It was the case that Mr Darougar did not do this. In paragraphs 5 and 6 of his witness statement he said that he did not recall Ms Moxon saying that she did not want to be contacted by Mr Zavery and that his notes of the meeting did not include this. He said, however, that when he raised possible mediation, Ms Moxon said that the would not be comfortable in a room with Mr Zavery, such that he was aware of her perceived problem with him. In cross-examination Mr Darougar pointed out that at this point Ms Moxon was due to go on maternity leave in 3 weeks' time. He said that he told Ms Moxon that he would have a discussion with Mr Zavery about how her management would work going forward, but that this did not take place because, in the event, Ms Moxon gave birth on 23 December and commenced her maternity leave on 24 December 2020.

70. The Tribunal accepted Mr Darougar's evidence on this aspect. Whether or not Ms Moxon expressly said that she did not wish to be contacted, given the imminent Christmas and New Year holiday period, and the fact that he was expecting Ms Moxon's maternity leave to start early in the New Year, it was understandable that Mr Darougar would not forthwith address the question of contact or management going forward, as it was not likely that this would be an immediate issue. The question was then overtaken by events the day after the meeting with Ms Moxon.

71. Ms Moxon sent an email on 23 December 2020 at page 150 to HR, copied to Mr Zavery and Mr Darougar, in which she wrote:

"I have had the baby this morning, I believe my maternity leave will start tomorrow the day after delivery.
Please could you confirm".

72. Mr Zavery responded to Ms Moxon and HR, copied to Mr Darougar:

"Thanks for letting me know.
HR – can you please confirm as below re maternity leave."

73. Ms Begum of HR replied to Ms Moxon, copied to Mr Zavery and Mr Darougar:

"Congratulations!
If you have not started your maternity leave it will start from the day the baby is born. Please forward a copy of baby's birth certificate when you have it."

74. Ms Moxon's case was that Mr Zavery had contacted HR in some way and prompted them to ask for the baby's birth certificate, and that this was an act of victimisation (issue 9.2) arising from the grievance. In paragraph 78 of her witness statement Ms Moxon said that she believed that Mr Zavery "was implying that I was economical with the truth in his concerns raised to HR."

75. In his oral evidence Mr Zavery said that he believed that he became aware of the grievance via an email on around 23-25 December 2020. The Tribunal found it unlikely that this would have happened on 24 or 25 December and considered it probable that he knew of the grievance by 23 December. In paragraph 13 of his witness statement Mr Zavery denied contacting HR about the birth certificate, saying that this request was made without his involvement.

76. It was common ground that Islington's maternity policy did not require provision of the baby's birth certificate. The Tribunal found that some light was shed on how this came to be requested by an email exchange at pages 151-154. Ms Moxon had contacted her union representative Ms James about the request. The latter wrote to HR about the matter, including the following in her email:

> …..I dare say that HR Advice has had no intention of being insensitive however there is a clear gap in knowledge around maternity rights…….I have just taken a call from [Ms Moxon] and she was in tears because she has had to struggle with her LM Yusuf Zavery's negative behaviour towards her during her pregnancy and submitted a grievance…..
>
> …We would like to know whether the HR Advisor was prompted by LM Yusuf Zavery to ask for the birth certificate."

77. In the first instance, Ms Nicholas of HR replied saying that she would look into the matter but would not be able to provide a substantive response before the first week of January. On 4 January 2021 she wrote again to Ms James, saying:

> "Firstly, please convey my apologies to [Ms Moxon] regarding the communication she received from HR; my colleague should not have asked for the Birth Certificate. What should normally happen is that the employee would inform the manager and in turn the manager would notify HR.
> Our intention is to give an appropriate and caring HR service to customers; no harm was meant by the request to see a Birth Certificate, neither was any prompt adhered to."

78. The Tribunal accepted that Mr Zavery had not in any way prompted the request for the birth certificate, and that Ms Begum had made a genuine error in asking for this. Ms Nicholas's prompt reply to Ms James indicated that this was the case, and there was no evidence to suggest otherwise.

79. In issue 9.3 under victimisation Ms Moxon alleged that in December 2020 a management post became available which Mr Zavery failed to share with her. When cross-examined about this, she said that she was referring to the post of joint team manager with Mr Zavery. Ms Moxon said that this had been offered to someone during her 2019/2020 maternity leave, but that they decided that they did not want the post, and so it was vacant when she returned from maternity leave in May 2020. Ms Moxon continued that the post remained vacant and was filled at some point (she did not

know precisely when) between her departure on maternity leave in December 2020 and her return in November 2021. In answer to Ms Craik, Mr Zavery said that he did not normally proactively send out notice of promotions, as these were advertised first on the internal system and subsequently in the public domain.

80. The Tribunal accepted Mr Zavery's evidence on this aspect and found that, although it was correct that he had not shared the availability of the post with Ms Moxon, this was not a detriment to her as he did not share the post with anyone else, nor did he generally share available posts.

81. Issue 9.4 under victimisation also related to December 2020. In the list of issues Ms Moxon alleged that Mr Zavery failed to share a BIA (Best Interests Assessor) training opportunity with her. In her oral evidence Ms Moxon said that the date December 2020 was an error, suggesting at first that it should have been December 2019. When she was taken to emails at pages 419-420 which referred to the BIA training, Ms Moxon agreed that these were dated 4 August 2021, and that she was shown as an addressee. She stated that this referred to her professional email address and was not copied to her private address. She said that she did not have access to her professional emails while off sick (presumably meaning while on maternity leave) and that there was no obligation on her to do so.

82. Whatever the position about this last point, a failure to inform in December 2019 cannot have occurred in response to a grievance raise in December 2020. Assuming that the relevant date is August 2021, and ignoring for present purposes any need to amend the claim to rely on a detriment that occurred after it was presented, the Tribunal found it improbable that information about the training would have been sent to Ms Moxon's professional address only, to the exclusion of her personal address, in response to a grievance raised in December 2020, the outcome of which had been provided in April 2021 (pages 157 onwards). We found that even if it was a detriment not to send the email to the personal address as well as the professional one, this was not influenced by the fact that Ms Moxon had raised the grievance.

**The applicable law and conclusions**

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

*(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.*
*(3) ………*
*(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*

84. The practical effect of section 18(7) of the Equality Act is that acts of pregnancy or maternity discrimination are not acts of direct sex discrimination under section 13. The latter section provides that:

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

85. In relation to victimisation, section 27 of the Equality Act provides that:

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
*(a) B does a protected act.*

86. Section 136 of the Equality Act makes the following provision about the burden of proof:

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

87. In **Royal Mail Group Limited v Efobi [2021] UKSC 33** the Supreme Court confirmed that the enactment of the Equality Act had not changed the approach to the burden of proof provisions as they had been understood under the earlier anti-discrimination legislation. There is a two-stage approach. At the first stage, the Tribunal asks itself whether the facts are such that, in the absence of another explanation, it could properly find that discrimination has occurred. It is not sufficient for there to be no more than s difference in treatment and a difference in protected characteristic: there must be something more (which may not in itself be very significant) to justify the making of the finding. If the facts are of that nature, the burden is on the Respondent to prove that it did not in any way discriminate against the Claimant.

88. Giving the judgment of the Supreme Court, Lord Leggatt repeated the following words of Lord Hope in **Hewage v Grampian Health Board** about the burden of proof provisions:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

89. On the majority of the issues in the present case the Tribunal has been able to make positive findings in this way. We will indicate where we have made use of the burden of proof provisions.

90. Section 123 of the Equality Act includes the following provisions about time limits for bringing claims:

*(1) Proceedings on a complaint….may not be brought after the end of –*
*(a) The period of three months starting with the date of the act to which the complaint relates, or*
*(b) Such other period as the employment tribunal thinks just and equitable*
*(2) …..*
*(3) For the purposes of this section –*
*(a) Conduct extending over a period is to be treated as done at the end of the period;*
*(b) Failure to do something is to be treated as occurring when the person in question decided on it.*

91. The events of issues 5 and 6.1 to 6.3 pre-dated Ms Moxon's and Mr Zavery's knowledge of her pregnancy. They therefore fell to be considered as allegations of direct discrimination because of sex under section 13 and, in the case of issue 5, because of association with her disabled daughter.

92. The Tribunal has found on issues 5 and 6.1 that Mr Zavery was not in any way influenced by Ms Moxon's association with her disabled daughter or by her sex in taking the approach that he did to the question of home working. That complaint therefore fails.

93. The complaint under issue 6.2 fails as a result of the Tribunal's finding that Mr Zavery did not in fact deny Ms Moxon the relevant training.

94. On issue 6.3, the Tribunal has accepted Mr Zavery's explanation for the brevity of the meeting and the lack of a record of it. This does not involve any element of discrimination.

95. The events of issues 6.4 to 6.14 post-date Ms Moxon's and Mr Zavery's knowledge of her pregnancy. The Tribunal therefore considered these issues as allegations of pregnancy or maternity discrimination (where the question is whether there was unfavourable treatment because of pregnancy) and in the alternative as allegations of direct discrimination because of sex (where the question is whether there was less favourable treatment because of sex).

96. On issue 6.5, the allegation is of "ridiculing" Ms Moxon. The Tribunal was unanimous in the view that, while "ridiculing" might not be an accurate description of what Mr Zavery said and wrote, Ms Moxon's complaint should not be dismissed purely because of the use of that word.

97. The finding of the Tribunal by a majority is that Mr Zavery treated Ms Moxon unfavourably because of her pregnancy in raising the question about her entitlement to maternity leave and in copying her into the email to HR on the point.

98. This is the only complaint on which Ms Moxon has succeeded. The events pre-date 23 November 2020 and are therefore out of time under the first limb of section 123 of the Equality Act. The Tribunal therefore asked itself whether it was just and equitable to consider the complaint nonetheless.

99. Although differing on the ultimate outcome, the Tribunal was unanimous in deciding that it was just and equitable to hear this complaint. Both parties had been able to give their evidence about this aspect, and the Tribunal had been able to make findings. In the Tribunal's judgment, the prejudice to the Claimant in ruling out of time a claim on which she had otherwise succeeded outweighed the prejudice to the Respondents of depriving them of the limitation defence. The complaint of discrimination because of pregnancy is therefore well-founded on this point.

100. On issue 6.6, the Tribunal has found that the "task" Ms Moxon was asked to do was that of following up the request to ICT. The Tribunal found nothing unusual or sinister in this, given that there was a need for IT equipment to be provided to facilitate Ms Moxon working from home. Neither this, nor Mr Zavery's request to Ms Moxon to call into the office on Monday (when she was due to return from sick leave on Tuesday) amounted to facts from which the Tribunal could properly conclude in the absence of an explanation that discrimination because of pregnancy or sex had occurred. These were routine requests which happened to have coincided with Ms Moxon being on sick leave. Furthermore, the Tribunal has accepted Mr Zavery's explanation in relation to the latter point. This complaint therefore fails.

101. The Tribunal has accepted Mr Zavery's evidence in relation to issue 6.7 that supervision lapsed for most people (and so not for Ms Moxon alone) for the non-discriminatory reason that he was so busy. This complaint therefore fails.

102. On issue 6.8 the Tribunal has found that there was not, in the circumstances, a failure to provide recommended equipment, and this complaint therefore fails on the facts.

103. The Tribunal has found in relation to issue 6.9 that Mr Zavery was careless in copying Ms Ferreira into email chain with the result that she received details of Ms Moxon's medical condition, but that this was not done because he was displeased about her pregnancy. This was not an act of discrimination, whether because of pregnancy or sex: it was a mistake.

104. On issue 6.10 the Tribunal has found that Mr Zavery wrote what he did because he did not want the situation to arise again in which Ms Moxon was overpaid, and not for any discriminatory reason.

105. The Tribunal has found with regard to issue 6.11 that Mr Zavery overlooked the relevant matters, rather than intentionally failing to address them. This was not therefore an act of discrimination; again, it was a mistake.

106. On issues 6.12 and 6.13 the Tribunal has found that Mr Zavery's reason for doing what he did was his concern as to Ms Moxon's whereabouts when she was due to be working from home. This was not a discriminatory reason.

107. The Tribunal has accepted Mr Darougar's evidence on issue 6.14 to the effect that the question of Ms Moxon's management in the light of her grievance against Mr Zavery was overtaken by events in that her baby was born the day after the relevant conversation, whereupon her maternity leave began. There was then no practical need for the question to be addressed. There was no element of discrimination in Mr Darougar's reason for not preventing all contact between Mr Zavery and Ms Moxon.

108. Issue 6.15 concerns Ms Moxon's earlier period of maternity leave between May 2019 and May 2020. The Tribunal has not been able to make firm findings of fact about this issue. Ms Moxon has not, therefore, proved facts from which, in the absence of an explanation, the Tribunal could properly find that discrimination occurred.

109. It is also the case that complaints about this period would on the face of the matter be out of time under the first limb of section 123. Although the successful complaint and this one both involved Mr Zavery, the Tribunal concluded that they could not be regarded as amounting together to conduct extending over a period. Mr Zavery's failure to keep in touch with Ms Moxon is to be treated as occurring when he decided on it, which on either party's account must have been around May 2019. The lapse of time between then and July 2020 rendered it difficult to say that there was conduct extending over a period. In addition, the circumstances were different: on the majority's finding, in July 2020 Mr Zavery took a negative view specifically of the Claimant becoming pregnant while on maternity leave. The Tribunal also concluded that, given its difficulty in reaching a conclusion on the evidence, it would not be just and equitable to extend time.

110. On either basis, therefore, the complaint under issue 6.15 is unsuccessful.

111. Turning to the allegations of victimisation, issue 9.1 covers the same ground as issue 6.14. The reasons given by the Tribunal in relation to issue 6.14 mean that the complaint of victimisation is also unsuccessful.

112. On issue 9.2, Ms Moxon's case has not been made out on the facts, in that the Tribunal has found that Mr Zavery did not prompt the request for the birth certificate.

113. The Tribunal has found that there was no detriment to Ms Moxon in respect of issue 9.3. Its finding equally excludes the possibility that this was done because Ms Moxon had raised the grievance: Mr Zavery was doing as he normally did in not sharing available posts with anyone.

114. Finally, the Tribunal's conclusion with regard to issue 9.4 that the act complained of was not done because Ms Moxon had raised the grievance means that this complaint is unsuccessful.

115. The outcome, therefore, is that the complaint in relation to issue 6.5 is well-founded. The liability of the two Respondents in this regard is joint and several. The other complaints are dismissed.

116. In the first instance, the parties should endeavour to agree on remedy for the successful complaint. If they are unable to do so, they should write to the Tribunal asking for a further hearing to be arranged to determine remedy, and for any case management orders that may be needed.

Employment Judge Glennie

Dated: ……29 December 2022……………………..

Judgment sent to the parties on:

29/12/2022

For the Tribunal Office