

EMPLOYMENT TRIBUNALS

Claimant: Ms Sadia Shakil

Respondent: Samsons Limited

Heard at: Birmingham West On: 17 and 18 April 2023

Before: Judge L Mensah

Panel: Ms S Campbell and Ms Helen Russell

Representation

Claimant: In person

Respondent: Mr M Saleem (Director)

JUDGMENT

1. The Tribunal gave a full oral judgment to the parties on the 18 April 2023. A written judgment was sent to the parties setting out the decisions made, and the calculations as detailed in the oral judgment. On the 20 April 2023 the Claimant requested written reasons.
2. The Claimant brought claims for unfavourable treatment on the grounds of pregnancy and maternity, notice pay, holiday pay accrued and untaken and a declaration of entitlement to maternity pay as the Claimant had already been paid her maternity leave directly from HMRC but based upon part time wages.
3. The Tribunal heard evidence and submissions over the course of two days.
4. The Respondent believe a computer is missing. We make no findings regarding the missing computer as there was not a shred of evidence to support any suggestion the Claimant retained a computer and Mr Saleem accepts, he has not supplied any evidence about the missing computer and did not go so far as to suggest the Claimant was responsible because he accepted, he had no evidence either way.
5. The Claimant has confirmed she will hand back the company keys promptly. We note this only as a matter of record.

Holiday pay

6. The Claimant brings claims for untaken and carried over holiday pay and untaken and accrued holiday pay. If there are express contractual provisions dealing with holiday pay but these do not provide an express right to be paid in lieu of accrued but untaken holiday on termination, it is unlikely that there will be an implied contractual right to be paid in lieu: *Morley v Heritage plc* [1993] IRLR 400 CA, but see *Janes Solicitors v Lamb-Simpson* EAT 323/94 which may give scope to imply such a term where there is no written contract of employment. In terms of the holiday pay claims the Tribunal must answer the following questions:
- What was the claimant's leave year?
 - How much of the leave year had passed when the claimant's employment ended?
 - How much leave had accrued for the year by that date?
 - How much paid leave had the claimant taken in the year?
 - Were any days carried over from previous holiday years?
 - How many days remain unpaid?
 - What is the relevant daily rate of pay?

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

7. The Tribunal has to decide if the Respondent treated the Claimant unfavourably. For subsection 2 of the same section the Tribunal must answer the following:
- Did the unfavourable treatment take place in a protected period?
 - If not did it implement a decision taken in the protected period?
 - Was the unfavourable treatment because of the pregnancy?
 - Was the unfavourable treatment because of illness suffered as a result of the pregnancy?
 - Further,
 - Was the unfavourable treatment because the Claimant was on compulsory maternity leave or the Claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Qualification for maternity pay

8. To qualify for statutory maternity, pay, a mother must have twenty-six weeks' continuous employment by the end of the 15th week before the expected due date and earn a minimum average pay of £123 per week. To qualify for maternity leave, a mother must be an employee and give employer a minimum of fifteen weeks' notice of the fact of pregnancy, the due date and date on which she wants maternity leave to start.
9. An employer then has a duty to tell employee the date on which maternity leave will finish (this will include AML) within twenty-eight days of receiving the

employee's notice. Maternity leave can be taken from up to 11 weeks prior to due date right up to the day of the birth. Mothers must take at least 2 weeks. Maternity leave must be taken in one go. Change of start date – employer must be given 28 days' notice.

10. The start of maternity leave can be triggered before the intended start date if, in the four weeks prior to the start date, the employee is off work due to pregnancy-related illness. If it is only the odd day off rather than a longer-term illness, the employer can agree to waive the start of maternity leave if the employee intends to continue working.

Notice pay

11. The Claimant says her employment was terminated by the Respondent without the Respondent giving any contractual or statutory notice pay.

Findings of facts made by the Tribunal.

12. Having heard all the evidence and submissions the Tribunal found as follows.

13. The Claimant commenced employment on the 5 October 2020 as an accountant/bookkeeper for the Respondent company. The Respondent company is a property development company with at least three offices and twelve staff. Her role included bookkeeping, dealing with PAYE, VAT returns and pay role. When full time, she also prepared regular management reports for the company.
14. The contract of employment before the Tribunal, confirms that the Claimant was initially contracted on a six-month probationary period and thereafter would become a permanent employee. The contract gives details of working hours, pay and other matters we would expect to see as required.
15. One of the first issues in dispute is the effective date of termination of the Claimant's employment. The Respondent say they gave notice of redundancy, and the effective date of termination was the 30 September 2021.
16. We rejected the Respondent's evidence about the redundancy process and documentation, see below. We found the effective date of termination was the 1 October 2021 when the Claimant commenced maternity leave. The Respondent through the evidence of Mr Saleem told us termination was by post and hand delivery. We were not impressed with the evidence regarding hand delivery or post and found Mr Saleem's account lacking credibility and rejected it. We have set out our reasons in detail below.

Holiday pay

17. In terms of the holiday pay year, it is agreed between the parties the Claimant was entitled to 31 days as per her contract and 5.6 weeks as per the Working time regulations. It is also agreed the Claimant took 30 hours holiday in Feb 2021 and no other holidays during the period 1 April 2021 to the 1 October 2021. The contract of employment says no leave may be carried over and no evidence was presented before us to show the Claimant's circumstances

- fulfilled any of the exceptions. By the end of the hearing the parties had managed to agree the majority of the outstanding holiday pay. See below.
18. There was no evidence it was not reasonably practicable for the Claimant to take leave in the year 05.10.2020 to end under the Working time (Coronavirus) (amendment) regulations 2020 SI 2020/365 and this only applies to four weeks.
 19. It is agreed there was no factual dispute between the parties regarding holiday pay in 2020 and it is not material to this case.
 20. The Claimant's evidence before us is she had a verbal communication with Mr Saleem, where she says Mr Saleem agreed to roll over the untaken and accrued holiday from 2020 to 2021. The Claimant explained as a small business she was always encourages to put family first and her family were friends of this family run business. Mr Saleem categorically denied this. The only written evidence regarding holiday entitlement is the contract. Overall, we found the Claimant a consistent witness. On the other hands Mr Saleem told us he had some memory problems, and we preferred the Claimant's clear account. The contract says holidays untaken cannot be carried over but in the light of the evidence of the way Mr Saleem and his son's dealt with this business we accept there was a casual conversation in which Mr Saleem agreed to the carry-over of some untaken holiday which was, like many aspects of the Respondent's evidence, not formalised. We have reduced the carried over holiday by the 30 hours she took and was paid for, as per the pay slips. We were dismayed to see the holiday record keeping is non-existent in this business and the lack of proper record keeping fell as a prejudice against the Respondent. It is very important pay slips accurately reflect what is being paid. Mr Saleem told us he thought the Claimant had taken another holiday, but we note there isn't any documentary evidence to substantiate that she took another holiday.
 21. We accept the Claimant is entitled to her accrued and untaken holiday pay for the period 1 January 2021 to 1 October 2021. That is a ten-month period.

Pregnancy and maternity

22. On the evidence the Claimant was pregnant by around February 2021. On the 30 March 2021 the Claimant phoned Mr Saleem and explained she was feeling unwell with morning sickness, and we accept she told him this. We find the Respondent knew about the pregnancy as of the 30 March 2021.
23. It was clear to the Tribunal that Mr Saleem's knowledge of pregnancy and maternity rights was almost non-existent. He was unable to explain even the most basic maternity rights as he didn't know about the qualifying period. Instead, he repeated several times during the hearing that the Claimant was entitled to maternity pay from a new employer. Anyone with any understanding of maternity pay would have known the Claimant did not qualify in the new job because she did not have the have twenty-six weeks' continuous employment by the end of the 15th week before the expected due date. The Claimant had accrued this with the Respondent and Mr Saleem seemed oblivious to this. He admitted he had not sought any advice either

through any research or otherwise. This is not acceptable. A quick glance at google enables even the smallest of employers to understand their basic responsibilities to pregnant woman and maternity and paternity leave.

24. We accept the Claimant adhered to her contract of employment and made contact with her employer and informed them she was pregnant. The contract of employment suggest the Employer would give advice to the employee as to their rights, but Mr Saleem failed to do this. He told us she was in Pakistan, but this does not release him of the contractual or statutory responsibilities. He failed to delegate this task to anyone else. This left the Claimant without important information regarding her entitlement to maternity leave and pay.
25. The Claimant has provided an e-mail dated the 1 April 2021, which she sent to the accounts department at the Respondents business, and which appears at electronic page 44 of the bundle. In this email exchange Mr Salim confirmed his knowledge of the claimant's pregnancy, something which was denied in the ET3. The Claimant says her employer and his sons would have known from the very start she was pregnant because she suffered with various problems during her pregnancy such as water retention and sickness. In response in oral evidence, Mr Saleem says he didn't take much notice of the fact the Claimant was pregnant as he was in fact in Pakistan at this time. However, it is clear from the email he suggested she go part time until her pregnancy stabilised,
26. [Email 31.03.2021]

“Therefore, after careful thought and deliberation especially considering that I am unable to give you extra work as I am abroad and in view that you are feeling unwell during your pregnancy it would be best if you only come into work for 2 days per week.”

27. We accept, as the Claimant explained, that she was effectively told by Mr Saleem that because of her pregnancy related ill-health he was unilaterally reducing her hours from full time to part time. We accept there was no discussion or agreement to vary the contract of employment. This is a breach of contract and a fundamental one.
28. The Claimant told us she was effectively being left to get on with this variation and the work, without any real direction or input from the director or his sons.
29. We considered this as evidence of a link between the decision to vary her contract from full time to part time and her pregnancy. In other words, it formed part of the motivation for such a variation. Mr Saleem argues the reason for the variation was because of a reduction in work in the business for the Claimant, and this in turn led to her redundancy. If the variation had been because of a downturn in work, as was suggested by Mr Saleem, it makes no sense it would later be suggested in the pleadings the Claimant wasn't performing her role and they needed to clear a backlog of work once she had left because work had not been done.
30. Mr Saleem did not pursue this performance argument before us and in fact confirmed orally, he would not pursue it, but it still left unexplained how the

need for her work had reduced. No documentary evidence had been filed about that and Mr Saleem confirmed missing documents about the Claimant's performance were not filed and not being relied upon. Further, not a shred of evidence was before us showing the Respondent had taken the Claimant down any performance management procedure as per their own capability and disciplinary procedures regarding his inability to perform her role and this email above and the other emails filed failed to show any performance management. At its highest there is one email where Mr Saleem asked the Claimant to complete her 'Trells' app with her work schedule, but nothing further to indicate this was being performance managed or was a conduct issue.

31. Mr Saleem suggested to the Claimant in cross-examination his business was successful, and it would not have any financial problems in being able to pay the Claimant maternity and reclaim it, or put her on furlough. In effect he says he was not financially motivated to avoid paying the Claimant maternity or not keeping her job open for her. However, this is counter to the core of the redundancy argument being pursued.
32. Further, the fact is he refused to offer her furlough, stating that there was very little work for her and informing her that she will work part time from the 1 April 2021, Monday to Thursday did not support such a suggestion. His evidence was inconsistent and overall, we considered it unreliable.
33. It was clear to use the Claimant made it clear in her emails she was not suggesting she take furlough because she was pregnant but because the Respondent was saying there was less work for her to do.
34. We accept, without even a day's notice, he sought to vary her contract fundamentally from full time to part time instead of looking to furlough her if the company did not have the work. During his evidence we asked him if he was suggesting he had a contractual right to vary the Claimant's work from full time to part time. Mr Saleem took us to the Claimant's contract and tried to argue he had such a right but as he started to read the contract there was no such right. The facts he even attempted to refer to the contract as giving a right when it was clear it didn't, in our view undermined his evidence and suggested he was making it up as he went along.
35. What in fact he does say in his emails is,

“The best situation this moment until I come back from abroad and you are more stable with your pregnancy you go on a two day week.”

36. The e-mail seems unequivocal and provides no choice for the Claimant as an alternative to this variation in the terms of her employment from full time to part time. It is such a significant variation and without her apparent consent. This is a breach of the contract signed by both parties and dated to commence on the 5 October 2020. This is a fundamental breach of contract which would have entitled the Claimant to resign. If the motivation for this change is because she had informed the Respondent's she was pregnant and

suffering pregnancy related illness, this would be less favourable treatment on the grounds of pregnancy and maternity.

37. In an e-mail dated the 1 April 2021 the Claimant is asking the accounts department and Mr Saleem to consider placing her on the furlough scheme under the basis of "less work". She suggests that she remains on furlough on this basis whilst Mr Saleem remains in Pakistan, to then go back to full time again once he returns back.
38. The Claimant indicates in her email that going from a full-time role to two days a week would be a financial struggle for her and if she is unwell then she can use their annual leave or sickness to cover those and then if there was work to do then she could possibly work one or two days a week.
39. However, it appears the Claimant continued in her employment until on the 30 April 2021 by e-mail she informed the Respondents that she wished to resign from her post because she could not afford the variation from full time to part time. We had to carefully consider whether this was a resignation which brought her employment to an end.
40. At the hearing we sought to establish what was agreed between the parties regarding the part time working and returning to full time work and this resignation. We noted there was no evidence filed on behalf of the Respondent regarding the change in available work for the Claimant or any evidence of any downturn in business beyond the assertion in his witness statement that the Claimant was not performing her role properly as opposed to there being insufficient work for her to undertake. This is inconsistent and we gave this negative weight in the overall assessment of the Respondents credibility.
41. Mr Saleem put to the Claimant that she was asked in the office to sign a new contract for part time work, but she refused. He suggested this event occurred when he was in Pakistan and was between the Claimant and one of his son's. We note the Respondent did not call this son to give evidence regarding this alleged event and as the Claimant pointed out, Mr Saleem did not say of this in the document he adopted and identified as his witness evidence for the hearing.
42. In fact, the Respondent has not adduced any new contract or anything in writing sending the Claimant a new contract with new terms. The Claimant denied this happened and with the paucity of evidence we preferred the Claimant's account. We find no new contract was provided and in fact the reason no new contract was provided is because it was decided unilaterally the Claimant would continue part time in the same role and as per the same terms and conditions but for her hours.
43. The Claimant told us she could not afford the reduced hours and so tried to negotiate some sort of resolution with Mr Saleem. We preferred the Claimant's evidence regarding the telephone discussions and emails suggesting to her that her part time hours would only be temporary in nature until Mr Saleem returned from Pakistan and could organise the work, he wanted her to do. If this view was not the intended consequence of the discussion, we consider the Respondent was in the best place to set out in

clearer terms that such a variation was permanent and their failure to do so falls as a prejudice which falls on the business. The balance of power in the relationship fell in favour of the employer, the Claimant was pregnant, she was due to have her first child, she needed the full-time job as she was due to be joined by the husband from Pakistan and she faced financial difficulties without work.

44. As the sole breadwinner in the family and in need of the full-time employment she was not in a position to walk away completely and so when Mr Saleem suggested in his email that he would look at the situation when he returned back from Pakistan, we accept she reasonably understood the variation to the temporary. We accept her evidence.
45. We also take the Respondents own evidence that they took on an accountant/bookkeeper to cover tasks that fell within the former remit of the Claimant's role as a strong indication there was a need for her role and for a full-time role. Mr Saleem tried to suggest the two roles were sufficiently different but did not file a shred of evidence in support of this or call his new accountant/booker to give evidence.
46. We accept the Claimant sought to take on a full-time role in another business to try and supplement her income whilst she worked part time and waited for Mr Saleem to return. We do not accept in her email dated 30.04.2023 where she says.

"As there is not enough work for me at the office and I am unable to work part time for a long period as its financially difficult. I have decided to resign".

47. means the Claimant accepted a downturn in her work was genuine. We accept this is what she was being told was the temporary position because Mr Saleem was abroad dealing with his own personal matters. In any event, we accept the Claimant's resignation was not effective as she continued in the business.
48. There would have been a strong motivation for her to continue in her role with the Respondent as she had worked a sufficient period to qualify for maternity leave and this would not have been the case in any new role. This was confirmed by the new employer when she did secure alternative employment whilst working part time for the Respondent. She says she sent her MAT B1 certificate to the Respondent and the second employer. We have seen a letter from the second employer confirming as much. Further, in her email dated 4 May 2021, filed by the Respondent, it shows the Claimant proactive in telling the Respondent that whilst she had managed to find another full-time role, she would be working from home and so would have the time to still do the work asked of her for the Respondent in the evenings and weekends. We accept this is what she did. Mr Saleem did not adduce any evidence to show otherwise and appears to accept the Claimant was doing something for the business, albeit as we say he did not pursue the performance argument in the Response.

49. Mr Saleem sought to argue that during this time the Respondent had decided to reorganise the business and decided to select two part time roles to reorganise. He said this included the Claimant's role. However, the Claimant told us she was not told about any redundancy situation until after she had given notice to the Respondent to take maternity leave. Her estimate week of delivery was the week of the 5 November 2021 and her MAT B1 was issued on the 21 July 2021 after a medical examination on the 7 September 2021.
50. The Claimant told us she sent a copy to the Respondent at the same time. The letter of acknowledgement from the second employer is dated 7 September 2021 confirming the Claimant had informed them of her pregnancy and the due date and that she was not eligible for maternity from the second employer due to the lack of the continuous twenty-six weeks employment by her 15th week of pregnancy. In her grievance letter and evidence, the Claimant told us she told the Respondent on the 12 September 2021 she intended to take her maternity leave on or around the 11 October 2021.
51. Mr Saleem says he and his son's concluded the redundancy investigation and selection of the two part time workers and by letter dated 20 September 2021 they wrote to the Claimant advising her she had been provisionally selected for redundancy. We note this is after the Claimant had told the Respondent about her intended maternity leave,
52. When being cross-examined by the Claimant about his motivation for suggesting she was redundant being because she was pregnant and about to go on maternity, Mr Saleem said he could have sent the Claimant to Peterborough to work as an alternative, which suggested there was work for the Claimant and further undermined any genuine redundancy situation.
53. On the 29 September 2021 Mr Saleem says they sent a second letter inviting the Claimant to a consultation. By letter the same date they terminate her employment with the effective date being the 30 September 2021.
54. We noted that there were various inconsistencies in the documentary evidence filed by the Respondents regarding the claim of being selected for redundancy.
55. In a first document dated 20 September 2021 the letter purports to tell the Claimant she has been provisionally selected for redundancy and there was a proposal for a meeting to take place on the 27th of September 2021 to discuss the possible redundancy situation.
56. In a second document dated 29th of September 2021 there is an invitation to a final consultation for the purposes of redundancy, in the document it refers to the previous letter of the 20th of September 2021 and a telephone call/meeting on the 24 September 2021 where it is stated that the Respondent agreed to pay the Claimant's wages until she finished work on the 30 October 2021. The document invites the claimant to a meeting on the 7th of October 2021 where, if no alternative role is located in time her redundancy will be confirmed. The document offers her a right to be accompanied at the meeting.
57. The Claimant accepts she received this second document but could find no trace of the first document ever being sent. We have seen an email from the Claimant the same date of the second letter, confirming she had not received

the earlier document and asking for a copy. The Claimant says she never received the copy. We note the Respondent had not filed any documentary evidence such as an email to confirm or show that earlier letter was sent, and the timing of the second letter is a matter we return to below.

58. We consider the letters both inconsistent and confusing. We gave them negative weight in terms of the reliability of the documentary evidence and overall credibility of the Respondent's case. No explanation was given for the two letters giving different dates for meetings or discussions to take place and termination dates.
59. Mr Saleem told us because he had difficult internet access from Pakistan and given the importance of these documents, he had his son deliver them by hand. He did not call his son to give that evidence. He also told us when the Claimant emailed and said she had not received the letter of the 20 September 2021 and asked for a copy he called his son again and asked him to return to the Claimant's home and deliver them again. He was unable to explain why he was unable to have these documents sent by email and the Claimant had requested this. We find the lack of a reasonable explanation for simply having his son email these documents to the Claimant so there would be a paper trail of delivery undermines his account. The fact the Respondent has chosen not to call the individual who is supposed to have hand delivered these documents to give evidence also does not assist the Respondent.
60. On the 27 September 2021 the Claimant was advised by her doctor that due to pregnancy related illness she would have to go into hospital on the 17 October 2021 and not wait to the week of the 05 November 2021. The Claimant explained in an emotional part of her evidence how she was told if she did not have the baby early, she might have lost the child. The Claimant has provided an email dated 27 September 2021 sent to Mr Saleem informing him of the change in her circumstances and that she would be bringing her maternity forward on the Doctors advice to the 1 October 2021.
61. Returning back to the timing of the Respondent's apparent redundancy documentation, we note the second letter was sent to the Claimant the day after she advised the Respondent she was bringing her maternity forward and the third letter in our view indicates a change of approach by the author to try and engineer her termination before the maternity leave commenced on the 01 October 2021 by bringing her notice down to one month ending the day before the maternity. Rather than a coincidence we find this was a deliberate attempt to try and circumvent not only the payment of maternity but potentially keeping the Claimant's job open for her whilst she undertook maternity.
62. Although the Respondent suggests that there was a redundancy situation there is a complete lack of evidence regarding any procedure for the selection of the Claimant for redundancy, the nature of the redundancy, actual consultation and ultimately a decision on redundancy. We did not consider the documents that had been filed showed any proper consideration for redundancy. We reject those documents as unreliable.
63. We also noted in the bundle that the Respondent has provided its policies, one of those policies purports to deal with capability and the other purports to

deal with disciplinary matters. We know that each has its own procedure for the purposes of leading to dismissal. At electronic page 73 or internal page 70 the capability procedures provide as follows,

if the nature of your job changes or if we have general concerns about your ability to perform your job we will try to ensure that you understand the level of performance expected of you and that you receive adequate training and supervision.

64. Not a shred of evidence was filed regarding this process having been followed or the offer of suitable training or supervision.

if your standard of performance is still not adequate you will be warned in writing that failure to improve and to maintain the performance required could lead to your dismissal, we will also consider the possibility of a transfer to more suitable work as possible.

65. We could find no such warning in writing that failure to improve could lead to the Claimants dismissal.

If there is no improvement after a reasonable time and we cannot transfer you to a more suitable work, or if your level of performance has a serious or substantial effect on our organisation or reputation, you will be issued with a final warning that you will be dismissed unless the required standard of performance is achieved and maintained.

66. Not a shred of evidence was filed to show the period in which the improvement was assessed, the level of performance that was reached, whether it was serious or substantial for the organisation and or the issue of a final warning with a clear indication that the Claimant could be dismissed. Finally, the procedure says that if such improvement is not forthcoming after a reasonable period you will be dismissed with appropriate notice. We note no written document has been produced to indicate that this procedure was followed, and that the Claimants employment was terminated because of a failure to improve in her performance.

67. At electronic page 74 or internal page 71 there is also a clear policy for the purposes of disciplinary procedure and at electronic page 75 internal page 72 it clearly indicates that there are four separate occasions where unsatisfactory conduct can lead to a dismissal starting with a formal verbal warning, followed by a written warning, followed by a final written warning and then a dismissal at. The procedure also allows for an acceleration of this process if there is misconduct, serious misconduct, or gross misconduct. The procedure sets out each of the stages and the fact that written or final warnings will be given we note that the respondent has not filed a shred of evidence that this process was followed including the issuing of either a formal verbal warning, written warning, final warning or dismissal for gross misconduct.

Conclusion

68. Having failed to satisfy us that the true reason for the termination of the Claimant's employment was either redundancy or capability, we are left looking at the facts as they have been presented. We find the Respondent was aware of the Claimant's pregnancy throughout. We find the main material reason for the decision to reduce her work from full time to part time is because she was pregnant and suffering pregnancy related illness. We consider this unfavourable treatment on the same grounds. Following this course of behaviour, we also find the real reason the Claimant's employment was terminated was not because of a genuine redundancy situation but because she sought to exercise or did exercise her right to maternity leave. Both occurred during the protected period.
69. We therefore find her employment was terminated on the grounds of unfavourable treatment due to pregnancy or maternity. We find her reduction from full time to part time was not affirmed as a permanent measure by the Claimant as she sought to resign and was told if she went part time instead, this was a temporary measure, she had no choice but to accept. We find her employment was continuous and she had a legitimate expectation to return to a full-time role even if this had not been less favourable treatment.
70. Her contract of employment entitled her to two months' notice. Further, she would have been entitled to take maternity leave as of the 01 October 2021. However, we accept that due to the events towards the end of her pregnancy, the lack of contact thereafter, we accept the relationship had broken down and we find she would not have returned to her role. We find she would have been entitled to two months' notice. The Claimant was paid one month notice, but this was during her period of maternity leave.
71. In terms of her claim to injury to feelings. There was no medical evidence before us and no evidence of factors impacting such as health, the Claimant did mitigate her loss by finding alternative full-time employment. We accept the emotional impact of the treatment but balance that with the short period of employment, only being in her role for around 12 months, the actual period from the variation on the 1 April 2021 to her termination being only six months and the need to separate the upset due to other factors such as the pregnancy related worries and concerns for her health and that of her child's. We wanted to give an award that demonstrated the importance of the protection of pregnancy and maternity rights, was not disproportionate to the circumstances of the parties and reflected the level of impact we felt the Claimant had demonstrated.
72. We calculated other financial loss based upon the very limited evidence we had regarding holiday pay and loss. We made it clear to the Claimant and Respondent, absent clear evidence of the financial loss we could only award what we felt was reasonably shown as loss. This may mean if the full financial records had been disclosed the figures may have differed, but they are not before us.

The Tribunal find as follows.

- (i) Unfavourable treatment during the protected period. Or a decision to implement unfavourable treatment during the protected period and was the unfavourable treatment because of pregnancy or illness related pregnancy or because the Claimant was seeking to exercise or was exercising the right to ordinary maternity pay.
- (ii) There is a breach of contract by a failure to give the Claimant two months' notice pay.
- (iii) The Claimant had been paid for untaken and carried over holiday pay but had not been paid for the period 1 April 2021 to 01 October 2021.
- (iv) The Claimant asked for a declaration of entitlement to maternity pay. The Claimant had already been paid her maternity leave directly from HMRC but based upon on a part time wage. We find the Claimant was reduced to part time by the Respondent on the 01.04.2021 until the end of her employment and this was less favourable treatment on the grounds of pregnancy or pregnancy related illness. But for the treatment, the Claimant would have remained in her full-time role until she commenced her maternity leave on the 02.10.2021. The Claimant is entitled to be paid maternity through the Respondent from the 02.10.2021 for the full 39 weeks based on her full pay of £28,000 per annum. This is in addition to the sum above.

73. The declaration is subject to the statutory calculation, which is the first 6 weeks – 90% of average weekly pay. Up to next 33 weeks - the lower of 90% of average weekly pay or statutory flat rate (currently £156.66 per week until Apr 2023). We decided this ran from the 02.10.2021 for the full period of 39 weeks. But for the discrimination this would have been calculated on a full-time wage of £28,000 per annum.

Holiday pay

74. We accept the Claimant carried over 30 hours from 2020 and took and was paid for those 30 hours. We did our best to calculate her loss and this requires some best estimates of loss. We found and accept she had not taken pro rata holiday based upon

01.04.2021 to 09.05.2021 full time

10.05.2021 to 01.10.2021 part time

£873.48 September and 1st October paid.

23 days £15.30 per hour (end month for loss of wage March 2022)

7.5 hours per day X 23 days 172.5 hours £2639.25 reduced wage

2/5th £1055.70 for a full year

Divide by 12 X 7.5 £659.8

01.04.2021 to 10.05.2021 1.5 months

£289.00 01.04.2021 to 09.05.2021

£948.80 10.05.2021 to 01.2021

Notice pay.

£1484.94 (agreed by the Claimant)

DISCRIMINATION AWARD

75. We have found the claims for unfavourable treatment on the grounds of pregnancy or maternity are made out and award the Claimant.

76. Loss of income was not awarded for the period from the 10.05.2021 as the Claimant mitigated her loss by findings alternative employment full time and earning more than the loss. But for the period 01.04.2021 to the 09.05.2021 at the full-time rate. No other loss is allowable otherwise it would lead to double recovery.

- (i) **£1280.31** (**£853.04** agreed and £427.27 found) full net pay for the period 01.04.2021 to 09.10.2021. The gross monthly salary is £2222.31 full time (per month) and the Tribunal deducted sums already paid to the Claimant and taxed. £1880 divided by 22 x 5 working days £1880 divided by 22 workings days £85,45 X 5 **£427.27**
- (ii) (ii) **£5000** injury to feeling

Total award

ACAS UPLIFT

77. Not awarded as grievance post termination and no jurisdictional basis shown.

Employment Judge Mensah

Date 20.06.2023