EMPLOYMENT TRIBUNALS

Claimant: Mrs C Dakin

Respondent: Mrs S Brennan

Heard at: Manchester **On:** 30, 31 January, 1-3 February 2023. Then in chambers on 24 March 2023.

Before: Employment Judge Leach
Mr Taylor
Mr Rowen

REPRESENTATION:

Claimant: Mr J. Dakin (claimant's husband) on days 1-4. The claimant represented herself on day 5.

Respondent: Ms R. Levine (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's complaints of direct discrimination (protected characteristic, sex) and pregnancy and maternity discrimination do not succeed. The claim is dismissed.

REASONS

Introduction

1. In 2015 the claimant and respondent set up in business together. At that time, they were close friends.

2. The claimant became pregnant in 2016 and told the respondent about this in August of that year.

3. In 2017 (but particularly from August 2017), relations between the parties broke down. The claimant claims that the respondent discriminated against her because she was pregnant and/or because of sex. The respondent denies all claims.

Preliminary Hearing in 2018/19

4. This claim was initially against Evolving Edge Limited ("EE"). EE was a limited company set up by the parties through which they conducted their business. Each party had a 50% shareholding in EE and each was a director.

5. The claim initially included a complaint of constructive unfair dismissal. EE disputed that the claimant was its employee and so could not bring an unfair dismissal claim. Employment status for the purposes of the Equality Act 2010 (EQA) was also disputed.

6. A preliminary hearing was listed to hear and determine these issues of status. Following a 4-day preliminary hearing in 2018-2019 (Preliminary Hearing), the Tribunal found that the claimant was not an employee within the meaning of the Employment Rights Act 1996 (ERA) but that she was an employee for the purposes of the EQA complaints. This meant that the claim of unfair dismissal could not proceed. In any event, on 17 September 2019, the first respondent company was dissolved so that claim could not have been pursued anyway.

7. The respondent seeks to rely on various findings of fact made at the Preliminary Hearing and recorded in the judgment. The claimant's stated position is that only limited evidence was available to the Tribunal at that hearing and we must not assume that the facts are as then found; that we should look at issues afresh having the benefit of further evidence. We explained on day one of this hearing that we were likely to accept and adopt the findings unless evidence was provided to us (particularly any evidence that had not been available to the Tribunal at the preliminary hearing) that made us doubt the findings made. No such evidence was provided and, where appropriate, our findings of fact below reflect (and sometimes refer to) the Tribunal's findings at the Preliminary Hearing (the "PH Judgment").

Proceedings against Mrs Brennan.

8. Following the Preliminary Hearing, the claimant made a successful application to add Mrs. Brennan as a respondent. Given the dissolution of EE, the only complaints that could then proceed were those that the claimant was able to make against an individual employee or agent of her employer under section 110 of the EQA. The respondent accepted that she was an employee (for the purposes of the EQA) and agent of EE. The respondent's relationship with EE was the same as the claimant's had been (as determined by the Tribunal at the Preliminary Hearing).

The issues

9. The issues for determination at this final hearing were refined and listed at a preliminary hearing on 9 March 2022. They are set out below.

1. **The factual allegations**

1.1 Did the respondent do the following things?

1.1.1 On 29 August 2016, amend the "Ways of Working" document by adding "use contraception in the future".

1.1.2 Between November 2016 and January 2017, requested and/or orchestrated a structure of the company which had the effect of reducing the claimant's remuneration, to the substantial disadvantage of the claimant. The claimant was misled and manipulated;

1.1.3 In January 2017, offered the claimant an enhanced maternity package and then requested that it be withdrawn;

1.1.4 In July 2017, failed to offer any support and/or to enquire about/even mention the claimant's health when or at any time after, she was informed the claimant had post-natal depression;

1.1.5 On 3 July 2017, accused the claimant of not wanting to grow the business since getting pregnant, of being disinterested in the business since becoming pregnant and used this as an excuse to force the claimant out of the business;

1.1.6 On 20 July 2017, sent hostile messages to the claimant which accused the claimant of not doing much work, applied pressure on the claimant to leave the business and indicated that she wanted the claimant to leave, stating that the claimant needed to resign before she took on any other work and also stated that she was not prepared to "carry on like this";

1.1.7 On 2 August 2017, stated in a meeting with the claimant that when the claimant fell pregnant she thought "well I just need to go off" which was again a clear indication that the respondent meant to side-line the claimant and orchestrated a restructure of the business to facilitate this;

1.1.8 On 22 August 2017, made extremely hurtful and unfounded accusations that the claimant's pregnancy-related illness was the fault of the claimant's husband;

1.1.9 On 24 August 2017, pressured the claimant to sell her shares for an extremely low price despite the claimant suffering from post-natal depression (a pregnancy-related illness) and specifically requesting time and space to deal with the same;

1.1.10 Between August and September 2017, refused to authorise the company accountant to apply for advance funding from HMRC and withheld pre-agreed salary from the claimant, following the claimant's second period of pregnancy-related absence due to post-natal depression;

1.1.11 Between August and October 2017, placing significant pressure on the claimant to leave the business, as follows:

1.1.11.1 Threatened to defame the claimant and blocked the claimant from undertaking additional work;

1.1.11.2 Removed the claimant's visibility from all business finance systems, so the claimant had no way of seeing monies coming into the business by removing her from all business systems and emails whilst she was off with post-natal depression and refused to reinstate her access when she returned;

1.1.11.3 Removed the claimant's access to the invoicing system, transferred the company's money into her personal account, made a demand from the claimant for alleged overpayments, accused the claimant of fraud and made numerous false allegations against her;

1.1.11.4 Removed the claimant from the company bank account by falsely declaring to the bank that the claimant was no longer a part of the business and did not disclose that she had done this to the claimant;

1.1.11.5 On 3 October 2017, made false declarations that one of the business' main clients were no longer working with them as a way of preventing the claimant being paid the money she was due;

1.1.11.6 Pressured the claimant to resign or she stated that she would damage her reputation;

1.1.12 In September 2017, disclosed the claimant's personal medical information relating to a pregnancy-related illness to a client of the business;

1.1.13 Between July and October 2017, the claimant was denied SMP payments as the respondent refused to authorise the accountant to request the SMP payment from HMRC on behalf of the claimant;

1.1.14 In November 2017, refused to allow the claimant to purchase her shares despite already agreeing to a new price.

2. **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

2.1 This complaint relates to the factual allegations above, except 1.1.14

2.2 Did the respondent treat the claimant unfavourably by any of each of those allegations?

2.3 Did the unfavourable treatment take place in a protected period?

2.4 If not did it implement a decision taken in the protected period?

2.5 Was the unfavourable treatment because of the pregnancy?

2.6 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

2.7 Was the unfavourable treatment because the claimant was on compulsory maternity leave / the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

3. **Direct sex discrimination (Equality Act 2010 section 13)**

3.1 This complaint relates to the factual allegations above,

3.2 Was any or each of the allegations less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated (a hypothetical comparator) .

The claimant says she was treated worse than a hypothetical comparator.

3.3 If so, was it because of sex?

4. **Time limits**

4.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 August 2017 may not have been brought in time.

4.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

4.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

4.2.2 If not, was there conduct extending over a period?

4.2.3 If so, was the claim made to the Tribunal within 3 months (plus early conciliation extension) of the end of that period?

4.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

4.2.4.1 Why were the complaints not made to the Tribunal in time?

4.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

5. **Remedy for discrimination**

5.1 What financial losses has the discrimination caused the claimant?

5.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the claimant be compensated?

5.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.8 Did the respondent or the claimant unreasonably fail to comply with the ACAS Code?

5.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.10 By what proportion, up to 25%?

5.11 Should interest be awarded? How much?

The Hearing

10. This hearing took place over five days. We were provided with a bundle of documents with 1362 pages. This had been agreed.

11. The respondent provided a supplementary bundle. Some of the documents in this bundle had been disclosed a month or more before the final hearing, others had only been disclosed a few days before. Whilst Mr. Dakin expressed some irritation at the late disclosure, he noted that it was appropriate to have "everything out in the open." He was unimpressed with very recent information provided from a bank, noting the length of time that the respondent had to obtain this. We allowed the introduction of the supplementary bundle, making clear that Mr. Dakin would be entitled to ask the claimant (his wife) supplementary questions about the documents just disclosed and that he could ask the respondent's witnesses about why such documentation has only been disclosed at this late stage.

12. The claimant's brother (B) provided evidence on Monday afternoon as he was unavailable later in the week. The claimant gave her evidence next. The claimant's witness, Laura Scarf gave evidence on the morning of day three. She joined the hearing by video.

13. Mr Dakin gave evidence on the afternoon of day 3. We then heard from the respondent's father (F). The respondent gave evidence on day 4 and at the beginning of day 5.

14. The claimant's husband (H) gave evidence on the morning of day 5 and the parties provided us with their written and verbal submissions on the afternoon of day 5.

Findings of Fact

Evolving Edge Limited.

15. EE was a limited company incorporated by the claimant and the respondent in April 2015. Incorporation of EE was one of various preparatory steps the parties took in 2015 to begin their new business.

16. The parties met each other in 2010 whilst working for the same employer and had become close friends. The friendship had become close enough for the claimant to be the godmother of the respondent's daughter. It was through their friendship that they discussed and decided to set up in business together.

17. Each party owned 50% of the shares in EE. Each was appointed as a director. There were initially no directors other than claimant and respondent.

18. The claimant confirmed that paragraph 24 of the PH judgment accurately records circumstances relating to establishment of EE.

> *24. The business was set up with very little agreement and in fact business overheads were initially covered from savings, the claimant and* [respondent] *had equal rights over the bank account and only a single signature was required they had identical credit and debit cards, there was no shareholders agreement, no contract of employment and no pension or health provisions, no sick pay and no company policies or procedures, there were no job descriptions or holiday allowances. The claimant contended they agreed 30 days holiday but there was no such agreement documented or referred to in the many What's App messages the claimant*

> *exchanged with* [the respondent]*. I prefer* [the respondent's] *evidence that the only requirement was to tell the other when they intended going on holiday. If either party was unhappy as was considered later the company would have to be wound up /dissolved.*

19. EE did not have premises. Each party was based at home although spent time away from home developing the business and/or undertaking training (one of the main activities of EE). The registered office of EE was the respondent's home address.

20. Some paid for work was available through EE from an early stage although the parties also needed to spend time developing the business.

21. We have been taken through relevant events (and various messages between the 2 parties) in 2016. Having considered this evidence, we find that the personal friendship between the 2 was strong. The parties enjoyed each other's company and made each other laugh. However, they were not always aligned in business. Through 2016 it became clear that the 2 parties had different ideas about the work they wanted to focus on as well as the steps they thought best to take in developing the business.

Payments/profit share

22. Initially, the parties expected and agreed to split everything equally; each therefore being responsible for 50% of expenditure and each benefitting from 50% of EE's income.

23. The first 6 or so months were challenging for both parties. Both had given up paid, secure employment; both needed their new business to provide an income soon after setting up. Their close personal relationship had to endure these challenging times and for the main part, in 2016, it did.

24. There were disagreements in the first half of 2016, around the appropriateness of some business expenditure. More fundamental though was a difference that was forming about the approach to business development and about fees. The respondent started to feel that she was attracting more profitable work and clients than the claimant and that she should receive more than 50% of the fees that she was provided under the arrangements that the 2 had agreed.

25. This led to the respondent proposing a restructure in November 2016. To illustrate her position the respondent provided the claimant with a list of clients, identifying who had brought those clients in and the income to date, generated by each client.

26. At the final hearing before us, the claimant emphasised on many occasions that the clients were not the respondent's or the claimant's but were clients of EE. We accept that as a fact but that is not inconsistent with the position put by the respondent; that she was attracting and securing work that generated many more fees than the claimant. The respondent identified the clients that EE had provided services to and put a name (the claimant's or respondent's) against each client name. The claimant did not dispute this at the time.

27. The respondent proposed an alternative business model; each party would effectively have her own profit centre but operating under the umbrella of EE, sharing

certain costs and resources. Costs would be split, depending on who brought the work in and who carried out the work.

28. We have reviewed communications between the 2 parties from late November 2016, leading up to these arrangements being formalized in early 2017. Having done so (and considered the oral evidence of the parties) we find that the claimant approved the arrangements. We note here that the parties were equals. Each had as much influence as the other in the business. Having heard the claimant's evidence, reviewed communications from her over the period relevant to this claim, we are unanimous in our view that, had the claimant disagreed with the arrangements; considered them to be unfair on her or in some other way, unreasonable, then she would have challenged them. She did not.

Announcement of pregnancy.

29. On 23 August 2016, the claimant told the respondent that she was pregnant. The parties were at the respondent's home, where there was a birthday party for the respondent's daughter.

30. We accept the evidence provided by the respondent and her husband; that when the claimant told them her news, she indicated that she was not entirely happy with the circumstances, that the pregnancy was not planned. Crucially we find that the claimant made a comment to the respondent and H that they should use contraception.

31. There is plenty of evidence in the bundle that the respondent was positive, friendly and supportive about the claimant's pregnancy. Examples include the following: respondent asked how the claimant's scan had gone and made supportive comments (597); comments between friends about sleep, small children and the claimant's "little bump" (601-603); comments about the baby's sex (629); sharing ideas about names for the baby (636).

Ways of working document.

32. At some time in mid-2016, the parties created a document called Ways of Working when the 2 were setting up the business. We note and agree with the description in the PH judgment (para 37)

> *The document was a sheet of A4 with headings such as confidentiality, accountability, commitment to trying ideas etc. the most practical and specific point was stick to weekly meetings, update to do list, share important information. I agree with* [the respondent's] *description of this document it was very general, it was clearly not complete, it did not contain any 'instructions'*

33. In or around August 2016, shortly after the claimant told the respondent that she was pregnant, the respondent made a change to the Ways of Working document. She added the comment *"use contraception in future."*

34. We make the following findings about this comment:-

a. The respondent intended the comment to be more for her than the claimant. The 2 of them engaged in open discussion and these discussions

included the respondent sharing her own thoughts about possibly planning another child – but her not being sure.

b. The comment arose from the unsolicited advice that the claimant offered to the respondent and H (see 30 above).
c. It was a lighthearted comment between 2 career focused mothers with potentially growing families who were close personal friends.
d. The claimant made no complaint about his comment until these proceedings.

Maternity Pay

35. We have made our findings above about the change in the way the income from EE was shared. These changes were agreed during the claimant's pregnancy. Had no changes been made then one supposes that the claimant would have benefitted from 50% of the EE's income during a period of maternity leave, even where 100% of the income came from the respondent's work. The claimant told us that was not something she ever contemplated. She expected her income to drop during a period of maternity leave. As it was, the time taken off for maternity leave was very short and during this short time, the claimant received statutory maternity pay.

36. During the discussions about changing the income/profit share structure, the respondent had suggested a 95%/5% split. That would mean that the person who brought in the income would receive 95% of that income and the person who did not, would still receive 5%. As it was, however, the agreement reached was that the party who brought in the income would receive 100% of that income.

37. An email exchange between the 2 on 25 January 2017 (pages 711,712) best illustrates how and why the parties reached that position. The first email quoted below (from respondent to claimant) was sent during discussions about the new arrangements. The second email (claimant to respondent) shows the claimant's agreement.

> *Erm..yes..i need to dig out my scribbled notes will look this aft and send them*
>
> *I know one of them was 95/5 and I was wondering what you thought ab out that one?*
> *I was just thinking, the amounts we do separately aren't going to be loads esp once youre back off mat leave. So I don't know if it's worth the faff of doing iit or whether we should just do 100% like you said. With your £500 with Louise, there will be corporation tax totake off & any expenses etc before the profit share, so it will literally work out ab out £15 or something to come to me.You'd still get 20% of the Swinton work I do which is the main separate coaching for me.*
>
> *I also need to be paid on 27th for our mortgage going out, but you could be paid on the 28th when your Swintonmoney comes in and you could just take all of that which makes it easier as there would be no allocation to me. I'm just conscious of Rob spending even more time on our accounts as he already spends ages and these allocations will make it more time consuming.*
>
> *He's more than happy to do it and I don't want us to have to pay Andrew to do it as he would charge but I do want to make it as easy as possible for him and if we're allocating £5 and £10 here and there on*

every invoice it could get really messy..

If you'd rather stick with 95/5 I'm more than happy to though, or if you just want to do it while you're on mat leave so you get a bit of extra money that's absolutely fine. Just want to make it as easy as possible on the accounting front. X

(Rob is the claimant's husband. He had been assisting with EE's accounts; the reference to Andrew is to the paid auditor/accountant used by EE)

Claimant's reply

Yeah, I'm happy to change it to 100%. Like you said, it's a bit of a faff to allocate and we aren't talking huge amounts.

I suppose the only thing I'm still not 100% on is the business developme nt expenses. If you wanted to go to London,
whilst I'm on mat leave, to meet with some potential clients I wouldn't w ant you to be put off by thinking you would have to fork out £120 for a train fare that you may not get back if the work doesn't convert. I know that's the most expensive example that we'd have, and in reality it's more likely to be the odd coffee here and there, but I would be happy to pay half for the trip. I'd trust your judgement that you were meeting potential clients and I would benefit in future. Do you know what I mean? I think we need to make an exception for something like this. x

38. One of the claimant's complaints is that she was manipulated and misled in to agreeing this arrangement. It became apparent to the claimant later in 2017, that the respondent's income had increased to such an extent by then that the 5% would have been worth a few thousand pounds to the claimant. We do not accept that the claimant was manipulated and misled. The claimant was an equal partner, the finance\al arrangements were not complex and not somehow hidden from the claimant. Clearly the respondent wanted to renegotiate the remuneration terms to benefit the respondent. The claimant knew that and agreed to the proposed new arrangements.

39. The claimant was able to make a claim for Statutory Maternity Pay. This was done with the assistance of EE's accountant, Andrew Lea ("AL"). AL also provided advice about making a request to HMRC for advance payment of the maternity leave, in the event that EE could not afford to first make the payment and then wait for repayment from HMRC. EE took that step, successfully applying for advance payment from HMRC. It did so because it was not able to fund the SMP upfront.

40. The claimant began her maternity leave on 6 March 2017. Her baby was born on 19 March 2017.

Return from Maternity leave.

41. The claimant's maternity absence was short. She was committed to the new business. We have no doubt that she felt obligations to the new business, and this

motivated a quick return to work; we are also sure that she decided that she needed to return quickly to earn an income.

42. Whilst the claimant returned to work on 9 May 2017, she did carry out training on 10 and 11 April 2017. These were regarded as Keeping In Touch (KIT) days. There is a dispute between the parties about what happened about this training and the arrangements for the training, It is not directly relevant to the complaints raised and we limit the detail of our fact finding here to the following comments:-

a. Through travelling and engaging in training on these KIT days, the claimant showed a significant commitment to return to work and to the new business, even though that was far from easy for the claimant and her family.
b. The respondent was appropriately supportive to the claimant during this time.
c. The respondent gained a view that some pressure for the claimant's early return came from the claimant's husband. We note the comments from the claimant at 804 (that her husband thought she should carry out training on 10 nd 11 April) as well as the text exchange at page 829, by which the claimant made clear to the respondent that the decision that the claimant return to work so soon after childbirth was her husbands.

<u>Claimant stating intentions to leave EE.</u>

43. At the end of June and beginning of July 2017, there was significant correspondence between claimant and respondent. There was also correspondence between respondent and claimant's husband (JD) on 3 July 2017. This is documented in the bundle.

44. The claimant and respondent engaged in a long text exchange, late in the evening of 30 June 2017 and continuing on the morning of 1 July 2017 (pages 957-962). In this exchange the claimant expressed her unhappiness with her involvement in the business, that she did not feel that she and the respondent were working as a team, that she wanted to work within more of a team environment, that she was concerned that EE was at that stage "punching above our weight" that the business was overstretched (particularly a reference to the respondent having just then worked on an overseas project for 10 days) and how she wanted the 2 of them to meet more and discuss the business. The claimant was being open about her feelings towards EE at that stage

45. The respondent was also open. She noted how much her client network had grown and was growing, about how hard she was working to keep up with this, how she wanted to "ramp up" the business aggressively and that she needed to do that because her growing network needed more capacity to support it and deliver on the work generated.

46. The respondent also expressed concern for the claimant. Those concerns were between friends as much as (if not more than) business partners. We are sure that without the close friendship that then existed between the parties, neither would have been so candid in the messages.

47. In this exchange, the claimant raised the prospect that she would leave the business.

> Claimant - *. I sort of feel like I need to make a decision too, for my own mental health, and obviously so you know where you stand x*
>
> Respondent: *What will you do if you don't do this? I think I've gone into a bit of shock tonight I'm worried a bit about my future as I obviously need to think about finding associates for work I could bring in and I will need stuff like northern gas to keep going. You're not going to stop training are you?? X*
>
> Claimant: *I'll probably go back into a business to be fair. I miss a team to bounce ideas off, even though they were crazy at* [client name and previous employer] *they were funny to work with! Oh god you don't need to worry about your future.* [client name] *will keep giving you work, as will* [client name] *, plus* [client name]*! Your private coaching is going amazing too and you love that*.

48. On 3 July 2017, the claimant sent an email to the respondent which ended with the following paragraph:

> *" I'm glad we've talked about it. I wouldn't feel right leaving and not saying how I feel. At least we tried, more than most people would do! I feel much clearer today that its all going to be ok. I'll work out what we have left to do jointly and send it over to you."*

49. The claimant's husband (JD) contacted the respondent by text on 3 July 2017. He told the respondent that he was contacting her without the claimant's knowledge. JD was also candid in his message. We note the following extracts.

> "*I know you won't have had any idea that she was feeling so low. I don't know exactly what she has said to you as it's getting blood out of a stone with her sometimes. The truth is she's been really struggling with the amount of work and balancing this with looking after* [child's name]."
>
> "*she's got post-natal depression and prior to this she had pre-natal depression. The past 12 months have been horrific at times and she's not been getting any enjoyment out of her work*."
>
> *"I do think that she went back to work too soon and this has had an impact on her mental state."*
>
> *" My personal view is that if its making her miserable then its time to face up to it and develop an exit strategy without leaving you in the lurch."*

50. These and other comments were made during a dialogue during which the respondent expressed sympathy and support, which we find was genuine.

51. The respondent did not mention this dialogue to the claimant. Her (reasonable) view was that JD had contacted her in confidence.

Dialogue of 20 July 2017.

52. The bundle includes an exchange of messages between the parties which took place on 20 July 2017, as the claimant was packing to go on family holiday.

53. The dialogue started about holidays and difficulties with packing. Then the respondent noted that she might be a little quieter whilst the claimant was away and would start to put together a document about what tasks need to be done to assist in their business separation, the claimant's handover, and ongoing involvement in delivery of client work. At this stage the claimant was delivering training on various projects for clients that the respondent had secured. Under the arrangements that had been put in place from the beginning of 2017, the claimant would be remunerated for a proportion of the work. The respondent asked the claimant to have a think about how much involvement in the work she would want going forwards.

54. The claimant replied

> *Thanks but I've got everything pretty much finished that I need to, I need to send a few bits out tomorrow but I can do that from the car. I think it's just the* [various client projects including international women's day] *that we need to do together isn't it? I'm trying to pick up extra bits to do on my own (associate stuff) to tide me over money wise until January. I'm happy to carry on with* [client name]*, it's a bit in limbo at the moment as we are waiting on stuff from them so not loads we can do at the moment x*

55. The respondent replied to ask what the claimant's plans would be in January.

> *Oh that's good, are you thinking of applying for jobs in Jan or are going to set something up on your own now for the associate work and maybe carry that on?*
> *That international women's day thing might be one we have to pull unless they're okay with us both being from separate businesses and coming together to deliver it. Just think it might be weird to promote a business we're not both part of (and probs won't even exist by then). We can think about that one though and how to manage it x*

56. The respondent then raised the subject of the claimant's formal resignation. This was prompted by the prospect that the claimant might accept associate work (meaning work for competitor training providers/HR consultancies) and there was a concern that if she did so, she might compromise EE. Sometimes restrictions are placed in agreements between provider organisations and associates which oblige associates not to compete with the organisation that they engage with. Both claimant and respondent acknowledged such restrictions existed although the claimant's position was they were not always contained in agreements between associates and consultants but sometimes they were.

57. The claimant responded:-

a. By assuring the respondent that she would not take on associate work that would compromise EE

b. Stating that she was not sure what she would do in January, it was "a way off", that she was happy to continue with the separate work until the New Year, they shouldn't turn down work and that the 2 of them should probably meet up to discuss things.

58. This was not satisfactory as far as the respondent was concerned. She told the claimant that she wanted to "*drive the business forward"* and that she could not do that as she wanted to, if the 2 of them remained as shareholders.

59. The exchange of messages continued. The claimant stated some uncertainty about what to do and said that the 2 of them needed to talk; the respondent stated that the claimant had made clear that she wanted to leave and, following this news, could not leave things *"in limbo."*

> *We both had a strategy at the start of the business to grow it rapidly. Your circumstances then changed and for the last 12 months we haven't been aligned in driving the business forward and you haven't brought in much work or done much BD. That's fine, but we can't operate as a partnership when we're so misaligned, or after the conversations we've had over the last few weeks. How can we develop a business when we're driving it in completely different directions and one director has said they want to leave? To be honest I think the conversation needs to be about which one of us exits now if you've changed your mind, but I think if either of us has been backed into a corner it's me, given you've just announced you want to leave and are now saying actually you don't after all but not only that, you're also going to start working with other partners and change the business model.*

60. The message exchange continued. The claimant noted that she may be changing her mind, but that texting does not work as a form of communication and again proposed they meet.

<u>Meeting between claimant and respondent on 2 August 2017.</u>

61. On 2 August 2017, shortly after the claimant had returned from holiday, the parties arranged to meet in a coffee shop. One of the complaints that we need to make a decision on concerns an allegation by the claimant that the respondent made a comment at this meeting that, when the respondent found out about the claimant's pregnancy, she decided that the claimant just needed to go (meaning she needed to leave EE). We note the way the claimant describes this in her witness statement (para 88):-

> "She *was overly smiley and clearly trying to get me on side. She said that when I told her I was pregnant she thought 'right I just need to go off now' I was pleased that she admitted this as I finally felt like I wasn't going mad and her feelings about my pregnancy had been negative resulting in her side lining me."*

62. The respondent simply denies that she made this comment during the discussion.

63. In an email dated 29 July 2017, the respondent set out what she saw as the options for them and to agree to meet. This email sets out the basis of the meeting.

Before you went away you told me that you felt that we should meet to discuss what we do next and, on reflection, I think you are right. I think that we should meet and sort things out as soon as possible because we both seem to be finding the current situation very stressful.

For me there only seem to be two practical options. The first is for us to wind up the business and us both set up again under our own brands. Ensuring as little disruption as possible to the clients I brought in would be my priority with this option, as I'm sure it would be for you with yours. Doing this would enable us to cleanly wrap up any outstanding tax and VAT bills and communicate out to our clients what is happening in the way we would like.

The second option would be for me to, effectively, buy you out with some money for the work you have put into building the brand. We would have to sort out the future operating details but it would mean that you could still earn money from EE in the future as an associate. One advantage of this for both of us is that there would be no disruption to the clients and no particular need for any communication to go out.

Of course this is looking at things from my point of view and please don't regard any of this as an ultimatum – it isn't. We are friends and I am happy to discuss with you any alternative suggestions that you want to put forward. I hope that whatever solution we decide on, we can remain friends and work together in the future.
Let me know when we can meet.

64. We also find (having been referred to message exchanges in the bundle) that:
    a. the meeting ended on friendly terms.
    b. The meeting ended with the respondent agreeing to make a payment to the claimant for her shareholding, although there was no discussion about how much that would be.

65. We find that the respondent did not make the comment stating that, when the claimant became pregnant, she just needed to leave ("go off"). We make this finding for the following reasons:-
    a. Because, having heard the respondent's evidence, we are satisfied that was not (and never was) her view:
    b. accepting the claimant's evidence that the respondent was trying to get her on side (see para 61 above), such a comment would have been inconsistent with that strategy.
    c. The meeting ended on friendly terms.

66. As noted above, the parties left the meeting with an expectation that the respondent would make a payment for the claimant's shares. The claimant was to consider what amount she would agree to.

67. Unfortunately, the parties had different expectations about how much should be paid for the claimant's shares, which then led to their relationship breaking down. However, it is clear that in the meeting between the parties on 2 August 2017, both agreed they should go their separate ways, and both agreed (in principle at least) the mechanism for that to happen.

68. The claimant wrote to the respondent late in the evening of 9 August 2017, with a valuation of £35,000. She also noted that, whilst she recognized their quasi partnership would end, she would have preferred to delay it until the end of the year rather than making such a big decision at that stage. She also made a number of suggestions as to clients and existing work.

69. The respondent replied on the morning of 10 August. The reply was brusque. The respondent stated her views in terms of valuation of EE; that it had no assets other than goodwill. Although she did not state this in the reply, we are clear that her (and the claimant's) expectation was that each would retain their own client base on the claimant's departure from EE.

70. In her reply the respondent put a counteroffer to the claimant; that the claimant could purchase the respondent's 50% shareholding for £25,000; noting that if the claimant did not accept this offer (discounting the claimant's valuation by £10,000) then:

> *"I will find it very difficult not to believe that your offer was either not a genuine attempt to resolve the situation, or it was an attempt to rip me off, particularly in light of the conversation we had last week about how Evolving Edge is effectively worth nothing, and certainly no more than the remaining bits of guaranteed future work; which is, at this stage of the year, very little.*

71. Relations between the 2 then quickly deteriorated. The respondent continued to push for certainty and at this stage proposed other options, that she would resign as a director or petition for EE to be wound up. She set out what she said would be difficult consequences for the claimant should the respondent follow either of those options.

72. On 16 August 2017, the claimant's husband (JD) contacted the respondent and suggested a meeting to try to find a resolution. He also informed the respondent that the claimant had been diagnosed with post-natal depression.

73. We note from the email exchange that the respondent was reticent about a meeting. Having been told by JD that he wanted to explore a resolution, she replied that he would be wasting his time to try to meet and persuade her to pay a large sum of money. However, she offered to meet JD at a coffee shop close to her home (and therefore some distance from the claimant's and JD's home).

74. JD did not consider the respondent's correspondence or the offer to meet at the proposed location as at all constructive. His reply (dated 18 August 2017) was as follows:-

> *"I genuinely feel like a line needs drawing under this. Caroline will start to feel much better once you are out of each other's lives and she can get on with what she wants to do. I've spoken to Caroline and we want to wind the*

company up straight away. You can then both arrange to work with your existing clients in separate businesses. As it's not my company can you make the necessary arrangements for the winding up of the company? I'll make sure any necessary paperwork is completed from this end."

75. On the same day the claimant sent an email to the respondent:

"Please take this email as confirmation that I wish us to dissolve the company. I authorise [JD] *to communicate with you and act on my behalf. I will handover the Fulcrum work today and save any notes in the Fulcrum folder."*

76. As a result of these communications, the respondent started to look at the process and costs of winding up a company. She found that it took time and would also require the payment of costs to cancel subscriptions early and some professional fees. In all about £1640 would have to be paid (page 1063).

77. Later, on the same day (18 August) the respondent's husband emailed the claimant detailing the monthly allocation of income. He raised an overpayment issue – stating that the claimant had been overpaid on a previous project by about £480.

78. JD replied on the claimant's behalf (21 August 2017, page 1064), disputing that there had been an overpayment and asking that communications be with him. He also stated his discomfort with the respondent's husbands ongoing involvement with EE's finances and that he (JD) should also check the details before they are submitted to the auditor.

79. In the same email, JD also referred to the claimant's illness, noting that she had been declared by her GP, as unfit to work from 14 August 2017. JD noted that the illness was maternity related and fell within 39 weeks of the birth of their child. JD informed the respondent that, as such, the claimant qualified for statutory maternity pay.

80. Later that day, the respondent emailed EE's auditor:

Hi Andrew,
As I mentioned in my emails this morning, Caroline has requested a wind up of the company and her husband is trying to get involved in the finances, despite having no accounting experience. Caroline is suffering with mental illness and, as per her husband's email this morning, has apparently been signed off sick. He is attempting to act on her behalf in the business and, without any understanding of how we run our accounts, seems keen for Caroline to be paid money that isn't owed to her. He has implied that this will possibly be paid back at a later date but has not confirmed this. This makes me incredibly nervous, particularly given that Caroline, in her fragile mental state, still has access to the bank account - also meaning he can access this via her. Every penny in our business account has been allocated already, so removing any that isn't owed will leave a shortfall in our VAT or corporation tax provisions.
For this reason, I have sought advice and taken some steps to safeguard the company assets, and just wanted to make you aware.

I have transferred out of our business bank account all allocated money, leaving in a buffer of £150 to cover any overheads for the remainder of the month. This money I have transferred totals £19,629.29 with £10,662 of this allocated to our VAT bill due in September and £8967.29 allocated to our corporation tax provision. We have £5-6k due in through invoices to cover the corporation tax shortfall.
This money will be held safely in my personal account and ring fenced to be used solely for business matters. I will keep a full log of any transactions and ensure the money due in is allocated accordingly.
As mentioned this morning, although Caroline has asked that the company be wound up immediately, she has not taken the practical steps I asked her to in order to make this happen. In her current state, it is of course possible that she will change her mind.

81. On or about the same day the claimant took steps that ensured the respondent could not access a shared Microsoft office account and a business account called Canva. She also took steps to freeze EEs bank account (albeit that it did not at that stage have very much money in it as the respondent had just transferred funds to her own account – see above). The respondent raised this and other matters in emails with JD dated 22 August 2017. We need to note 2 other subjects covered in the respondent's long email sent early in the morning of 22 August 2017.

a. The respondent replied to that part of JD's email that stated the position about the claimant's illness and entitlement to SMP. This is what the respondent said:-

As with the situation when Caroline claimed her initial maternity pay, where there is not enough money in the business to cover payments, an application to HMRC to claim the money upfront must be made. This is what you will need to do again in order for Caroline to receive the SMP you would like to claim. Andrew helped Caroline to arrange this last time.

b. The respondent also commented about the claimant's mental health and JD's involvement:

That brings me to your repeated suggestion that Caroline and I need to separate our lives in order for her mental health to improve. That implies that either I, or our relationship, is responsible for, or contributes in some way to, her current mental state and I utterly reject any such suggestion. Instead, I recommend that you look at your own support, or lack of it. There can be no question that her problems stem from pregnancy and birth, but how supportive were you? I had told Caroline to take whatever time off she felt was necessary after having Jack, but only nine days after the birth, she sent me a message to tell me that you thought she should do the sessions in London on the 10th and 11th of April, which involved an overnight stay. In other words,

> *you wanted her to be back at work, and away from her newborn overnight, three weeks after giving birth. Yet on July 3rd you sent me a message including "I do think that she went back to work too soon and this has had an impact on her mental state with feelings of guilt etc". I'm not surprised she has struggled with the sort of support you have given her.*
>
> *When I met Caroline recently, we came to the joint conclusion that the only way to move forward was to separate and me buy her shares in Evolving Edge. To help her and ease things with the clients, I offered to let her continue with committed work under the brand. She seemed happy at the end of the meeting and I left believing that we had retained our friendship and would work for each other in the future. Then you got involved!*
>
> *The next thing was that Caroline suddenly demanded £35k for her shares. I am certain that this figure came from you because, not only had Caroline agreed that Evolving Edge was virtually worthless, only somebody who has no idea how to value a business like Evolving Edge could come up with such a ridiculous figure. That nonsense put an end to the deal.*
>
> *I feel sorry for Caroline because if, as you appear to claim, you are so concerned about her and believe that an immediate separation would benefit her health, I fail to understand why you torpedoed the deal, unless it was simply greed on your part. If the deal had gone through, the separation could have been immediate with the prospect of work when she was feeling better, and she would have got a few thousand pounds. As it is, it is going to take months to achieve a final separation, it will cost you money and, if you are lucky, you will walk away with nothing. Frankly that is exactly what you deserve."*

82. On the same day (22 August 2017) EE's auditor contacted both parties to tell them that his fees were outstanding and that winding up the company might not be the best option. He asked whether they had discussed one party buying out the other party to allow EE to continue. He also made clear that instructions would have to be joint instructions; otherwise, he would need to resign.

83. The claimant replied directly to the auditor. She did not copy the respondent. In her correspondence, she informed the auditor of her maternity related sickness and asked him to process her SMP as he had done when on maternity leave (page 1077).

84. The auditor's response is as follows:

> *I'm afraid I can't do anything without approval from both Directors. With regards to the SSP/SMP even if the payroll is processed this month it will need to be reclaimed from HMRC and it's a slightly more*

> *complicated process than with the SMP advance funding. EE would need to pay or owe you the amount and then reclaim it from HMRC, which can take up to six months.*

85. The respondent also replied directly to the auditor without copying in the claimant.

> *I appreciated your suggestion about one of us buying the other out. This was what I had hoped would happen as it would be far more straightforward. It still may be an option but I probably won't know for a couple of weeks, so will keep you posted on the situation. I will ensure that, whichever way it goes, all of your fees will be paid.*

86. From 14 August 2017, the claimant was too ill to work due to post-natal depression. As noted already, she had by then frozen EE's account. The respondent took steps to remove the claimant from the account, so that the account could be restored for business purposes. In so doing, she was required to complete a standard bank form stating tha the claimant had left the business. We accept the respondent's evidence that account (1) she informed the bank of the true position (the claimant's long-term absence due to illness) but that (2) it was only by completing this form that steps could be taken by the bank to restore the account.

Respondent's offer to purchase shares – 24 August 2017.

87. By 24 August 2017 and following the events noted above, relations between the parties had deteriorated further. The respondent took some legal advice and then wrote a long letter to the claimant, setting out the respondent's position and offering to buy the claimant's shares for £5000 plus writing off what the respondent believed to have been an overpayment to the claimant. She made clear the offer was non-negotiable and had to be accepted by 8 September 2017. The respondent also set out alternatives:-

a. To wind up the company (and provided the claimant with a form to sign if that was her preferred option)
b. That the respondent would resign as director (but retain 50% shareholding), inform clients that she no longer had an active role in EE and proceed in business by herself.

88. The claimant replied to note the respondent had behaved unlawfully in withdrawing funds from EE's account and to require the return of those funds before the account would be unfrozen. She also raised queries about other funds having been withdrawn and told the respondent that by changing access arrangements to Canva, she had not denied the respondent access to company materials.

89. The respondent then went away on family holiday for 2 weeks. Whilst away she found that learned that changes had been made to an IT account called 1and1. This account included EE's website domain. The claimant regarded the 1and1 account as a company asset. The respondent regarded it as her own account as she had personally set it up and funded it for some time. Whether or not this was a company asset we find the claimant changed the access arrangements to the account without informing the respondent and in doing so, denied access to the respondent.

90. In turn, the respondent denied the claimant access to a finance account called Quickbooks.

91. We find that both parties behaved badly towards each other between 21 August and 8 September 2017; the respondent, in removing EE's funds from the bank account and denying the claimant access to Quickbooks; the claimant in disrupting access to various accounts used by the parties to carry out their work.

92. These actions were part of (and an indication of) the increasingly bitter dispute between them.

Events leading up to the claimant's resignation

93. The parties were unable to reach agreement. The claimant rejected the respondent's proposals of 24 August 2017 (see para 87 above) and proposed mediation. The respondent did not initially dismiss the idea but first wanted to understand what outcome the claimant wanted, given her rejection of the respondent's proposal (one of which had been to wind EE up – a resolution that had been proposed by the claimant).

94. The claimant instructed solicitors and the respondent received correspondence from them, dated 29 September 2017 (page 1178). This correspondence set out the claimant's position:-

c. That the respondent was in breach of her fiduciary duties as she was indicating she would take steps to ensure EE ceased trading;
d. That the respondent must return withdrawn funds to EE's account

95. In their letter the solicitors also raised the issue of SMP, noting that the claimant had returned to work on 25 September, but she had not received her SMP.

96. The solicitor's letter made an allegation of discrimination:-

> *We are informed that the above steps have arisen as a result of our client's pregnancy and maternity leave along with her recent discussions regarding her future with the company.*
>
> *We must remind you that as a director you must always act in the best interests of the company, and any private decision by our client to consider exiting the company must be treated as a separate matter. Until any agreement has been reached as to any parties exit or otherwise from the company, both of you must continue working in the best interests of the company failing which you face potential personal claims for any loss suffered by the company as a result of acting in contravention to your fiduciary duties.*

97. We note the second of the 2 paragraphs quoted above. The respondent was aware of her obligations to the company and that, whilst the parties had agreed the new profit share arrangements, the success she was starting to see with client work, was likely to benefit the company as a whole. That is why she wanted a resolution to the impasse the parties found themselves in.

98. The claimant's solicitors wrote separately under cover of without prejudice, offering to sell the shares and settle all claims for a global sum of £13,520 (which included a valuation of the shares at £6000 and the sum of £6200 that was claimed as being owed to the claimant under certain contractual arrangements with a client).

99. The respondent replied by letter dated 3 October 2017 (page 1187). It is a long reply, in which the respondent sets out her position and denies that she has behaved improperly. The respondent also sets out her complaints about the claimant's behaviour.

100. Included was the respondent's reply to the claim that the claimant was owed a sum of money from work carried out for a particular client. The respondent denied that and also noted that client had "*reassessed any involvement Evolving Edge has in their future training delivery, overriding any previous discussions regarding intended training."*

101. The respondent also made a counteroffer, that she would buy the claimant's shares for £4000.

102. Long correspondence between claimant's solicitor and respondent continued, the detail of which is not relevant except as referred to below.

103. On 12 October 2017, the respondent increased her proposed purchase price to £6000 but also made an alternative proposal that the claimant could purchase the respondent's 50% shareholding for £6000. On 17 October the claimant, via her solicitors, accepted the proposal in principle that she would buy the respondent's shareholding. The terms used were these

> *our client is prepared to buy your shareholding in Evolving Edge for the sum of £6,000 provided you confirm that the VAT and corporation tax is up to date and that there is sufficient monies held back to cover any future liability for Vat and corporation tax with regard to jobs already invoiced and paid.*

104. On 15 October 2017, the respondent wrote an open response to correspondence from the claimant's solicitors dated 11 October 2017 in which they had made further allegations of unlawful behaviour by the respondent. In her letter dated 15 October 2017, the respondent accused the claimant of acting unlawfully in a number of respects, including an accusation that the claimant had wrongly used the respondent's name to try to win business and an accusation that the claimant had "fraudulently" gained access to the respondent's IT accounts. She then stated in the same letter that she would contact certain clients and contacts to *"give them a factual account of your appalling behaviour."*

105. In that same letter she demanded the claimant's resignation. We are satisfied that, by this letter, the respondent was attempting to place pressure on the claimant and advisers to accept the offer that the respondent had made (and remained outstanding as of 15 October 2017) which was to purchase the claimant's shareholding for £6000. She did so because the parties were in dispute and the respondent wanted a resolution.

106. As it was, the claimant agreed in principle that she (the claimant) would purchase the respondent's 50% shareholding for £6000. Some conditions applied to that, which were to ensure funds were available to pay tax liabilities.

107. By letter dated 18 October 2017 (page 1222) the respondent agreed to this proposal "*as long as this takes place without undue delay."*

108. As it was, the parties did not manage to reach agreement. The claimant sought further assurances and other disputes arose, including who should retain certain clients. By letter dated 27 October 2017 (page 1231) the respondent tried to force the position by applying an ultimatum of completion by 30 October 2017. This is what she said: -

> *You have stated that your client seeks a speedy resolution but I see no evidence of that. In my considered view, your client's changes of mind and wishes have been a deliberate strategy to delay a solution to the problem, and I would regard her challenging a list of clients that she has already agreed to as another time waster. As far as any amendments are concerned, I find it difficult to imagine anything that is not another time-wasting and unnecessary complication.*
>
> *The deal on the table is very simple. I have offered to sell all my shares in Evolving Edge to your client for £6,000. She either wants to buy them and is in a financial position to do so, or she doesn't.*
>
> *So, I request that you respond to my previous correspondence no later than 3pm on Monday 30th October with a definitive answer. By this time, twelve days will have passed since I sent my response. If you fail to do so or make a further attempt to delay resolution, my offer to sell my shares will be withdrawn and I will continue on the course I previously stated. As well as reserving my right to take legal action, this will, of course, include giving past, present and prospective clients a factual account of your client's fraudulent and damaging behaviour. When you threatened action in relation to slander, you obviously ignored the word "factual" that I had used. I can assure you that I would never fabricate anything regarding your client's behaviour and have absolutely no need to do so.*
>
> *Because your failure to respond has left a very short time until Monday, I will send a copy of this directly to your client. I can assure you both that this really is the last opportunity to reach an amicable solution.*

109. It is clear to us from their letter of 27 October 2017 (in response to the respondent's letter of the same date) that the claimant's solicitors were hopeful of a completion. However further issues were raised for agreement. One of those was the transfer of the EE website domain name. We note here the respondent's refusal to transfer this over. We also note that in her evidence to the Tribunal she accepted that was perhaps petty on her part. She is right; and we would have reached that conclusion had she not volunteered it. However, that was far from the only issue which arose, and which stopped the parties from reaching agreement.

110. By 30 October 2017, the claimant reached the decision that she was not prepared to buy the respondent's shareholding on the basis of the terms proposed. Instead, she submitted her resignation from her position as director of EE. It is a long resignation letter and makes various allegations against the respondent, many of which are repeated in this claim.

Other relevant findings

111. We record our findings about 2 other relevant matters.

Comments made by the claimant in a discussion between her and Janine Smith.

112. This is relevant to issue 12. We heard evidence from Laura Scarf that it had been reported to her by Janine Smith (JS), that the respondent had told JS that the claimant was suffering from post-natal depression. Notably we did not hear from Janine Smith herself.

113. LS's evidence is that JS told her about this discussion/disclosure on or about 10 September 2017. But she was unable to provide evidence about when the discussion between JS and the respondent had taken place.

114. The respondent's evidence is straightforward – that she did not make this statement to JS; also, that she was on holiday in Dubai during the first 2 weeks of September.

115. We need to decide whether it is more likely than not that this comment was made. Our decision is that it was not. It is relevant that SB was overseas during the first 2 weeks of September. There is no evidence about when or where this discussion took place.

116. We did not hear evidence from JS.

117. We did hear from the respondent (the only other person allegedly involved in the discussion), and we accept her evidence on this point. She did not disclose to JS that the claimant had post-natal depression.

Submissions

118. We heard submissions from both representatives and thank them for these. We also received written submissions from Ms Levine.

119. We have considered oral and written submissions in reaching our decisions on the various complaints and issues. We do not set out the submissions in this judgment although reference is made to some submissions in our conclusions below.

The Law

Equality Act Claims

Time limits

120. Section 123 EqA provides that complaints may not be brought after the end of 3 months "starting *with* the *date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

121. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

122. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."* (para 25 of the Judgment)

123. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

   - the length of and reasons for the delay;
   - the extent to which the cogency of the evidence is likely to be affected by the delay;
   - the extent to which the party sued had co-operated with any requests for information.
   - the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
   - the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the claim were relevant considerations to whether to grant an extension of time.

Direct Discrimination – section 13 EA

124. Section 13 states:

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

125. An important question for us is whether the claimant's sex was an effective cause of the treatment which we find. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question. We also note the following:-

a. The House of Lords in **Nagarajan v London Regional Transport 1999 ICR *877*, HL,** held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

126. Direct discrimination under section 13 is about less favourable treatment. It requires comparison. Where a claimant does not have an actual comparator to rely on, then it is possible to rely on a hypothetical comparator, one who resembles the claimant in all material respects, except for the relevant protected characteristic. In other words, a man in substantially the same circumstances.

127. For the avoidance of doubt, we note the issue of a comparator only raises in complaints under section 13. There is no requirement for a comparator (real or hypothetical) in relation to the complaints made under section 18, which we comment on next.

Pregnancy and Maternity discrimination - Section 18 EQA

128. The relevant parts of section 18 state:

(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) A person a discriminates against a woman if a treats her unfavourably because she is on compulsory maternity leave

(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 sort to exercise the right to ordinary or additional maternity leave.

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

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

a. if she has the right to ordinary and additional maternity leave at the end of the additional maternity leave. Or if earlier when she returns to work after the pregnancy

b. if she does not have that right at the end of the period of two weeks beginning with the end of the pregnancy

129. This section protects expectant and new mothers against "unfavourable treatment" by their employer, and not "less favourable" treatment as in section 13. It is not necessary therefore to identify a comparator.

130. The claimant makes allegation of unfavourable treatment under section 18 EQA, in respect of each complaint except the final one. We note here:-

e. The terms of section 18(6) EQA (see above) in defining the *"protected period"* during which the protection under section 18 applies.

f. The terms of section 18(5) which provides that where a decision is taken during the protected period, then the treatment is regarded as having occurred during the protected period even when the implementation of that decision occurred after the end of the period.

g. The decision in **Lyons v. DWP Jobcentre Plus UKEAT/0348/13** that the protection under section 18 EQA ends at the end of the protected period. As such, it did not apply in that case to the claimant's dismissal after a period of illness, even though the illness was pregnancy related.

131. The principles from the cases and materials referred to at para 125 above, apply to section 18 claims; that is to say that pregnancy/maternity does not need to be the sole or even the principal cause of the treatment complained of. It must have been a material influence.

Burden of Proof

132. We are required to apply the burden of proof provisions under section 136 EA when considering complaints raised under the EA.

133. Section 136 states:

" (*1) This section applies to any proceedings relating to a contravention of this Act.*

(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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."

134. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. It is the annex to the judgment particularly that provides

guidance (the amended Barton guidance). We note the following particularly from the guidance (recognising that the guidance is now relevant to the application of s136 EqA)

a. That it is guidance only and not a substitute for the statutory language
b. It is for the claimant to prove on the balance of probabilities, facts from which the tribunal could conclude, in the absence of adequate explanation, that the respondent has committed an unlawful act of discrimination. If the claimant does not prove such facts, then the claim will fail.
c. It is unusual to find direct evidence of discrimination.
d. It is important to note the use of the word "*could*" at s136(2) – that, at this stage of analysis, a definitive determination does not have to be made.
e. The Tribunal needs to decide what inferences of secondary facts can be made from the primary facts at this stage, on the assumption there is no adequate explanation for those facts?
f. Where the claimant has proven facts from which the Tribunal could conclude that the respondent has treated claimant less favourably on the grounds of (in this case) the claimant's race then the respondent must prove that it did not do so. It must pro9ve that the treatment of the claimant was in no sense whatsoever on the grounds of the claimant's race.
g. The tribunal will need to assess (1) whether the respondent has provided an explanation for the relevant facts and (2) that the explanation is adequate to discharge the burden of proof on a balance of probabilities.
h. The facts necessary to discharge the burden of proof would normally be in the possession of the respondent and a tribunal would therefore normally expect cogent evidence to discharge that burden of proof.

135. There can be occasions, particularly where a claimant is relying on a hypothetical comparator (as here) where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the Respondent treated the claimant in the way that it did. See for example the EAT Judgment in **Laing v. Manchester City Council [2006] IRLR 748 (**paragraphs 73 to 77**)**. However, we also note the EAT's caution against Tribunals adopting this approach too readily - in the recent case of **Field v. Steve Pye and Co (KL) Limited [2022] EAT 68** and particularly paragraphs 43-46.

136. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassy v. Nomura International [2007 ICR 867]** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Discussions and conclusions

137. We note below our conclusion against each of the factual allegations, applying the decision-making process that statute and case law requires and in accordance with

those questions asked in the list of complaints and issues in paragraphs 2 and 3 of that list (depending on whether pregnancy discrimination, sex discrimination or both).

138. Before we set out our conclusions to the many and various complaints, we note some points applicable generally:

a. Generally, Employment Tribunals consider and decide complaints made by employees against their employer; where there is something of an unequal bargaining relationship. In this case however, both parties had equal positions within EE. We agree with Ms Levene's submissions that this case arises from a commercial dispute. The parties decided that they should go their separate ways from a business. There was a dispute about how that should happen. There was no mechanism within documents such as EE's articles of association or a shareholder agreement, to assist in resolving a dispute, or to avoid a dispute where one or both business partners decided that the business partnership should come to an end.

b. After the claimant gave birth in February 2017, she suffered from depression. In some of the complaints (issue 9 for example) the claimant alleges that the respondent treated her less favourably or unfavourably because she was ill. That is not our finding. The respondent's actions arose from the claimant's statements and behaviour including (and particularly) her statement that she wanted to end the business relationship between them, a statement that was reinforced by the claimant's husband. Whilst the claimant's illness might have affected some of her actions, it was not the reason the respondent acted as she did. It did not in any material way, influence the respondent's actions.

c. In each of the complaints (other than the last) the claimant alleges direct discrimination (protected characteristic sex) and pregnancy/maternity discrimination under section 18 EQA even though various of the complaints occur after the protected period. We find that the claimant did not have the protection of section 18 following her return from maternity leave. We have also considered the terms of section 18(5) EQA, and we are satisfied that the respondent did not reach a decision, during the claimant's maternity leave, that the 2 of them needed to go their separate ways. It is clear to us that this was the claimant's stated proposal, not the respondent's.

d. We have decided to treat the fact of the claimant's pregnancy, as enough of an indication that the respondent's treatment of the claimant during and after her pregnancy could have been less favourable treatment because of the claimant's sex or unfavourable treatment because of pregnancy. As such we have looked for an explanation for the respondent's behaviour in respect of each and every complaint. The explanations (and our conclusions) are the same for a number of them, particularly those under issue 11; but in reaching these conclusions we have considered individually each and every complaint.

139. We note next our decision about time limits (issue 4). We have decided that it is just and equitable to reach decisions about all allegations including those that may be out of time. In reaching this decision we took into account:-

a. That we had heard the evidence about all the issues and so were in a position to reach a decision

b. That, had the claimant been successful with some or all the complaints, we may well have concluded that there had been conduct extending over a period for the purposes of section 123(3) EQA

c. That the matters in dispute arose during the claimant's pregnancy and shortly thereafter. As a Tribunal we are well aware of the potential for pregnancy/maternity discrimination and a strict application of the 3-month time limit at a stage when a claimant was an expectant and new mother (including periods of time when an employee is not in the workplace) would often in our view lead to unjust outcomes.

140. We set out below the various complaints. Our responses cover not just our findings on the relevant facts but also (under each of the complaints) our conclusions under issues 2.2 to 2.7 and issues 3.2 and 3.3.

Issue One On 29 August 2016, did the respondent amend the "Ways of Working" document by adding "use contraception in the future";

141. She did. See paragraph 32-34 above. What is also clear from our findings is that we do not consider that comment to have been unfavourable or less favourable treatment of the claimant.

Issue 2. Between November 2016 and January 2017 did the respondent request and/or orchestrate a structure of the company which had the effect of reducing the claimant's remuneration, to the substantial disadvantage of the claimant? In doing so, was the claimant was misled and manipulated.

142. See our findings at paragraphs 22 to 28 above. We are satisfied that the amended remuneration arrangements are as a result of a commercial negotiation and agreement between 2 business partners. The claimant was not misled or manipulated.

143. In so far as the proposal to alter remuneration arrangements amounted to unfavourable treatment of the claimant at all, the claimant's pregnancy was irrelevant to the respondent's decision to raise the prospect of renegotiation, prior to the parties agreement.

144. As for the allegation of less favourable treatment, we are satisfied that the claimant's gender played no part in the respondent's actions. The respondent would have made the same proposal to change the remuneration/profit share structure of EE to a hypothetical male comparator in circumstances that were materially the same.

Issue 3. In January 2017, did the respondent offer the claimant an enhanced maternity package and then requested that it be withdrawn?

145. This is a reference to an initial proposal in discussions between the parties about changing the remuneration structure, that income be split on a 95%/5% basis. The parties did not proceed with that option because they agreed another option. It was not put as an enhanced maternity package but as a profit-sharing model going forwards (not just during maternity leave). In so far as it amounted to unfavourable treatment of the claimant, the claimant's pregnancy was irrelevant to the respondent's decision to propose an alternative arrangement and the claimant's agreement to that alternative arrangement. See our findings at paras 35-39. These findings also record that the respondent offered the claimant the 95/5% split but the claimant agreed instead to the arrangement that was then put in place. In so far as it amounted to less favourable treatment, the claimant's gender was irrelevant. A hypothetical male comparator would have been treated in the same way.

Issue 4. In July 2017, did the respondent fail to offer any support and/or to enquire about/even mention the claimant's health when or at any time after, she was informed the claimant had post-natal depression?

146. This is a reference to the weeks following a telephone call between the respondent and the claimant's husband during which the claimant's husband spoke openly about his concerns for the claimant. See our findings at paras 49-51 above. We accept the respondent's explanation as to why she did not mention what had been said to her in that call. We do not regard that as less favourable treatment.

147. It is also apparent from our findings that the respondent was not unsupportive or disinterested in the claimant's health and wellbeing in July 2017. At this stage the parties remained personal friends as well as business partners. As such the respondent did not treat the claimant less favourably than a hypothetical comparator would have been treated.

148. The respondent's behaviour did not amount to unfavourable treatment of the claimant either, but in any event, section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 5. On 3 July 2017, did the respondent accuse the claimant of not wanting to grow the business since getting pregnant, of being disinterested in the business since becoming pregnant and use this as an excuse to force the claimant out of the business?

149. Relevant findings of fact are at paras 43-48 above. We have no criticism of the respondent's conduct on 3 July 2017. Comments about problems in the business relationship between the 2 came from the claimant, not the respondent. The claimant (not the respondent) stated her intention to end their business relationship.

150. We also note that there were no comments using words along the lines in this complaint that were sent by the respondent during the message exchange between the parties at the beginning of July.

151. We are satisfied that the claimant's sex was irrelevant to the respondent's actions/ comment made on 3 July 2017. She would have started to have the same concerns had a hypothetical male comparator, in business with the respondent, expressed similar concerns about the business and their partnership.

152. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 6. On 20 July 2017, did the respondent send hostile messages to the claimant which accused the claimant of not doing much work, apply pressure on the claimant to leave the business and indicate that she wanted the claimant to leave, stating that the claimant needed to resign before she took on any other work and also stating that she was not prepared to "carry on like this?

153. Relevant findings are at paragraphs 52 to 60. We do not find that any hostile messages were sent. In so far as the respondent sent messages asking what the claimant was going to do, from a professional perspective; these were prompted by the claimant's own indications that she wanted to leave EE. In so far as the respondent indicated a preference that the claimant resign her directorship with EE, this was prompted by the claimant's indication that she would engage in work with competitive firms.

154. We are satisfied that the respondent would have applied the same treatment to a hypothetical male comparator who had also indicated an intention to leave and an intention to seek associate work with competitor firms.

155. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 7. On 2 August 2017, did the respondent state in a meeting with the claimant that when the claimant fell pregnant she thought "well I just need to go off" which was again a clear indication that the respondent meant to side-line the claimant and orchestrated a restructure of the business to facilitate this?

156. The respondent did not state this. See our findings at paragraph 61 to 65.

Issue 8. On 22 August 2017, did the respondent made extremely hurtful and unfounded accusations that the claimant's pregnancy-related illness was the fault of the claimant's husband?

157. In her submissions Ms Levene noted this was an allegation that the respondent treated the claimant's husband in an unfavourable or less favourable way and as such it cannot proceed as an allegation by the claimant that the respondent subjected her to unlawful treatment under the Equality Act 2010. We agree.

158. Further, the comments that the respondent did make to the claimant's husband were not made because of the claimant's sex. They were made because the claimant herself had indicated that there was some pressure from her husband for her return to work and because the respondent understood the claimant's husband was apportioning some responsibility for the claimant's poor health on the respondent. Her comments were perhaps a little unkind; but they did not amount to direct discrimination.

159. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 9. On 24 August 2017, did the respondent pressure the claimant to sell her shares for an extremely low price despite the claimant suffering from post-natal depression (a pregnancy-related illness) and specifically requesting time and space to deal with the same?

160. No. This is clear from our findings of fact (almost entirely documented) about the protracted but ultimately unsuccessful share sale negotiation. We also note that the claimant had instructed solicitors at a later stage in these negotiations and, even with their professional advice and assistance, the negotiations (this time for the claimant to buy the respondent's shares) were based on the same value that the claimant complains she was being pressurised to sell.

161. The respondent did place some pressure on the claimant to enter a transaction. But that pressure was applied because of a desire for finality; a resolution. It was not because of the claimant's gender. It was applied at a time that the claimant had recently returned to work from a maternity related illness but it was not applied because the claimant had a pregnancy related illness.

162. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 10. Between August and September 2017, did the respondent refuse to authorise the company accountant to apply for advance funding from HMRC and withheld pre-agreed salary from the claimant, following the claimant's second period of pregnancy-related absence due to post-natal depression?

163. No. It was the respondent who proposed an application for advance funding from HMRC to cover a further payment of maternity pay (see para 81(a) above). There is no evidence that the respondent refused to authorise such an application.

164. In so far as the allegation is that the respondent refused to authorise payments from EE's funds, we are satisfied that this was because there were no funds available from the claimant's profit share and that the expectation at the time was that the company may be dissolved in the near future (and well before any repayment from HMRC would have been made). The claimant's sex was irrelevant to the respondent's actions. We also note

a. that the claimant herself proposed the same approach to funding a further tranche of maternity pay as had been applied during the claimant's maternity leave (see para 83 above).

b. that ultimately this application was made to HMRC for direct funding and that it was paid (we have seen this in the bundle of documents at page 1310).

165. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 11. General conclusions – relevant to each complaint under issue 11.

166. We have considered the respondent's explanations in relation to each allegation under 11 and comment below. However, we have reached conclusions relevant to all allegations about the respondent's conduct between August and October

167. There was by this stage a dispute between claimant and respondent. This dispute arose particularly following the claimant's proposal made on 9 August 2017, that the

respondent purchase the claimant's shareholding for £35,000. From that stage relations between the 2 were unfriendly. Whilst the claimant's husband hoped to be able to intervene to help resolve the dispute that had then begun, his intervention was unsuccessful and his proposal that EE be wound up "straightaway" made even clearer the need for finality. The respondent's view was that the claimant did not help in achieving this, even though the request for it had come from the claimant and the respondent understandably needed an outcome so that she would be able to continue to progress with her business plans.

168. We also note the clear message from the claimant on 18 August 2017 that she wanted EE to be dissolved. Certainly, by then it was clear that the parties were to separate their business relationship. The respondent wanted to achieve that within a short time frame. The respondent's wish to resolve matters quickly, probably added to the dispute that had by then begun. However, the claimant's pregnancy or sex were irrelevant to the respondent wanting to achieve a quick outcome. The respondent was motivated by her wish to continue in business, to retain her client and contacts and to ensure that she alone would then benefit from the business that she generated (not just in terms of immediate revenue but in terms of increasing the value of the business overall).

169. Sadly, and when an outcome was not quickly realised, the behaviour of both parties deteriorated. The dispute impacted the respondent's behaviour; but the respondent's behaviour between (and including) August and October 2017 was not because of the claimant's sex; it was because the parties were in dispute.

170. During this period, the actions of one party led to the other party taking action. But that was in the nature of the dispute and deteriorating relationship between the 2 parties. It was not because of the claimant's sex.

171. Having reached that conclusion, it is not for us, an Employment Tribunal to then pick through the various elements of the dispute and various behaviours of the parties and determine who is right and who is wrong.

172. Section 18 is not engaged in any of the complaints under issue 11.

Issue 11.1. Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business, by threatening to defame the claimant and block the claimant from undertaking additional work?

173. The reference to "defame" is a reference to the claimant's email dated 15 October 2017 (see para 104). The content of correspondence between the parties (and between the claimant's solicitors and respondent) had by this stage become confrontational on both sides.

174. The respondent made these threats because (1) she had been on the receiving end of correspondence from the claimant's solicitors (2)she was in dispute with the claimant and she believed, in making these threats, she would improve her position in the dispute and negotiations. It was not because of (or in any way influenced by) the claimant's sex. Had the respondent found herself in the same position with a hypothetical male comparator, she would have behaved in the same way.

Issue 11.2. Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business by removing the claimant's visibility from all business finance systems, so the claimant had no way of seeing monies coming into the business by removing her from all business systems and emails whilst she was off with post-natal depression and refusing to reinstate her access when she returned?

175. Our conclusion is the same as under issue 11.1 above. As is clear in our findings of fact, we are critical of each party's actions in preventing the other party accessing various accounts. However, this behaviour was part of (and a consequence of) the dispute between the parties. It was not because of (or in any way influenced by) the claimant's sex. Had the respondent found herself in the same position with a hypothetical male comparator, she would have behaved in the same way.

Issue 11.3. Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business by removing the claimant's access to the invoicing system, transferring the company's money into her personal account, making a demand from the claimant for alleged overpayments, accusing the claimant of fraud and making numerous false allegations against her?

176. Our conclusion is the same as under issue 11.1 and 11.2 above.

Issue 11.4 Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business by removing the claimant from the company bank account by falsely declaring to the bank that the claimant was no longer a part of the business and did not disclose that she had done this to the claimant?

177. Our conclusion is the same as under issue 11.1 and 11.2 above. We also note our findings of fact about the claimant being removed from EE's bank account. The respondent acted in this way because the claimant had frozen the account and the respondent was unable to use it. The claimant had taken that action because the respondent had transferred substantial funds. This action was part of an escalating dispute which had reached an unedifying stage at which one party took some action and the other party reacted in a confrontational manner. The claimant's gender was irrelevant. The respondent would have acted in the same way towards a hypothetical male comparator in materially similar circumstances.

Issue 11.5. Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business by, on 3 October 2017, making false declarations that one of the business' main clients were no longer working with them as a way of preventing the claimant being paid the money she was due?

178. See our findings of fact at para 100 above.

179. We conclude that there are 2 explanations for the respondent's comments about the particular client :-

a. That they are true

b. That they are not true but the respondent sought to put herself at an advantage in the dispute and negotiations between the parties.

180. The claimant's sex is not relevant to either explanation. We are satisfied that the respondent did not treat the claimant less favourably than she would have treated a

hypothetical male comparator in substantially the same circumstances. She did not treat the claimant less favourably because of her sex.

Issue 11.6. Between August and October 2017, did the respondent place significant pressure on the claimant to leave the business by pressurising the claimant to resign or she state that she would damage her reputation?

181. This complaint is covered by 11.1 above.

Issue 12. In September 2017, did the respondent disclose the claimant's personal medical information relating to a pregnancy-related illness to a client of the business?

182. No. See our findings at 112-117 above.

Issue 13. Between July and October 2017, was the claimant denied SMP payments as the respondent refused to authorise the accountant to request the SMP payment from HMRC on behalf of the claimant?

183. No. See our conclusions under issue 10 above.

184. Section 18 is not engaged as the facts relevant to this complaint fall outside of the protected period.

Issue 14. In November 2017, did the respondent refuse to allow the claimant to purchase her shares despite already agreeing to a new price?

185. The claimant failed to meet the deadline set by the respondent (30 October 2017) and the parties were unable to agree terms. Those are the reasons that the claimant did not buy the respondent's shareholding. The claimant's sex was irrelevant.

Employment Judge Leach

Date: 18 May 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 May 2023

FOR THE TRIBUNAL OFFICE