EMPLOYMENT TRIBUNALS

Claimant: Miss J Akthar

Respondent: Mibelle Ltd

Heard at: Reading **On:** 25, 26, 27, 28 July, 2, 3, 4 August 2023

Before: Employment Judge Shastri-Hurst, Mr Kapur and Mr Appleton

Representation
Claimant: Miss G Nicholls (counsel)
Respondent: Miss K Sheridan (counsel)

RESERVED JUDGMENT

1. The claimant's claim of victimisation is dismissed upon withdrawal by the claimant;
2. The claimant's claim of automatic unfair dismissal fails;
3. The claimant's claim of pregnancy/maternity discrimination fails;
4. The claimant's claim of harassment related to sex fails;
5. The claimant's claim of detriments for pregnancy fails;
6. The claimant's claim of direct race discrimination fails;
7. The claimant's claim for holiday pay succeeds.

REASONS

The respondent is involved in providing consumer wellbeing, health and beauty solutions. It develops, produces and markets its customers' and its' own brands for retail in the fields of personal care and beauty.

The claimant started work for the respondent as Head of E-Commerce on 5 August 2021. The claimant's role was to generate sustainable, high growth revenue from two of the respondent's channels; Direct-to-Customer (D2C) and Amazon.

The claimant's employment with the respondent ended on 6 May 2022. The respondent says that this was by reason of redundancy. The claimant does not accept that there was a genuine redundancy situation, and claims that her dismissal was an act of discrimination due to her pregnancy/maternity leave.

The ACAS early conciliation period commenced on 28 April 2022 and ended on 18 May 2022. The claim form was presented on 4 July 2022. The claimant brings claims of:

.1. Automatic unfair dismissal – s99 Employment Rights Act 1996 ("ERA")/reg 20(1)(a) Maternity and Parental Leave etc Regulations 1999 ("MAPLE");
.2. Pregnancy/maternity discrimination – s18 Equality Act 2010 ("EqA");
.3. Harassment related to sex – s26 EqA;
.4. Detriments due to pregnancy – s47C ERA/reg 19 MAPLE;
.5. Direct race discrimination – s13 EqA;
.6. Unlawful deduction of wages (accrued but untaken holiday pay) – s13 ERA.

The claimant initially also brought a claim of victimisation (s27 EqA), however that claim was withdrawn prior to the commencement of the final hearing. It appeared from the Tribunal file that no judgment dismissing that claim upon withdrawal had been made, and so it is included in our judgment here.

This claim has not been subject of a preliminary hearing, as the parties were able to agree a list of issues, directions and a timetable.

Unfortunately, the timetable proved to be inaccurate: first, it left out any time for submissions from both parties. Second, it anticipated that the Tribunal would be able to reach and deliver a decision on liability within a day. These inaccuracies meant that, after a four-day hearing, we had managed to conclude the evidence. Luckily, all parties and the Tribunal were available on 2 August 2023: submissions were therefore heard on that day, with the Tribunal then taking the rest of 2, and 3 & 4 August 2023 to deliberate.

The claimant was represented by Ms G Nicholls, and the respondent was represented by Ms K Sheridan.

We had witness statements and heard evidence from (job titles at the material time of this claim):

.1. The claimant – Head of E-Commerce;
.2. Anne-Claire Ahouangonou ("ACA") on behalf of the claimant – Head of Customer Activation;
.3. Tim Pluess ("TP") – Head of International Sales and E-Commerce, then Corporate Development, the claimant's manager until the end of 2021;
.4. Mike Tourle ("MT") – Head of Brands UK, the claimant's line manager from the beginning of 2022;
.5. Max Costantini ("MC") – Commercial Director of Mibelle Ltd;
.6. Ali Hinton-Redford ("AHR") – Office Manager.

Reference to paragraph X of AB's witness statement is herein noted as [AB/WS/X].

We also had a witness statement from Xaviera Agbor ("XA"), who did not attend to give evidence, and so the respondent did not have the opportunity to cross-examine her.

We had a bundle that started as comprising 1014 pages (reference to page X herein is recorded as [X]). As the hearing progressed, more pages were added, by consent, leaving us with a bundle of 1022 pages.

We also had an opening note from Ms Sheridan, and a chronology, cast list and reading list from Ms Nicholls. Both counsel provided us with written skeleton arguments in support of their oral closing submissions.

Application to admit document

After having given her evidence, the claimant applied to admit another document of 8 pages regarding pregnancy information from the NHS and her own fundal height chart, showing the baby's growth from 21 weeks. This document was said to be relevant to the issue of the respondent's knowledge of the claimant's pregnancy. The respondent objected to the admission of this document.

We did not admit the document, on the basis that it was not helpful to us in answering the question of "did TP know the claimant was pregnant in February 2022 (or any time before 27 April 2022)?", and indirectly "was the claimant showing, or obviously pregnant at that point in time?". The chart, as we have said, only shows us the foetus' growth from 21 weeks, substantially after the time frame we need to consider. The general NHS advice states that women can show before 12 weeks if it is not their first pregnancy. This really takes us no further in answering the above two questions. Further, we accept that there is some limited prejudice to the respondent, should the evidence be admitted, in that the claimant had already given evidence and so could not be cross-examined, and the respondent did now not have the opportunity to provide rebuttal evidence. It must be said that we were not clear that such rebuttal evidence would be of assistance, or indeed what the claimant could be cross-examined on, on the basis of this document. However, from the claimant's point of view, she had given her evidence as to her showing in February 2022, and that she was suffering from other pregnancy symptoms at that time. Her barrister also had the opportunity to cross-examine the respondent's witnesses on those points.

We therefore concluded that there was very limited probative value in the document. Combined with our consideration on the (albeit limited) prejudice to the respondent, we determined not to admit the document.

Issues

As mentioned above, an agreed list of issues was produced by the parties. That list is set out below:

1. Automatic unfair dismissal – s99 ERA/reg 20(1)(2) MAPLE

1.1. What was the reason or principal reason for the claimant's dismissal?

The claimant asserts that it was her pregnancy and/or because she sought to exercise her right to take maternity leave. The respondent asserts this was a redundancy situation.

2. Pregnancy/maternity discrimination – s18 EqA

2.1. Did the respondent subject the claimant to the following unfavourable treatment:

2.1.1. excluding the claimant and/or treating her unfavourably in the process of integration following the Marq Labs acquisition (from late March 2020);

2.1.2. TP shouting at the claimant and treating her badly during a meeting on 21 April 2022, causing the claimant to leave the room in fear of her safety;

2.1.3. MT suggesting to the claimant on 22 April 2022 that it would be better for her to leave;

2.1.4. placing the claimant at risk of redundancy on 27 April 2022;

2.1.5. asking the claimant to do work on 28 April 2022, despite the claimant being off sick;

2.1.6. deliberately following a very limited "sham" redundancy process;

2.1.7. not rearranging a redundancy consultation meeting originally scheduled for 4 May 2022 in light of the claimant's pregnancy-related sickness absence;

2.1.8. the claimant's dismissal with effect from 6 May 2022 (and in particular ensuring the claimant was dismissed swiftly so that she did not qualify for maternity pay); and

2.1.9. any of the treatment not found to have been harassment.

2.2. Was that treatment because of the claimant's pregnancy (s18(2)(a)) and/or because the claimant sought to exercise her right to take maternity leave (s18(4))?

3. Harassment related to sex – s26 EqA and detriments of pregnancy – s47C ERA/reg 19 MAPLE

Harassment related to sex

3.1. Did the respondent engage in unwanted conduct as follows:

3.1.1. MT referred to the claimant's pregnancy as a "condition" rather than a "pregnancy" from March 2022 onwards;

3.1.2. MT made a number of offensive comments to the claimant at the Christmas party on 22 April 2022, specifically:

3.1.2.1. That he didn't think the claimant should stay [employed by the respondent] as maternity pay is rubbish;

3.1.2.2. Words to the effect of "after how you have been treated and after today's incident, do you really want to stay? Is it worth it? Think of the stress and strain on your condition and the risk it could have, especially as I'm assuming you're early on";

3.1.2.3. Making reference to the relationship between stress and the risk of a miscarriage;

3.1.2.4. That the claimant came from a financially comfortable background and asked whether it was worth having this job, whether she wanted all the stress;

3.1.2.5. That it would be best for the claimant to leave because of her health, pregnancy, maternity leave and

the increased harassment and discrimination she was facing;

3.1.2.6. That he could have a word and see whether there was a redundancy package available for the claimant; and

3.1.2.7. That by the time the claimant did a handover she would be going off on maternity leave and they [the respondent] didn't want the disruption.

3.1.3. TP shouting at the claimant and treating her badly during a meeting on 21 April 2022, causing the claimant to leave the room in fear of her safety.

3.2. Was the conduct related to the claimant's protected characteristic of her sex as a woman?

3.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Detriments for pregnancy

3.4. Did the respondent subject the claimant to detriments? The claimant relies on the same allegations as the allegations of sex harassment as set out at 3.1 above.

3.5. Was the detriment for a prescribed reason, namely the claimant's pregnancy or proposed maternity leave?

4. Direct race discrimination – s13 EqA

4.1. Did the respondent subject the claimant to the following treatment falling within s39 EqA, namely:

4.1.1. The respondent fostered a toxic culture where micro-aggressions and discriminatory behaviours were accepted as normal, as is illustrated by the following six examples:

4.1.2. From October 2021 onwards, the respondent failed to investigate or take appropriate action in respect of the claimant's complaints of bullying and discrimination;

4.1.3. On 17 February 2022, threatening to give the responsibility for Pureplay to the claimant's colleague, Amy Hawes, and subsequently threatening to remove the claimant from the leadership team instead;

4.1.4. In January 2022, when an ingredient ban and delivery issue was affecting the respondent's business and the claimant's department was on a deficit of £220,000 - £300,000, the claimant was instructed to find an upside (an alternative to plug the revenue gap) whereas her white counterpart, Amy Hawes, was not asked to find an upside in respect of a £1.3million deficit in her department;

4.1.5. The respondent's HR department required the claimant to undertake administrative tasks and complete additional forms/documentation which was not required of the claimant's colleagues who were not of colour.;

4.1.6. TP shouting at the claimant and treating her badly during a meeting on 21 April 2022, causing the claimant to leave the room in fear of her safety;

4.1.7. The respondent failed to pay the claimant for holiday rolled over from 2021 in April 2022 or on termination of her employment;

4.1.8. On or around 20-21 April 2022, following a conversation between the claimant and XA, XA went over to AHR to ask her about an issue the claimant was having relating to lack of equipment and her crouching over a laptop screen in which the cliamant was visibly uncomfortably working. AHR said "oh what does that bitch want?".

4.2. Did the respondent treat the claimant less favourably (as alleged) than it treated or would have treated the comparators? The claimant relies upon the following comparators:

4.2.1. Rob Fenton (for allegation 4.1.7);

4.2.2. Amy Hawes (for allegations 4.1.3 and 4.1.4);

4.2.3. And hypothetical comparators.

4.3. If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

5. Victimisation – s27 EqA

(withdrawn, and therefore the issues are not repeated here)

6. Holiday pay – unlawful deduction of wages – s13 ERA

6.1. Was the claimant entitled to holiday pay for all holiday accrued in 2021?

6.2. Did the respondent agree that all holiday accrued in 2021 could be taken over to 2022 and taken at any time during 2022?

Although not recorded in the original agreed list of issues, the Tribunal identified that there was an issue of jurisdiction relating to time limits. At the beginning of the final hearing, it was identified that some of the race discrimination claims may have been presented outside the primary time limit of three months (less a day) provided for in s123 EqA.

The ACAS early conciliation period started on 28 April 2022 and ended on 18 May 2022. The claim form was presented on 4 July 2022. Anything that occurred before 29 January 2022 is therefore on the face of it out of time. Given the time between the end of the ACAS early conciliation period and the date of presentation of the claim form (more than one month), later claims may also be out of time, depending on the specific dates of allegations. The issues to be considered in relation to time limits were therefore discussed, and parties were aware that this was an issue for the Tribunal to determine.

7. Time limits – s123 EqA

7.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 January 2022 (and possibly later) may not have been brought in time.

7.2. Were the discrimination complaints made within the time limit in s123 EqA? The Tribunal will decide:

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

7.2.2. If not, was there conduct extending over a period?

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

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

7.2.4.1. Why were the complaints not made to the Tribunal in time?

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

Law

Time limits

The time limit in which a claimant is to present a claim for discrimination is set out in s123 of the **Equality Act 2010**:

1. Subject to s140B, proceedings on a complaint within s120 may not be brought after the end of –
    a. The period of 3 months starting with the date of the act to which the complaint relates, or
    b. Such other period as the employment tribunal thinks just and equitable.
2. …
3. For the purposes of this section –
    a. Conduct extending over a period is to be treated as done at the end of the period;
    b. Failure to do something is to be treated as occurring when the person in question decided on it.
4. In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
    a. When P acts an act inconsistent with doing it, or
    b. If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

The tribunals have been advised that s33 of the Limitation Act 1980 does not provide a mandatory checklist, but can offer guidance in the exercise of discretion. Two important factors for consideration will be the length of, and reasons for, delay in presenting the claim, as well as whether the respondent is prejudiced by the delay – **Southwark London Borough Council v Afolabi [2003] ICR 800**. The accepted approach now is to take into account all the factors in a particular case that the tribunal considers are relevant, including the length of and reasons for delay – **Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23**. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – **Lupetti v Wrens Old House Ltd 1984 ICR 348**.

The tribunal must also consider the balance of prejudice to the parties if the extension is granted or refused – **Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.**

In terms of ignorance of rights as reason for delay, this will only to lead to an extension of time being granted where the ignorance is reasonable. This requires the tribunal to consider not whether the claimant in fact knew about his rights, but whether the claimant *ought to have known* about his rights (and associated time limits) – **Porter v Bandridge Ltd 1978 ICR 943.**

Automatic unfair dismissal – s99 ERA/r20 MAPLE

Regulation 20 MAPLE provides:

"(1) An employee who is dismissed is entitled under section 99 [ERA] to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

(a) The reason or principal reason for the dismissal is of a kind specified in paragraph (3)

…

(3) The kinds of reason referred to in paragraphs (1)(and (2) are reasons connected with

(a) the pregnancy of the employee;

…

(d) the face that she took, sought to take or availed herself of the benefits of, ordinary maternity leave; …"

Section 99 ERA provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

(a) The reason or principal reason for the dismissal is of a prescribed kind, …

…

(3) A reason or set of circumstances prescribed under this section must relate to –

(a) pregnancy, childbirth or maternity;
…
(b) Ordinary, compulsory or additional maternity leave; …"

As the claimant had less than 2 years' service with the respondent, the Tribunal has no jurisdiction to consider an unfair dismissal claim, unless the dismissal was automatically unfair. Given that this is then a question of jurisdiction, it is for the claimant to bear the burden of proof to establish the facts that confer jurisdiction on the Tribunal – **Smith v Hayle Town Council [1978] ICR 996**. In other words, the claimant has the onus of showing that the reason or principal reason for dismissal was a prescribed reason.

For this claim to get off the ground, it is necessary for the Tribunal to find that the respondent (or relevant alleged perpetrators) knew of the claimant's pregnancy – **Ramdoolar v Bycity Ltd 2006 ICR 368**. The claimant mentions constructive knowledge in her submissions (paragraph 13), but constructive knowledge is not enough here, it must be that the respondent has actual knowledge of the claimant's pregnancy.

It is vitally important to identify when the decision to dismiss was made, in order to then establish whether the decision-maker was aware of an employee's pregnancy at the time of making that decision – **Really Easy Car Credit Limited v Thompson UKEAT/0197/17 (3 January 2018, unreported).**

The reason for the dismissal must be (in this case) pregnancy or maternity leave. The reason for dismissal has been defined as meaning **(Abernethy v Mott Hay and Anderson [1974] IRLR 213):**

"a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

Pregnancy/maternity discrimination – s18 EqA

Section 18 EqA provides:

"…
(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, …

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

(5) …

(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 period or (if earlier) when she returns to work after the pregnancy; …

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as –

(a) It is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4)."

S18 requires no comparator, but simply "unfavourable treatment". The test for unfavourable treatment is to be measured objectively, by consideration of whether the treatment is adverse compared to beneficial. In other words, as held in **Williams v Trustee of Swansea University Pension and Assurance Scheme [2018] UKSC 65**:

> "treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous...persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

As for the automatic unfair dismissal claim above, the alleged perpetrator's knowledge of the claimant's pregnancy is a pre-condition of a s18 claim being successful – **Hair Division Ltd V Macmillan [2013] UKEATS/0033/12**.

It is not sufficient for pregnancy or maternity to just be part of the background of the case. The reason for the unfavourable treatment, whether conscious or unconscious, must be the claimant's pregnancy/maternity leave – **Interserve FM Ltd v Tuleilkyte [2017] IRLR 615**.

The burden of proof regarding claims under the EqA is set out at s136 EqA.

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

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

There are two stages to the burden of proof. The initial stage is for the Tribunal to decide whether there are facts proven which *could* lead them to find discrimination, if there were to be an absence of any other explanation.

If this first limb is met, then the Tribunal *must* find that discrimination has occurred, unless the respondent can then prove a non-discriminatory reason for its conduct.

It is not enough for a claimant to show that they suffered unwanted conduct/unfavourable treatment/less favourable treatment, and that they have a protected characteristic: there must be something more to draw the causal link between the two – **Madarassy v Nomura International plc [2007] ICR 867**.

Harassment related to sex – s26 EqA

The definition of harassment is set out at s26 EqA:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) Violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, mediating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable to have had the effect.

<u>Unwanted conduct</u>

42. In terms of what amounts to unwanted conduct it is for the alleged victim to determine what is acceptable or offensive. However, the claimant must actually consider the conduct to be unwanted or unwelcome – **Whitley v Thompson EAT/1167/97 (14 May 1998, unreported)**. There may be times when the

allegedly harassing conduct would not, to the average person, be objectionable. However, it is for the claimant to set the boundaries of what is and is not acceptable. The issue then becomes whether the claimant made it clear that they considered the conduct unacceptable.

Purpose or effect

43. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator. Harassment may still be made out where there is teasing, also called banter, without any malicious intent.

44. In terms of effect, the alleged perpetrator's motive is again irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way.

45. Furthermore, it is not necessary for the conduct to be aimed directly at the claimant. A claim can succeed if it was reasonable for the claimant to feel that their environment had been made intimidating, hostile, degrading, humiliating or offensive, whether or not any language or conduct is specifically aimed at them.

Related to the protected characteristic

46. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case race. There is no protection from general bullying within the EqA; harassment will not be proven where someone is picked on or singled out, unless that treatment is related to a protected characteristic.

47. There is limited guidance from the higher courts as to what is meant by "related to". Some guidance has been given by the Court of Appeal in the case of **UNITE the Union v Nailard [2018] EWCA Civ 1203**. The facts of this case were that the respondent had failed to deal with the claimant's sexual harassment complaint. The Employment Tribunal found that, because the failure related to a grievance regarding harassment, that was sufficient to find that the failure was itself an act of sexual harassment. The Court of Appeal found the Tribunal had got it wrong. The Tribunal had not made findings as to the thought processes of the individuals who failed to deal with the grievance; therefore, it could not be found that the failure itself was an act of sexual harassment. A finding would have to be made that those who failed to deal with the grievance were guilty of sexual harassment. The tribunal had, in effect, used the "but for" test; in other words, they found liability on the basis that, but for the grievance, there would have been no failure. This is not the correct legal test under section 26.

Detriments for pregnancy – s47C ERA/r19 MAPLE

Regulation 19 of MAPLE provides:

"(1) An employee is entitled under section 47C [ERA] not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2)

(2) The reasons referred to in paragraph (1) are that the employee –

(a) is pregnant:
…
(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave"

Section 47C of ERA provides:

"(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) a prescribed reason is one which is prescribed by regulations made by the Secretary f State and which relates to –

(a) pregnancy, childbirth or maternity,
…
(b) Ordinary, compulsory or additional maternity leave, …"

A detriment will have occurred if a reasonable employee would consider that they have been subjected to a detriment. An unjustified sense of grievance will not suffice to prove a detriment – **Secretary of State for Justice v Slee UKEAT/0349/06**.

Turning to the causal connection required between the detriment and pregnancy/maternity leave, the motive of the alleged perpetrator is irrelevant, as is that individual's intent. The exercise by the Tribunal is one of considering the mental processes, conscious or unconscious, of the allege perpetrator. It is for the employer to prove that the allege perpetrator was not materially influenced by the pregnancy/maternity leave – **Fecitt v NHS Manchester [2012] IRLR 64**. If the respondent does not prove that the detriment was not done on prohibited grounds, then the claimant must succeed - s48(2) ERA.

Direct race discrimination – s13 EqA

Employees are protected from discrimination by s39 EqA:

(2) An employer (A) must not discriminate against an employee of A's (B) -
…
(d) by subjecting B to any other detriment.

Direct discrimination is set out in s13 EqA:

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

There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – **Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11**.

"Because of": reason for less favourable treatment

In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be "inextricably linked" - **Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278**.

The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – **James v Eastleigh Borough Council [1990] IRLR 288**.

The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – **Nagarajan v London Regional Transport [1999] IRLR 572**. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48**. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

if there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – **O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372**.

Unlawful deduction of wages – s13 ERA

S13 ERA provides as follows:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> b. The worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) …
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This is an issue to be decided in line with the approach of the civil courts in contractual

actions – **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT**.

The sum that is "properly payable" can relate to a legal, but not necessarily contractual, entitlement on part of the claimant to the payment – **New Century Cleaning Co Ltd v Church [2000] IRLR 27.**

> In determining the terms of the contract in question, it is necessary to take into account all the relevant terms of the contract, including implied terms – **Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA**.
> The extent of the Tribunal's ability ti interpret contractual terms has been clarified in the case of **Agarwal v Cardiff University and Another [2018] EWCA Civ 1434** in which Lord Justice Underhill stated that there was clear and binding authority from the Court of Appeal in **Delaney v Staples [1991] IRLR 112,** in which Lord Nicholls stated:
>
> > "a dispute on whatever ground as to the amount of wages properly payable cannot have the effect of taking the case outside [s13 ERA]". It is for the [Employment Tribunal] to determine that dispute as a necessary preliminary to discovering whether there has been an unauthorised deduction"
>
> In other words, the Tribunal has the power to consider and interpret contractual terms between parties, whether implied or express, in relation to claims under s13 ERA.

Findings of fact

Introduction and overview

The claimant commenced work on 5 August 2021. Her job description is at [75], and her contract of employment, signed by the claimant on 22 July 2021, is at [85]. As Head of E-Commerce, the claimant was required to build good working relationships with the respondent's Communications, Activation and Brands Teams. MT was the claimant's line manager. Amy Hawes ("AH") was the Head of UK and Western European Sales, and is white.

The claimant was given a £5000 pay rise in December 2021. She was informed in February 2022 that she was to be promoted to join the respondent's Leadership Team with effect from March 2022. In light of this promotion the claimant's salary was increased as of 1 March 2022, by £10,000.

The chronology of this case involves the integration between the respondent and a second company, Marq of Brands Americas LLC (trading as "Marq Labs"). In December 2021, the respondent invested in Marq Labs. The integration took place over several months.

The week commencing 18 April 2022, the Chief Executive Officer, Cam Campbell ("CC"), and Chief Marketing Office, Jenine Wong ("JWO"), of Marq Labs came to the respondent's Bracknell office. They were there from 19 to 21 April, to meet the

marketing and e-commerce teams, including the claimant.

The plan was that the respondent's majority shareholding of Marq Labs would evolve into full ownership three years later. This full ownership was finalised on 5 July 2023.

Issue 4.1.2 - from October 2021 onwards, the respondent failed to investigate or take appropriate action in respect of the claimant's complaints of bullying and discrimination – alleged perpetrators TP and MT

In the claimant's Grounds of Complaint, she references complaints in September, October and November 2021 – paragraph 9 of the Grounds of Complaint. This is therefore the time frame we have considered when dealing with this allegation.

In September 2021, the claimant raised a concern with TP about Toni Paine's ("TPA") conduct towards her – [C/WS/15a]. Then, on 22 October 2021, the claimant texted TP about TPA's conduct towards herself and others, saying "I guess I'm asking you frankly – me and [ACA] have one thing in common, tell me it's not that? Because they also did it to Caroline" – [113]. Caroline is a white colleague.

TP replied to say that he would like to formally escalate these concerns, but only if all those with complaints agreed (including ACA) – [113]. At [112], TP contacted ACA to reach out with support: he told her that she could contact MT and mention his (TP's) name, and that others have also received poor treatment from TPA.

In this chain of messages, several other names are mentioned: ACA, the claimant, "Leanne", "Kirstie", "Caitlyn", "Caroline". Some of those individuals are white (Caroline, for example).

We therefore find that people of different race/colour were complaining about TPA. We find that the message at [113] from the claimant could not reasonably objectively be interpreted as an allegation of race discrimination, as she had mentioned that Caroline has undergone the same treatment.

The complaints against TPA continued to be the subject of some discussion until, on 7 December 2021, ACA texted TP to tell him that she did not wish to be a part of a catch-up meeting regarding the conduct within the respondent anymore – [166].

In any event, a discussion did take place between the claimant and other complainants and TP, following which TP produced the email of 15 December 2021 at [176], setting out what he understood the concerns to be so that he could take them to the Leadership Team, and asking for any additional points to be shared. In that email, there is no mention of discrimination of any sort, and the claimant did not reply to TP to ask him to include such an allegation.

On 16 December 2021, TP sent an email to various employees, including the claimant, stating that he needed "factual based examples" and that they should be shared on a "121" basis with him. He stated "ANY examples of gossiping, or anything even less professional such as bullying or scenarios where you feel very uncomfortable – please escalate immediately to me. …" – [175].

On 16 December 2021, there was a Leadership Team meeting; the notes are at [173]. At this meeting, the culture at the respondent was discussed, and it was noted that there was a serious problem with the culture within the respondent, including "bullying in numbers". The notes stated that "it was founded (sic) that a bullying culture within Mibelle exists". An action point from the meeting was that:

> "it was decided that measures will be put in place to create a better culture within Mibelle. [Leadership Team] to regroup on 6th January with solutions".

The claimant raised further issues in December:

.1. 23 December 2021 – the claimant sent a message to MT, alleging "bullying" and "victimisation" – [181];

.2. 23 December 2022 – MT told the claimant that he did not have evidence of bullying and he could not do anything unless the claimant gave him the evidence "formally", including "names, times, evidence" – [181];

.3. 23 December 2021 – the claimant sent to MT several examples of "where the Comms/Brand team have acted unprofessionally with the intent of isolation and causing value leakage…" – [186];

.4. 24 December 2021 – MT replied "just wanted to confirm I have the below and will take action as I messaged" – [197];

.5. 24 December 2021 – the claimant responds, alleging a "systemic problem" – [197].

Come the New Year, it appears to us that nothing was done to further the action plan mentioned in the December Leadership Team meeting, and nothing was done to follow up on the claimant's concerns raised at the end of December 2021 to MT. Although we are not satisfied that clear allegations of discrimination were made in 2021, we do find that the respondent did not take appropriate action having accepted as of 16 December that there was a bullying problem within the respondent. We find that, over Christmas, and with the approach of the integration with Marq Labs on the near horizon, the respondent failed to investigate and take actions to address the known bullying problem.

Therefore, factually, we find that the treatment alleged in **Issue 4.1.2** did occur, to an extent. We find that the failure of the respondent to deal with these complaints and further the action plan that should have arisen following the December meeting was due to there being a break over Christmas, and the leadership team forgetting to progress this further. it may be that, because no individual was tasked with addressing bullying culture, that this fell between the cracks, as no one wished to take responsibility for it. This is poor from the leadership team: it is unacceptable that, in the knowledge of an acknowledged bullying culture, nothing was done to address this problem.

Pureplay

Pureplay is a term for third-party e-commerce re-sellers: they do not operate in a physical market space. Pureplay is not connected to one supplier only, but sells multiple products from multiple entities.

The claimant's evidence is that she was promised ownership of Pureplay within her interview for her position with the respondent. The claimant relies on her own document at [96], a PowerPoint presentation produced on her second day of employment, to show that Pureplay was within her remit. This document sets out various target audiences, including Pureplay/E-Retail. We are not satisfied that this document proves that it was agreed that Pureplay would sit within the claimant's role. We also consider it unlikely that an interviewee would be promised something at this early, interview stage that was not a part of the job description.

We accept that there may well have been discussions around Pureplay at interview, as the respondent anticipated that the claimant would have some input and oversight. We find that the claimant misconstrued any such discussion to mean that she was being promised ownership of Pureplay: she was adamant to us that she had received such a promise, but adamant witnesses can be genuinely mistaken.

When the claimant joined, AH had responsibility for Pureplay with The Hut Group; a billion-pound business which owns many brands and e-commerce sites such as Hair HQ and Look Fantastic. The claimant has not challenged this evidence from the respondent. It therefore is common ground that AH had some responsibility for Pureplay as at August 2021.

A member of staff left in October 2021, which precipitated a plan to recruit someone into TP's team to cover Pureplay, with a dotted line to the claimant. The idea being that the claimant would have some influence on that new recruit, without having line management responsibility.

TP contacted an external recruiter to appoint an "Account Manager – Pureplay & International" post on 4 October 2021 – [150]. Both the claimant and AH were involved in the recruitment process:

.1. 25 October 2021 – TP email to say that AH will be with him at an interview for this role – [135];
.2. 9 November 2021 – TP email to the recruiter about interview dates at which the claimant and TP will be present – [124];
.3. 22 November 2021 – the claimant sent the job description;
.4. 3 December 2021 – TP ran some potential CVs past the claimant;
.5. 21 December 2021 – the claimant was sent some CVs, including Lily Shaw Morris' ("LSM") CV, who ended up being the successful candidate.

At [110], on 20 October 2021, TP sent the claimant an email stating "I was talking to Amy [AH] about pure play and suggested we do a session together on this…". The claimant took from the use of "we" that the meeting would be just TP and the claimant: however, "we" could just as easily have been interpreted to mean the claimant, TP and AH.

This meeting took place on 27 October 2021: AH sent the Teams invitation, which the claimant says was the first time she became aware that she (AH) would be attending – [117].

After that meeting, on the afternoon of 27 October 2021 at 1413 hours, the claimant sent a Teams message to TP, stating at [116]:

> "I am a little confused why pureplay would sit in Amy's team?...I did mention I wanted Ocado before I came here. …".

There is no response to this message.

LSM was recruited on a fixed term contract to cover Pureplay, commencing her work in February 2022.

Issue 4.1.3 - On 17 February 2022, threatening to give the responsibility for Pureplay to the claimant's colleague, AH, and subsequently threatening to remove the claimant from the leadership team instead – alleged perpetrator MT

The issue of Pureplay arose again in February 2022 (**Issue 4.1.3**). The documents within which the alleged threats are contained are [292/299]:

> The claimant: "Will I get Lily as a headcount as she is looking after pureplay + I'm looking at a few"
>
> MT "marq have it in sales not e-comm which personally I agree with as it more account management focused so i'm going to take that approach and maybe ask you to support amy (as i know you do already) when needed"
>
> The claimant: "Does that mean that pureplay will sit under me as we discussed, …"
>
> MT: "pureplay sits separately to e-comm in marq labs and they have a good model and I feel it works for us as these guys largely act as retailer"
>
> The claimant: "So would we have another team in the UK?"
>
> MT: "problem with pureplay is it is basically account management so sits for me in classic sales because skill set is different to managing amazon and d2c"
>
> MT: "happy to discuss with you and amy though before we decide and tell lily"
>
> The claimant: "Ok – I thought we discussed before. But happy to discuss. But it feels like you've already made your mind up. When we bought (sic) Rakhi on, we agreed we would give her an opportunity to work on other platforms. In addition I was also told I would work on Pureplay"
>
> The claimant: "…Also, you said pureplay would eventually sit with ecomm. For now with Tim via Lily. All the places I've worked, eretail and pureplay has sat with ecomm"
>
> MT: "yep but I am allowed to change my mind, and the places I have worked it sits separately as it does with marq labs hence the debate…I don't think either is wrong but I'm looking at size of opportunity for us specifically and I'm not sure its big. If you think differently that's fair"
>
> The claimant: "of course, but when interviewed it's not the scope of the role I was promised which changes things for me. …"

> MT: "being on the LT (Leadership Team) was not discussed either ;-0. I think the main issue I don't see the size of prize being worth your time but happy to you happy to change my mind [sic]. Let me have a wine on it."
>
> The claimant: (in response to the LT comment): "It was on my objectives and development plan [smiley emoji]. But happy to give up the LT to get what I was promised in my interview"
>
> MT: "you have nearly convinced me but I need a business plan on long term value for these businesses. Not right now though ;-0"
>
> The claimant: "I think the only fair way is we both (Amy and I) present and put a business case forward"
>
> MT: "you can have pureplay [smiley emoji] I'll update org chart and we can share with lilly [sic] next week…"

We do not find that MT's reference to the LT was a threat to remove the claimant from the LT. We consider it was him saying that there are "swings and roundabouts": yes, the claimant did not have Pureplay, but she did have the Leadership Team. We consider that the claimant has a tendency to take the most severe interpretation of words used to her, and to see matters more in black and white. Therefore, we accept that she subjectively viewed this as a threat, but objectively it was an innocuous comment.

In terms of the threat to give Pureplay to AH, we find that Pureplay was already under the remit of AH at the point of the claimant's arrival at the respondent. We find that, although the claimant had input and influence on Pureplay, she did not formally have responsibility for it. Therefore, there was no risk or threat of it being removed from her remit, as it was never within her remit.

Therefore, we do not find that the treatment in **Issue 4.1.3** occurred as alleged.

We accept MT's reason for determining (initially) that Pureplay should stay with AH in sales was a commercial decision. His reason was that this is where Pureplay sat within Marq Labs, and so MT saw no reason to change that position at a time when integration was on the horizon. MT's evidence on this point was credible and consistent with the contemporaneous messages set out above.

In any event, MT ended up giving the claimant the responsibility for Pureplay.

In the Leadership Team meeting on 22 February 2022, it was confirmed that the claimant would join the Leadership Team, and that Pureplay would sit under E-Commerce – [312].

Issue 4.1.4 - in January 2022, when an ingredient ban and delivery issue was affecting the respondent's business and the claimant's department was on a deficit of £220,000 - £300,000, the claimant was instructed to find an upside (an alternative to plug the revenue gap) whereas her white counterpart, AH, was not asked to find an upside in respect of a £1.3million deficit in her department – alleged perpetrator MT

In January 2022, TP's unchallenged evidence was that he was in the office for 1-

2 days a week for the first three weeks, then out of the office for the last week of January 2022.

At the Leadership Team meeting on 11 January 2022, ACA was present, but the claimant was not (she had not at this point been promoted to be a part of the Leadership Team). At this meeting, it was noted that, due to an ingredient shortage, there would be a shortage in producing certain products, leading to the respondent being "hard hit" in April. It is noted that "alternative solutions to be found" – [225]. It was further noted that there would be a severe impact on E-Commerce, leading to a deficit of £70-100K.

At the same meeting, it was noted that there was a deficit of £1.3m in Boots, which sits within the Sales Team, headed up by AH.

The notes record that "E-Comm required to find a solution. All Sales departments to put a meeting together to find upsides" – [225]. This is the point to which **Issue 4.1.4** relates.

ACA told us that the claimant was individually picked out during this meeting and tasked with finding an upside.

We accept that, at this meeting, E-Commerce and therefore the claimant as its Head, were picked to find an upside, followed by a general instruction to all sales departments to do the same. As a fact, therefore, we find that the treatment alleged within **Issue 4.1.4** occurred.

MT's evidence on this was that E-Commerce was the area which had the greatest potential to turn a profit quickly, unlike Boots, which had a six-month lead time for any new promotion. MT told us that, in E-Commerce, one can "put on a promotion tomorrow" to generate immediate sales. We accept this evidence, and note that it was not challenged.

We find that it was this ability to move quickly in E-Commerce that led to MT making the comment that E-Commerce should find an upside.

February 2022

During February, TP's unchallenged evidence was that he had only been in the office on 26/27 February 2022.

The claimant alleges that there were rumours in February 2022 at work that she was pregnant – [C/WS/52]. She suffered from morning sickness whilst at the office during early pregnancy, and often needed to take anti-sickness medication. In February 2022, the claimant informed ACA and Rakhi Chauhan ("RC") that she was pregnant.

The claimant says that she was showing in February/March 2022. We have no photographic evidence of her appearance in Spring last year. ACA told us that it was obvious that the claimant was pregnant from around this time, but we note that, by this time (February/March), ACA had been told of the pregnancy: it is therefore more likely that she would be acutely aware of signs of pregnancy and

the claimant showing than someone who was not aware of the pregnancy.

In February 2022, the claimant was made aware that she was to be promoted and be part of the Leadership Team from March 2022. The claimant's salary was increased as of 1 March 2022, by £10,000. This meant that the claimant was, by this stage, on the highest salary, other than MT and TP. It was a salary that was also somewhat higher than her colleagues with comparable roles.

Issue 4.1.5 - The respondent's HR department required the claimant to undertake administrative tasks and complete additional forms/documentation which was not required of the claimant's colleagues who were not of colour – alleged perpetrator JWE

On 10 February 2022, Jen Webster (Human Resources) ("JWE") introduced a variety of new forms regarding onboarding, offboarding and changes to terms and conditions to those in the email groups ORG Mibelle-Bradford and ORG Mibelle-Brands – [509].

On 15 February 2022, the claimant asked JWE for a new starter form – [298].

On 16 February 2022, JWE sent a copy of the probationary review form to MT, ACA, TPA, AH, TP and AHR, with an instruction to cascade the document to line managers for whom they are responsible – [915].

On 28 February 2022, the claimant emailed Zubair Khan (Human Resources) ("ZK") asking for help as she wished to extend LSM's probation period – [339].

On 2 March 2022, ZK asked the claimant to complete the 1-week probation process for LSM – [337]. The claimant sent the completed form the following day. The claimant then completed another probationary review form on 7 March 2022 – [341].

On 11 April 2022, JWE sent a gentle reminder to two group email addresses (ORG Mibelle-Bradford and ORG Mibelle-Brands) about the new HR processes – [509].

In terms of **Issue 4.1.5**, the claimant alleges that she was required by JWE to complete additional forms and tasks which were not required of her colleagues. In the course of the hearing, this allegation morphed slightly to be an allegation that the claimant was chased for completion of forms, whereas colleagues who were not of colour were not chased.

The claimant alleges that, in relation to LSM, the new recruit, TP was not required to complete any new forms. However, the claimant alleges that once LSM moved to her (the claimant's) line management, the claimant was then required to do both LSM's 1-week and 1-month review.

At the beginning of LSM's employment, the implementation of the new HR

processes had not occurred. At the point of their implementation (16 February 2022), TP was away from the office. During his period of line management of LSM, he was only in the office on 26 and 27 February 2022. He did not complete LSM's 1-week probation form during this window. TP was then away for the entirety of March.

LSM's line management moved to the claimant from 23 March 2022 – [928].

In terms of the requirement to complete forms and processes, we find that the implementation of the new HR systems was communicated to employees who were white and of colour.

In terms of any chasing to complete these forms, we have no evidence in the bundle that JWE chased the claimant. The claimant told us that she had asked for evidence of other employees being chased, but that the respondent had said there was none. That means that we have no documentary evidence of anyone being chased.

The claimant and ACA gave us evidence that they had both been asked by JWE to enforce the new HR rules and forms. In terms of contemporaneous supportive evidence, the claimant complained about JWE's conduct on 14 March 2022 – [360]. Within that email to Kevin Green (Head of Human Resources UK) ("KG"), the claimant mentioned the new HR processes specifically, however she did not mention anything regarding being chased by JWE. Given that the claimant was comfortable enough to complain about JWE, we find that, had she experienced chasing, this is something that would have appeared within this email, or another communication. Given the lack of such a complaint, and the lack of any documentary evidence of chasing, we are not satisfied that any chasing of the claimant in fact took place.

Therefore, we do not find that the treatment alleged in **Issue 4.1.5** in fact occurred.

March 2022

It was TP's unchallenged evidence to us that, although he could not swear "hand on heart", he was sure he had been out of the office all month.

On 7 March 2022, MT emailed a group of people, including employees of the respondent and Marq Labs – [946]. In this email he stated that JWO and the claimant would have "the opportunity to decide how best we use the resource from both businesses to un-lock the sales opportunity in the US".

The claimant informed MT of her pregnancy during the week commencing 14 March 2022, by way of a telephone conversation. There is a dispute of fact as to what was said in this conversation. It is the claimant's case that MT told her to "keep it quiet", and that "this is going to cause problems" regarding the integration with Marq Labs. In cross examination, the claimant also stated that she thought she had asked MT not to tell senior management, given that she was in the early stages of pregnancy.

MT's evidence was that he did not say anything about the claimant's pregnancy causing a problem for the integration; he was not involved in the integration or the new structure.

We find that MT did not say that the claimant should keep her pregnancy quiet, or that her pregnancy could cause problems for the integration. We find this for the following reasons:

.1. We accept that the claimant did ask MT not to tell anyone about her pregnancy: this is consistent with her own feelings set out in [C/WS/52] that "it was [her] preference to wait until the pregnancy was safe or the anomaly scan (which usually happens in week 18-20 of pregnancy) before announcing this formally with the respondent".
.2. The claimant's evidence that she asked MT not to tell anyone, coupled with the allegation that MT told the claimant to keep it quiet does not make sense to us. It would seem strange and unnecessary for MT to tell the claimant to keep her pregnancy quiet, if she had indicated that this was what she intended to do;
.3. The fact that the claimant asked MT not to tell anyone is consistent with her evidence to us that she "wanted to control the narrative".

Issue 2.1.1 - excluding the claimant and/or treating her unfavourably in the process of integration following the Marq Labs acquisition – alleged perpetrator TP

The evidence on this point is set out at [C/WS/87-92], in which the claimant gives the following specific examples:

.1. 25 March 2022 – [388] – an attempt by TP to put the claimant down and make her feel inferior ("Example 1");

.2. 25 March 2022 – [388] – TP had not been including the claimant in pricing discussions that the claimant says she should have been included in ("Example 2");

.3. 1 April 2022 – [432] and 4 April 2022 [439] – delegating tasks to the claimant's team, bypassing her ("Example 3").

We will deal with Example 1 and Example 2 together, as they involve the same email. The chain of emails relating to these examples are as follows:

JWO, in her email to the claimant at [389], included TP in her initial email. She stated:

> "I think we are just trying to work through Transfer Pricing to determine the best financial model for Amazon. Including [TP] here as he is working on this with Steve on our end on the pricing. However, we can definitely meet and run through some ideas."

The claimant replied at [388]:

> "We need to check the list with NPD in terms of compliance, which I will loop back with you."

TP's email to the claimant (copying in JWO), which arrived after JWO's email at [389], reads as follows:

> "I need this list before [JWO] due to transfer pricing, I was also surprised at some of the SKUs included from a profit/compliance perspective, all of which is info you have available.
>
> Please send the list to me and I will look over Monday on the plane (this is the info I've needed for a couple of days)."

The claimant responded with:

> "This email was unfair and could have been taken offline.
>
> 1 You have never shared the cogs with me since I have been with the business, so profit cannot be considered. To avoid such misunderstandings and inaccurate emails I would suggest you share these with me.
>
> 2 You only asked me for a catalogue a couple of days ago which is on the shared drive.
>
> This was on hold as we were considering old fragrance initially, a completely diff task.
>
> Note, [RC] is on annual leave so your patience and understanding is appreciated.
>
> I should and would like to be involved in pricing, especially as it considers the Amazon channel. Please could I kindly request you include me in the emails and meetings"

We find that it was reasonable of TP to include JWO in his email, given her position (above the claimant) within the integration process. We find it implausible that TP would deliberately fabricate the fact that the claimant had information available to her if he knew this was not the case, in order to cause her embarrassment. We have no evidence to support that theory.

Although we can understand why the claimant may have found this email embarrassing (to be pulled up in front of JWO), it was TP's management style to get involved. Some management styles micro-manage more than others, there is nothing on the face of it wrong with such an approach.

We find that transfer pricing was something that was appropriately dealt with at TP's level of management; it is clearly a complex, and company-wide matter with serious consequences. Transfer pricing was also an exercise that went beyond simply Amazon, for which the claimant was responsible. It was perfectly proper and appropriate for TP to be involved in Transfer Pricing. We do not accept that it was necessary for the claimant to be involved in those discussions. Therefore, she was not unfairly excluded from these discussions.

Regarding Example 3, we accept that TP went straight to the claimant's direct report, RC, in his email of - [432]. We note that TP also went to ACA's team directly, both on an occasion when she was off sick, and on other occasions too, bypassing

ACA – [476].

We find that this was TP's management style. He was not afraid to bypass a management level if he needed information and he thought the wider team would be able to provide it to him. Again, we can understand why this may have annoyed the claimant, but it was not excluding the claimant; it was a management style.

Factually, therefore, we do not find that the allegations that the claimant was excluded or treated unfavourably as set out in **Issue 2.1.1** occurred as alleged.

April 2022

TP's unchallenged evidence to us was that he was not in the office until 19 April 2022.

On 5 April 2022, there was a Leadership Team meeting – [68]. The relevant parts of the notes of that meeting are as follows:

> "Toni, [ACA] & [C] will be part of [JWO]'s LT Team…Reiterated that there will be no job losses and that we should reassure our team"
>
> "…Tim is a support function to deliver key projects on our request to get us in touch with the right people in Marq Labs"

It is in this meeting that MT is alleged to have said that 60% of his team will be on maternity leave by the summer. The team in that meeting comprised the claimant, ACA, "Phil", TPA and AH. We find that this comment was not made, for the following reasons:

.1. The claimant relies on corroboration from ACA. On inspection of ACA's statement at [ACA/WS/74], she states:

> "MT made a joke about the fact that most of his Leadership Team (60%) excluding myself were pregnant and he referred to Amy Hawes' approaching maternity leave as "holiday" which everyone chastised and he then, rephrased".

.2. This is different to the claimant's account of this conversation at [C/WS/96], in which the claimant simply records that MT said "60% of my team will be on maternity leave this summer".
.3. Also, the claimant was inconsistent in cross-examination: at one point she said that MT made this comment the day before the 5 April meeting, and at another point she said the comment arose at the meeting;
.4. MT denied this allegation. We accept that, given his wife is an NCT practitioner, MT is aware of the risks and sensitivities associated with pregnancy, and so it is more likely than not that he did not make this comment.

Issue 3.1.1 - MT referred to the claimant's pregnancy as a "condition" rather than a "pregnancy" from March 222 onwards

It is the claimant's case that on 6 April 2022 MT referred to her pregnancy as a "condition" (**Issue 3.1.1**) – [C/WS/93]. [ACA/WS/37] mentions this, but it is a reported fact, told to ACA by the claimant. ACA does not say in her statement that she heard or saw MT referring to the claimant's pregnancy as a "condition". Neither

is there any evidence in the bundle of MT using that word. We also note MT's evidence that his wife is an NCT practitioner, and that "she would slap [him] round the face" if he used that wording; we accept this evidence, it was candid and credible.

Skipping ahead to the redundancy process, the claimant referred to her pregnancy as her "condition" – [605]. The claimant's evidence was that she used this word as MT had used it so many times; she said "if you have a slur enough times, you just repeat it". We do not accept that someone would repeat a word about themselves that they found offensive in the way the claimant alleges she found the word "condition" offensive.

We find that there was some conversation between the claimant and MT on 6 April 2022 around her pregnancy. This makes sense looking at [441], in which there is a text exchange between the two, as follows:

> Claimant at 1259hrs; "Actually please don't tell Tim. I will reach out"
>
> MT: [thumbs up emoji]
>
> Claimant at 1831hrs; "I appreciated the call today".

We consider that the claimant would not have said she appreciated a call with MT if in fact she had been offended by something he said in that call. There was no reason for her to send that message, unless she really meant that she was appreciative.

For the above reasons, we therefore conclude that MT did not use the word "condition" as alleged within **Issue 3.1.1**.

April 2022 continued

On the morning of 19 April 2022, it was announced that MT would be leaving the respondent's employment.

The week commencing 18 April 2022, CC and JWO of Marq Labs came to the respondent's Bracknell office. They were there from 19 to 21 April, to meet the Marketing and E-Commerce teams, including the claimant.

One night (either 19 or 20 April 2022), CC and JWO were taken to dinner at a hotel near the Bracknell office by TP and others, including the claimant. TP covers this in [TP/WS/76]. TP reiterated this evidence during cross-examination, and that evidence was not challenged. In short, he told us that, at the dinner, the claimant spoke at (not to) CC and TP, discussing parenting. TP's evidence was that CC was so uncomfortable that he leant away from the claimant and was playing with his butter knife. As mentioned, this evidence was not challenged. We accept that the dinner unfolded as TP set out in his evidence.

TP's evidence is that those at the dinner stayed at the hotel overnight, and that the following morning that the claimant and he shared a car ride to the office, some ten minutes away. Again, TP was not challenged on this timing.

We therefore find that the conversation that the claimant refers to in [C/WS/97] as taking place in a car with TP week commencing 18 April 2022 occurred the morning after that dinner.

There is a dispute in evidence as to the conversation that occurred in the car between the claimant and TP. The claimant told us that the two were discussing their children's speech delay, and then TP raised TPA's pregnancy, and commented that TPA and the claimant must be at similar weeks in their pregnancies.

TP's evidence to us was that the car journey stuck in his mind as an odd conversation, as it was a continuation of the claimant's discussion the previous night. TP's impression was that the claimant was talking at him, in statements, for the full length of the ten-minute car journey.

TP denied in cross-examination that he had discussed TPA's pregnancy and stated that talking in terms of weeks of pregnancy is not "a language [he] speak[s] in". He denied knowing of the claimant's pregnancy at this point in time.

We find that the conversation in the car occurred as TP explained, and that there was no discussion about the claimant's pregnancy, for the following reasons:

.1. We have one person's word against another, and so we must look at the surrounding factors;
.2. We have no evidence that anyone had directly told TP about the claimant's pregnancy at this point in time;
.3. TP's evidence as to the conversation at dinner the night before was not challenged, and we have found that the conversation went as he said. His evidence that the following morning was a continuation of that discussion is therefore credible to us;
.4. We consider that, given the car journey was only ten minutes' long, it would seem a bizarre conversation to get into the detail of how many weeks' pregnant both TPA and the claimant were;
.5. The claimant accepted in cross-examination that TP's child did not have a speech delay. This concession undermines the claimant's account that she and TP had been discussing that both their children had a speech delay, and therefore undermines her credibility on the rest of that conversation.

Issue 2.1.2, 3.1.3 and 4.1.6 - TP shouting at the claimant and treating her badly during a meeting on 21 April 2022, causing the claimant to leave the room in fear of her safety

This meeting on 21 April 2022 took place with CC, as part of the series of meetings that CC and JWO were having in their week in the UK.

At the meeting were the claimant, ACA, several other junior employees, and JWO and CC from Marq Labs. The discussion during this meeting turned to the claimant stating she wanted to draft a "cease and desist" letter to send to various traders on Amazon, regarding them selling grey market stock of Lee Stafford goods (one of the companies for whom the respondent was responsible). The claimant asked CC

for permission to write and send these letters. It was TP's evidence to us that he was embarrassed for the claimant, as she was being unprofessional in the manner in which she was discussing this issue.

In terms of the detail of the conversation, the claimant (supported by ACA) told us that TP accused the claimant of not raising a particular process with him – [C/WS/106]. ACA's evidence on the topic of conversation was that TP yelled at the claimant for pointing out that he was incorrect – [ACA/WS/93]. Both witness statements have less detail in them than the witness statement of TP, at [TP/WS/53]. We therefore accept that the content of the conversation was as TP told us, namely that the claimant informed CC that she had not raised the cease and desist letters because the respondent's Group Legal Counsel had not permitted her to do so. TP told the claimant to stop asking for CC's approval and to stop talking to CC about this.

TP accepted that he raised his voice to the claimant, in an attempt to be heard over her voice. He further accepted that the claimant asked him not to shout at her. We therefore find that the treatment alleged at **Issue 2.1.2, 3.1.3 and 4.1.6** did occur, in that TP did raise his voice to a level that may have been considered to be a shout. We do not consider it necessary to determine whether TP raised his voice, or whether he expressly shouted.

We find that TP raised his voice to an unprofessional level, but did so because of the claimant's unwise and unprofessional conduct in the meeting, asking CC for permission to send cease and desist letters.

21 April 2022 – the Christmas party

Two conversations of import are alleged to have taken place at the Christmas party: a conversation between the claimant and MC, and another between the claimant and MT. We note that the Christmas party was delayed until April 2022 due to the Covid-19 pandemic.

<u>Conversation with MC</u>

The claimant asserts that, due to this conversation with MC, she understood that he knew she was pregnant. Looking at [C/WS/109], her evidence is that MC asked her to sit down and said that "he needed there not to be any disruption to the integration process of Marq Labs and Mibelle". It was that comment alone that led the claimant to believe that MC knew of her pregnancy, as she took from this that he considered her going on maternity leave would be a disruption.

The claimant told us that, in this conversation, she went on to explain how good her performance was, and that "e-commerce was flying". Lastly, she told us that MC said to her that "I have sacked people in the past that are performing, performance is not everything".

MC's evidence was that the claimant approached him, where he was sitting in a booth.

There is actually little dispute about the tenor of what was said between the two. MC accepted that the claimant was talking about how good her performance was,

and accepted that he told an anecdote about performance and sacking. However, the precise words and interpretation of those words is what differs between the two individuals. MC did however deny that there was any conversation about the integration.

We accept MC's account of this conversation for the following reasons:

.1. Although ACA seems to support the claimant's account of who approached who, we note that there is an inconsistency between ACA's and the claimant's account of the Christmas party. ACA's account is that the claimant had a conversation with MT, followed by MC. The claimant's evidence is that the conversations occurred the other way round. This undermines ACA's evidence on this point, and therefore undermines her evidence that it was MC who approached the claimant;

.2. It seems unlikely to us that MC, in his position as Commercial Director of the respondent, and Chief Strategy Officer of Mibelle AG, would go out of his way at a Christmas party to instigate a conversation about the integration process with the claimant. We consider it more likely that the claimant approached MC;

.3. Further to this, on the balance of probabilities, we find it unlikely that the integration would be a topic of discussion at the Christmas party between MC and the claimant, given their different levels in the hierarchy of the respondent, and the fact that this was a social occasion;

.4. We consider it more likely that the claimant approached MC to tell him how well she and her team were doing. We find that MC was somewhat put out by the claimant communicating her "high opinion of herself" to him (as he said in evidence to us), and so gave her his anecdote that performance is not enough, that behaviour is also important – [MC/WS/35].

Issue 2.1.3 - MT suggesting to the claimant on 21 April 2022 that it would be better for her to leave

Issue 3.1.2 - MT made a number of offensive comments to the claimant at the Christmas party on 21 April 2022 as set out in paragraph 25 of the Particulars of Claim, and at issues 3.1.2.1 - 3.1.2.7

We accept MT's evidence that the Christmas event was intended to be a fun and light-hearted event. This evidence ties in with the common-sense purpose of a Christmas celebration. We also accept MT's evidence that, given the facts we have found so far as to how the claimant engages with colleagues in conversation, talking at them rather than with/to them, MT would not have chosen to spend that evening talking to the claimant, as the conversation was likely not to be light.

We also find that, having announced his departure from the respondent 3 days earlier, MT had effectively "checked out" and was no longer concerned about the future of the respondent or the integration process.

We therefore find it more likely than not that the claimant approached MT, not the

other way round.

The claimant makes various allegations about what MT said to her in this conversation at **Issues 3.1.2.1 – 3.1.2.7** (note 3.1.2.5 is factually the same as 2.1.3). We are not satisfied that the conversation contained the comments that the claimant alleges in those issues, for the following reasons:

.1. There is an inconsistency between the claimant's evidence and ACA's supportive evidence on this issue. The claimant states at [C/WS/110] that MT specifically mentioned risk of miscarriage, whereas in [ACA/WS/94], the claimant told ACA that she felt like MT was hinting at the risk of miscarriage;
.2. We accept MT's evidence that, particularly given the experiences of friends, and his wife's job, he is acutely aware of the devastation that miscarriages bring, and therefore would never mention such a thing in such circumstances as the claimant alleges here;
.3. Given we have found that the claimant initiated the conversation, and therefore the conversation was unplanned from MT's perspective, we find it unlikely that MT would engage in such a detailed discussion with the claimant. This is particularly given our finding that he had checked out from the respondent;
.4. The evidence we have heard and seen suggests that, although for the majority of the claimant's employment, MT and she had a good working relationship, there is no suggestion that they were socially friendly. We again find it unlikely that this level of detail and personal conversation would happen between these two individuals in the context of a Christmas party;
.5. Although we accept that the claimant appeared upset to ACA at the hotel after the party, we can envisage how she may have misinterpreted something said by MT and been upset. It is common ground that the incident with TP on the same day was discussed between MT and the claimant. We find that it is likely that MT said something about the claimant needing to calm down and not stress about it. We find that the claimant misinterpreted and extrapolated that MT was telling her not to stress because of a risk to her pregnancy: therefore, she was upset. We make it clear that we find that MT did not connect any mention of stress to the claimant's pregnancy, but that he was trying to get her to put the incident with TP into perspective.

We therefore do not find that the treatment at **Issues 2.1.3 and 3.1.2** occurred as alleged by the claimant.

Issue 4.1.8 - on or around 20-21 April 2022, following a conversation between the clamant and XA, XA went over to AHR to ask her about an issue the claimant was having relating to lack of equipment and her crouching over a laptop screen in which the claimant was visibly uncomfortable working. AHR said "oh what does that bitch want"

We note that the claimant was not present at the time of this conversation.

The claimant relies on the evidence of XA in her witness statement, and also a recording and transcript of a conversation between XA and her manager, ACA.

XA did not attend to confirm her evidence and to be cross-examined. We therefore cannot give her statement the full weight we would give it had she attended.

In terms of the transcript of the recording, we understand that this recording was taken by ACA, without XA's knowledge or permission. We generally consider that it is not good management practice to make such a recording of a conversation with any employee, particularly a direct report. However, given that the recording and transcript were produced for us, we have taken them into account and given them some weight. We note also that there is no suggestion from the respondent that the transcript is inaccurate.

AHR attended to give evidence and be cross-examined; she denies the allegation.

We find it more likely than not that AHR did refer to the claimant as a bitch, for the following reasons:

.1. The most contemporaneous evidence we have is that of the transcript, taken from a recording made approximately two weeks after the alleged incident;
.2. XA did not know that she was being recorded, and that her words would form part of a Tribunal hearing. We find it unlikely therefore that she had any agenda during this conversation with ACA;
.3. We consider it more likely that AHR would deny an accusation once made, than that XA would make up such an allegation unprompted in the first place;
.4. Although AHR told us that she had no reason to call the claimant a bitch, as she (AHR) was not being asked to do anything outside her remit, that does not in itself preclude someone referring to a colleague as a bitch.

We therefore find that the treatment at **issue 4.1.8** occurred as alleged. We find that this was because of a personal animosity between the two colleagues. We set out more on this in our conclusions below.

Redundancy process

MC gave us clear and credible evidence as to the surrounding circumstances of the integration between the respondent and Marq Labs. He told us that this was a stand-alone acquisition, that there was no need for the businesses to integrate. In that respect, the integration was not about costs savings, but an opportunity to work together. Furthermore, it was not envisaged that the merger would need to lead to any redundancies.

MC's expression was that this was a "1 + 1 = 3" model, from which we took to mean that the integration would equate to something that was more successful than the sum of its parts.

On several occasions during the integration process, MC had reassured employees of the respondent that the integration was not being done to bring about costs savings, or redundancies. This same reassurance was given on 19 April 2022.

However, MC told us that things were moving very quickly. The respondent had been losing money for many years (£4-5m a year by April 2022), and this did not change in the first quarter of 2022. Also in 2022, MT started to back out of the integration and, come April 2022, had taken the decision to leave the respondent's employment.

MT had presented a model for improving the respondent's business to MC that involved keeping the two businesses (the respondent and Marq Labs) independent. MC was not satisfied that this approach would lead to any improvement in the respondent's business.

On 22 April 2022, a meeting was held between TP, MC, CC and JWO. In this meeting, MC was persuaded that seven redundancies would mean that there could be increased profitability for the respondent, whilst still going ahead with MC's 1 + 1 = 3 model for the integration.

The rationale behind those seven roles/individuals being placed at risk of redundancy was that some targeted management level reductions could save the respondent some money. £500,000 was to be saved in MT, ACA and the claimant's salaries. There was then some lesser saving from the five other roles that had been suggested for redundancy; these were very junior roles within the E-Commerce team.

We accept that MC's logic remained constant: the redundancies were not brought about because of the integration. The redundancies were necessary for the respondent given its financial situation, and the work of the redundant roles could be absorbed within Marq Labs. Therefore, MC's statements up to and including 19 April 2022 were genuine, and remained true, even at the point at which roles were placed at risk of redundancy a few days later. It was not the integration that was the root cause of the redundancies, but the respondent's poor profits (as a whole).

The respondent told the Tribunal, and we accept, that Marq Labs had a bigger and more professional e-commerce business than the respondent, and was able to absorb the claimant's role and that of some of her team. That is why, coupled with the high salary it was the claimant as Head of E-Commerce and some of her team that were placed at risk of redundancy.

Given that the respondent was making targeted redundancies, with the above logic regarding the reduction of the E-Commerce team, the claimant was in a pool of one as there was only one Head of E-Commerce role. The reality was therefore that the writing was on the wall as at 22 April 2022 meeting and dismissal was inevitable.

We therefore find as a fact that the decision to dismiss the claimant was made on 22 April 2022, as her dismissal was an inevitability at that point. Although the claimant was given the opportunity to present alternatives to redundancy, given the lack of suitable jobs available, there was no alternative but redundnacy (see below for further discussion).

Following on from the 22 April 2022 meeting, TP sent the email at [1010], encapsulating the discussion. Shortly afterwards, an aspirational organisation

chart was sent around by JWO, including a role of Director of E-Commerce, a role which held line management responsibility for 13-14 people (or more).

The plan as at 22 April 2022 was as set out by TP, namely that the claimant's exit would be "immediate" then ACA's exit would be "expedited". However, this plan was then subject to JWO's comments on 24 April 2022 at [1010], which stated that "next week (w/c May 2nd) – Exit team members identified per the attached org chart". Although we find it unusual that the respondent (as the new major shareholder in Marq Labs) would have their timetable dictated by Marq Labs, this appears to have genuinely been the dynamic between the two. It was the respondent's wish to stick to the suggested timetable as set out by JWO: that timetable was to be stuck to, as can be seen from the respondent's communication on [587] of 28 April 2022, that "our timings stand as communicated".

End of April 2022

On 25 April 2022, the claimant formally confirmed her pregnancy to MT by email – [534]. MT's response was "Are you ok for me to share this with key members of business, GMT [General Management Team] and HR".

The claimant replied to this, stating:

> "GMT – all good to share, if this is required for management information.
>
> I would prefer to wait until 25 weeks before telling HR 25 weeks as I would feel more comfortable."

On the evening of 26 April 2022 or the following morning, MT contacted MC to inform him that the claimant was pregnant. On the morning of 27 April 2022, MC informed TP of the claimant's pregnancy.

Issue 2.1.4 - placing the claimant at risk of redundancy on 27 April 2022

As a matter of fact, the claimant was placed at risk of redundancy formally on 27 April 2022 - [568]. As discussed above, we accept that the reason for this was that the respondent needed to make savings, and that the claimant had a highly paid management role whose work could be encompassed within the existing Marq Labs structure once integration had occurred.

Issue 2.1.5 - asking the claimant to do work on 28 April 2022, despite the claimant being off sick – alleged perpetrator TP

On 27 April 2022, the claimant received an email from TP after office hours, asking her to do various tasks – [578]. The claimant was then off sick due to her pregnancy on 28 April 2022.

Looking at the email chain around this issue, at the point of sending the email on 27 April, TP was not aware that the claimant was going to be off sick the next day. The following day, MT forwarded TP's email to Rakhi Chauhan to action. He did not include the claimant in this email.

> We find that there was no requirement or instruction for the claimant to work whilst she was off sick. The claimant suggested that someone should have informed her on 28 April that she did not have to complete the work in TP's email of 27 April. This would be completely surplus to requirements. When an employee is off sick, it is generally assumed that they will not do any work, and a claimant is entitled not to do any work whilst off sick. There is nothing in the evidence to suggest that the respondent, on knowing that the claimant was ill, required her to complete the work mentioned in the email sent the day before her sick leave.
>
> We therefore do not find as a fact that the treatment set out in **issue 2.1.5** occurred as alleged.

The claimant was told that she was at risk of redundancy on 27 April 2022: this was followed up with the letter at – [568]. That letter contained an invitation to a consultation meeting on 4 May 2022, at which stage a final decision would be communicated to the claimant. She was invited to send any proposals to the respondent by 29 April 2022.

An email was sent out to all those at risk of redundancy on 29 April 2022 – [1016-1023], asking for any proposals, and setting out links to available job roles within Marq Labs, stating that any roles open at the respondent were visible on the intranet.

The claimant responded to that email on [587], setting out the areas of work she could be deployed into, but without identifying any role, or any alternative solution to her redundancy.

<u>3 May 2022 meeting</u>

On 3 May 2022, a meeting was held with all employees not at risk of redundancy, in which the news was given that those not in attendance were indeed at risk. The claimant alleges that at the meeting it was announced that the 7 roles were redundant, as opposed to "just" being at risk of redundancy. She relies upon texts she received from colleagues, demonstrating their sadness that she would be leaving.

We accept that the respondent communicated that the roles were at risk of redundancy, but that certain people in that meeting misconstrued what was said. We find this as there were mixed messages contained within the texts that the claimant relies upon: "they named everyone that was let go" followed by "they said everyone was at risk of redundancy" – [597]. We also note the claimant's own email of 3 May 2022 which states "the 'risk of redundancy' was announced today…" – [601]. We find it more likely that the respondent would have been acutely aware of the difference in language between "at risk of redundancy" and "redundancy", and would have been careful to use the right expression. However, it is easily understandable that the attendees of that meeting could understand that the decision to dismiss had already been made.

4 May 2022 meeting

At 1716hrs on 3 May 2022, the claimant emailed TP, having declined the meeting for 4 May 2022 – [604/605]. She did so on two grounds: (a) her concerns around the process, and (b) she had been unwell "about my recent condition". On closer inspection, the claimant did not expressly ask to rearrange or postpone that hearing. She did however ask that the team leading the redundancy process be present in the meeting.

At 1856hrs on 3 May 2022, the claimant emailed stating that the process of the meeting the following day was futile, as the decision had already been made to dismiss her on discriminatory grounds.

At 0937hrs on 4 May 2022, the claimant accused TP of bullying and victimising behaviour, copying in MC and asking to advise "how you would like to proceed" – [604]. Again, the claimant did not expressly ask for a rearrangement of the meeting.

Issue 2.1.7 - not rearranging a redundancy consultation meeting originally scheduled for 4 May 2022 in light of the claimant's pregnancy-related sickness absence

Factually it is common ground that this meeting was rearranged. It is the claimant's case that her email at [604] was intended to be read as requiring the hearing to be scheduled for another day with MC present.

The claimant did not in fact attend the meeting on 4 May 2022, and a decision was made to dismiss her on the grounds of redundancy. the outcome letter confirming the dismissal is at [614]. This letter is not entirely accurate, as it refers to a discussion earlier on 4 May 2022: there was no such discussion on this date between the parties.

Looking at the emails the claimant sent on 3 and 4 May 2022 at [604/605], we find that the primary reason for not attending the meeting on 4 May 2022 was her concern about the fairness of the process, in particular the presence of the notetaker and the claimant's understanding of TP's prior conduct towards her. We find that, even if the respondent had postponed the meeting, the claimant would not have attended any rearranged meeting. We find this on the basis of her email at [604], in which she makes her feelings about TP perfectly clear: this was supported by her evidence to the Tribunal that she did not wish to be in the same room as TP.

We also find that it is not clear objectively that the claimant's wish is for the meeting to be postponed and rearranged.

The respondent's evidence on this point was that it wished to stick to JWO's timetable set out on [1010]. In other words, in the week commencing 2 May 2022, the respondent wished to exit team members identified as per the org chart. We accept this evidence. Although it was put to TP that the reason why the meeting was not postponed was due to the claimant's pregnancy or pregnancy related illness, it was put very much as a blanket suggestion, and the allegation was denied by TP.

We also note [657] that ACA had been feeling anxious and suffering from panic attacks, however there was no alteration to the timetable for her. Further, we were told that many of the people at risk of redundancy chose not to be a part of the business during that process (TP evidence). The timetable was not altered for any of the employees at risk of redundancy.

Following the 4 May exchange of emails, the respondent sent the letter at [614] to the claimant, confirming the decision that the claimant was to be dismissed with effect from 6 May 2022. All the employees at risk of redundancy were dismissed with effect from that date.

The claimant had already made her intention to appeal such a decision clear to the respondent in her email of 4 May 2022 – [604]. However, she was not given the right to appeal, due to having less than 2 years' service with the respondent.

Her employment therefore came to an end on 6 May 2022.

Issue 2.1.6 - deliberately following a very limited "sham" redundancy process – alleged perpetrators – TP and MC

It is the claimant's case that the entire redundancy process was deliberately designed in order to get rid of both herself and ACA. Furthermore, she alleges that the other five dismissals by way of redundancy were simply collateral damage, in that the respondent weighed up the risk of dismissing those five in order to get rid of the claimant and ACA, and determined that it was a risk worth taking. The reasons the claimant gives as to why the respondent wished to get rid of the claimant and ACA is because of the claimant's pregnancy and ACA's race.

Ultimately it is a management decision as to whether redundancies are required for financial reasons. There is sufficient evidence before us for us to accept that the respondent was indeed in financial difficulties.

In terms of why the claimant was picked to be placed at risk of redundancy as well as the other six individuals we find that this was because the

claimant and ACA, along with MT, were amongst the highest paid at the respondent. The savings made by not having to pay their salary would not be insignificant.

Furthermore when weighing up the cost-benefit analysis of keeping them on versus making them redundant, we note that Marq Labs had a robust and sophisticated e-commerce department. This meant that the claimant and her team was surplus to requirements once the integration had taken place.

It was suggested by the claimant that the respondent decided it was worth taking the risk of dismissing five other individuals lower down the hierarchy in order to act as a smokescreen for getting rid of the claimant and ACA. The claimant alleges that the litigation risk of those five bringing a claim would be relatively low, and was a risk that the respondent was willing to take.

We consider that this is a convoluted argument to run. Although the five juniors may not have had two years of employment under their belts with the respondent, neither did the claimant. It is therefore evident that, just because an employee has under two years' service, this does not mean there is a low risk of litigation.

We find it inherently unlikely that the respondent would go to the lengths of inventing a redundancy situation and dismissing six people besides the claimant, simply in order to cover up the fact that they wanted her employment terminated. Given that she had been with the respondent for less than two years, we find that the claimant could have been dismissed (with the same level of risk of litigation) without the need to dismiss 6 other individuals. It is too elaborate a scheme to be plausible.

We accept that the reason for dismissing the five junior individuals was that they were part of the claimant's E-Commerce team, and therefore also surplus to requirement under the new integrated structure.

The claimant's case is that the respondent wanted to dismiss her as her going on maternity leave would be a disruption. We do not accept that this would be more of a disruption than dismissing 7 people.

Furthermore, we do not find that the respondent considered the claimant's maternity leave a disruption, as the claimant alleges. MC told us that pregnancy and maternity leave are not considered a disruption. TP told us that the logistics

around maternity leave are a normal part of being an employer. The claimant's maternity leave was scheduled to start on 18 September 2022; although the integration process may not have finished by that stage, we do not see that her leaving at that time would cause any major disruptions to the integration process, nor have we heard or seen any evidence to support that contention.

The claimant also raises the point that TPA was not made redundant, or placed at risk of redundancy. We find that the reason why the claimant was chosen to be placed at risk instead of TPA (who was pregnant at the time) was the difference in their roles and their place in the integration. As stated above, Marq Labs had a more robust E-Commerce business, and was able to absorb the work of the claimant's role, and that of some of her team. TPA's role is in Product Development: on that side of matters, Marq Labs did not have new product development. TPA's work could not be covered or absorbed by Marq Labs as they did not have the infrastructure. This evidence from TP about the disparity in roles was not challenged by the claimant.

The claimant relies on the fact that she was not given the Director of E-Commerce role as an indication that the redundancy was a sham and the respondent wanted her gone due to her pregnancy. We heard from the respondent's witnesses, and accept, that this was only ever a job on paper. It was a role with much more managerial responsibility that the claimant's role, and was responsible for £70 million of business. It was therefore not a suitable alternative for the claimant, and was only ever a theoretical role. The Director role has never been recruited to. We find it incredible that the respondent (once integrated with Marq Labs) would deliberately leave the role of Director of E-Commerce open if the role was needed, just in order to bolster its defence to this claim. We find that, on the balance of probabilities, as things currently stand, the role is simply not required to be filled.

We do not accept that the redundancy process was a sham as alleged or at all. There was a genuine redundancy situation, and a process was duly followed.

Issue 2.1.8 - The claimant's dismissal with effect from 6 May 2022 (and in particular ensuring the claimant was dismissed swiftly so that she did not qualify for maternity pay)

We have found that the claimant was dismissed in light of a genuine redundancy situation, in which the process was not a sham. We find that she was dismissed by way of redundancy.

Specifically, it is the claimant's case that she was dismissed swiftly so that she did not qualify for maternity pay.

From the respondent's evidence it transpired that all seven employees who were made redundant were all dismissed with effect from the same date. This evidence was not challenged. We also note JWO's email which stated that all of those at risk of redundancy should have their meetings in the week commencing 2 May 2022 - [1010].

We therefore find that (regardless of TP's email at [1010]) the claimant was dismissed no more swiftly than anyone else.

In any event, given the claimant's length of service, she would have been entitled to statutory maternity pay. We therefore are not clear as to how an earlier dismissal date would have altered her qualification for statutory maternity pay. We find that she was not dismissed with effect from 6 May 2022 in order for the respondent to make any savings on the claimant's maternity pay.

Issues 4.1.7 and 6 - The respondent failed to pay the claimant for holiday rolled over from 2021 April 2022 or on termination of her employment – alleged perpetrators TP and MT

The claimant's allegation at **Issue 4.1.7** has two parts to it: first, that the claimant was not paid carried-over holiday pay on her request on 21 April 2022, and second that she was not paid that pay at the time of her termination.

<u>April 2022 refusal</u>

This refusal comes at [525/524]. The claimant's request to have her rolled over holiday leave paid out to her was initially approved by MT, however Chris Johnson (Financial Controller) revoked that approval, as "due to UK legislation, Mibelle isn't allowed to buy-out rolled-over holidays. The only time they can be paid is when an employee leaves the company" – [525].

Factually, therefore, it is correct to say that she was refused a pay out at this stage.

<u>On termination</u>

It is common ground that the claimant's pay on termination did not allow for 10 days' holiday carried over from 2021.

The claimant's case here is that her right to carry over holiday from 2021 into 2022 was only limited by the 18-month time period within her contract of employment (clause 8.4, [88]).

The respondent's point is that the 10-day carry over was at the management's discretion, and that discretion was exercised on the precondition that this rolled-over holiday would be taken before the end of Quarter 1 of 2022.

The claimant's contract states at clause 8.4:

> "You may, following the approval of a senior manager, carry forward a maximum of 3 days unused holiday into the following holiday year. There may be circumstances whereby you have been prevented from taking holidays in the relevant holiday year and therefore may be able to carry forward more than 3 days. Examples of this may be: A period of Long-Term Sickness absence, statutory maternity, paternity, adoption, shared parental, or parental bereavement leave. In cases of sickness absence, carry-over is limited to four weeks' holiday per year. Any such carried over holiday which is not taken within eighteen months of the end of the relevant holiday year will be lost."

Looking at the communications between the parties on this, we see the following conversation – [640]. On 21 October 2021, the claimant asked TP if she could roll over 10 days leave. TP's response was:

> "Ok. Leave with me. They will want you to take roll over by end of q1. I will push for full roll over."

TP then approached Kevin Green (HR) ("KG"), and asked him whether the claimant could roll over all her holiday provided she took it by the end of Q1. KG's response is to say that he is happy with that, and he does not mind if she slips into a part of Q2 – [639].

We conclude from these documents the following:

.1. Management discretion to allow carried over leave within clause 8.4 extends to the number of days to carry over. It does not however extend to having discretion to reduce the 18 month period within which that carried over leave could be taken. If that was the intention of this clause, it would be clearly stated that management have the discretion to reduce the 18 month period;

.2. It was not clearly confirmed to the claimant that she was required to take carried over leave within Q1. The reference to "I will push for full roll over" is ambiguous, and we can see why the claimant may interpret this to mean that TP would push for leave to be taken within the contractual 18-month period;

.3. We accept that TP did impose and believed in the "Q1" time limit, for valid reasons, and that others were aware of it (for example, KG, 13 December 2022, after the claimant's dismissal – [672]). However, we have seen nothing to show that this policy was formally implemented and disseminated to employees.

We therefore find that there was no meeting of the minds between the claimant and TP that her carried over holiday would need to be taken by the end of Q1. There was therefore no variation of her contract to that effect.

Contractually, therefore, the claimant was entitled to take her 10 days holiday at any time up to 18 months after the end of the relevant holiday year (i.e. here Summer 2023).

At the time of the claimant's termination, the claimant was therefore entitled to be paid for any holiday she had not taken but accrued, which would include the 10 days carried over from 2021.

Time limits

Despite the issue of time limits being raised at the beginning of the hearing, the Tribunal heard no evidence as to why the claims were presented on 4 July 2022, and why the early conciliation period was commenced on 18 April 2022, as opposed to earlier.

This point affects **Issues 4.1.2, 4.1.3 and 4.1.4**.

Regarding **Issue 4.1.2**, the claimant complains about the respondent's failure to act on complaints in October, November and December 2021. The LT meeting in December recognised the problem with the bullying culture at the respondent, and had intended to take action at the next LT meeting in January 2022. The date of that meeting was 11 January 2022. Therefore, we find that the respondent should have done something about the bullying culture by 11 January 2022.

For the purposes of s123(4) EqA, this means that time starts to run for this claim from 11 January 2022, meaning that ACAS early conciliation should have started by 10 April 2022.

Turning to **Issue 4.1.3**, this incident occurred on 17 February 2022, meaning that the primary time limit expired on 16 May 2022. Given that this date falls within the ACAS early conciliation period plus a month, the time limit for this claim expired on 18 June 2022.

In relation to **Issue 4.1.4**, this allegation is said to have occurred in January 2022. Assuming this took place on the last day in January, 31 January, the time limit for bringing this claim to the Tribunal was 30 April 2022. This date falls within the ACAS early conciliation period plus a month, and therefore the new time limit is 18 June 2022.

Ms Nicholls for the claimant submitted that all the allegations of race discrimination formed a continuing act given the background of the racist culture within the respondent.

Further, Ms Nicholls submitted that it would be just and equitable to extend time for the following reasons:

.1. **Issue 4.1.2** - the failure to deal with the claimant's complaints was not limited to October to December 2021 on the facts. In any event, 11 January 2022 does not represent a reasonable time frame within which the respondent could have been expected to respond to the complaints. It was fair for the claimant to rely upon the understanding that, at some point, the respondent would investigate.
.2. Regarding **Issue 4.1.3 and 4.1.4**, the claimant was being put through a sham redundancy process around the time at which she should have been going to ACAS to deal with early conciliation and presenting her claim.
.3. Regarding all three issues, the Tribunal must bear in mind what the claimant

was going through around April 2022, and consider the impact that the respondent's conduct and this litigation has had on her.

We reject these submissions. Firstly, the claimant was notified of being at risk of redundancy on 27 April 2022, and contacted ACAS to start early conciliation on 28 April 2022. Therefore, it was not the alleged sham redundancy that prevented her from starting the ACAS process. The redundancy process concluded on 4 May 2022, so again that process did not distract the claimant from entering her ET1 on time: the redundancy decision was made known around 6 weeks before the expiry of primary limitation (18 June 2022).

Secondly, it is an unattractive argument for the claimant on one hand to bring a claim that the respondent failed to deal with complaints, then on the other to say that the respondent did not need to have acted on those complaints by 11 January 2022 (the LT meeting).

Conclusions

The respondent's witnesses' knowledge of the claimant's pregnancy

Taking MT first, the first allegations of pregnancy discrimination/harassment relating to sex against him are in late March 2022. By this time, the claimant had informed MT of her pregnancy, in the week commencing 14 March 2022. Therefore, he had the requisite knowledge of her pregnancy in relation to the claims against him.

Turning to TP, we find that he did not have knowledge of the claimant's pregnancy until the morning of 27 April 2022, on hearing the news from MC. We conclude this for the following reasons:

.1. TP and the claimant did not cross paths in the office enough during January – April 2022 for TP to have noticed any signs of pregnancy. TP was in the office 6 days in January, 2 days in February, none in March, and in April he was out of the office until 19 April. The claimant worked in the office 2 days a week. This means that the two were very rarely in the office at the same time during Spring 2022.

.2. Although the claimant may have had a small bump in spring 2022, we find that TP did not understand from the claimant's appearance that she was pregnant. We find that it would only have been clear to those who knew she was pregnant that she had a bump. There are many reasons why a woman may show a slightly larger abdomen, other than just pregnancy. We find it more likely than not that TP did not notice any signs or symptoms in the claimant, and did not notice or piece together than any minor change in her appearance was down to pregnancy.

.3. The claimant argues that TP would have picked up the news of her pregnancy from office gossip. Again, we note that TP was hardly in the office in Spring 2022. Further, we have no evidence that TP did receive such gossip; this point is based solely on the claimant's speculation. We find that TP was not made aware of the claimant's pregnancy by office gossip;

.4. The claimant relies on Mr Khan's comment to her that MT had spoken to HR about the claimant's pregnancy, as proof that TP would have found out. Firstly, this information is hearsay; we have not heard from Mr Khan

directly. In any event, even if this conversation did happen, it is evidence of MT and HR's knowledge of the claimant's pregnancy, but does not assist us as to TP's knowledge.

.5. The claimant also relies on MT's comment on or around 5 April 2022 Leadership Team meeting that 60% of his team would be on maternity leave in the summer, as evidence that MT would have told TP, and therefore that TP knew of the pregnancy. First, we have found that this comment was not made. Second, even if it was made, this is not evidence that TP was told or knew of the claimant's pregnancy. TP and MC were not at this meeting.

.6. We have found that there was no discussion about the claimant's pregnancy in the car journey week commencing 18 April 2022;

.7. We have no evidence that anyone spoke to TP about the claimant's pregnancy before 27 April 2022.

In relation to MC's knowledge, we find that he became aware of the claimant's pregnancy from MT, either on the evening of 26 April 2022, or the morning of 27 April 2022:

.1. The only evidence that the claimant relies upon to demonstrate that MC had prior knowledge of her pregnancy was the general office gossip, and the conversation between the two individuals at the Christmas party;

.2. We find that, although there may have been office gossip, MC was not aware of it. It was common ground that he was not in the office that much in Spring 2022. We have no direct evidence that MC was told about the claimant's pregnancy by anyone. We conclude that he did not find out about the pregnancy via office gossip;

.3. In terms of the Christmas party conversation, we prefer MC's account of this conversation, for the reasons set out in our findings. In any event, even if we were to accept the claimant's account, taken at its highest the claimant asks us to infer MC's knowledge of her pregnancy from his comment about not wanting any disruption to the integration. On her own evidence, there is no direct reference to her pregnancy during this conversation.

Direct race discrimination – s13 EqA

4.1.2 - failing to investigation bullying/discrimination

We have found as a fact that there was a failure on the part of the respondent to take appropriate action in relation to the recognised bullying culture within the respondent. the reason for this was the Leadership Team's forgetfulness and ineptitude.

The evidence before us suggests that both white people and people of colour were experiencing bullying behaviour, which was reported to the respondent. Therefore, we are not satisfied on the evidence before us that there was a racist undertone to the bullying culture at the respondent.

The question for us is whether a white person in the claimant's shoes would have been treated any more favourably than the claimant. We have no evidence from which we could draw such an inference. The bullying culture that is acknowledged to exist within the respondent affected white employees and employees of colour

alike. I asked Ms Nicholls in her submissions what evidence she relied upon to show us the "something more" than just a difference in treatment and colour. She relied upon the fact that it was allegations of race discrimination were ignored. At the stage at which we have found that there was a failure by the respondent (as at the end of December 2021) we are not satisfied that any complaints of racism had been made.

We therefore find that we have no good evidence from which we could conclude that the failure to deal with the bullying culture was discriminatory, and therefore the burden of proof does not shift to the respondent.

This allegation therefore fails.

4.1.3 - Pureplay

This claim fails as, on the facts, we have found that no threats were made as alleged.

In any event, if we are wrong on our interpretation of the messages on [299] onwards, we find that there is no evidence from which we could conclude that MT had discriminated against the claimant because of her race.

The claimant relies on AH as her comparator, however AH is not an appropriate comparator. The two women held very different roles, with different lengths of service within the respondent, one as Head of Sales, one as Head of E-Commerce.

We therefore turn to a hypothetical comparator. We have no evidence from which we could conclude that a white comparator would have experienced any different treatment to the claimant.

In any event, even if the burden of proof shifts to the respondent, we accept MT's evidence that the reason he initially chose to leave Pureplay with AH was because Pureplay sat within Sales at Marq Labs. We also find it unlikely that, if MT had threatened the claimant on the basis of her race, he would then have changed his mind and given her the responsibility for Pureplay.

This allegation fails.

4.1.4 – finding an "upside"

We have found that E-Commerce, and therefore the claimant as its Head, were instructed to find an upside.

On this allegation, AH is said to be the comparator, however she is not an appropriate comparator, as there are material differences between her position and that of the claimant:

.1. They hold different job roles, with different responsibilities;
.2. Their respective deficits were of different sizes;

.3. The promotions their respective teams could generate had different lead times.

In any event, we find that there is no evidence from which we could conclude that MT's conduct at this meeting was significantly influenced by the claimant's race. We accept MT's rationale as to why E-Commerce was asked initially to find an upside: E-Commerce under the claimant had the agility to turn a profit much faster than Boots under AH.

We therefore turn to consider a hypothetical comparator, and the treatment that they would have had if they had been in the claimant's shoes at the meeting on 11 January 2022. Again, there is no evidence before us from which we could conclude that the treatment of the claimant here was because of her race. The initial burden of proof is therefore not met, and so the burden does not shift to the respondent.

This allegation fails.

4.1.5 – requirement to complete administrative tasks/forms

We have found that employees who were both white and of colour were in receipt to JWE's initial email, and reminder email, about the new HR processes. Therefore, there is no difference in treatment of the claimant in terms of the requirement to complete such processes.

In terms of being chased, we are not satisfied that the claimant was in fact chased by Jen Webster. In any event, there is no evidence from which we could conclude that that any such chasing was significantly influenced by the claimant's race. We have no evidence to suggest that there would be "something more" than a difference in treatment and a difference in race between the claimant and a hypothetical comparator.

This allegation therefore fails.

4.1.6 - TP shouting on 21 April 2022

Factually, we have accepted that TP did raise his voice to the claimant. Whether or not the volume level extended to be objectively referred to as a shout is not important: what matters is that we have found that TP raised his voice in a way that was unprofessional.

However, there is no evidence from which we could conclude that TP's behaviour was significantly influenced by the claimant's race. No evidence has been led on this point, and we note that even in the claimant's own witness statement, she blames TP's behaviour on her pregnancy (and therefore sex), and not her race.

In any event, we accept that the reason for this conduct by TP was the claimant's conduct during that meeting. We accept that, in light of our findings as to the content of that conversation, she was speaking in a manner that was not appropriate to the CEO of Marq Labs.

This allegation therefore fails.

4.1.7 – holiday pay

Factually, we accept this allegation, in that the claimant was refused a pay out of her 10 days' rolled over holiday, both in April 2022 and at the point of her termination.

However, we do not find that those refusals were significantly influenced by the claimant's race.

The decision maker in April 2022 was CJ. The comparator is said to be Rob Fenton. He is not an appropriate comparator: his situation was different to the claimant's. The claimant had not taken her holiday in 2021 due to how hectic she was at work. Mr Fenton had been unable to take his leave because he had had a heart attack and reduced his hors down from full time to part time hours. Furthermore, the decision maker for Mr Fenton's case was not CJ, but Michael Colton.

TPA was also mentioned by the claimant, although not listed as a comparator within the list of issues. Again, she is not an appropriate comparator. The discussion around her holiday pay occurred in 2019, in relation to annual leave to be attached to her maternity leave – [64]. Her circumstances were at that time materially different to the claimant's.

We consider then a hypothetical comparator. We have no evidence from which we could conclude that CJ's decision was significantly influenced by the claimant's race. This is a one-off allegation against CJ, and there is no evidence to show us that a white colleague would have been treated more favourably. There is also no evidence of "something more" than a difference in race between a comparator and the claimant that would lead to the test in **Madarassy** being met.

The burden of proof therefore does not shift to the respondent. In any event we accept the respondent's reason for this refusal, namely that it is against UK legislation.

Turning to the refusal to pay out for 10 days' carried over leave at the stage of the claimant's termination, again there is no evidence from which we could conclude that this decision was taken because of the claimant's race. It is not clear who the decision maker was in any event at the point of the termination. Furthermore, we have been presented with no evidence to demonstrate that a hypothetical comparator would have been treated any more favourably.

In any event, we accept that the respondent's reason for refusing to include the full 10 days within the claimant's final pay was its understanding that the "Q1 limit" had been applied.

This claim therefore fails.

4.1.8 - AHR calling the claimant a bitch

We have found that this comment occurred.

Considering the reason for that comment, we are asked to consider the treatment a hypothetical comparator would receive from AHR. No evidence has been presented to us that could lead us to conclude that there would be anything other than a difference in race, if indeed a hypothetical comparator were to be treated differently.

This is a one-off allegation against AHR. We have already found that, despite there being a bullying culture, that culture was not tainted by racism.

As such, there is no evidence from which we could conclude that AHR's use of the word bitch was significantly influenced by the claimant's race. There is not "something more" as required in **Madarassy** that leads to the burden of proof being shifted to the respondent.

We conclude that AHR's conduct was not signficiantly influenced by race. This allegation therefore fails.

Automatic unfair dismissal – s99 ERA/reg 20 MAPLE

The claimant's case on this is that the decision was made to dismiss her on 22 April 2022. She relies on the email at [1010]. We have found that, although the respondent may not have admitted it to itself even, the claimant's dismissal was inevitable as at 22 April 2022.

The decision makers in respect of the claimant's dismissal were MC and TP. We have found that they were not aware of the claimant's pregnancy until after 22 April 2022. Therefore, pregnancy cannot be the reason for their decision making on 22 April 2022.

This claim therefore fails due to the respondent's lack of knowledge at the time the decision to dismiss was taken.

Even if the decision to dismiss the claimant was made after TP and MC's knowledge of the claimant's pregnancy, we not satisfied that her dismissal was because of pregnancy or because the claimant sought to exercise her right to maternity leave.

We have accepted that there was a genuine redundancy situation. The claimant's case is that the whole redundancy situation was orchestrated in order to dismiss both the claimant (for her pregnancy) and ACA (for her race): the other 5 redundancies were collateral damage. We have found this to be an inherently unlikely scenario.

Furthermore, we note that AH and TPA were pregnant and coming up to, or already on their maternity leave. We have heard that TPA and the claimant were close in terms of gestation. We therefore find that this weakens the claimant's case that she was dismissed because of her pregnancy, or that she was seen as a disruption for taking maternity leave.

We are not satisfied that the reason for the claimant's dismissal was not her pregnancy: we find that it was redundancy.

Therefore this claim fails.

We note at this stage that, many of the claimant's criticisms of the respondent's redundancy process and her dismissal would fit much more comfortably within a claim of ordinary unfair dismissal, had the claimant had two years' service. In that scenario, the respondent would have been at risk of a finding of unfair dismissal. However, that is not the case we have had to determine.

Pregnancy/maternity discrimination – s18 EqA

2.1.1 - exclusion and unfavourable treatment by TP

This claim fails on its facts. There was no exclusion or unfavourable treatment of the claimant as she alleges under **Issue 2.1.1**.

This act is alleged to have been perpetrated by TP from late March 2022. All three of the specific examples given occurred before 27 April 2022. We have found that TP was not aware of the claimant's pregnancy until 27 April 2022, and therefore any behaviour predating that date cannot have been because of the claimant's pregnancy, or because of her wishing to exercise her right to maternity leave.

We therefore reject these allegations.

2.1.2 - TP shouting on 21 April 2022

As of 21 April 2022, TP was not aware that the claimant was pregnant, and therefore any treatment by him on this day could not be because of the claimant's pregnancy. In any event, we have found that the reason for TP raising his voice or shouting was the claimant's conduct during that meeting.

This allegation therefore fails.

2.1.3 – MT's conversation at the Christmas party

We have found that the conversation did not take place as alleged by the claimant.

Therefore, we reject this allegation on the facts.

2.1.4 - Being placed at risk of redundancy on 27 April 2022
2.1.6 - deliberately following a very limited "sham" redundancy process
2.1.8 - the claimant's dismissal with effect from 6 May 2022

We take these issues together for ease, as ultimately they are all part of the same redundancy procedure.

The claimant alleges that she was placed at risk of redundancy because she was pregnant and she sought to exercise the right to maternity leave. She further alleges that her dismissal was due to the same reasons and was both automatically unfair and an act of pregnancy discrimination, and that the whole process was a sham.

She bases this argument on the following assertions:

.1. The change in MC's view communicated on 19 April that redundancies would be required. The claimant says the change in MC, from no redundancies, to making redundancies was due to his discovery that the claimant was pregnant. We have already dealt with this and have found that his statement that no redundancies would be required due to the integration was correct. Redundancies were required due to the financial position of the respondent.

.2. The claimant raises a difference in treatment in that she was dismissed whereas TPA was not. Although both women were pregnant at the time at which the claimant was made redundant, they were at different stages. The claimant's case is that TPA would already be on maternity leave at the point of integration, whereas the claimant would be about to go on maternity leave and so her departure would be more disruptive. We have found that the respondent did not consider the claimant's maternity leave to be a disruption, nor did it find anyone else's maternity leave to cause disruption.

.3. The claimant also says we can draw inferences as to the reason for her dismissal due to the fact that she was not offered alternative work. She was provided with the same opportunity as her fellow colleagues who were placed at risk of redundancy and given the same information – [1016-1022];

.4. The claimant says that she should have been given the Director of E-Commerce role, and the fact this did not happen (and that the role remains empty) points to the respondent deliberately orchestrating her departure. We have found above that this is simply too convoluted a theory: we do not accept that the Director role should have been given to the claimant, or that the role has been left empty for the purposes of this litigation.

We determine that there is no good evidence from which we could conclude that the respondent's treatment throughout the redundancy process was because of her pregnancy or her taking maternity leave. Therefore, the burden of proof does not shift to the respondent. In any event, we accept that the respondent's reasons for acting as it did were non-discriminatory.

Specifically, the claimant was placed at risk of redundancy following a management decision that financial savings could be made by making her role redundant.

We have found that the redundancy process was not a sham.

The reason for dismissal was redundancy, and the timing of that dismissal was not connected to the claimant's qualification for maternity leave.

Therefore, these three allegations fail.

2.1.5 – required to work when on sick leave

We have found that the claimant was not required to do work on 28 April 2022. Therefore, the allegation fails on its facts.

2.1.7 - not re-arranging the redundancy consultation meeting

We have found that the reason for not rearranging redundancy consultation meeting was in order that the respondent stick to the timetable set out by JWO on [1010].

At this point TP was aware that the claimant was pregnant. However, there is no evidence from which we could determine that the claimant's pregnancy, or indeed her pregnancy-related illness on 4 May, significantly influenced TP's decision to go ahead with the meeting. There is no evidence from which we could conclude that this lack of rearranging was motivated, whether consciously or unconsciously, by either the claimant's pregnancy or a pregnancy related illness.

In any event, we accept the respondent's non-discriminatory reason for this conduct.

This claim therefore fails.

2.1.9 - any treatment found not to have been harassment.

We will return to this after we have addressed our conclusions on the harassment claim below.

Harassment related to sex/detriment for pregnancy – s26 EqA, s47C ERA

3.1.1 – MT saying "condition"

We have found as a fact that MT did not use the word "condition" to described the claimant's pregnancy.

Therefore this allegation fails on its facts.

3.1.2 – MT's conversation at the Christmas party

We have found that the conversation did not take place as alleged by the claimant.

Therefore we reject this allegation on the facts.

3.1.3 – TP on 21 April 2022

In relation to **Issue 3.1.3**, we have found that TP was not aware of the claimant's pregnancy as at 21 April 2022. Therefore any conduct by him on that day was not related to the claimant's pregnancy, and by consequence was not related to her sex. Nor could it be for a reason relating to the claimant's pregnancy.

This allegation of harassment and detriment fails.

2.1.9 - any treatment found not to have been harassment.

For the reasons set out above, we have not upheld the claims of harassment/detriment. This is either because we have found that the allegation did not occur as pleaded, or because the conduct was not connected to the claimant's pregnancy and therefore sex.

The causal link required for s18 is more strict than that required by s26 EqA. As set out above, s18 requires that the treatment is because of pregnancy, whereas s26 requires the treatment to be "related to" sex (and therefore, here, pregnancy).

Taking each briefly in turn:

.1. Issue 3.1.1 was not upheld on its facts;
.2. Issue 3.1.2 was not upheld on its fact; and
.3. Issue 3.1.3 was upheld on its facts, but failed on the required causal link. Given that it failed on the looser causal link, it also fails on the more stringent causal link required under s18.

This allegation therefore fails.

Holiday pay – unlawful deduction of wages

We have found that, contractually, the claimant was entitled to carry over her full 10 days into summer 2023. Therefore, at the time of her dismissal, this leave should have been included within the calculations of accrued but untaken holiday pay.

We therefore find that there was an unauthorised deduction in her wages.

We are however unable to quantify this unauthorised deduction, as the figures of what the claimant was paid and how they were calculated are not clear to us.

Directions will be given separately in order to progress the remedy aspect of this

claim.

Time limits

We have only upheld the holiday pay claim, which is in time.

We therefore need not consider the issue of whether Issues 4.1.2, 4.1.3 and 4.1.4 are in time. However, for completeness we will deal with this issue.

On the facts as we have found them to be, and on our conclusions above, no race discrimination claims that were presented in time were upheld. Therefore, there are no claims that are in time for **Issues 4.1.2, 4.1.3 and 4.1.4** to latch onto as a continuing act, in order to bring those three claims in time.

In terms of whether the claims were presented within such time as was just and equitable, as we have discussed, we were provided with no evidence from the claimant as to why the claim form and early conciliation period were completed when they were. Although submissions were made on the claimant's behalf, this is not sufficient: evidence is required to prove to the Tribunal that time should be extended under s123 EqA.

The claimant has therefore failed to prove that it would be just and equitable to extend time within which these three allegations should have been brought.

To the extent it is relevant, we therefore would have refused to extend time under s123 EqA in relation to these three allegations of race discrimination.

_____
Employment Judge Shastri-Hurst

_____

Date: 4/9/2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12/9/2023

FOR EMPLOYMENT TRIBUNALS – N Gotecha