EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Louise Hawes	**v**	Paradigm Housing Group Limited

Heard at: Cambridge

On: 22, 23, 24 and 25 May and 13 June (pm) 2023
In Chambers: 12 and 13 (am) June 2023

Before: Employment Judge Tynan

Members: Ms J Buck and Ms C Smith

Appearances
For the Claimants: Ms Millin, Counsel
For the Respondent: Ms Brown, Counsel

JUDGMENT

1. At the relevant date, namely on or around 9 February 2021, the Claimant was not disabled within the meaning of Section 6 and Schedule 1 of the Equality Act 2010. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's claim that she was directly discriminated against because of the protected characteristic of disability.

2. The Claimant's unfair dismissal claim is dismissed on the grounds that the Tribunal has no jurisdiction to consider it, her claim having been presented out of time in circumstances where it was reasonably practicable for the claim to have been presented within the primary time limit applicable to it.

3. The Claimant's remaining complaints that she was discriminated against because of pregnancy, as set out in paragraphs 8.1 – 8.9 of the List of Issues and discriminated against because of sex by being dismissed, are not well founded and are dismissed.

REASONS

1. The Claimant was employed by the Respondent as a Sales Progressor from 3 December 2018 to 23 July 2021, when her employment was

terminated on the grounds of alleged incapability following a performance improvement process. She commenced ACAS Early Conciliation on 16 April 2021 with the relevant Early Conciliation Certificate being issued by ACAS on 28 May 2021.

2. Subject to there having been conduct extending over a period and subject also to the Tribunal's discretion to grant a just and equitable extension of time, any complaints within the claim as originally submitted about discrimination alleged to have occurred prior to 17 January 2021 have been brought out of time. In which case, this would potentially preclude the Claimant from pursuing the complaints which are identified as Issues 8.1, 8.2, 8.4, 8.6 and 8.9 within the List of Issues, though in this regard Issues 8.2, 8.4 and 8.6 would seem, on the face of it, to comprise part of the overall performance improvement process which was still ongoing when the claim was filed with the Tribunal. It is not necessary for us to determine this issue since, for the reasons we come to, the complaints are not well-founded.

3. The Claimant originally claimed that she had been discriminated against on grounds of pregnancy / maternity and disability, complaining of matters up to and including a final formal notification under the Respondent's Capability Policy. However, at a Preliminary Hearing on 5 August 2022, Employment Judge Manley allowed an application by the Claimant to amend her claim to include complaints of unfair dismissal and sex discrimination arising from her dismissal on 23 July 2021. We return to this.

4. We heard evidence from the Claimant and on behalf of the Respondent, from: Sharon Paddison, Resident Sales Manager and the Claimant's Line Manager; Louise King Head of Sales, to whom Ms Paddison reports; and Suzanne Prince, Recruitment Business Partner. They had each made a written Witness Statement.

5. There was a single agreed Hearing Bundle comprising 865 numbered pages, albeit with some inserts.

6. For the detailed reasons given by the Tribunal on the first day of the Hearing, we refused the Claimant permission to submit a supplementary Witness Statement regarding her claim to be disabled. Instead, on that issue, we have regard to the existing evidence in her Witness Statement, her evidence at Tribunal, and the medical evidence in the Hearing Bundle.

Preliminary Findings of Fact

7. We start by setting out our findings and conclusions in respect of three preliminary issues, namely the protected period in relation to the Claimant's 2020 pregnancy, whether the Claimant was disabled when she alleges the Respondent commenced formal attendance management procedures in respect of mental health related absences (this being her only claim of disability discrimination) and whether the Tribunal has

jurisdiction in respect of her unfair dismissal claim if it has been brought out of time.

Protected Period

8. Section 18 of the Equality Act 2010 ("EqA") provides as follows:

> 18(6) The protected period in relation to a woman's pregnancy begins when the pregnancy begins, and ends –
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> 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,
> b. if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

It is common ground between the parties that we are concerned with the second limb in s.18(6)(b).

9. Whilst s.18(6) EqA 2010 derives from the Pregnant Worker's Directive, in our judgement the wording of the statute is clear and unambiguous. The protected period commences with a woman's pregnancy regardless of the employer's and indeed, the woman's own knowledge in the matter. An employer's knowledge or otherwise of the pregnancy becomes a potentially relevant consideration at the point at which the Tribunal examines the reasons why the woman may have been treated unfavourably during the protected period.

10. The date when the Claimant's pregnancy began is not identified in the Claimant's Witness Statement, nor is it confirmed in the Confidential Report at page 673 of the Hearing Bundle that provides an overview of her pregnancy and miscarriage. The Claimant states that she took a pregnancy test, having felt very unwell in late June and early July. A private scan on 15 July 2020 confirmed the pregnancy, though it was too early in the pregnancy to detect a heartbeat. A second scan, on 30 July 2020, indicated there was no discernible heartbeat. The Claimant was referred for a third scan, she says, in early August 2020 when again she says she was informed there was no heartbeat. She states that she was advised she would have to choose between either a medical surgical procedure, or allow the embryo to pass naturally. That suggests that by early August 2020 it had been identified that she potentially no longer had a viable pregnancy.

11. The Confidential Report, which was prepared either by Mr Vathanan or Ms Bertolotti of the Wexham Hospital, noted that there had been no interval growth between the two July scans and, further, that no foetal pole (that is to say, embryo) showed in the second scan on 30 July 2020. There is no reference in the Confidential Report to a third scan in early August 2020. It may be that the Claimant has become confused as to the dates, alternatively that an incomplete record was kept on 21 August 2020 when

the Claimant attended for a further scan at Wexham Hospital and she was provisionally booked to have a medical surgical procedure on 31 August 2020 as well as a further scan three days beforehand, on 28 August 2020. The Claimant states that the scan on 21 August 2020 brought about what she refers to as "the physical miscarriage".

12. The Claimant's GP records document the date of the miscarriage as 21 August 2020. We find that by that date there was no longer a viable pregnancy and accordingly that the Claimant's protected period ended on 3 September 2020; namely two weeks later. Ms Brown had contended for a date of 4 September 2020 but that does not accord with the statutory wording which identifies that the two week period commences with the date that the pregnancy ends. If the Claimant's pregnancy ended on 21 August 2020, as we find it did, the two week period commencing with that date ended on 3 September 2020.

13. It is immaterial in this case that we cannot identify the precise start date of the protected period, since none of the matters complained of might arguably pre-date the Claimant's pregnancy.

14. Issue 8.2 ('putting the Claimant on a performance improvement plan in September 2020'), is said by the Claimant to have occurred on 24 September 2020. Otherwise, Issues, 8.4, 8.5, 8.6, 8.7 and 8.8 are all clearly identified as having happened outside the protected period. The issue therefore is whether, in the event the alleged treatment is established, these matters were the implementation of a decision taken in the protected period (section 18(5) of EqA 2010). In this regard, it is entirely unclear to us on what basis it might be said that Ms Paddison's alleged comment during a Teams Meeting on 28 June 2021, "let's hope there are no more pregnancies" (Issue 8.8), was the implementation of a decision taken in the protected period. It is not suggested that the alleged comment was made in the course of the capability process such as to provide even a basic link with the protected period and thereby any decision taken during it. The alleged comment might have provided the basis for a harassment complaint, but no such claim has been made. Whilst the comments, if upheld, might provide material from which the Tribunal could draw adverse inferences, in our judgement they cannot succeed as a complaint under s.18 EqA 2010.

Disability

15. The Claimant has the burden of establishing that she was disabled at the relevant time, namely, when she alleges the Respondent began formal attendance management procedures in respect of mental health related absences. The claimed impairments are an anxiety disorder, panic attacks and a depressive disorder. The relevant date was identified as January 2021, though in fact we understand the complaint to relate to a letter which the Claimant received from Ms Prince dated 9 February 2021 (pages 420 and 421 of the Hearing Bundle), in which the Claimant's level of absence was identified as giving rise to a Bradford Factor Score of 216,

which was said to be between the level of a Second Informal Review Meeting and Potential First Formal Notification.

16. The question for the Tribunal is whether the Claimant had one or more mental impairments which had a long term adverse effect on her ability to carry out normal day to day activities at that date.

17. Section 6 EqA 2010, is to be read in conjunction with Schedule 1(2) of the Act. An impairment is long term if it has lasted for 12 months, or is likely to last for at least 12 months.

18. In All Answers Limited v W and Another [2021] EWCA Civ 606, the Court of Appeal considered the correct date on which a Tribunal should assess whether a Claimant is disabled, specifically whether the effects of an impairment are likely to last for at least 12 months. The answer is that the Tribunal must consider the position as at the date or dates the alleged discriminatory event or events took place. In All Answers Limited, the Court of Appeal said the Tribunal had fallen into error by taking note of medical evidence about the Claimant from just a month after the alleged discrimination occurred.

19. For these reasons, the Claimant's medical records from April 2021 in the Hearing Bundle are not to be considered by us in coming to a decision on the issue of the Claimant's claimed disability as at 9 February 2021 or indeed prior to that date. We do, however, have regard to the (limited) evidence contained in the Claimant's Witness Statement and to the more detailed information contained in the occupational health report of 25 January 2021 (pages 322 to 325 of the Hearing Bundle). In the course of re-examination, the Claimant stated that she had not been seeing her GP prior to Performance Improvement Plan ("PIP") meetings in November 2020 and further stated that her health was "fine" as at 15 November 2020. There is no reference to any history of mental health issues in the GP notes available to us in the Hearing Bundle. When the Claimant saw her GP on 24 November 2020, following what seems to have been a panic attack, her GP noted that she was feeling better and that her symptoms had mostly resolved. The January 2021 occupational health report documented the Claimant being unable to sleep and vomiting before going to work during November 2020 as a result of the stress of the PIP process. That is not entirely consistent with the GP's record on 24 November 2020 that the Claimant's symptoms were mostly resolved, though equally she was certified unfit for work between 24 November and 23 December 2020 with work related stress; it makes no reference to an anxiety or depressive disorder or to panic attacks. Thereafter, no further certificates were issued, though under the heading, 'Current Medical Status' it was recorded in the occupational health report in January 2021 that the Claimant was experiencing chest pains, vomiting, uncontrolled fear and panic attacks, hypervigilant behaviour at work to compensate for fear, lack of appetite, weight loss equating to a drop of two dress sizes, hair loss and waking in the night with feelings of dread and sweating symptoms (page 324 of the

Hearing Bundle). The symptoms were said to have developed since November 2020.

20. Although the January 2021 occupational health report contained recommendations for reasonable adjustments addressed to both parties, it did not specifically address the question of whether the Claimant was disabled within the meaning of EqA 2010. The adjustments that the Respondent was recommended to implement were short term adjustments to support the Claimant "during this time and the Grievance Procedure" rather than longer term adjustments that were focused upon her ability to perform her substantive role or which addressed any disadvantages to which she was put as a result of the Respondent's performance expectations of her or otherwise. The report did not indicate that the stress and anxiety experienced by the Claimant was other than an immediate reaction to the situation in which she then found herself, and certainly did not identify that the effects might be long term, specifically that they might or could well last for at least 12 months in total. Whilst the described effects were on day to day activities, namely: sleep, concentration and eating; and as documented that they were more than minor, in our judgement, even allowing for the relatively low threshold test for establishing that the effects of an impairment are likely to last for at least 12 months, there is no evidence from which we might properly conclude that as at 9 February 2021, those effects could well have lasted 12 months or more from their inception, assuming for these purposes that the symptoms of impaired sleep and vomiting were first experienced by the Claimant immediately following the PIP meeting on 5 November 2020. In our judgement, the assessment and expectation in January 2021 was that the Claimant was experiencing a short term reaction to the management of her performance at work from which she would fully recover in the short term, such that any adverse effects would not continue to last for at least 12 months. In the circumstances the Claimant has failed to establish that she was disabled at the relevant time and her complaint of disability discrimination will therefore be dismissed.

Unfair Dismissal

21. Pursuant to s.111 of the Employment Rights Act 1996 ("ERA"),

> 111. Complaints to Employment Tribunal
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> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
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> (2) … an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-
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> a. before the end of the period of three months beginning with the effective date of termination, or

> b. within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

22. The Claimant was dismissed with effect from 23 July 2021. Subject to any extension for ACAS Early Conciliation, any complaint by the Claimant that she was unfairly dismissed should have been presented by her to the Employment Tribunals by no later than 22 October 2021. The Claimant was permitted to amend her claim on 5 August 2022 to include a complaint of unfair dismissal; namely over 9 months after the last date the claim should have been presented to the Tribunals. Paragraph 3 of the record of the case management discussion on 5 August 2022 is silent as to the reasons why and basis upon which Employment Judge Manley granted permission for the claim to be amended. However, as now, the Respondent was represented at that hearing by Ms Brown. The Claimant represented herself. In section VII of her written submissions, Ms Brown observes that granting an amendment does not automatically deprive a respondent of limitation arguments in respect of the added claims, and that the introduction of new claims or causes of action take effect for the purpose of limitation at the time permission is given, citing Galilee v Commissioner of Police of the Metropolis [2018] ICR 634, EAT, approved in Reuters Ltd v Cole EAT 0258/17. As we understand Ms Brown, in granting the amendment, Employment Judge Manley did not extend time in respect of the new claims. Certainly there is nothing within paragraph 3 of the record of hearing to indicate that time was extended in the context of having weighed the respective hardship and prejudice to the parties of permitting or denying the amendment. In any event, Ms Brown submits, the Tribunal cannot consider a claim for which it does not have jurisdiction: see s.123 EqA 2010 (a claim may not be brought…) and s.111 ERA 1996 (a Tribunal shall not consider…). On the basis that the unfair dismissal and sex discrimination claims were permitted as amendments on 5 August 2022, Ms Brown submits they are both are out of time, in circumstances where the dismissal (the only act relied upon in the sex discrimination claim) was 23 July 2021.

23. Counsel exchanged written submissions in advance of their oral closing submissions. Ms Millin also had the advantage of making her oral submissions after Ms Brown. She did not challenge Ms Brown's submissions above or otherwise make any further submissions in respect of jurisdiction.

24. In the circumstances, and given that Ms Brown was at the hearing on 5 August 2022 so as to understand the basis upon which the amendment was permitted, Ms Brown has satisfied us that the unfair dismissal complaint is prima facie out of time and that we are required to determine whether time should be extended.

25. As we have noted already, an Employment Tribunal can extend time for bringing an unfair dismissal claim where it was not reasonably practicable for the claim to be presented in time, provided the claim is presented within such further period as the Tribunal considers reasonable. The test of reasonable practicability is one of what was reasonably feasible. We refer in this regard to the Court of Appeal's decision in Saunders v Southend on Sea Borough Council [1984] IRLR 119. It is not a broader test of what is just and equitable. The factors affecting what may have been reasonably practicable are infinitely varied. At one extreme a postal strike, loss of internet connection or a sudden illness may prevent a claimant from presenting their claim in time. At the other end a claimant's ignorance of their rights, if reasonable in itself, might be sufficient. What is clear is that it is for a claimant to establish by evidence that it was not reasonably practicable to present a claim in time. They have the burden of proof in the matter.

26. The Claimant has not put forward any evidence on the matter and perhaps on that basis Ms Millin did not make any submissions either. In any event, the Claimant is an intelligent individual. She is a qualified Solicitor and although she does not practice in the field of Employment Law is better placed than many other employees in such circumstances to find out her rights, and how to enforce her rights, whether through researching the matter using the legal search tools available to her or with which she may be familiar or even through talking to her friends or contacts in the legal profession.

27. By April 2021, the Claimant was "feeling better" and "sounded well" (page 670 of the Hearing Bundle. She was sufficiently well informed of her rights by then, including as to her ability to take legal action in respect of the alleged infringement of her rights and seemingly the need to do so within time, that she contacted ACAS under the Early Conciliation scheme on 16 April 2021 and thereafter commenced Employment Tribunal proceedings against the Respondent, completing and filing the claim form herself. Against that backdrop, in our judgement, it was equally reasonably practicable for her to have researched her rights following her subsequent dismissal and to have established both her right not to be unfairly dismissed and the time limit for pursuing any complaint about the matter. There is a wealth of readily accessible information available to workers on the internet about their employment rights and how to enforce them, including the relatively short time limits that apply in the Employment Tribunals. In our judgement, even a relatively cursory internet search by the Claimant would have equipped her with the knowledge she reasonably required in order to bring a claim within time. She does not suggest that she lacked that knowledge, nor has she offered any other explanation for delaying bringing her claim.

28. In circumstances where we conclude that it was reasonably practicable for her unfair dismissal complaint to notified to ACAS and thereafter presented to the Employment Tribunals within the primary time limit, we

have no jurisdiction to consider her complaint which will be dismissed. The further findings of fact that follow are limited accordingly.

Substantive Findings of Fact

29. The findings that follow are limited to the Claimant's claims pursuant to §.18 and 13 EqA 2010, the latter with reference to the protected characteristic of sex.

s.18 of the Equality Act 2010

30. The Claimant alleges that she was requested by Ms Paddison to make up her hours following her attendance at pregnancy related hospital appointments between 7 August and 28 August 2020 (**Issue 8.1**). The matter is referred to briefly in paragraph 22 of the Claimant's Witness Statement. She does not identify when she was asked by Ms Paddison to make this time up, and whether the request was made in person, by Teams, over the phone, by email or otherwise in writing. There is no further detail or context as one might expect in a Witness Statement. The contemporaneous emails relied upon by the Claimant (pages 224 – 226 of the Hearing Bundle) do not support the allegation. On the contrary, they evidence to us that she and Ms Paddison were on the same page on the issue, namely that she was fully entitled to take the time off, the only issue being whether the hospital appointments ought to be recorded on the Claimant's time sheets.

31. In so far as Ms Paddison said she would check the position in this regard, in our judgement that cannot amount to a detriment. It would be unreasonable for the Claimant to perceive such comments or actions on the part of Ms Paddison as disadvantaging her. Instead, they were the actions of a reasonable, diligent Manager who simply needed to check how any related time away from work should be recorded as part of the Respondent's time and record keeping requirements. The Claimant has failed to establish the primary facts upon which the complaint is pursued.

32. The Claimant complains of being placed on a Performance Improvement Plan in September 2020 (**Issue 8.2**). The date in this regard is a little unclear. At paragraph 25 of her Witness Statement the Claimant identifies 1 October 2020 as the date she says she was shocked to receive an email from Ms Paddison attaching a PIP. We are concerned with the date that the PIP was decided upon by the Respondent. Although the process commenced on or around 1 October 2020, it had its origins in performance concerns that arose towards the end of July 2020 and which caused Ms Paddison to seek guidance from Lucy Whittaker in the Respondent's HR Department on 29 July 2020 (confirmed in a follow up email the following day at page 207 of the Hearing Bundle). This was during the Claimant's protected period albeit, as we return to, any further action in the matter was placed on hold on 3 August 2020 when it was learned that the Claimant was pregnant and that a heartbeat could not be detected.

33. The email starting at page 227 of the Hearing Bundle, evidences, as Ms Brown submits, that the decision to progress a PIP in respect of the Claimant was taken on or around 21 September 2020, namely outside the protected period. There is no explicit provision for PIPs within the Respondent's Capability Policy (pages 660 to 667 of the Hearing Bundle) though the Policy states that performance concerns should normally be dealt with informally in the first instance as part of day-to-day management. Although the Claimant perceived it otherwise, we accept that the Respondent regarded the PIP as an informal process outside the ambit of the formal performance management procedure laid down in the Capability Policy. Viewed objectively, whilst the PIP could be said to preferable to the Respondent invoking its formal procedure in relation to the Claimant, it was nevertheless undoubtedly to the Claimant's detriment, representing as it did an escalation of the Respondent's concerns and meaning that the Claimant's performance was subject to closer scrutiny. The Claimant undoubtedly experienced it as an unwelcome development, that disadvantaged her in her employment. In our judgement, it was reasonable for her to do so. Ms Brown does not seemingly suggest otherwise.

34. The question is whether the decision on or around 21 September 2020 to progress the PIP: (a) was the implementation of a decision taken in the protected period; and, if it was, (b) whether that decision was because of the Claimant's pregnancy, or illness suffered by her as a result of it? We shall return to these questions.

35. There is a dispute between the parties as to when Ms Paddison first learned that the Claimant was pregnant. Ms Paddison believes it was 3 August 2020, whereas the Claimant asserts that she disclosed her pregnancy to Ms Paddison earlier, around the time of an initial scan on 15 July 2020. We prefer Ms Paddison's specific evidence in the matter to the Claimant's more tentative evidence, namely that Ms Paddison received a phone call from the Claimant on 3 August 2020, who told her that she was pregnant but that there was no heartbeat. She describes the Claimant as understandably emotional. Ms Paddison's evidence in this regard is consistent with the concerns that emerged following the Claimant's second scan on 28 or 30 July 2020 (we say 28 or 30 July 2020 because although the Claimant has identified the date of the scan as 28 July 2020, the Confidential Report already referred to refers the second scan as having been carried out on 30 July 2020).

36. In our judgement, it is more likely on the balance of probabilities that the Claimant would have shared her news with Ms Paddison when the viability of the pregnancy was in issue, rather than following the initial scan on 15 July 2020 when it was too early in the pregnancy for a heartbeat to be detected and accordingly the absence of a heartbeat would not have given particular cause for concern. The Claimant does not explain why she would otherwise have shared the news of her pregnancy at such a very early stage in the pregnancy, whereas there was an obvious explanation for sharing the news with Ms Paddison once concerns arose. If the

Claimant was feeling anxious following the initial scan on 15 July 2020 or over the following days, there was no obvious imperative for her to share the news of her pregnancy with Ms Paddison, let alone to highlight the lack of any heartbeat or to become emotional given that a heartbeat would equally not have been detected in a viable pregnancy. Had the Claimant disclosed her pregnancy and concerns to Ms Paddison on 16 or 17 July 2020, as she now claims, we conclude that Ms Paddison would have disclosed this in confidence to Lucy Whittaker when she sought her advice on 29 July 2020. It would have been highly material information that she would have needed to make available to Ms Whittaker to ensure she was advised correctly in the matter and did not act inappropriately in relation to the Claimant at a particularly sensitive time. Had she known of the pregnancy, but felt bound to respect the Claimant's confidence, we believe she would not have taken any further action in the matter until such time as she was confident the Claimant had shared the news of her pregnancy with HR. The pregnancy is not mentioned in Ms Paddison's email of 30 July 2020 to Ms Whittaker already referred to. Furthermore, as Ms Brown observes, Ms Paddison's contemporaneous notes (pages 220 – 221 of the Hearing Bundle) support her account that she first learned the Claimant was pregnant on 3 August 2020.

37. Moreover, we agree with Ms Brown that it makes no sense that Ms Paddison would have even drafted the letter at page 213 of the Hearing Bundle, inviting the Claimant to an initial Investigation Meeting, if she already knew the Claimant was pregnant, given that the PIP was paused in response to the news of the Claimant's pregnancy.

38. We are satisfied that the draft letter itself is consistent with the general 'Policy statement' in the Capability Policy (page 660 of the Hearing Bundle), even if an investigation is not specifically referred to in the formal stages of the Policy (pages 662 – 664 of the Hearing Bundle). Although it was not sent, the draft letter and the Respondent's intention indicated by it to commence what it considered to be an informal performance management process, was in implementation of a decision taken on 27 July 2020 when Ms Paddison was effectively instructed by Ms King to take action to address issues of concern that had come to a head during Ms Paddison's absence on leave and which reflected concerns that had been accumulating since at least March 2020 when Ms Paddison had formally appraised the Claimant's performance as not fully meeting expectations.

39. The decision to escalate these issues through performance management processes was taken during the protected period but regardless of whether the decision was effectively taken by Ms King on 27 July 2020 or not until 29 July 2020, when Ms Paddison sought Ms Whittaker's advice, it was taken in ignorance of the fact that the Claimant was pregnant.

40. The Claimant alleges that the performance expectations of her were greater than for others (**Issue 8.3**). She contrasts her treatment with Ms Paddison and Faye Williams. Ms Paddison was, of course, her Line Manager, so that we have difficulty in understanding on what basis she

might be said to be a direct comparator in terms of the performance expectations of them. Ms Williams is a more obvious comparator as they had the same job title and both reported to Ms Paddison.

41. Be that as it may, in terms of evidence, the Claimant's complaint does not get off the ground. Whatever the Claimant's perception in the matter, she has singularly failed to convey the basis for her complaint in her Witness Statement and did not bring any further clarity to the issue in the course of her evidence at Tribunal, notwithstanding our efforts to explore the matter further with her. If the information in paragraph 31 of her Witness Statement is potentially relevant to the determination of Issue 8.3, the Claimant has not explained why that is the case and has failed in particular to provide the essential narrative, context and analysis that might establish the necessary primary case.

42. We have read the minutes of the Capability Meeting of 23 July 2021, (pages 586 – 606 of the Hearing Bundle). The meeting lasted 3 hours and 40 minutes. Nevertheless the detailed minutes provide no further information or clarity on this aspect of the Claimant's claim. On the contrary, the minutes evidence significant frustration on the part of Ms Paddison and Ms Prince as they continued to press the Claimant to provide evidence that she was being subjected to more exacting performance expectations. The Claimant continued to assert throughout the meeting that the Respondent had different performance expectations of her, but in spite of Ms Paddison and Ms Prince's patient and galliant efforts would not provide any specific facts or examples to support what she was saying. As the meeting progressed and she was pressed about the matter, we find she became increasingly difficult and defensive, even obstructive, telling Ms Paddison that she was under no obligation to do so and deflecting her questions by repeatedly stating that she was not lying. The exchange between them that is recorded at page 598 of the Hearing Bundle is particularly instructive in this regard.

43. For completeness, whilst it is plainly not the function of the Tribunal to put the Claimant's case for her, we have additionally reviewed the minutes of the grievance and grievance appeal hearings. However, again, they evidence a distinct lack of information in support of the Claimant's complaint that she was subjected to higher performance expectations. Indeed, at page 335 of the Hearing Bundle, which are the minutes of an investigation meeting held on 13 January 2021, the Claimant seemingly did not challenge Ms Paddison's statement that others were not falling behind or missing things. Likewise at page 340, the minutes of the same meeting, the Claimant did not obviously challenge Ms Paddison when she referred to Ms Williams home schooling two children but keeping on top of things.

44. In the course of the Hearing we were taken to page 685 of the Hearing Bundle, which evidences that in the period April 2020 to March 2021, which included a four week period of sickness absence for the Claimant, but also included an extended period when Ms Williams was home

schooling her children, Ms Williams had approximately 40% more completions than the Claimant and double the number of active files.

45. In conclusion, the Claimant has failed to establish basic primary facts to support her complaint recorded as Issue 8.3 that the performance expectations of her were greater than for others.

46. The Claimant complains that she was set up to fail insofar as the Respondent added additional tasks to the Performance Improvement Plan between September and November 2020 (**Issue 8.4**). She spoke in her grievance of being set up to fail. It is not entirely clear whether she has used that expression in a general sense, rather than to be suggesting that it was done deliberately i.e. with a view to ensuring that she did not meet the Respondent's performance expectations of her. If the Claimant contends that the Respondent acted in bad faith in relation to her, there is no evidence to support any such contention and it was not put to the Respondent's witnesses in terms that this is what happened.

47. Strictly, no tasks were in fact added to the PIP between September and November 2021, as Issue 8.4 suggests. The original PIP is at pages 238 – 241 of the Hearing Bundle. The records of the meetings of 5, 17 and 24 November 2020 are at pages 284 – 287, 290 – 293 and 294 – 295 of the Hearing Bundle. Together with the PIP updated spreadsheet (pages 296 – 307) these various documents evidence that the process of managing the Claimant's performance continued to be undertaken with reference to the same five core issues of concern, three of which the Claimant continued to be assessed as having made satisfactory progress in relation to. If the Claimant's complaint is that additional examples of her failure to meet the Respondent's performance expectations of her were provided, as opposed to additional tasks imposed, we do not consider this to have been to the Claimant's detriment. On the contrary, it would be an essential feature of a fair and transparent performance management process that the Claimant should be provided with specific examples to evidence the Respondent's assessment that she was continuing to fail to meet its reasonable expectations of her. Even if we were to be persuaded that the provision of such further information was to her detriment, because she reasonably perceived it to disadvantage her in her employment, it was not provided to her because she was, or had been pregnant, it was provided because the Respondent believed, acting as a fair and reasonable employer in the matter, that it needed to evidence its concerns.

48. The primary facts have not been established and the complaint fails.

49. It is difficult for us to identify what **Issue 8.6** adds to Issue 8.4. In any event, performance improvement measures were not imposed on 24 November 2020. The measures of performance were unchanged from the start of the PIP process through to its conclusion and, indeed, beyond into the more formal performance management stages under the Capability Policy. For the same reasons Issue 8.4 is not well-founded, the further complaint identified as Issue 8.6 is also not well-founded.

50. The Claimant complains that she was supervised by Ms Paddison in an overbearing manner between September 2020 and July 2021 (**Issue 8.5**). Even if the PIP process between September and November 2020 was unwelcome, there is nothing in the meeting records that indicates or supports that Ms Paddison was acting in an overbearing manner towards the Claimant. On the contrary, they evidence that she showed empathy and compassion in her dealings with the Claimant, even if the Claimant went sick with stress at the end of the process. Similarly, the notes of their return to work discussion on 4 January 2021 evidence the same empathy and compassion, with Ms Paddison reminding the Claimant of the availability of the early intervention team (page 316 of the Hearing Bundle).

51. Following the determination of the Claimant's grievance on 3 February 2021, the performance management process resumed, this time in accordance with the Respondent's documented formal procedure set out in the Capability Policy.

52. We have reviewed the letters sent to the Claimant during that process, as well as the notes of the nine PIP review meetings under the first and second stages of the procedure. They are detailed, and reflect an evidence based approach. We refer in this regard to pages 486a – 486f, 524 – 527, 531 and 567 of the Hearing Bundle. We are in no doubt that the process was unwelcome to the Claimant. The Capability Policy itself does not prescribe a particular number of review meetings. Whilst we find that Ms Paddison's approach could be said to be detailed and thorough, or even at its highest, zealous, it was certainly not overzealous, overbearing, unpleasant or controlling.

53. If Ms Paddison's manner had been overbearing, we do not think she would have provided the Claimant with specific examples to support what she was saying, persisted on 23 July 2021 in encouraging the Claimant to bring forward examples of any unfavourable treatment, permitted the meeting to continue for as long as she did, or have deferred the second stage of the formal procedure whilst further occupational health input was sought.

54. In conclusion, the Claimant has failed to establish the primary facts upon which her complaint is based.

55. The Claimant complains that formal attendance management procedures were commenced in January 2021 in respect of pregnancy related absence (**Issue 8.7**). The complaint, relates to the Respondent's letter of 9 February 2021 which references her Bradford Factor score. We find that her score was calculated with reference to three absences totalling 24 days; namely two single days' absence on 2 and 26 October 2020, and the period of stress related absence already referred to between 24 November and 23 December 2020. None were pregnancy related absences as the Respondent made clear in its letter. The Claimant has never satisfactorily

explained why she might assert otherwise. The complaint is misconceived.

56. We have already set out why the complaint identified in **Issue 8.8** cannot succeed.

57. The complaint indicated as **Issue 8.9** likewise cannot succeed. Notwithstanding her quite specific evidence in paragraph 13 of her Witness Statement, the Claimant said at Tribunal that the discussion about flexible working in fact took place before she was pregnant. Her confusion in this regard and failure to correct her Witness Statement before adopting it as her evidence in the proceedings, has been a further factor in why we prefer Ms Paddison's evidence regarding the date the Claimant informed her of her pregnancy.

58. Whatever Ms King may have said during their discussion regarding the potential for part-time working, this was not during the protected period or in implementation of a decision made during it. The complaint is not well founded.

59. Section 18(2) of the Equality Act 2010 provides as follows:

> 18 Pregnancy and maternity discrimination: work cases
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-
>
> (a) because of the pregnancy, or
> (b) because of illness suffered by her as a result of it.

60. The operative causal test under s.18(2) and indeed as we shall come to, under s.13 EqA 2010, is the "reason why" a woman was treated as she was. In Nagarajan v London Regional Transport [1999] IRLR 572, Lord Nichols when giving Judgment in an appeal in a race discrimination case under the Race Relations Act said,

> "In every case it is necessary to enquire why the complainant received less favourable treatment, this is the crucial question. Was it on grounds of race or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."

61. Nagarajan was referred to by the Supreme Court in R (E) v Governing Body of JFS (SC) (E) [2010], a case in which Baroness Hale observed,

> "The distinction between the two types of 'why' question is plain enough. One is what has caused the treatment in question and one is its motive or purpose. The former is important and the latter is not."

62. Section 18 of the Equality Act 2010 is distinct from s.13 in that a complainant under s.18 need only establish that they have experienced unfavourable treatment on the prohibited ground, as opposed to less favourable treatment. Notwithstanding the Claimant's complaint that she was subjected to more onerous performance expectations than others, it is not in fact a comparative exercise that requires the identification of actual, hypothetical or evidential comparators. We are concerned with the reasons why, if she was treated unfavourably, the Claimant was treated as she was. That requires some consideration of the Respondent's mental processes, including any facts or materials from which an adverse inference might be drawn.

63. The Claimant has failed to establish the primary facts in respect of all but one of her s.18 EqA 2010 complaints. The only remaining issue is the reason why the Claimant put on a PIP in September 2020 (**Issue 8.2**).

64. In our judgement, the fact that the Respondent altered its previously planned approach in September 2021 in light of the Claimant's personal circumstances and decided to pursue a less formal approach than the one set out in the formal stages of its Capability Policy, does not take the decision outside the scope of s.18 of EqA 2010. Having regard to s.18(5) EqA 2010, its actions in that regard continued to be the implementation of a decision taken in the protected period that the Claimant's performance should be managed, even if the decision was implemented in a slightly different way. However, any s.18 claim can only succeed if the original decision in July 2020 or the decision to proceed in September 2020 (albeit in a different, potentially less formal way), was because the Claimant was pregnant or suffering illness as a result of her pregnancy.

65. Insofar as the PIP was in implementation of a decision originally taken in the protected period, that decision was taken in the week commencing 27 July 2020 before the Respondent knew the Claimant was pregnant and in those circumstances it was not because of the pregnancy or illness suffered by her as a result of it. Insofar as a decision was taken on 21 September 2020 to proceed, albeit in a different, less formal way, the reason for this was that nothing had happened in the intervening period to alter the Respondent's view that the Claimant was failing to meet its performance expectations of her and that her performance should be managed. In other words, it was acting on established concerns rather than reacting, consciously or otherwise, to her pregnancy or any illness resulting from it. It could indeed be said that the further reason it proceeded in September 2020 was that the Claimant was no longer pregnant. Insofar as the Respondent made a conscious decision in September 2020 to implement a less formal performance management procedure to that originally planned, we cannot see on what basis that could be said to be unfavourable treatment by reason of pregnancy or

pregnancy related illness. For these reasons, the complaint does not succeed.

66. Turning then to the Claimant's dismissal and the question of whether, as the Claimant asserts, it amounted to sex discrimination.

67. Section 13(1) of the Equality Act 2010 provides,

> 13 Discrimination
>
> (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.

68. As we have identified already, in considering the Claimant's direct discrimination complaint, we must focus on the reasons why the Respondent dismissed her. That is because, as we have already said, other than in the cases of obvious discrimination the Tribunals will want to consider the mental processes of the alleged discriminator.

69. There must be facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Claimant was discriminated against. This reflects both the statutory burden of proof in s.136 of EqA 2010, but also long established guidance including by the Court of Appeal in Igen Limited v Wong [2005] IRLR 258. The grounds of any treatment often have to be deduced or inferred from the surrounding circumstances and in order to justify an inference, a Tribunal has to make findings of primary fact from which the inference can properly be drawn. This is commonly done by a Claimant placing before a Tribunal evidential material from which the inference can be drawn, that they were treated less favourably than they would have been treated if they had not been of that particular sex, race, religion etc.

70. Comparators provide evidential material but ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated an hypothetical comparator. Otherwise there has to be some other material that is capable of supporting the requisite inference of discrimination. That could be a relevant Code of Practice, it could be discriminatory comments made by the alleged discriminator about the Claimant or others. Unconvincing denials of a discriminatory intent coupled, perhaps, with unconvincing assertions of other reasons for decisions might also in some case suffice. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of any unlawful discrimination.

71. Ultimately, in our discussions regarding the Claimant's direct discrimination complaint, we have held in mind that we are concerned with

the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant and in the final analysis, why was she dismissed? There is no male comparator with whom the Claimant contrasts her treatment. To the extent the Claimant has contrasted her treatment with how others were treated, she has referred to what she says were the performance expectations of Ms Paddison and Ms Williams. For the reasons already given, her evidence falls some way short of establishing any difference in treatment. In any event, Ms Paddison and Ms Williams do not assist us in coming to a view as to whether the Claimant was treated less favourably that the Respondent treats or would have treated a man in similar circumstances. The closest hypothetical male comparator would be a man, with the same history of performance as the Claimant, whose partner miscarried and where their intention was that he would be the primary carer for their child, alternatively, a male employee who intended to adopt a child and to take a period of adoption leave, but where the intended placement did not go ahead. In either of these situations, there are no facts in this case that lead us to conclude that such a man would not have been dealt with in exactly the same way as the Claimant if there were also similar concerns regarding his performance.

72. Much of the focus of Ms Millin's cross examination of the Respondent's witnesses, was directed to the issue of whether the Claimant had been treated unfairly, for example: whether the KPIs against which her performance was assessed were sufficiently clearly documented and communicated; whether the decision to dismiss the Claimant and possibly also to issue her with the first and final performance notifications should have been decided upon by someone independent of and even perhaps senior to, Ms Paddison; whether the PIP process was an informal process as the Respondent claims and consistent with the Respondent's documented Capability Policy. Unfair or unreasonable conduct is not to be equated with discriminatory conduct and will not of itself generally support an inference of discrimination. Had the Claimant pursued her unfair dismissal claim in time, we would have had to look critically at how the Claimant's performance was managed and had we concluded that the Respondent acted outside the band of reasonable responses, we would have had to go on to consider whether any claimed unfairness ultimately made any difference, i.e. whether the Claimant would, or might, have been dismissed in any event, particularly given the lengthy period of time over which and extensive number of meetings during which her performance was assessed. It is not necessary that we express any view on these matters or on the related question of whether the Claimant caused or contributed to her dismissal.

73. In terms of the Claimant s.13 EqA 2010 complaint, we have remained fully focused on the 'reason why' question. What was the reason why the Claimant was dismissed? The answer, in our judgement, is that having initially got off to a promising start with the Respondent, the Claimant failed to live up to the initial promising expectations of her. In summary, by March 2020, the Claimant was assessed as not fully meeting expectations. Although the available Manager comments are incomplete (page 132 of

the Hearing Bundle), there is sufficient information there for us to conclude that her failure to fully meet the Respondent's expectations of her did not reflect a lack of knowledge or ability on her part, rather that she was prone to become distracted and to lose focus, failed to prioritise her work and was not updating the Respondent's records. That is consistent with various ongoing themes and concerns documented throughout the various stages of the performance management process through to dismissal.

74. It is significant we think that the Respondent was consistent throughout in terms of how it articulated its concerns, even if the live examples relied upon inevitably evolved to reflect current transactions being worked on by the Claimant from time to time. This consistency extends back to a point in time before the Claimant became pregnant; namely March 2020. If one looks at how the concerns were structured in the PIP and thereafter in the formal capability process, they originate in Ms Paddison's email of 30 July (page 217 of the Hearing Bundle) written when, as we have found, she was unaware that the Claimant was pregnant. As we say, the concerns were consistent with the end of year appraisal and feedback. Inconsistency of, and inconsistent explanations for, treatment will often lead a Tribunal to draw an adverse inference, certainly where there is no explanation for that inconsistency. In this case, the consistency with which the Respondent's concerns were expressed and documented over an extended period of time and in the course of some 16 or so meetings is a significant factor that enables us to have confidence in the explanations that have been put forward by the Respondent for why it treated the Claimant as it did.

75. It is potentially a small point, but if as the Claimant asserts the Respondent was setting her up to fail, it rather begs the question why the Respondent implemented performance management processes that continued over the best part of nearly ten months and involved upwards of 16 meetings as well as significant input from Ms Paddison. That points, in our judgement, to an employer seeking to discharge its responsibilities to its employee and supporting her to realise her potential and maintain a consistent level of acceptable performance, rather than an employer reacting adversely to the disclosure that the Claimant might be seeking to start a family.

76. It is alleged by the Claimant that Ms Paddison said, *"let's hope there are no more pregnancies"* during a Team meeting on 28 June 2021 (Issue 8.8). The alleged comment is not addressed in the Claimant's Witness Statement, though Ms Paddison addresses it in paragraph 62 of her own Witness Statement, specifically that there had been an ongoing joke within the Team about a pregnancy chair given the number of pregnancies within the Team. She was not cross examined by Ms Millin about the matter and her account that the Claimant was part of this group banter therefore went unchallenged.

77. As we have identified already, the Claimant has not pursued any claim of harassment in respect of the alleged comment. There is no immediate connection to the performance management issues at the heart of the

claim. In our judgement, whatever comment or comments may have been made as part of entirely welcome group banter to which the Claimant was privy, they do not support an inference that the Respondent, or specifically Ms Paddison, discriminated against the Claimant on grounds of her sex, or indeed her pregnancy.

78. We are satisfied that the reasons given by the Respondent for managing the Claimant's performance and thereafter terminating her employment, reflect the actual reasons operating in the minds of Ms Paddison, Ms King and Ms Prince at the relevant time. Their actions, discussions, advice and treatment of the Claimant were not tainted by irrelevant and unlawful considerations of her sex or indeed pregnancy. The Claimant's s.13 EqA 2010 complaint is not well founded and, as with her other complaints is dismissed.

79. Some short while after the Tribunal gave judgment, Ms Millin emailed Employment Judge Tynan directly stating that the Claimant had in fact presented a claim of unfair dismissal to the Employment Tribunals on 4 October 2021 and, accordingly, that her complaint was in time. She stated that she would be drafting an application for reconsideration to deal with this matter and requested that the Tribunal "amend [its] comments regarding my alleged omission". These are matters that can be considered and addressed in the event of an application for reconsideration. As at the date of finalising these Reasons, there has been no such application, though that may well be because Ms Millin is awaiting sight of these Reasons before she can advise the Claimant further in the matter and, as appropriate, settle any application.

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Employment Judge Tynan

Date: 13 September 2023

Sent to the parties on:
14 September 2023

For the Tribunal Office.